



TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (TTIP)

Update No.3 December 2014

This Update follows a **background paper** published by EUA in January 2014 and Updates issued in April and August. All three are available at <http://www.eua.be/eua-work-and-policy-area/building-the-european-higher-education-area/international-trade-agreements.aspx>

EUA is concerned with the status of **higher education as a tradable service** and the extent to which HE might feature in future international free trade agreements (FTAs). A number of such agreements are currently being prepared. TTIP has received the most publicity, but all of them are significant. The others are: the Trans-Pacific Partnership (TPP), in which the EU is not involved; the Comprehensive Economic and Trade Agreement (CETA) recently concluded between the EU and Canada; FTAs between the EU and Japan, and the EU and Singapore; and – much less publicised – the Trade in Services Agreement (TiSA). The latest known developments are covered in the Update.

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Acronyms

ACE	American Council on Education
ACP	African, Caribbean and Pacific countries
AE	Adult education
ALDE	Alliance of Liberals and Democrats for Europe
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
CJEU	Court of Justice of the European Union
CPD	Continuing professional development
CTF	Common training framework
DG EAC	Directorate General for Education and Culture
ECTS	European Credit Accumulation and Transfer System
EEA	European Economic Area
EP	European Parliament
EPA	Economic Partnership Agreement
EPP	European People's Party
EQF	European Qualifications Framework for Lifelong Learning
EUA	European University Association
FTA	Free trade agreement
GATS	General Agreement on Trade in Services
GEU/NGL	European United Left / Nordic Green Left
GPA	Government procurement agreement
GSP	Generalised System of Preferences
HE	Higher education
ILO	International Labour Organisation
INTA	European Parliament Committee on International Trade
IPR	Intellectual property rights
ISDS	Investor-state dispute settlement
MOOC	Massive open online courses
MRA	Mutual recognition agreement
MS	Member State
NTB	Non-tariff barrier
S&D	Progressive Alliance of Socialists and Democrats
SPS	Sanitary and phytosanitary measures
TBT	Technical barriers to trade
TiSA	Trade in Services Agreement
TPA	Trade Promotion Authority
TPP	Trans-Pacific Partnership
TRIPS	Agreement on Trade-related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership
UNESCO	<i>United Nations Educational, Scientific and Cultural Organisation</i>
WTO	World Trade Organisation

1 The political background to TTIP

If TTIP has seemed to be on hold since August, it is partly because much has happened in wider arenas: in the US, in Ukraine, and in the EU institutions. This section reviews relevant developments.

1.1.1 In the recent **US mid-term elections**, half of the Senate seats were up for re-election, with the Republicans requiring six seats to gain control. In this, they were successful. TTIP now depends, much more than before, on bipartisan support. The incoming chair of the Senate Finance Committee, Orrin Hatch, suggested that such backing is probable, but only time will tell.

1.1.2 A related issue in the US is the question of **trade promotion authority (TPA)** that allows trade deals to be fast-tracked. TPA ensures that the President works to the mandate of the Congress and that trade agreements are ultimately signed off unamended. However, the TPA law has expired. President Obama has requested its renewal, but since January legislation has been held up by Democrat opposition in the Senate. Paradoxically, and in the view of the *Financial Times*, Republican control of the Senate might ease the way for its approval. For the official view of the Obama administration on TPA, see <http://www.ustr.gov/trade-topics/trade-promotion-authority>

1.2 The outgoing European Commission was delighted to have secured agreement with Russia on the **supply of gas to Ukraine** throughout the coming winter. The agreement runs only to March 2015, long before TTIP is likely to be finalised. It gives no grounds for assuming that Europe's need to access American shale gas stocks will be any less than has previously been claimed. The EU is drawing up proposals on energy and raw materials as part of the ongoing TTIP negotiations.

http://europa.eu/rapid/press-release_IP-14-1238_en.htm?locale=en

European Council

1.3.1 The new **president of the European Council** is Donald Tusk, former prime minister of Poland. He is regarded by some as pro-American, by others as an ally of Germany, and by yet others as a conciliator with Russia; his view of TTIP will depend on strategic, rather than on trade factors alone.

1.3.2 The Italian deputy minister of economic development addressed the European Parliament (EP) in September, on behalf of the **Italian presidency**. Among his remarks are the following:

Allow me to take stock of these negotiations starting with Canada. [...] It will be the most ambitious agreement concluded by the European Union to date. Results are positive for all sectors and go far beyond the reduction of duties. The public procurement market has been opened both at federal and provincial (state) level. A convincing compromise was also found to recognise geographical indications, an important step for the agro-food sector. In general this treaty can become a benchmark for the most important negotiating table of the next months: the TTIP with the US. [...]

In the last months TTIP was too much talked about, mostly imprecisely. [...] A preliminary point has to be made clear: the TTIP is an agreement that should particularly benefit small and medium enterprises. It is misleading to present it as an agreement to further multinationals which already operate across borders and are able to intercept demand where it arises. [...]

At the same time it is evident that the welfare systems, different on the two sides of the Atlantic, could not be affected by this agreement. [...]

The TTIP negotiation does not seem to have kept a satisfactory pace to date. Transparency alone will not be enough to convince public opinion on the importance of TTIP if we cannot show real progress with actual impact on our economies. [...] We had established that the TTIP should be clinched by the end of 2015. [...] It is our opinion that taking into account the progress made, we should ponder carefully the negotiating strategy if the deadline of 2015 become unrealistic. We should avoid that continuous differences on important but non-critical issues could effectively stop progress on issues where an understanding appears within reach. [...]

The Italian Government thinks that, if after the [US] mid-term elections the pace of negotiations does not change, we should consider the possibility of closing an interim agreement on the most important and less controversial issues by the end of 2015.

