



## Transatlantic Trade and Investment Partnership (TTIP)

### Update no.2, August 2014

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

EUA is primarily concerned with the status of **higher education as a tradable service** and the extent to which it might feature in international trade agreements. A number of such agreements are currently being prepared, of which the most politically significant and the most controversial is TTIP. Others are: the Comprehensive Economic and Trade Agreement (CETA) recently concluded between the EU and Canada, details of which are officially to be made public in September; the Trans-Pacific Partnership (TPP); and the Trade in Services Agreement (TiSA).

These are consequences of failure of the **World Trade Organisation (WTO)** to liberalise world trade on a multilateral basis. In the higher education sector, the prevailing climate resembles that which existed thirteen years ago, when institutions on both sides of the Atlantic were concerned whether HE would feature in the WTO's General Agreement on Trade in Services (GATS).

In 2001, EUA signed a **Joint Declaration** with partner bodies in Canada and the US:

*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 and its partners affirmed 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

The Joint Declaration is also available at <http://www.eua.be/eua-work-and-policy-area/building-the-european-higher-education-area/international-trade-agreements.aspx>

EUA's **Transatlantic Dialogue** has since become an annual event and the emergence of TTIP has put trade policy back on its agenda. See [http://www.eua.be/News/14-07-10/14th Transatlantic Dialogue Reputation public opinion and accountability in higher education.aspx](http://www.eua.be/News/14-07-10/14th%20Transatlantic%20Dialogue%20Reputation%20public%20opinion%20and%20accountability%20in%20higher%20education.aspx)

***EUA members are urged to take stock of the positions taken up by their ministries of trade and higher education, by their representatives in the European Parliament, their national parliaments and other national bodies, including social partners, with a view to building an effective consensus at European level.***

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## 1 The political background

1.1 In early 2013, the EU and the US envisaged completing TTIP by the end of 2014. It was to be a stimulus package sufficiently potent to give a massive boost to economic growth. The wider context at that time was the perceived need to outflank the WTO's sluggish multilateralism by pushing a series of pluri- and bilateral agreements between like-minded countries. TTIP, however, has become increasingly mired in controversy and buffeted by the volatility of global politics. It is now widely accepted that **negotiations will continue well into 2015**.

1.2 Certainly they will continue... One reason is the collapse of the recent Bali talks called by the WTO to salvage something from its **Doha Round of trade negotiations**. In late July, the new Indian government refused to sign up to what its predecessor had agreed (limited subsidies for foodstuffs destined for impoverished sections of the population), on the grounds that it did not go far enough. This may further sap confidence in WTO's ability ever to produce a binding multilateral agreement. It also gives a new context to the impending EU-India trade talks.

1.3 A second reason is geo-strategic. Recent **events in Ukraine** have brought into prominence debates on European energy supplies and the import of shale gas from the US, to the point at which some commentators look to TTIP as an economic NATO. The Russian response to the West's third level sanctions – its ban on a wide range of food imports from Australia, Canada, the EU, Norway and the US – can only increase the sense of urgency among TTIP negotiators to gain full access to each other's internal market.

1.4 Transatlantic trade in **foodstuffs** is, however, fraught with difficulties. Hormone-treated beef, GMOs, 'bleached chicken' are all problematic; so, too, is the intractable incompatibility of the EU's system of geographical indicators and US trademarking practice. For a forceful attack on alleged EU protectionism, see the Consortium for Common Food Names at <http://www.commonfoodnames.com/>

1.5 Another significant global player is, of course, **China**. Western commentators debate whether it will accept the US invitation to join the Trans-Pacific Partnership (TPP), whether it will favour closer association with the EU or with the Russian-led Eurasian Economic Union, or whether it will pursue its own portfolio of bilateral agreements. Some consider that the merit of TTIP will be to constrain China by reaffirming the shaky WTO global trading rules.

1.6 As for the **US** itself, the mid-term elections begin to loom, with the Democrats requiring significant gains if President Obama is to acquire the Trade Promotion Authority allowing him to fast-track trade deals. Moreover, as previous EUA documents have noted, domestic opposition to TTIP is considerable, as are the problems associated with bringing the 50 state legislatures on board.

1.7 The **Canadian government** announced on August 5 that agreement-in-principle has been reached with the EU on the Comprehensive Economic and Trade Agreement (CETA). The draft text will undergo legal review before being circulated to Canadian provinces and EU Member States (MSs) prior to ratification, a process which may run over into 2016. A 521-page draft dated August 5 was then leaked and is discussed below. It can be downloaded from <http://www.tagesschau.de/wirtschaft/ceta-dokument-101.pdf>

1.8 The full range of **EU trade agreements** is vast. New economic partnership agreements (EPAs) forged this year (not all of them signed, sealed and delivered) link the EU to Georgia, Moldova and

Ukraine, as well as with, in the last month, the Economic Community of West African States (ECOWAS), the six countries of the South African Development Community, and Ecuador. All are within the framework of WTO rules, but all challenge the primacy of multilateralism. For country-by-country and bloc-by-bloc details, go to <http://ec.europa.eu/trade/policy/countries-and-regions/>

