

Transatlantic Trade and Investment Partnership (TTIP)¹

EUA Background Paper, January 2014

The EU and the US have embarked on negotiations designed to culminate in a major trade deal. Will it lead to **unrestricted market access to higher education services**? This is not the first time that the issue has arisen. The question is complex, the implications uncertain, and the answer unknown. EUA is following the course of events closely. This background paper looks at:

- The TTIP in the context of EU trade policy
- The ongoing negotiation process
- Service industries and higher education
- Future developments

Updates will follow at appropriate intervals.

Acronyms

ACE	American Council on Education
ACP	African, Caribbean and Pacific countries
ASEAN	Association of Southeast Asian Nations
AUCC	Association of Universities and Colleges of Canada
CAP	Common Agricultural Policy
CETA	Comprehensive Economic and Trade Agreement
CHEA	Council for Higher Education Accreditation
EPA	Economic Partnership Agreement
EUA	European University Association
GATS	General Agreement on Trade in Services
GPA	Government Procurement Agreement
GSP	Generalised System of Preferences
ILO	International Labour Organisation
MOOC	Massive open online courses
NTB	Non-tariff barrier

¹ DG Trade website: <http://ec.europa.eu/trade/policy/in-focus/ttip/>

US government website: www.ustr.gov/about-us/press-office/fact-sheets/2013/june/wh-ttip

NB: TTIP is known in the US as T-TIP

SPS	Sanitary and phytosanitary measures
TBT	Technical barriers to trade
TiSA	Trade in Services Agreement
TPP	Trans-Pacific Partnership
TRIPS	Agreement on Trade-related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership
UNESCO	United Nations Educational, Scientific and Cultural Organisation
WTO	World Trade Organisation

The TTIP in the context of EU trade policy

1 **TTIP** is an intended future trade partnership between the EU and the US, aimed at boosting growth and creating jobs on both sides of the Atlantic. It is cited in the Commission's 2014 Work Programme as a 'key objective'.² Currently in negotiation, it kicked off in July 2013 and hopes to dismantle barriers to trade in both goods and services, with the initial public emphasis in Europe being placed on manufactured and agricultural goods. The US launch factsheet, by contrast, gave more prominence to achieving greater market access in the service sectors.

2 TTIP is perceived by both sides as a powerful **stimulus package**. EU-commissioned research indicates that a successful partnership could benefit the EU economy by EUR 120 billion – and the US and world economies to a slightly lesser extent. Average EU-US tariff barriers now stand at 3%. Removing them would create a huge single market. Negotiations will focus on how to eliminate unnecessary red tape, align or mutually recognise product standards (the so-called non-tariff barriers, or NTB's), particularly in the automotive, pharmaceutical and medical device sectors, and create a transatlantic procurement space. The EU and US do not envisage retrospective harmonisation, but will instead concentrate on maximising cooperation on future regulation and standard-setting. Both sides assert that existing levels of consumer protection will be respected. These assertions are vigorously contested by some stakeholders.

3 TTIP is **driven by a number of factors**: the global financial crisis; the excessively slow progress of the World Trade Organisation (WTO)'s Doha Round; high commodity prices; the long-term project to reform the EU's Common Agricultural Policy (CAP); the EU's strategic intent to complement the ongoing negotiations of the Trans-Pacific Partnership (TPP), which involves 12 countries.

4 **EU trade policy** shifted at the beginning of 2014 with the reform of its generalised system of preferences (GSP). When set up in the late 1980s, the GSP gave favourable trading facilities to the ACP (African, Caribbean and Pacific) and former Soviet countries. It has since been revised as a result of various WTO rulings and the emergence of strong third world economies. Currently, China and India remain in the GSP category, thanks to their huge concentrations of poverty, while Brazil and Russia have been removed (along with Belarus,

² COM/2013/739 p.4

Kazakhstan, Argentina, Cuba and Uruguay). Africa now constitutes the main body of GSP countries. The EU aims to conclude economic partnership agreements (EPAs) with various African blocs, leaving only the poorest countries in the world with the advantageous GSP status.³