<http://www.europarl.europa.eu/document/activities/cont/201409/20140929ATT90166/20140929ATT90166EN.pdf>

1.3.3 The possibility of an interim agreement was immediately rebuffed by **US Ambassador to EU** Anthony Gardner: 'He spoke out against an interim agreement (that had been suggested by Italian Presidency earlier the same day in INTA [European Parliament Committee on International Trade]), promoting instead a pragmatic approach that would allow reaching a comprehensive and ambitious result possibly still by the end of 2015.' (INTA Newsletter 47, September 2014)

European Commission

1.4.1 The Italian proposal of a fall-back position has now been relegated to where it logically belongs – on the back-burner. DG Trade officials at the Civil Society Dialogue meeting in Brussels in November spoke, with some relish, of the new 'team Juncker' making a **'fresh start'**.

1.4.2 The **Juncker Commission** was formally approved by the European Parliament on 22 October, with 423 votes in favour, 209 against and 67 abstentions.

1.4.3 The **new trade commissioner Cecilia Malmström** is a Swedish liberal, who served as home affairs commissioner in the Barroso II Commission. Her view of trade is generally considered to be based on: a belief in open markets; protection of EU environmental and labour standards; transparency. She has a PhD in political science from the University of Gothenburg and worked as a senior lecturer before being elected to the European Parliament in 1999. Her CV is available at http://www.europarl.europa.eu/meetdocs/2014_2019/documents/inta/dv/malmstrom_cv/_malmstrom_cv_en.pdf

1.4.4 Jean-Claude Juncker has charged Malmström with a **focused mission**:

- Continuing to engage fully in the World Trade Organisation and multilateral trade processes. The EU must continue to champion global and multilateral action in this field and push the post-Bali work programme and multilateral negotiations forward.
- Working towards a reasonable and balanced Transatlantic Trade and Investment Partnership with the United States of America, which neither threatens Europe's safety, health, social and data protection standards, nor jeopardises our cultural diversity. I will ask you to enhance transparency towards citizens and the European Parliament during all steps of the negotiations. Our aim must be to conclude the negotiations on a reciprocal and mutually beneficial basis.
- Taking forward the various bilateral and regional negotiations which have been launched and considering whether new negotiations should be launched.

- Developing, in close cooperation with the Vice-President for Jobs, Growth, Investment and Competitiveness, a strong foreign direct investment policy.
- Taking stock of the use of our trade defence instruments so that we can decide on the best way forward.
- Working closely with the High-Representative of the Union for Foreign Affairs and Security Policy/Vice-President, the Commissioner for International Cooperation and Development and the Commissioner for Migration and Home Affairs to strengthen the EU's strategic partnership with Africa.

The full text of Juncker's letter has been posted at http://www.europarl.europa.eu/meetdocs/2014_2019/documents/inta/dv/mission_letter_cecilia_malmstrom_/mission_letter_cecilia_malmstrom_en.pdf

1.4.5 Malmström's mission aligns with **Juncker's presentation to the European Parliament** on 15 July, in which he indicated that

The Commission would negotiate a reasonable and balanced trade agreement with the US, in a spirit of mutual and reciprocal benefits and transparency [...] He promised that he would not 'sacrifice Europe's safety, health, social and data-protection standards or our cultural diversity on the altar of free trade.' (*European Voice*, July 17 2014)

1.4.6 Malmström is to be overseen – in the **new matrix formation** adopted by the Juncker Commission – by Federica Mogherini, the incoming High Representative for Foreign Affairs and Security Policy. Mogherini, in turn, is answerable to Juncker himself, as well as to Frans Timmermans, the first vice-president of the Commission. Juncker has devolved to Timmermans the final word in the question of ISDS (see para.8.5 below).

1.4.7 In common with all the other commissioners-designate, Malmström was given a **hearing by the European Parliament** (29 September). An EP hearing consists of two elements: written answers to a standard questionnaire; a live question-and-answer encounter with the relevant committee. The latter proved more problematic than anticipated, on two counts. First, she had to extricate herself from allegations that her office, in the Barroso II Commission, had advised the US embassy in Brussels on the best timing of its lobby on data protection. Secondly, she had to address the fact that Juncker's aide Martin Selmayr had inserted a statement condemning ISDS into her written submission, a statement which she repudiated. Andrew Gardner, in the *European Voice* of 2 October, gave a colourful account. These two items apart, Malmström answered with considerable confidence, appeared well briefed, and covered a wide range of topics: ISDS; IPR; transparency; labour rights in TTIP; the exclusion of the audio-visual sector from all FTAs; geographical indications; SMEs; the integration of EU foreign, development and trade policies; China, South-East Asia, Latin America; the association agreement with Ukraine; Israel; the inclusion of human rights in Commission impact assessments; the exclusion of all public services (health, education, and particularly water) from all FTAs, unless individual MSs determine otherwise; the EU's ongoing commitment to the Doha Round. Her written submission is posted at http://www.elections2014.eu/pdfs/new-commission/hearings/20140910CAD60712/Hearings2014_Malmstr%C3%B6m_Questionnaire_en.pdf The Q&A session can be viewed at <http://www.elections2014.eu/en/new-commission/hearing/20140917HEA64702>

1.4.8 In respect of the **CETA**, Malmström was adamant that ISDS could not be excised without jeopardising the whole agreement. She envisaged that the text would come before INTA and EP for ratification in the summer of 2015. The consolidated document has now been posted at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf

See also the in-depth analysis prepared for INTA at

http://www.europarl.europa.eu/RegData/etudes/IDAN/2014/536410/EXPO_IDA%282014%29536410_EN.pdf

1.4.9 DG Trade officials at the Civil Society Dialogue stressed that before travelling to Washington for talks with her US opposite number Michael Froman, she will meet as many **TTIP stakeholders** as possible. Already scheduled are: German economics minister Sigmar Gabriel, a vocal opponent of ISDS; the UK minister for Europe Lord Livingston; Friends of the Earth; INTA; Civil Society Dialogue.