1.9.1 Since the coming into force of the Treaty of Lisbon, the **European Parliament** has much more leverage in trade policy than previously. Veteran Portuguese Socialist Vital Moreira has now retired and his seat as Chair of the International Trade committee (INTA) has been taken by the German Bernd Lange, also a Socialist. Former Commissioners Reding and Rehn are also INTA members. See <http://www.europarl.europa.eu/committees/en/inta/members.html#menuzone> and <http://www.europarl.europa.eu/document/activities/cont/201407/20140717ATT87159/20140717ATT87159EN.pdf>

1.9.2 In his first interventions as Chair, the ‘trade-friendly’<sup>1</sup> **Bernd Lange** has protested about the lack of transparency in the TTIP negotiations and, in particular, about the failure to publish the Council mandate<sup>2</sup> to which the EU negotiators are working; he has also expressed serious objections to the inclusion of the investor-state dispute settlement (ISDS) (see section 8 below). <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20140715+ITEM-009+DOC+XML+V0//EN&language=en&query=INTERV&detail=2-163-000>

1.9.3 INTA has already looked at the EU’s **TTIP impact assessment**. It commissioned a study which is critical of the methodology and even doubts that an objective impact assessment is feasible. While the study is highly technical, the flavour of its commentary is clear:

The empirical economic analysis underlying the European Commission’s Impact Assessment (IA) of the Transatlantic Trade and Investment Partnership (TTIP) (European Commission, 2013) is particularly difficult because TTIP is an unusual bilateral trade agreement. Apart from the sheer economic size of the two partners and their economic intercourse today, its nature is more like a wide-ranging regulatory agreement, with some elements of classical trade agreements as well. The regulatory core of the TTIP makes it extremely difficult for economists to come to grips with the expected economic meaning of the outcome of the negotiations. NTBs (non-tariff barriers, in fact, mostly ‘regulatory barriers’) and regulatory heterogeneity between the US and the EU create ‘trade costs’ for market access, both ways, but it is exceedingly hard to assess authoritatively what the trade costs are and what their consequences might be, whether for goods or services.

For the full text, go to

[http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2014/528798/IPOL-JOIN\\_ET%282014%29528798\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2014/528798/IPOL-JOIN_ET%282014%29528798_EN.pdf)

1.9.4 The impact assessment study is only one of a number of **research papers produced by or for INTA**. Others concern the implications of existing EU environmental and food safety law in the context of TTIP, the role of Parliament in future regulatory cooperation, and a report by the High Level Working Group on Jobs and Growth. For the complete list and links, see <http://www.europarl.europa.eu/document/activities/cont/201405/20140527ATT84575/20140527ATT84575EN.pdf>

<sup>1</sup> *European Voice*, July 10 2014

<sup>2</sup> Various drafts of the mandate have been leaked, for example at [http://www.s2bnetwork.org/fileadmin/dateien/downloads/21st\\_May\\_DS1353\\_13\\_REV1.pdf](http://www.s2bnetwork.org/fileadmin/dateien/downloads/21st_May_DS1353_13_REV1.pdf)

1.9.5 In another development, the new Parliament has increased the size of its **delegation for relations with the United States**, from 41 to 58 members, doubtless due in part to the political importance of TTIP. The Chair will be elected in October.

<http://www.europarl.europa.eu/delegations/en/d-us/home.html>

1.10.1 The **new European Commission**, meanwhile, will have to sustain the momentum of the TTIP talks with one eye on the not easily predictable attitude of Parliament. The Commission's own complexion is still undecided. The identity of the Commissioner for Trade, in particular, is not yet known, despite the decision by Karel de Gucht not to take up his seat in Parliament. That person will have to work closely with the High Representative for foreign and security policy, an appointment which will not be known before the end of August at the very earliest. *EurActiv* reports that former Energy Commissioner Günther Oettinger is being pushed by the German government, although Finland, Latvia, Slovakia and Spain are also interested.

[http://www.euractiv.com/sections/eu-elections-2014/merkel-eyes-trade-portfolio-oettinger-303611?utm\\_source=EurActiv+Newsletter&utm\\_campaign=40088bfe4f-newsletter\\_eu\\_priorities\\_2020&utm\\_medium=email&utm\\_term=0\\_bab5f0ea4e-40088bfe4f-245356445](http://www.euractiv.com/sections/eu-elections-2014/merkel-eyes-trade-portfolio-oettinger-303611?utm_source=EurActiv+Newsletter&utm_campaign=40088bfe4f-newsletter_eu_priorities_2020&utm_medium=email&utm_term=0_bab5f0ea4e-40088bfe4f-245356445)

1.10.2 New Commission president **Jean-Claude Juncker** presented his outline programme to Parliament on 15 July, evidently drafted to appeal to all three elements of the dominant coalition of conservatives (excluding those from the UK), socialists and liberals. On trade, he is reported as saying 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.'<sup>3</sup>

The statement appears to offer France continuing reassurance regarding the audio-visual sector and to encourage the many voices seeking the exclusion of health services from TTIP, but it says little beyond that.