5 Nevertheless, the EU professes not to have abandoned the **multilateral approach** to trade liberalisation embodied in the Doha Round. It says it is anxious to prevent 'regulatory segmentation'. It believes that the successful negotiation of bilateral free trade agreements will advance the cause of eventual multilateral solutions. It sees the EU-US partnership in this light. In its view, so large are the two markets that good practice in regulatory cooperation will free up negotiations at WTO level. This position is not uncontroversial. China regards it as protectionist, which is perhaps one reason why the US has invited China to join the TPP.

6 The TTIP and TPP are currently the most concerted attempts to reach **regional trade deals**, along with the ASEAN (ten countries) overtures to its Asian and Australasian neighbours. The EU's Eastern Partnership is competing with Russia's Eurasian Customs Union (Russia, Belarus and Kazakhstan), but has recently failed to draw Ukraine and Armenia into trade agreements. The EU has nonetheless given Russia 'strategic partner' status, along with Brazil and India. With China it is hoping to open discussions on a mutual investment agreement. As for the second rank of emerging markets, Turkey is already in the EU Customs Union, while Mexico belongs to the North American Free Trade Association with the US and Canada. The EU signed a trade deal with Canada in October 2013 (see para.24 below). The full range of EU trade partners and policies can be viewed on the DG Trade website.⁴

7 All this makes for an extremely complex and shifting landscape. Despite its limited success in recent global rounds, the **WTO** still holds the international rule book. The TTIP and other EU deals will eventually have to be accommodated within its overarching framework or within its ancillary agreements such as the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS). They will also have to be framed within EU law; they cannot stand above it.

The TTIP negotiation process

8 The EU published a set of **initial position papers** in mid-2013.⁵ They dealt with:

- A Cross-cutting and institutional provisions on regulatory issues

The EU wants the eventual TTIP agreement to feature a horizontal chapter asserting: shared willingness to examine regulatory cooperation across the board; balance of

³ The African blocs are the South African Development Community, the Eastern African Community and the West Africa bloc; political agreement with the West Africa bloc is imminent.

⁴ <http://ec.europa.eu/trade/policy/countries-and-regions/>

⁵ <http://trade.ec.europa.eu/doclib/press/index.cfm?id=943>

commitments between EU and US; respect for existing levels of consumer protection and public safety; routine recourse to consultations and impact assessments; broad principles (transparency, sharing of evidence, etc) within which sectoral agreements can be drawn up; creation of framework for monitoring implementation and subsequent deepening of cooperation.

- B Technical barriers to trade (TBT): how to build on the existing WTO TBT agreement which concerns manufactured goods, not services.
- C Sanitary and phytosanitary measures (SPS) (i.e. barriers to trade in food and agricultural produce): how to build on the existing WTO SPS agreement.
- D Public procurement: how to build on the existing WTO GPA (Government Procurement Agreement), including services; the EU expectation is that TTIP will agree negative lists, i.e. lists of items to be excluded from transatlantic procurement arrangements.
- E Raw materials and energy
- F Trade and sustainable development: commitment to various existing environmental agreements, as well as to ILO labour standards, corporate social responsibility, and civil society dialogue.

9 The Commission negotiates on behalf of the EU, just as it does in the WTO, reporting to the ultimate decision-makers, Council and Parliament. The Lisbon Treaty of 2009 gave **Parliament** the right to veto trade deals, bringing its powers into line with those of the US Congress. A detailed account and flow-chart of the constitutional interaction of Commission, Council and Parliament in negotiating trade agreements is available on the DG Trade website.⁶ Parliament's International Trade Committee is chaired by Portuguese Socialist Vital Moreira.