1.5.1 Commissioner Malmström will also meet the **TTIP advisory group**. The list of the 14 members published in the EUA Background Paper has now evolved, by dint of substitutions and additions, into a 16-person group. Their CVs are published at

http://trade.ec.europa.eu/doclib/docs/2014/january/tradoc_152102.pdf

1.5.2 The **minutes** of the advisory group's monthly meetings are posted at

<http://ec.europa.eu/trade/policy/in-focus/ttip/resources/#advisory-group>

European Parliament

1.6.1 As reported in EUA's previous Update, the EP's **INTA committee** is now newly re-constituted under the chairmanship of the German socialist Bernd Lange. The full membership is at <http://www.europarl.europa.eu/committees/en/inta/members.html#menuzone>

1.6.2 At its October meeting, it decided that it would schedule **hearings** during the period January to June 2015: on 'TTIP – what's in it for the citizen?'; on TiSA; and on CETA (in March). It also envisages joint hearings with JURI (Legal Affairs Committee) on ISDS and regulatory cooperation and with LIBE (Civil Liberties, Justice and Home Affairs) on data protection and trade agreements.

1.6.3 It also proposes to send a **delegation** to Canada in the first half of 2015. Meanwhile, EP has increased the size of its delegation for relations with the United States, from 41 to 58 members; the chair is the German EPP member David McAllister.

1.6.4 Finally, two **INTA research papers** may be of interest to readers of this Update:

'in-depth analyses' of civil society's concerns, at

http://www.europarl.europa.eu/RegData/etudes/IDAN/2014/536404/EXPO_IDA%282014%29536404_EN.pdf

and of the impact of TTIP on third countries, at

http://www.europarl.europa.eu/RegData/etudes/IDAN/2014/536403/EXPO_IDA%282014%29536403_EN.pdf

2 The seventh round of negotiations

2.1 The **seventh round** of TTIP negotiations took place in Chevy Chase Maryland at the end of September. The US has now adopted the EU format, in which a stakeholder consultation is built in to

the schedule, together with an oral briefing given by the chief negotiators at the close of the round. For the comments of Dan Mullaney and Ignacio Garcia-Bercero on services, see para.3.1.1 below.

2.1.1 Readers looking for official reports on the **US Trade Representative's website** will be disappointed. When accessed on 28 November, it had not registered the sixth round, let alone the seventh. <http://www.ustr.gov/trade-agreements/free-trade-agreements/transatlantic-trade-and-investment-partnership/readouts>

2.1.2 The **DG Trade website**, in contrast, is well maintained. It offers a six-page report which contains the following summary of developments on services:

The EU and the US continued the discussion of their services and investment offers. The sectors covered included in particular environment, distribution, postal services, business services, health, education [EUA emphasis], energy, and transport. The EU also discussed its approach to investment in non-service sectors. [...]

Discussions also continued on e-commerce, notably the scope of the chapter, possibilities for cooperation, customs duties, "digital products", e-signatures, online consumer protection, paperless trading and access to and use of the internet. The EU and the US discussed their respective approaches to improving mobility of skilled professionals and other business people.

http://trade.ec.europa.eu/doclib/docs/2014/october/tradoc_152859.pdf

2.2.1 At the November meeting of the Civil Society Dialogue, DG Trade elaborated on this report. In the majority of sectors, it said, the work of the negotiators was gradually evolving into **texts**, but this was not yet the case for regulatory cooperation and sustainable development. The EU was currently developing proposals on energy and raw materials, and on IPR.

2.2.2 Discussions on market access would eventually lead to a **second round of offers**, but first DG saw a need to agree a methodology permitting offers to be couched in comparable terms, as well as to strengthen the link with public procurement. In services, for example, the two sides had to find a consistent way of formatting MS and sub-federal exceptions.

3 Market access to higher [HE] and adult education [AE] providers

3.1 The **seventh round** of talks shed little light on how HE and AE might feature in an eventual agreement. The chief negotiators confined themselves to routine reassurances.

<http://www.ustr.gov/about-us/press-office/speeches/2014/October/Opening-Remarks-by-US-and-EU-Chief-Negotiators-for-TTIP-Round-Seven-Press-Conference>

3.1.1 **Dan Mullaney**, for the US, set the scene:

What we are working toward in the services area, for instance, is a trade agreement that creates more opportunities for U.S. and EU companies to provide and expand services across the Atlantic and around the world, services that not only support high-tech jobs where U.S. and EU companies excel, but that can also improve the lives of our citizens. [...] During the last round, our negotiators were able to discuss approximately 15 percent of the proposed EU services offer. After this week, negotiators are now more than halfway. [...]

I mentioned at the outset that our negotiators have been able this week to exchange views with a wide range of U.S. and EU public. [...] For instance, we heard the concern that our negotiations should not require privatization of public services such as water utilities, education [EUA emphasis], national healthcare, and that they not limit the ability of governments to regulate those services as they see fit; for example, to protect consumers, the environment, and health and safety. So we welcome the opportunity to confirm that the United States does not include such provisions in its trade agreements and will not do so in this negotiation.

Mullaney's hands-off posture in respect of education suggests that it did not figure in the negotiating round, but this is belied by DG Trade's report quoted in para.2.1.2 above.

3.1.2 **Ignacio Garcia-Bercero** (EU) omitted education from his list of 'protected' public policy areas.

I wish in this collection [sic] to stress that our approach to services negotiations excludes any commitment on public services, and the governments remain at any time free to decide that certain services should be provided by the public sector. And I've seen very much work on that. [...]

Under the new commission, we will continue working towards achieving an ambitious agreement. We will not compromise on the protection of the environment, health, safety, consumers, data privacy, or any other public policy goal. We will do nothing that puts into question the right of governments to regulate.