1.11.1 The current **Italian presidency's programme** is similarly short on detail:

The Presidency will accord special priority to policy areas which have a positive short and medium term impact on EU competitiveness, with a special focus on SMEs, linked to three capital drivers for growth: industrial competitiveness (in line with the March 2014 European Council Conclusions), innovation policies, trade and export policies (above all, challenges and opportunities resulting from the Transatlantic Trade and Investment Partnership - TTIP).

[http://italia2014.eu/media/1349/programma\\_en1\\_def.pdf](http://italia2014.eu/media/1349/programma_en1_def.pdf)

1.11.2 The EUA background paper reported in January that former Director-General of Trade David O'Sullivan was to be appointed to the **post of EU ambassador to the US**. This has now been confirmed and indicates the priority assigned to TTIP.

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<sup>3</sup> *European Voice*, July 17 2014

1.11.3 The intention of the EU and US is believed to be that other participants will be invited to join TTIP once the negotiations have been completed. **EEA countries**, as well as Switzerland and Turkey, are engaged in any case, since the EU negotiates on their behalf. Turkey, a long-standing member of the EU Customs Union, is known to be unhappy with its passive role. Further light may be shed on this following the recent Turkish presidential election.

## 2 The fifth and sixth rounds of negotiations

2.1 The **fifth round** of negotiations took place in Arlington Virginia in the third week of May. In Brussels, the event was marked by the arrest of 250 demonstrators protesting against the presumed content of the intended deal as well as against the lack of transparency.<sup>4</sup> In advance of the talks, the EU published a set of positions – on chemicals, cosmetics, motor vehicles, pharmaceutical products, textiles and clothing. These can be downloaded from <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1076&title=Ensuring-transparency-in-EU-US-trade-talks-EU-publishes-negotiating-positions-in-five-more-areas>

2.2 The **outcomes** of the fifth round were summarised in the closing press conference. Chief negotiators, as has become customary, affirmed that they were making progress on a broad range of fronts. They also stressed the high degree of ‘senior level engagement’. One concrete outcome was the decision to include a separate chapter on SMEs.<sup>5</sup> A chapter on energy and raw materials was also under discussion. By contrast, on the framework for regulatory cooperation in financial services, serious divergences were said to persist, the US being adamant – perhaps to counter the EU ring-fencing of audio-visual services – that financial services were not on the table. (An EU draft offer on investment and services leaked in June<sup>6</sup> subsequently revealed that the EU had temporarily conceded the point.) The video of the press conference can be viewed at <http://ec.europa.eu/trade/policy/in-focus/ttip/resources/#videos>

2.3 The **sixth round** of talks took place in Brussels in the week of 14 July. By then, it appeared that the US had also ruled out any discussion of maritime and aviation services. The lead negotiators rehearsed their now familiar positions:

- The negotiating rounds are technical, not political; the political decisions are made later and elsewhere
- TTIP will not curtail consumer protection or the public policy space
- The gap in time between the technical rounds and the political process will give ample scope for verifying the continuing levels of public protection
- The primary aim is to facilitate regulatory cooperation, rather than to deregulate
- Civil society will have a strong role in monitoring eventual implementation

2.4 The **stakeholder consultation event** gave five-minute platforms to around 300 spokespersons, arrayed in four separate meeting rooms, to speak for and against TTIP. They included Business

<sup>4</sup> See [http://www.euractiv.com/sections/eu-priorities-2020/de-gucht-ngos-trade-accusations-after-anti-ttip-protestors-kettled?utm\\_source=EurActiv+Newsletter&utm\\_campaign=87e46f4069-newsletter\\_eu\\_priorities\\_2020&utm\\_medium=email&utm\\_term=0\\_bab5f0ea4e-87e46f4069-245356445](http://www.euractiv.com/sections/eu-priorities-2020/de-gucht-ngos-trade-accusations-after-anti-ttip-protestors-kettled?utm_source=EurActiv+Newsletter&utm_campaign=87e46f4069-newsletter_eu_priorities_2020&utm_medium=email&utm_term=0_bab5f0ea4e-87e46f4069-245356445)

<sup>5</sup> To inform its preparation of this chapter, DG Trade has opened a consultation on SMEs, at [http://trade.ec.europa.eu/consultations/index.cfm?consul\\_id=181](http://trade.ec.europa.eu/consultations/index.cfm?consul_id=181)

<sup>6</sup> Available at <https://data.awp.is/filtrala/2014/06/13/4.html>

Europe (a full consultative member of the Bologna Process), the European Public Health Alliance (EPHA), and the European Trade Union Council for Education (ETUCE) (see para.3.9 below).