10 The **first round** of TTIP talks took place in July 2013. It mapped convergence and divergence in the following areas: market access for agricultural and industrial goods, government procurement, investment, energy and raw materials, regulatory issues, sanitary and phytosanitary measures, services, intellectual property rights, sustainable development, small- and medium-sized enterprises, dispute settlement, competition, customs/trade facilitation, and state-owned enterprises.⁷

11 The **second round**, delayed by the US government shut-down, was held in November 2013. Discussions focused on energy, manufactured products, liberalisation of investment,⁸ and services. 'On services, the EU and US compared their respective approaches on cross-border services, financial services, telecommunications and e-commerce. They also began setting out their respective market access interests in various services sectors. They agreed

⁶ See http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149616.pdf

⁷ Commission press release: http://europa.eu/rapid/press-release_IP-13-691_en.htm

⁸ A public consultation on this topic will run from March to June 2014.

to discuss regulatory cooperation in financial services within the next two weeks.⁹ The service sectors were not identified.

12 By December 2013, negotiators had moved into the **third round** of talks. These went deeper into issues of market access, regulatory cooperation and technical barriers, with a view to embarking on the drafting of texts in 2014.¹⁰

13 The **fourth round** of negotiations will be held in Brussels between 10 and 14 March 2014. Prior to that, on 17/18 February, EU Trade Commissioner Karel De Gucht and US Trade Representative Ambassador Michael Froman will meet in Washington to take stock of developments to date. Following the fourth round, President Obama is due to visit Brussels.

14 Prior to and during the early rounds of negotiations the EU displayed sensitivity to the views of stakeholders, aware that consumer organisations and trade unions in particular were deeply sceptical of TTIP. DG Trade runs a **Civil Society Dialogue**¹¹ to act as a sounding board and to advertise its commitment to transparency and accountability.

15 At the beginning of 2014, the Commission set up an **advisory group**, to give technical advice to the negotiators, but also to take soundings from stakeholder bodies and to represent their views. It will function for at least two years. It will be chaired by Ignacio Garcia Bercero, the EU chief negotiator, and will have access to confidential documentation. Membership is as follows:

Edward Bowles, *Services interests*, Regional Head of Public Affairs, EMEA, Standard Chartered Bank <https://www.sc.com/en/index.html>

Jos Dings, *Transport and environment interests*, Director, Policy Team, Transport & Environment <http://www.transportenvironment.org/press/eeb-and-te-participate-ttip-advisory-group>

Ulrich Eckelmann, *Labour and trade union interests*, General Secretary of industri-ALL European Trade Union <http://www.industrial-union.org/>

Benedicte Federspiel, *Consumer interests*, Transatlantic Consumer Dialogue Steering Committee <http://tacd.org/topics/policy/ttip/>

Roxane Feller, *Food and drink sector interests*, Head of Economic Department, FoodDrinkEurope <http://www.fooddrinkeurope.eu/S=0/news/statement/agri-food-chain-reps-call-on-negotiators-to-resolve-non-tariff-measures-in/>

Monique Goyens, *Consumer interests*, Director-General, BEUC <http://www.beuc.org/Content/default.asp?pagelD=1120&searchString=TTIP>

⁹ Commission press release: http://europa.eu/rapid/press-release_IP-13-1091_en.htm

¹⁰ <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1007>

¹¹ <http://trade.ec.europa.eu/civilsoc/index.cfm>

Ivan Hodac, *Manufacturing interests*, Former Secretary General, ACEA

<http://www.acea.be/news/article/eu-us-ttip>

Tom Jenkins, *Labour and trade union interests*, Senior Advisor to the General Secretary, European Trade Union Confederation <http://www.etuc.org/r/529>

Pascal Kerneis, *Services interests*, Managing Director, European Services Forum
<http://www.esf.be/>

Monika Kosinska, *Health sector interests*, Secretary-General, European Public Health Alliance (alternate during maternity leave – **Susanne Løgstrup**, Director, European Heart Network)
<http://epha.org/spip.php?article5855>

Pekka Pesonen, *Agricultural sector interests*, Secretary-General, COPA-COGECA
<http://www.copa-cogeca.be/Menu.aspx>