3.2 The **uncertainties** that predate the TTIP talks therefore persist. Many are definitional. What is 'public'? What is 'higher education'? What is 'adult education'? What are 'other educational services'? The chief negotiators have said nothing to dispel the widespread feeling that an appeal to the notion of 'public' offers no clarification or reassurance to the European HE sector.

3.3 What is known (and reported in Update 2) is that the leaked EU's **draft services and investments offer** included R&D services, HE, and the recognition of professional qualifications. <https://data.awp.is/filtrala/2014/06/13/4.html>

3.4.1 The recently initialled EU-Singapore Free Trade Agreement (FTA) uses the **UN Central Products Classification code (CPC)** to specify the activities included. CPC covers services as well as manufactured products. However, it offers no guidance to non-specialists. For HE, it gives 'no explanatory note for this code'. For 'other', it proposes a definition which many in the HE community would have assigned to HE itself: 'Education services leading to a university degree or equivalent. Such education services are provided by universities or specialized professional schools. The programmes not only emphasize theoretical instruction, but also research training aiming to prepare students for participation in original work.' (CPC 92390) <http://unstats.un.org/UNSD/cr/registry/regcs.asp?Cl=9&Lg=1&Co=92390>

3.4.2 CPC 92400 defines **adult education** as: 'Education services for adults who are not in the regular school and university system. Such education services may be provided in day or evening classes by schools or by special institutions for adult education. Included are education services through radio or television broadcasting or by correspondence. The programmes may cover both general and vocational subjects. Services related to literacy programmes for adults are included.' <http://unstats.un.org/UNSD/cr/registry/regcs.asp?Cl=9&Lg=1&Co=92400>

3.4.3 AE features in the **EU-Singapore FTA**, not offered bilaterally, only inward into Singapore. See Annex 10E at http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151756.pdf

3.5 At the June meeting of the **Advisory Group**, 'One member asked what consultation would take place on the services offer, especially in relation to education services. The Chair explained that Member States would be asked for their input as usual. The EU's offer would be based on the TiSA "mixed" model [see para.3.7 and section 10 below], including negative listing for national treatment and positive listing for market access. With regard to publicly funded education and public services in general, the EU will take the same approach as it has done in other FTAs and in the WTO (i.e. not take any commitments).'

http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152685.pdf

3.6.1 The matter was further probed at the November meeting of the Civil Society Dialogue. DG Trade stressed yet again that public services would be treated as per the **GATS regime**, i.e. they would be excluded if they were delivered in an exercise of government authority or if they concerned public utilities. Publicly funded education services would be excluded, while private services would be included if individual MSs so wished.

3.6.2 Pressed by **EUA**, the lead negotiator asserted that privately funded systems could be included in the offer, but that all systems 'which receive' public funding would be excluded. He failed to acknowledge that many systems receive public funding, while at the same time allowing competition from the private sector. Moreover, there are many 'public' institutions which generate revenue from commercial operations. Such hybridity carries the systems beyond the scope of the GATS exclusion.

3.6.3 In response to **EUA's** question, it was revealed that **DG Education and Culture (EAC)** would be part of the EU negotiating team in Washington in early 2015. This has not been confirmed.

3.7 The debate on education services leads into another – the question of whether the EU can strike agreements covering policy areas in which it has only complementary competence, as well as in the areas in which its competence is exclusive. The ratification procedure for '**mixed agreements**' is unclear. Outgoing trade commissioner De Gucht indicated that he would seek advice from the CJEU. EurLEX has a summary of procedure, but this was last updated in August 2010. See <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1410949127767&uri=URISERV:l14532> See also <http://euobserver.com/institutional/124833> for this and for the national parliaments' concerns regarding subsidiarity.

4 Mutual recognition of professional qualifications

4.1 The tabulation below is reproduced from Update 2. It suggests the areas in which **TTIP, EU legislation on professional qualifications, and higher education**, might come into contact.

Which professions? All or only some?	Of those which have been cited by stakeholders and commentators, architecture is covered by the sectoral chapter of DIR 2013/55/EU, accountancy and engineering by the General System of the same Directive and law by dedicated Directives ¹ .
Will inclusion in TTIP affect or lengthen the ongoing transposition	DIR 2013/55/EU will be in transposition until January 2016. The General System includes professions that are regulated in some Member States,

¹ The Lawyers' Services Directive (LSD) of 1997 and the Lawyers' Establishment Directive (LED) of 1998.

process?	but in different ways, and unregulated in others. The two law Directives have just begun their review process.
Will the current intra-EU 'mutual evaluation' process be linked to TTIP?	Member States are currently assessing how far their professions might be de-regulated or more lightly regulated, with the dual aim of boosting cross-border service delivery and introducing a greater degree of automaticity into the recognition of qualifications.
Will the healthcare professions be included?	It seems unlikely, given that they were excluded from the Services Directive. On the US side, the wide variation in state practice will constitute a major barrier.
How will inclusion in TTIP reflect the gradual alignment of EU law on professional qualifications with the Bologna Process?	DIR 2013/55/EU, unlike the previous legislation which it amended, allows – in certain circumstances – the use of the European Credit Accumulation and Transfer System (ECTS) and reference to the European Qualifications Framework (EQF).
Will the assimilation of the Morgenbesser ruling into EU law have any bearing on TTIP?	Morgenbesser allows professional traineeships to be undertaken in any Member State, irrespective of where the professional qualification is delivered, and to enjoy full recognition. Particular attention has to be paid to the role of the supervisor.
How will EU and national requirements related to continuing professional development be accommodated in TTIP?	The current EU position is that Member States must report to the Commission, by the end of the transposition period, on how they 'encourage' CPD in the seven sectoral professions, six of which are healthcare professions. It is not clear whether extending this requirement to all US states would allay existing anxieties about patient safety.
Will US HEIs be allowed to participate in the new Common Training Frameworks?	CTFs are designed to allow a vanguard of Member States to design competence-based curricula into which other MSs may subsequently opt. Third countries are welcome as academic partners in curriculum development, but the amended DIR makes no specific mention of whether third country graduates would enjoy any special status.