2.5 DG Trade published its view of the **state of play** following the sixth round of talks. Largely couched in generalities, it asserts that progress has been made in mutual understanding of regulatory complexities, in making first offers on services, and in proceeding to the first draft of consolidated texts. In addition, there are observations on a number of manufacturing sectors. For the full text, consult the DG Trade website at [http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc\\_152699.pdf](http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152699.pdf)

### 3 Market access to higher and adult education providers

3.1 The EU negotiating mandate aims to bind the EU and the US to the highest degree of **service liberalisation** envisaged in the WTO's General Agreement on Trade in Services (GATS). The EUA's background paper and first Update have already stressed that:

- Although 'higher' and 'adult' education are separate categories in GATS, the actual distinction in practice is blurred and varies from MS to MS
- The 'negative list' principle adopted by TTIP negotiators means that no service is in principle excluded from the eventual deal (the only apparently clear exceptions thus far being audio-visual and water)
- While for-profit educational services are necessarily eligible for inclusion, the fact that public services are exempted in GATS offers no comfort to the European higher education sector, much of which is hybrid in terms of its funding and governance
- Where infringement proceedings have been initiated by the Commission against MSs seeking to protect their HE sectors from foreign penetration, the Services Directive is now being used as the legal basis, alongside the Treaty provisions on freedom of establishment

3.2 What have been the developments since the fifth round of talks in March and since EUA's first Update? Although the British Medical Association was confident that **healthcare services** would be excluded from TTIP, this is by no means certain. In July, timed to influence the sixth round, the Standing Committee of European Doctors (CPME) called for an exemption 'equivalent to the carve-out of audio-visual services'. For the CPME statement, see [http://cpme.dyndns.org:591/adopted/2014/CPME\\_AD\\_EC\\_04072014\\_060\\_Final\\_EN\\_consultation.TIP.ISDS.pdf](http://cpme.dyndns.org:591/adopted/2014/CPME_AD_EC_04072014_060_Final_EN_consultation.TIP.ISDS.pdf)

3.3 The **UK's National Health Service** has become a principal focus of opposition to TTIP. In response to public concern over its creeping privatisation, EU lead negotiator Ignacio Garcia Bercero was obliged in July to offer detailed reassurances to the Chair of the All-Party Parliamentary Group on TTIP in Westminster. His letter, to which later sections of this Update refer, can be found at [http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc\\_152665.pdf](http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152665.pdf)

3.4 No such effort to manage public opinion has yet been mounted by the Commission in respect of **education**. While health and education are similar in the extent to which MSs retain legal competence, they differ where cross-border service provision is concerned. Health services were

explicitly excluded from the Services Directive. No such exemption applies to education; it is therefore arguably more exposed to TTIP.

3.5 A major development has been the leak in June of the EU's **draft services and investments offer**. It consists of three large files with some discursive passages, but featuring mainly a tabulation of service categories, with details of limitations on market access and of restrictions imposed at MS level. They constitute, apparently, a provisional list of the items which the EU is prepared to put on the TTIP table. The most important file is TTIP 1. On p.5, it lists research and development services; on p.13, higher education; and on p.31, recognition of professional qualifications. The HE details are sufficiently complex as to render problematic any deal on mutual access across the board, particularly if the US states are as varied in their practice as EU28.

For the leaked zip file, go to <https://data.awp.is/filtrala/2014/06/13/4.html>

3.6 In March, EUA asked the lead negotiators whether their proposals included higher and adult education. Dan Mullaney for the US replied that they were not excluded and that it would be useful to include them, but that no discussions had so far taken place. EU negotiator Bercero confirmed that the US had expressed an interest in adult education, but that it was not clear whether this also covered higher education. It has since transpired that the US is particularly interested in **privately-operated adult and other educational services**, particularly those which are digitally delivered. At the July stakeholder consultation event in Brussels, a US negotiator described these as 'post-HE services' and appeared to have in mind online courses and materials designed for an unspecified lifelong learning market.

3.7 Despite the existence of definitions at WTO and UN levels, the field of virtual transnational education is evolving so rapidly that the Commission has asked MSs to clarify what **'adult' and 'other'** mean in their different jurisdictions, as well as to what extent they are protected or liberalised. The results of its inquiries are not publicly available. It is understood that the US team is conducting a similar survey.

3.8 The direction now being followed suggests that full-time higher education provision may not yet be on the table. This, however, does not guarantee that **higher education institutions** are sheltered from the eventual provisions of TTIP. At system level, they may well be affected by government procurement and ISDS (see sections 5 and 8 below). As institutions with a complex portfolio of research, teaching, publishing and consultancy activities, actual and virtual, they may find that TTIP impacts their operating environment.