Pieter de Pous, *Environment interests*, EU Policy Director, European Environmental Bureau
<http://www.eeb.org/?LinkServID=4BB114A0-5056-B741-DBDB433749C03673&showMeta=0&aa>

Reinhard Quick, *Manufacturing interests*, Director, VCI
<https://www.vci.de/Seiten/Startseite.aspx>

Luisa Santos, *Business interests*, Director, International Relations, BusinessEurope
<http://www.business europe.eu/content/default.asp?PageID=568&DocID=32446>

16 Also in January, the *European Voice*¹² reported that Catherine Ashton would appoint David O’Sullivan to the post of **EU Ambassador to the US**. O’Sullivan was DG Trade Commissioner from 2005 to 2010, as well as secretary to the Prodi Commission; currently he is Chief Operating Officer of the European External Action Service. The appointment, if confirmed, would indicate the high priority given to TTIP.

The current position of services and of higher education in particular

17 The HE sector has for some years been watchful of the progress of negotiations on the liberalisation of services undertaken by WTO members in the framework of the 1994 **General Agreement on Trade in Services (GATS)**.¹³ Cross-border service provision, in the framework of GATS, would be regarded as operating in one or more of four modes:

- Mode 1: ‘cross-border supply’, e.g. the delivery, from one country, of distance learning programmes taken up in others, including fee-based MOOC provision

¹² No.20.2, Jan.16-22

¹³ http://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm

- Mode 2: 'consumption abroad', e.g. programme mobility out of the student's home country
- Mode 3: 'commercial presence', e.g. a branch campus established abroad
- Mode 4: 'presence of natural persons', e.g. home country teachers working temporarily in foreign branch campuses

18 In 2001, **EUA**, together with three sibling organisations in North America, produced a substantial position paper¹⁴ which concluded as follows:

Our member institutions are committed to reducing obstacles to international trade in higher education using conventions and agreements outside of a trade policy regime. This commitment includes, but is not limited to improving communications, expanding information exchanges, and developing agreements concerning higher education institutions, programs, degrees or qualifications and quality review practices.

Our respective countries should not make commitments in Higher Education Services or in the related categories of Adult Education and Other Education Services in the context of the GATS. Where such commitments have already been made in 1995, no further ones should be forthcoming.

In support of this position, *EUA et al.* argued that:

- HE serves the public interest; regulatory responsibility must therefore remain with the competent authority designated by each WTO member country
- The HE systems of developing countries must be protected
- Quality in HE depends, *inter alia*, on internationalisation and on existing quality assurance arrangements that must not be compromised
- The internationalisation of HE is developing rapidly; intervention at the level of GATS is unnecessary
- HE already falls within the scope of international agreements such as those sponsored by UNESCO on the recognition of academic qualifications
- Public and private inputs to HE are inextricably linked; ring-fenced sub-sectoral settlements within the framework of GATS are not feasible
- In this context, the explicit exclusion of public service systems offers no reassurance
- Movement within GATS must be characterised by caution, consultation and transparency
- The impact of the inclusion of HE is virtually impossible to assess

¹⁴ Joint declaration by ACE, AUCC, CHEA and EUA
http://www.aic.lv/rec/Eng/new_d_en/gats/jointdec.html

19 Since 2001, the **absence of far-reaching agreement on services within GATS** has not prevented rapid growth either in transnational education, or in the commercial activities of ‘public’ institutions, or in the expansion of private provision, whether not-for-profit or for-profit. The drivers are well known: rising levels and broader bands of participation; relentless innovation in educational technology; institutional entrepreneurialism prompted by economic and financial crisis; the need for highly qualified labour in the emerging economies; the wider context of globalisation.