4.2.1 Update 2 reported in some detail the treatment accorded to the recognition of professional qualifications in the EU-Canadian CETA. Its use of the Mutual Recognition Agreement (MRA) procedure also appears in the **EU-Singapore FTA**. See art.8.16 at http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151743.pdf

4.2.2 EUA asked for further clarification and was told that the **CETA will not be used as a template for TTIP**. In the CETA, provision exists for all professions to consider an MRA. In TTIP, by contrast, specified professions will be included from the outset. MSs, the relevant Competent Authorities and professional bodies are currently working on this. The professions were not named at the Civil Society Dialogue meeting at which the question was asked.

4.2.3 For professional qualifications in **TISA**, see para.10.9 below.

5 Public procurement

5.1 EUA Update no.1 reported the extent to which higher education is covered in principle by the new **Directive 2014/24/EU on Public Procurement**, now in transposition until March 2016. The actual incidence of public procurement in HE and AE is uncertain.

5.2 The **2013 Single Market Scoreboard** rates 30 EU and EEA countries in terms of their effective participation in public procurement over a three-year period (and therefore excludes Croatia). It is

worth noting that five of the least well performing (Cyprus, Czech Republic, Greece, Latvia and Portugal) were signatories to a letter supporting the inclusion of ISDS in TTIP (see para.8.6 below). http://ec.europa.eu/internal_market/scoreboard/performance_per_policy_area/public_procurement/index_en.htm

6 e-commerce and data protection

6.1 Update no.1 listed some of the **factors which have soured the climate of the TTIP talks**: the Snowden revelations of espionage, European doubts regarding the efficacy of the ‘safe harbor’ regime, the (now previous) European Parliament’s threat to veto TTIP unless effective data protection for EU citizens can be assured. To this list has been added the CJEU ruling (case C-131/12) that search engines, notably Google, must respect EU provisions on the right to be forgotten, together with recent suggestions that they should be unbundled and more strictly regulated.

6.2 The issues of privacy and restrictions on cross-border data flows are also proving controversial in the **TISA** negotiations. See paras.10.10 and 10.11 below.

6.3 The INTA briefing note on IPR cited in para.7.4 below asserts that TTIP ‘will not cover data protection (although the issue is linked to discussions about e-commerce)’. Whether TTIP will indeed include a **digital economy chapter**, as Update 3 suggested, remains to be seen.

6.4 **Incoming Commissioner Andrus Ansip** (digital single market) has said that he is prepared to consider suspending the safe harbor regime. As a Commission vice-president, he has oversight of the work of his colleague Günther Oettinger on IPR (see para.7.1 below). <http://www.euractiv.com/sections/innovation-enterprise/ansip-threatens-suspend-safe-harbour-data-agreement-us-308962?utm>

6.5 The **High Level Group on the Modernisation of Higher Education**, set up by DG Education and Culture, recommends in its October 2014 report, that ‘the European Commission and national authorities should encourage and incentivise higher education providers to award and recognise credits under the European Credit Transfer and Accumulation System for all forms of online courses. The current revision of the ECTS Guide should incorporate these principles.’ This will accelerate the mainstreaming of online provision and assist the absorption of e-courses into the European and national qualifications frameworks. The revised ECTS Users’ Guide is due to be endorsed by ministers of the Bologna Process when they meet in Yerevan in the spring of 2015. http://ec.europa.eu/education/library/reports/modernisation-universities_en.pdf

7 Intellectual property rights (IPR)

7.1 In the new Juncker Commission, the copyright unit is moving from DG MARKT to DG CNECT. This puts it in under the responsibility of the German Commissioner Günther Oettinger, whose appointment to the **Digital Economy and Society** portfolio has been greeted by some disquiet, from himself included, since he had apparently hoped to become Trade Commissioner. See <http://www.euractiv.com/sections/infosociety/oettingers-new-digital-job-raises-eyebrows-berlin-308356?utm>

7.2.1 IPR has thus far had a low profile in the public debate on TTIP. One source of critical analysis is the Brussels-based **Transatlantic Consumer Dialogue** (TACD). Its position on IPR within TTIP contains 11 recommendations, including:

1. TACD objects to the inclusion of investor state dispute mechanisms that would empower investors to sue sovereign nations over IPR rules or conditions that could reduce their expected profits and to challenge national laws outside of the ordinary judicial system. IPR regulation, as with other areas of policy, could be caught up in an investor-state system that provides corporations with a new venue to undermine critical consumer safeguards and to exclude citizen and consumer input.
2. TACD declares that no provision in the TTIP should prevent or weaken the enactment of robust exceptions and limitations to IPR by national governments. TACD supports the promotion in TTIP of Transatlantic exceptions and limitations in the TTIP for libraries, disabled persons, scientific text and data mining (except personal data) and distance education.
10. TACD demands that no measure be taken in the TTIP that constrains citizen's open access to publicly financed education, scientific data, information or materials.

<http://test.tacd.org/wp-content/uploads/2013/09/TACD-IP-15-13-IPR-in-the-Transatlantic-Trade-and-Investment-Partnership.pdf>

7.2.2 TACD notes that Commissioner Oettinger 'has committed himself to presenting an **EU copyright reform proposal** within a year. [...] The big challenge will be to try to overcome very different national copyright and licensing rules to conform a single digital market. Harmonizing exceptions and limitation to copyright, including exceptions for Text and Data mining as well as for libraries, might be some of the issues.' See the IP Policy blog (1 October) at <http://tacd-ip.org/>

7.2.3 The *European Voice* (30 October) surmises that a first step towards the creation of a single digital market will be a **Europe-wide levy on internet search engines** which permit access to copyrighted material and thereby generate revenue.