3.9 The strongest educational objections to TTIP, supported by a substantial dossier, have been made by ETUCE. Like CPME, it calls for a sectoral carve-out and the removal of provisions relating to ISDS. The ETUCE website contains valuable technical detail, together with coverage of actions taken at MS level by its member organisations. For the ETUCE statement, go to [http://etuce.homestead.com/Statements/2014/Statement\\_on\\_the\\_Transatlantic\\_Trade\\_and\\_Investment\\_Partnership- EN.pdf](http://etuce.homestead.com/Statements/2014/Statement_on_the_Transatlantic_Trade_and_Investment_Partnership- EN.pdf)

3.10 The **leaked EU-Canada CETA** has a Chapter 11 which deals with cross-border service delivery in generic terms, while specifically excluding audio-visual and cultural, financial and air services. It mentions higher education services, in relation to the temporary entry of contracted service suppliers and independent professionals. It appears to envisage quite clearly the operation of cross-border HE services construed in three of the four GATS 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

- 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

#### 4 Mutual recognition of professional qualifications

4.1 The tabulation below (slightly amended from EUA Update 1) suggests the areas in which **TTIP, EU legislation on professional qualifications, and higher education**, might come into contact.

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| 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. <sup>7</sup>   |
| Will inclusion in TTIP affect or lengthen the ongoing transposition process?  | DIR 2013/55/EU will be in transposition until January 2016. The General System includes professions that are regulated in some Member States, 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   |

<sup>7</sup> The Lawyers' Services Directive (LSD) of 1997 and the Lawyers' Establishment Directive (LED) of 1998

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| country graduates would enjoy any special status. |
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4.2 US lead negotiator Dan Mullaney, in his briefing to the July stakeholder consultation event, commented that discussions on the professional mobility of **architects and engineers** were under way. No other information was forthcoming.

4.3.1 Again, it is useful to scrutinise the **leaked CETA** for clues of what TTIP might contain. The leaked draft has a Chapter 13 (pp.237-240) which covers professions which are regulated both in the EU and in Canada (although not necessarily in all EU MSs or in all Canadian provinces). Its provisions allow relevant regulatory or professional bodies in both jurisdictions to present draft Mutual Recognition Agreements (MRAs) to a Joint Committee on Mutual Recognition. An MRA is to become binding once the Joint Committee is satisfied that it is consistent with the provisions of the CETA. Professional service providers in the host jurisdiction will then enjoy no less favourable treatment than home providers, irrespective of nationality, citizenship and the location of the training institution. Chapter 13 also outlines the composition and remit of the Joint Committee.

4.3.2 Guidelines on the **negotiation of MRAs** are set out in Annex to the Chapter (pp.241-245). They envisage a sequence of four steps:

- ‘Verification of equivalency’ – including scope of professional practice and minimum level of professional training
- ‘Evaluation of substantial differences’ – in ‘essential knowledge’, in the content or duration of basic training, and in lack of congruence in the component disciplines of a particular professional practice
- ‘Compensatory measures’ taking the form of adaptation periods or aptitude tests
- ‘Identification of the conditions for recognition’: this consists of a summary of the above steps, setting out in precise terms what they represent for the specific profession featured in the MRA

The Annex also contains guidelines dealing with individual applications, appeals, contact points, and so on.

4.3.3 A number of departures from the letter and spirit of **Directive 2013/55/EU** are worth noting:

- ‘Equivalency’ has a wider meaning in the leaked CETA. While in the amended Directive it covers measurable factors, such as level of attainment, course duration or credit points, it appears in the CETA to be used more broadly and to apply to course content as well as to the component disciplines of professional practice.
- There are no provisions in the CETA for partial access to a profession; nor is there any reference to continuing professional development (CPD).
- In the amended Directive, ‘substantial differences’ in the General System are no longer specifiable in terms of course duration; they must be calibrated in terms of course content, as well as in terms of knowledge, skills and competences, rather than of knowledge alone. A reading of Recitals 1 and 27, together with Article 14.5, suggests that third country professionals (e.g. Canadian or US) would fall within the scope of the Directive’s provisions in this respect.

4.3.4 These points raise interesting questions about the eventual accommodation of the CETA within EU law, since it cannot stand above it. EU law, of course, embraces not only the amended Directive, but also the Treaty provisions which affirm the strength of MS legal competence in health and education. While MSs are bound by the Directive insofar as professionals incoming from other MSs are concerned, they have much greater discretion regarding those from **third countries**. This is the sense of EU chief negotiator's reassurance to the UK Parliament, in the letter quoted above:

Member States can also limit the access of foreign doctors to work within their health services system. For example, the UK has done this by reserving the right in trade agreements (such as EU-Korea) to make the establishment of foreign doctors under the NHS subject to medical manpower planning.

4.3.5 Greater detail is to be found in CETA Chapter 11 (mentioned above, para.3.10), which concerns the **temporary entry of contracted service suppliers (CSS) and independent professionals (IP)**. Here, length of employment or self-employment, years of experience, equivalent level of qualification, are all specified. So, too, are the reservations imposed by various MSs. These may include work permits or economic needs tests. The reservations attaching to architects are listed on p.220; to engineers, medical and dental practitioners on p.221; to veterinary surgeons, midwives, nurses and physiotherapists on p.222. Clearly, in this respect at least, healthcare services are not excluded from the CETA.