20 Meanwhile, in the **EU’s Single Market**, the situation is complex and uncertain. Financial services have their own sectoral legislation. The status of services of general economic interest (public utilities, for example) is ill-defined. The mass of commercial services fall into the scope of the Services Directive, from which, amid much controversy, healthcare services were excluded during the legislative process. Education services were neither explicitly excluded nor effectively included. While it is evident that higher education is a tradable service, since it is traded unambiguously by a number of for-profit ventures (and DG Competition’s rule of thumb says that if a service is traded somewhere, then in principle it is tradable everywhere in the internal market), the issue was ultimately shelved by the legislators. Unwilling to declare higher education a service industry and thus to draw it into the exclusive competence of the EU, they had recourse to a Court of Justice ruling¹⁵ which in fact covered state-funded compulsory (primary and secondary) education. As a result, whenever the Commission has felt bound to protect the right of higher education institutions to operate on a cross-border basis, it has done so by recourse, not to the Services Directive, but to the Treaty’s guarantee of freedom of establishment.

Future developments

21 As indicated at the outset, TTIP enters its detailed stages of negotiation in 2014. Its inclusion of **government procurement**, explicitly excluded by GATS, is a significant development. It opens up possibilities for outsourcing public services to private providers, on a cross-border basis, as well as allowing governments the opportunity to outsource to other governments, in so-called ‘G2G’ contracts.

22 TTIP, however, is not the only potential game-changer. GATS now looks likely to be overtaken by a more focused liberalising initiative known as the **Trade in Services Agreement (TiSA)**. TiSA¹⁶ brings together over 40 countries, i.e. about one third of WTO members, but covering about 60% of the world’s trade in services. The EU is prominent in

¹⁵ C-263/86 Humbel

¹⁶ See http://download.ei-ie.org/Docs/WebDepot/Circular_TISA_briefing_EN.pdf

this initiative,¹⁷ which aims for a first round agreement in 2014. Like TTIP, TiSA is driven by frustration at the sluggishness of the Doha Round, which began to address services in 2000 but which has yielded little in the way of outcomes, and by the quest to dramatically boost growth. It proposes to proceed on a no-exclusion basis, that is to say that participating countries will table the services that they do not protect from international competition, while expecting to lengthen their lists in the course of negotiation. TiSA will not produce a final agreement; instead, it will generate a series of cumulative agreements which, ultimately, it will wish to fold into the full multilateral WTO framework.¹⁸ Given that the EU and the US are both major players in TiSA, it is reasonable to expect that the negotiating process will be closely aligned with TTIP.

23 In respect of these developments, the observations of **EUA *et al.*** in 2001 remain pertinent. The HE systems of developing countries become more vulnerable to dominance from abroad, while the hybrid nature of the HE systems in most developed countries means that the protection offered by the GATS exemption of ‘services supplied in the exercise of government authority’ has little value in practice.

24 Running slightly ahead of TTIP is the Comprehensive Economic and Trade Agreement (CETA) now being concluded between the **EU and Canada**. It is the first CETA that the EU has concluded with a G8 country and may well influence the outcomes of TTIP. A major deal, it is expected to boost two-way trade by 23% (EUR 26 billion). It covers agricultural produce, manufactured goods, intellectual property, government procurement and services.¹⁹ Which services are covered, and how, is not yet clear, since the political agreement now in place precedes publication of the detailed text. Press reports indicate that the CETA includes some measure of mutual recognition of professional qualifications.

25 Finally, it is clear that the outcomes of the TTIP and TiSA negotiations will be heavily influenced, on the European side, by the complexions of the new Parliament, the new Commission, by the identity of the new presidents of Council and Commission and of the new head of external relations. These factors introduce **further unpredictability** into an already complex situation.

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¹⁷ See the DG Trade memo at http://europa.eu/rapid/press-release_MEMO-13-107_en.htm See also the summary view of the US Chamber of Commerce at <https://www.uschamber.com/issue-brief/trade-services-agreement> See, too, the Education International briefing note at http://download.ei-ie.org/Docs/WebDepot/Circular_TISA_briefing_EN.pdf

¹⁸ Currently, therefore, TiSA is plurilateral – more than bilateral, but falling short of ‘multilateral’ in the WTO sense of ‘covering all member countries’.

¹⁹ <http://trade.ec.europa.eu/doclib/press/index.cfm?id=973>