7.3 Corporates regard their IPR as an asset to be invested. A recent statement by eight EU and US healthcare organisations drew attention to the complexity of the **IPR-ISDS relationship**. See <http://haieurope.org/wp-content/uploads/2014/07/ISDS-Consultation-Response.pdf>

7.4 For detailed background to IPR debates – in general, and TTIP-related – Update readers are recommended to consult the **briefing note prepared for INTA** by Carmen-Cristina Cîrlig. She concludes that 'the US and the EU will probably focus their discourse on how to cooperate in promoting protection and combating infringement of IPRs in third countries rather than attempt to harmonise aspects of their respective IP systems.'
http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/140760/LDM_BRI%282014%29140760_REV1_EN.pdf

8 Investor-state dispute settlement (ISDS)

8.1 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. Update no.1 rehearsed the major arguments for and against.

8.2 Opinion is divided and vociferous. Whether or not ISDS is retained in any eventual TTIP agreement depends essentially on two factors: the position adopted by Germany and the view of the European Parliament. German economics minister **Sigmar Gabriel** (SPD, social democrat) consistently opposed ISDS until very recently. The *Financial Times* (28 November) reports, however, that he has dropped his insistence that ISDS be cut out of the CETA.

8.3 The **European Parliament**, for its part, has no formal view, being more concerned with asserting its right to full briefing on, and access to, the detail of negotiations as they proceed (but see para.9.3 below). It has, however, published a report of an INTA workshop on ISDS held in April 2014. The workshop debated a number of issues: whether the EU should refine ISDS for its own purposes, how a European ISDS would stand in relation to existing EU legal and judicial procedures, how it would handle disputes in areas in which the EU has only complementary competence. See http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534979/EXPO_STU%282014%29534979_EN.pdf

8.4 The next significant marker in the ISDS debate will be the publication of the Commission's report on the 149,000 submissions that it received in response to its consultation. This was promised for November but might well appear later. The most relevant recent event has been the coming into force, on 17 September, of **Regulation 912/2014 'establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party'**. Although technically in force, it is enforceable only after a pending agreement or treaty, such as TTIP, has been finalised. The Regulation concerns the division of responsibilities between the EU and Member States, in respect of arbitration proceedings and financial settlements. The full text can be downloaded from http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.257.01.0121.01.ENG

8.5 Much attention has been given to the remarks made by **incoming Commission president Jean-Claude Juncker** in his address to Parliament on 22 October:

I took note of the intense debates around investor-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP) negotiations. Let me once again state my position clearly, that I had set out on 15 July in front of this House and that you will find in my Political Guidelines: My Commission will not accept that the jurisdiction of courts in the EU Member States be limited by special regimes for investor-to-state disputes. The rule of law and the principle of equality before the law must also apply in this context.

The negotiating mandate foresees a number of conditions that have to be respected by such a regime as well as an assessment of its relationship with domestic courts. There is thus no obligation in this regard: the mandate leaves it open and serves as a guide.

I had thought my commitment on this point was very clear but I am happy to clarify and reiterate it here today as a number of you have asked me to do so: In the agreement that my Commission will eventually submit to this House for approval there will be nothing that limits for the parties the access to national courts or that will allow secret courts to have the final say in disputes between investors and States.

I have asked Frans Timmermans, in his role as First Vice-President in charge of the Rule of Law and the Charter of Fundamental Rights, to advise me on the matter. There will be no investor-to-state dispute clause in TTIP if Frans does not agree with it too.

I am confident that – with your support – we can negotiate an ambitious trade agreement with the U.S. along these lines, with full respect of European interests and the rule of law.

Beyond affirming that ISDS arbitration proceedings held in the EU will take place within established jurisdictions, Juncker's statement is, for all its assertiveness, non-committal on the politics of ISDS. http://europa.eu/rapid/press-release_SPEECH-14-705_en.htm

8.6 A letter addressed to Malmström, leaked to and by the *Financial Times* and signed by ministers in **14 MSs**, would appear to be an attempt to bolster her resolve in the face of the perceived reservations of Juncker and Selmayr (see para.1.4.7 above). The letter is on the web at <http://blogs.ft.com/brusselsblog/files/2014/10/ISDSLetter.pdf>

9 Transparency in the TTIP negotiations

9.1 Previous EUA papers have covered the way in which the **issue of transparency** has been addressed. The former chair of INTA, Vital Moreira, regarded TTIP as the most transparent trade negotiation he had ever known. Many voices have been raised to protest at the high level of confidentiality. The two perceptions are not necessarily in conflict. What is clear is that both EU and US authorities have become sensitive to accusations of lack of accountability. On the EU side, this is due to the diligence of opponents of TTIP, as well as to the fact that Parliament has a crucial role to play in the eventual endorsement or rejection of the agreement.

9.2 At its September meeting, the coordinators of the newly formed INTA committee received, from Marine Le Pen (France, not attached to a political group) and others, a request for a motion on the lack of transparency in the TTIP negotiations. They took no immediate decision, preferring to 'take note of the motion for resolution in the on-going work for increasing transparency in TTIP and to inform the authors of the letter of the decision of the committee in line with the Rule 133(3)'. This rule effectively refers the matter to Parliament's **conference of presidents**, i.e. the leaders of the political groups whose votes are weighted according the size of their group. The dominant 'coalition' of EPP, S&D and ALDE is likely to wait and see how far Parliament is made privy to the TTIP negotiations as they proceed. See the INTA minutes at <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-539.479&format=PDF&language=EN&secondRef=01>

9.3 Meanwhile, the 52-member European United Left / Nordic Green Left (GEU/NGL) staged a protest demonstration outside Parliament's **TTIP reading room**, to which only the INTA chair, coordinators and rapporteur (and the other committee chairs and TTIP rapporteurs) have access. <http://www.guengl.eu/news/article/gue-ngl-news/access-denied-meps-stage-ttip-reading-room-demonstration> Subsequently, Commissioner-designate Malmström was asked if she would make all documents available to all INTA members:

With regard to sharing written information with the Parliament, the Commission will continue to share all relevant trade policy documents, including those related to negotiations that are shared with the Council's Trade Policy Committee. However, the precise modalities for ensuring the confidentiality of such information, where it is sensitive and/or classified, will need to be worked out.