## 5 Public procurement

5.1 EUA Update no.1 reported the extent to which higher education is covered by the new **Directive 2014/24/EU on Public Procurement**, now in transposition until March 2016. Together with new or proposed legislation on concessions (i.e. public-private partnerships), on e-invoicing and e-procurement, it constitutes one of the core elements of the EU negotiating position. Another is the international procurement instrument (IPI), which is designed to allow public authorities to exclude bids from countries which afford the EU little or no reciprocity in public procurement. Such countries are Canada, Japan, Korea, and the US. Hence the desire on the part of the EU to include public procurement in the new round of trade deals. For the Commission's view of the IPI, see <http://www.europarl.europa.eu/document/activities/cont/201209/20120925ATT52255/20120925ATT52255EN.pdf>

5.2 The **US position**, unstated in public, is no doubt foreshadowed by the emphatic manner in which it presents the Trans-Pacific Partnership (TPP) to its domestic audience:

**There are a lot of myths suggesting that TPP would overturn or undermine our ability to buy American or even prevent states and local governments from implementing their own procurement processes. These assertions are incorrect. There is nothing in TPP that will ban federal, state, or local governments from buying American.** In fact, under TPP we are working to ensure that more countries around the world have the ability to buy American in order to help support jobs here at home. TPP will tear down barriers in other countries to create opportunities for our workers in fast-growing markets where governments are significant buyers of goods and services.

<http://www.ustr.gov/about-us/press-office/blog/2014/july/facts-about-government-procurement-and-tpp-tpp-promotes-buying>

5.3 This approach was backed up by the contribution of the **Teamsters** Union at the July stakeholder consultation event: insistence on the blanket exclusion from TTIP of all US public services, coupled with a readiness to contemplate the access to EU public services by US private interests.

5.4 Ignacio Garcia **Bercero's letter to the UK Parliament** is also instructive:

[...] on public procurement, it is important to underline the difference between the way Member States organise the sector and the extent of public and private involvement, and the disciplines that apply once a public authority decides to turn to the market for execution of works or the provision of services through the award of a concession. The current NHS commissioning model [...] is decided by the UK government, not by the EU's rules on public procurement. [...] none of these rules prevent Member States from liberalising the health sector nor [sic] from de-liberalising it.

That is to say, competence for health and education rests with the MS. It may be that some MSs have gone so far down the road to the privatisation of services that TTIP represents little threat to them. What is uncertain is how far TTIP might weaken the protection sought by MSs which still have classically public services – and how far these might become vulnerable to US operators, as well as to those in MSs which support TTIP.

5.5 As Update 1 noted, it remains unclear how far **European HE** is already involved in public procurement practices. Do national and regional public authorities in the EU routinely outsource HE and AE services by tender? How does practice differ between Member States? Are there examples of cross-border procurement of HE services? This is unmapped territory.

5.6 The **leaked CETA** contains a Chapter 21 (pp.308-338) on public procurement. It sets out the procedures designed to secure a level playing field, but does not contain the detailed offers made by the EU or by Canada.

## 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 European Parliament's threat to veto TTIP unless effective data protection for EU citizens can be assured.

6.2 Matters have been complicated by the ECJ's ruling (case C-131/12) that Google, and by extension other search engines, must abide by existing EU provisions on the **right to be forgotten**. <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d5e08d5eaa27714438b4b0d629dffdae62.e34KaxiLc3eQc40LaxqMbN4OaNmNe0?text=&docid=152065&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=282638>

6.3 On the other hand, the *Financial Times* (April 11) reported **Microsoft's** decision to non-US customers' data to be stored on non-US servers, thus bringing its cloud into compliance with EU privacy law.

6.4 *EurActiv* has reported that the TTIP teams are contemplating a **digital economy chapter**, which would create a new focus by gathering up scattered references, and which at the same time would deliberately avoid the most contentious issues.

[http://www.euractiv.com/sections/infosociety/eu-and-us-mulls-digital-economy-chapter-ttip-303583?utm\\_source=EurActiv+Newsletter&utm\\_campaign=ae4801e2b6-newsletter\\_innovation\\_enterprise&utm\\_medium=email&utm\\_term=0\\_bab5f0ea4e-ae4801e2b6-245356445](http://www.euractiv.com/sections/infosociety/eu-and-us-mulls-digital-economy-chapter-ttip-303583?utm_source=EurActiv+Newsletter&utm_campaign=ae4801e2b6-newsletter_innovation_enterprise&utm_medium=email&utm_term=0_bab5f0ea4e-ae4801e2b6-245356445)

6.5 In April, **EUA Board and Council** adopted a position paper on the proposed general data protection regulation which is currently in the legislative process. The paper seeks to ensure that rights to individual privacy are balanced with the access to data required by researchers in a variety of fields, notably in health and social sciences. Of particular concern is the risk to the collaborative research undertaken with third country institutions, of which data transfer is a key element.

<http://www.eua.be/eua-work-and-policy-area/eua-policy-position-and-declarations.aspx>

6.6 The **leaked CETA** contains a Chapter 18 (pp.297-299) on e-commerce. As it stands, it goes no further than to assert the potential of e-commerce to economic growth.