Provided that we can share such restricted information in an appropriate manner and that this is backed up by appropriate steps in the event of unwarranted disclosure of the documents themselves or their content, I would like to ensure that all INTA members can consult such

documents. The precise modalities will have to be further discussed, also taking into account the Framework Agreement on relations between the European Parliament and the Commission.

9.4.1 As reported in the EUA August Update, **European Ombudsman Emily O'Reilly** queried the Commission's policy on the release of TTIP documentation, which she considers to be apparently selective and based on uncertain criteria. She has welcomed Malmström's intervention. She has also welcomed the decision to publish the EU negotiating mandate, which had been leaked some months before. 'It's a good day for TTIP transparency', she announced. 'I am delighted to see that all Member States in the Council now share the view of many, that given the potential impact of TTIP on the lives of citizens, key documents, such as the negotiating directives, have to be published.' (Press release 19/2014, October 9) At the end of September, O'Reilly was elected unopposed to a new five-year term as European Ombudsman. The EU negotiating mandate is now officially available at <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf>

9.4.2 Its publication was also greeted enthusiastically by outgoing trade commissioner **De Gucht**, who strongly implied that initial resistance had come from the Council of Ministers. http://europa.eu/rapid/press-release_STATEMENT-14-306_en.htm

9.4.3 At the same time, De Gucht has been forced to rebuff accusations that DG Trade has been selective in presenting the potential advantages of TTIP. See his response to **Friends of the Earth and BEUC** (European Consumers Organisation) at <http://www.euractiv.com/sections/trade-industry/de-gucht-rejects-claims-commission-misrepresented-benefits-ttip-308292?utm>

9.5 Will the Juncker Commission be more transparent? The commissioners-designate were advised by Juncker in their **mission letters** that "I expect all of us to make public, on our respective webpages, all the contacts and meetings we hold with professional organisations and self-employed individuals on any matter relating to EU policy making and implementation." For more on the transparency initiative, see <http://www.euractiv.com/sections/justice-home-affairs/commission-launches-transparency-initiative-ttip-and-lobbying-310183?utm>

9.6 DG Trade has published the **list of Commission lead negotiators**. Those potentially relevant to HE are Marco Düerkop (services), Colin Brown (ISDS), Anders Jessen (DG Trade), and Pedro Velasco Martins (intellectual property), all in DG Trade. Christophe Kiener (DG Trade) and Blanca Rodriguez (DG Competition) cover 'Competition Policy, State-owned enterprises (SOEs) and other Enterprises benefiting from special Government granted rights, Subsidies'. DG EAC (Education and Culture) and DG RTD (Research and Innovation) have no lead negotiators. DG Trade invites readers to 'share your input with negotiators' via trade-ttip-transparency@ec.europa.eu See http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151668.pdf

9.7 **Official and leaked sources:**

<p>Official information sources:</p> <p>European Commission DG Trade http://ec.europa.eu/trade/policy/in-focus/ttip/</p>	<p>Leaked information sources:</p> <p>http://eu-secretdeals.info/ttip/ [for TTIP and EU-Canada CETA] http://www.tradejustice.ca/leakeddocs/ and http://www.tagesschau.de/wirtschaft/ceta-dokument-101.pdf [for EU-Canada CETA]</p>
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US Trade http://www.ustr.gov/ttip	http://www.s2bnetwork.org/ [a forum covering a range of trade deals] https://filtrala.org/ https://wikileaks.org/tisa-financial/ [for leaked TISA text on financial services] <i>NB Documents leaked in trade negotiations are rarely final versions</i>
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10 The Trade in Services Agreement (TiSA)

This section gives some background and sets out the main issues. The notes are distilled from the Civil Society Dialogue's discussion of TiSA in November, from the DG Trade website, and briefings by Education International (EI), European Trade Union Committee on Education (ETUCE), and Public Services International (PSI). Useful websites are:

- DG Trade <http://ec.europa.eu/trade/policy/in-focus/tisa/>
- EI TiSA briefing, June 2013
http://download.ei-ie.org/Docs/WebDepot/Circular_TISA_briefing_EN.pdf
- ETUCE position paper, June 2014
<http://www.csee-etuice.org/images/PressReleases/PressreleaseTiSA.pdf>
- PSI: *TiSA versus public services*, April 2014
http://www.world-psi.org/sites/default/files/documents/research/en_tisaresearchpaper_hqp_internal.pdf
- PSI: *The Really Good Friends of Transnational Corporations Agreement*, September 2014
http://www.world-psi.org/sites/default/files/documents/research/report_tisa_eng_lr.pdf

10.1 TiSA discussions began in 2012, prompted by the US and supported by Australia and the EU. These three chair the negotiating rounds in rotation. Their **express intention** is to liberalise trade in services, in the pursuit of growth, job creation and recovery from crisis. The EU is the largest exporter of services in the world and already very open to third country service providers. Its interest is therefore 'offensive', i.e. it seeks to persuade other countries to open their markets, rather than to further widen its own. Thus far, there have been nine rounds of negotiation. There is no end in sight; talks are expected to extend into 2016.

10.2 There are currently 23 **participating countries**, with the EU counting as one. China and Uruguay may join in the near future. Brazil and India are regarded by DG Trade as the principal absentees. TiSA will embody a plurilateral agreement (i.e. involving some WTO members), which the EU hopes will then be multilateralised (i.e. extended to all WTO members). Participants see this as a way round, and through, the current impasse in the Doha Development Agenda. 21 initial offers have so far been tabled, with Pakistan and Paraguay yet to submit. By agreement, offers are made on the basis of each party's 'best FTA' (free trade agreement), which, for the EU, is EU-Korea.

10.3 At the EU's insistence, and as a logical precondition of multilateralisation, TiSA is **consistent with GATS architecture**. This means:

- that it contains no ISDS provision
- that it includes no labour or environmental standards

- that it excludes services delivered in the exercise of governmental authority (defence, justice, police)
- that it protects audio-visual services and water utilities
- that it adopts the established GATS position on other public services

10.4.1 DG Trade argues that **education** cannot be the object of exclusion, since individual MSs are free to privatise public services if they wish to do so. Nevertheless, the EU has lodged the same reservation as in GATS:

'The EU reserves the right to adopt or maintain any measure with regard to publicly-funded education services.'

In practice, according to the DG, the EU retains the right to discriminate in favour of publicly-funded education, while leaving MSs free to take commitments on private education. As in TTIP, this is said to be a domestic policy choice.

10.4.2 The critics of TiSA point to the unresolved ambiguity of the term 'public' and argue that the freedom to discriminate is cancelled out by the obligation to guarantee '**competitive neutrality**' between public and private providers.

10.5 The answer may lie in the application of one of the two underlying principles of TiSA: **national treatment**. The principle requires that foreign providers enjoy no less favourable treatment than national providers. In this instance, and in contrast to GATS, negotiation proceeds by negative list: everything is on the table until something is withdrawn. This means that any determination to retain the capacity to discriminate in favour of public providers has to be made explicit. This is known as 'list it or lose it'. MSs and public sectors, in other words, need to be fully apprised of the course of the negotiation and alert to its possibilities once the initial offers begin to elicit responses. While this will no doubt be the case for each MS government, it may not be true of its education sector at large. DG Trade's case is that the reservation is sufficiently robust to protect public services; the public service representative bodies are not persuaded.

10.6 The second underlying principle is **market access**, by which is meant the elimination of any quantitative restrictions imposed on foreign service provision. Here the use of the positive list in GATS has been retained. Nothing is on the table until it is put there, but, as indicated earlier, initial offers are by agreement based on the 'best FTA'.

10.7 The interaction of the two principles, already complex, is further complicated by **other mechanisms** brought into play by TiSA. Together with the use of the negative list for national treatment, they push TiSA beyond GATS – and into what is known as GATS+. They are:

- Standstill: otherwise known as 'lock-in', it prohibits any reduction in the level of service liberalisation that existed at the time of signing the agreement; it is viewed by opponents as a weakening, if not as the overturning, of GATS article XXI which allows signatory countries some scope in reversing their commitments.
- Ratchet: the application of standstill to a particular commitment, coupled with the requirement that any change be made only in the direction of further liberalisation.
- Future-proofing: the automatic inclusion of services not yet in existence – notably e-services.

10.8 Education figures in the **EU's initial offer**. Readers are referred to pages 14-15 and 85-89 for a tabulation of MS limitations on national treatment and market access, displayed separately for primary, secondary, higher, adult and other education services. What this means in terms of the ongoing negotiations is impossible to say. DG Trade is at pains to convince stakeholders that publicly-

funded education, however it varies in definition from one MS to another, is protectable and protected. Both the opponents and proponents of liberalisation remain sceptical.

http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152689.pdf

10.9 TiSA is currently focusing on the **short-term professional mobility of service providers**, rather than on the recognition of professional qualifications. These fall into three categories within GATS mode 4: contracted service providers (CSP); inter-company transfers (ICT); and independent professionals (IP). Normally, they involve the mobility of graduate workers for periods of between three and six months. DG Trade does not exclude the possibility that work on professional qualifications will follow. It will be based on the CETA model and not on TTIP, i.e. it will feature mutual recognition agreements (MRAs), into which signatory countries can opt. Presumably, recognition will be subject to standstill, ratchet and future-proofing, but these are questions that have still to be posed.

10.10 The tensions mentioned in para.6.1 above continue to beset TiSA. With major US corporations dominating e-commerce, search engines, and cloud computing, it is not surprising that US negotiators have consistently pressed for the removal of restrictions on **cross-border data flows** and of national requirements concerning local data storage. EU privacy and data protection standards are at variance with the US position. DG Trade insists that, although negotiation is taking place on data flows, there will be no compromise on data protection. As in other respects, the attitudes of Germany and the European Parliament may be decisive in the long run.

10.11 Whatever is decided, however, may well be subject to standstill, ratchet and future-proofing. Universities should concern themselves with **HE services that do not yet exist** or that have not been fully developed. An accredited, fee-based, global MOOC Bachelor qualification would be a good example. As a transacted cross-border e-service, it would function principally in GATS mode 1, but might also involve support in GATS mode 3 (a branch campus located outside the country of origin) and GATS mode 4 (temporary mobility of paid academics). It would fall into the category of e-commerce. It would deal in digital goods (apps, e-books) as an adjunct to the core e-service provision. How far such service provision might override the competence of MSs is unclear.

11 Future developments

11.1 The date of the **eighth round** of TTIP talks has not yet been confirmed. The political changes in the EU and in the US mean that it will not take place before the end of January 2015.

11.2 The next rounds of talks in the **Trade in Services Agreement (TiSA)** are scheduled for 1-5 December, 9-13 February, and April.

11.3 The eighth round of the **EU-Japan talks** will take place in Tokyo in December.

This Update is posted at

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

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