## 7 Intellectual property rights (IPR)

7.1 With the exception of the contentious issues surrounding the EU's geographic indicators, no major IPR question has so far attracted the attention of commentators or reached the ear of the general public. It is possible that some might emerge in the framework of the chapter on the **digital economy** mentioned above.

7.2 Independent of TTIP, the Commission's open **consultation on copyright** is now closed, having drawn nearly 10,000 responses. The consultation concerned the implementation of Directive 2001/29/EC and included questions on the interpretation of the 'exceptions' which allow the free use of copyrighted material for teaching and research purposes. Pages 53-61 report the views of academics, authors, publishers and other interested parties. While a policy response from the Commission is awaited, the consultation report is available at

[http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/docs/contributions/consultation-report\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf)

7.3 As under other headings, the **leaked draft of the EU-Canada CETA** reveals the direction of EU thinking. Chapter 22 on IPR (pp.341-364) covers copyright, geographic indicators and trademarks, designs and patents. It appears to pursue the dual objective of increasing reciprocal market access, while safeguarding the level of protection afforded to producers by existing international agreements and by domestic legal systems and practices. Safe conclusions, however, can be drawn only by specialist lawyers. Universities are advised to inspect the text at

<http://www.tagesschau.de/wirtschaft/ceta-dokument-101.pdf>

## 8 Investor-state dispute settlement (ISDS)

8.1 ISDS is still 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 Particularly relevant to ISDS is service provision that has been contracted out, via public procurement, to a cross-border supplier. An example is the case of **Slovakian healthcare insurance**. In 2006, the government sought to reverse legislation which had privatised healthcare. This led to litigation by the major Dutch insurer Achmea which, having been awarded EUR 29.5m in compensation, 'is now attempting to use the same powers to block the Slovak government'<sup>8</sup> from setting up a universal public health insurance scheme.

8.3 Ostensibly, the debate on ISDS is in abeyance. DG Trade, in response to public concern, organised a **consultation** which attracted around 150,000 responses. Ignacio Garcia Bercero told the Brussels stakeholder meeting that it would take until November for the Commission to produce a full report of the outcomes – and that only then would decision on further action be taken. In the interim, it has posted a brief statistical analysis of the responses – by MS and by category of respondent. This preliminary report is available at [http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc\\_152693.pdf](http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152693.pdf)

8.4 Ignacio Garcia Bercero made reference to ISDS in his **letter to the UK Parliament** quoted earlier. In it, he points out that the bulk of the UK's 94 bilateral investment treaties (BITs) contain an ISDS component, without this ever impinging on the development of the NHS commissioning model. In order for a foreign operator to bring a successful ISDS case, he notes...

... it would need to prove that its rights under the relevant treaty had been breached, for example by expropriation without compensation, a denial of justice or manifestly arbitrary treatment. In such cases, an ISDS tribunal can award compensation but it cannot overturn national regulation, nor can it order repeal or reversal of a government's decision related to the organisation and management of health services.

He concludes that whatever ISDS provisions may feature in TTIP they will have no impact on the UK's sovereign right to manage its health services.

8.5 It should be pointed out that bilateral investment treaties are more limited in scope than trade agreements, although they may well be included within them – most pertinently, in Chapter 11 section B of the North American Free Trade Agreement (NAFTA). A useful **briefing note to the UK Parliament** makes a number of points:

- Investor-state investment dispute resolution is normally governed by international law, but typically each treaty or agreement specifies the rules and agents of arbitration. Sometimes, but not always, these are under the aegis of an international agency such as the United Nations. The tendency is for the plaintiff investor to have a greater influence on procedures than does the state.

<sup>8</sup> See John Hilary, 'The Transatlantic Trade and Investment Partnership, a charter for deregulation, an attack on jobs, an end to democracy', Rosa Luxemburg Stiftung, 2014. John Hilary is executive director of the charity War on Want.

- The lack of pre-determined procedures has been shown to raise doubts about consistency of judgements, transparency, and the independence of arbitrators.
- Arbitration cases cost, on average, USD 4m per party, approximately 82% of which consists of legal fees.
- EU law makes no provision for international arbitration. Instead, cases fall within the jurisdiction of the Court of Justice of the European Union (CJEU). Its hearings, unlike most ISDS tribunals, are public. 'Its transparency and claims to legitimacy are thus arguably stronger than the arbitral panels used to settle ISDS cases.'

See [www.parliament.uk/briefing-papers/SN06777.pdf](http://www.parliament.uk/briefing-papers/SN06777.pdf)

8.6 Reassurances of the kind offered by Ignacio Garcia Bercero fail to satisfy many stakeholders. The **CPME position paper** quoted above (para.3.2), in calling for the total exclusion of health services from TTIP, asserts that MS legal competence 'may not be undermined by investors' challenging Member States as to the regulatory framework of the delivery of health services and medical care'.

8.7 The DG Trade position notwithstanding, it should not be assumed that the debate will become any less heated in the period from August to November. Recent developments suggest that the fate of ISDS in TTIP may depend on **Germany**. In an interview with the *Financial Times* (June 29), foreign minister Wolfgang Schäuble spoke of strong German support for TTIP, but the same newspaper later reported that economics minister Sigmar Gabriel was opposed to the inclusion of ISDS because of its threat to existing standards of consumer and environmental protection. It is possible that, ultimately, ISDS will be sacrificed for the sake of the wider trade agreement. Reports in the Canadian press suggest that ISDS provisions in the leaked CETA might be watered down in view of the strength of public feeling in Europe. See [http://www.thestar.com/news/canada/2014/08/13/secret\\_details\\_of\\_canadaeu\\_pact\\_prompt\\_scrutiny.html](http://www.thestar.com/news/canada/2014/08/13/secret_details_of_canadaeu_pact_prompt_scrutiny.html)

## 9 Transparency in the TTIP negotiations

9.1 EU and US authorities have both become increasingly sensitive to accusations of secrecy and lack of accountability. They have repeatedly argued that a measure of confidentiality is crucial to trade negotiations, while pointing to the role assigned to democratic processes in the eventual approval or rejection of the agreement. They have also staged regular and well-publicised **stakeholder consultation** events. These, however, tend to be 'one-way dialogues', in which negotiating teams are much more ready to listen than they are to disclose. At the 16 July event in Brussels, a group of protestors chanting 'where are the texts?' were ejected by security staff.

9.2 Ruling on case C350/12P on 3 July, the **European Court of Justice** set down its judgement in favour of Dutch MEP Sophie in't Veld. In 2009 the Council had denied her full access to documents emanating from the Commission and concerning the opening of TTIP talks, partly on the grounds that the EU's negotiating position would be weakened. She had subsequently appealed to the CJEU, which had upheld her appeal. The Council having in its turn appealed, the CJEU concluded that the Council's case had been flawed by inappropriate procedure and inadequate argumentation. The judgement does not, however, appear to offer clear guidelines regarding the conduct of future trade negotiations.

<http://curia.europa.eu/juris/document/document.jsf?docid=154535&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=84245>

9.3 A recent study<sup>9</sup> commissioned by DG Trade provides a comparative analysis of the degree of **transparency and consultation in the EU and US legislative and regulatory systems**. It finds that early drafting processes are more open in the EU, whereas final deliberative stages are more open in the US. On the question of whether it is possible to base regulatory cooperation on higher levels of mutual EU-US trust, the authors make a specific recommendation:

TTIP negotiators may find it useful to examine sectors of particular interest with an eye to ascertaining specifically what would be needed to achieve desired levels of compatibility/alignment of TTIP-relevant regulations in those sectors. This is the ‘in-built agenda’ of TTIP, and it may be useful to consider launching a few pilot projects to try out different approaches to regulatory cooperation – including multi-stakeholder collaborative approaches – to guide negotiators’ thinking about how to design or refine the regulatory cooperation chapter (the so-called “horizontal chapter”) to TTIP.

9.4.1 Meanwhile, **European Ombudsman Emily O’Reilly** has expressed her own concerns on two fronts. To the Commission, she has written querying its policy on the release of TTIP documentation: apparently selective and with uncertain criteria. She has requested a response by the end of October. Her letter can be found at

<http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/54633/html.bookmark>

9.4.2 The **Ombudsman’s letter to the Council** asks specifically for comment on its refusal to publish the (leaked and widely available) EU negotiating mandate. She gives an end-of-September deadline.

<http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/54634/html.bookmark>

9.5 Interested lobby groups on both sides of the Atlantic are very active. The general public, meanwhile, relies on press reports. These in turn draw on stakeholder statements, as well as on **official and leaked sources**:

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| <p><i>Official information sources:</i></p> <p>European Commission DG Trade<br/><a href="http://ec.europa.eu/trade/policy/in-focus/ttip/">http://ec.europa.eu/trade/policy/in-focus/ttip/</a></p> <p>US Trade<br/><a href="http://www.ustr.gov/ttip">http://www.ustr.gov/ttip</a></p> | <p><i>Leaked information sources:</i></p> <p><a href="http://eu-secretdeals.info/ttip/">http://eu-secretdeals.info/ttip/</a><br/>[for TTIP and EU-Canada CETA]</p> <p><a href="http://www.tradejustice.ca/leakeddocs/">http://www.tradejustice.ca/leakeddocs/</a> and<br/><a href="http://www.tagesschau.de/wirtschaft/ceta-dokument-101.pdf">http://www.tagesschau.de/wirtschaft/ceta-dokument-101.pdf</a><br/>[for EU-Canada CETA]</p> <p><a href="http://www.s2bnetwork.org/">http://www.s2bnetwork.org/</a><br/>[a forum covering a range of trade deals]</p> <p><a href="https://filtrala.org/">https://filtrala.org/</a></p> |
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<sup>9</sup> Parker, R & Alemanno, A, ‘Towards effective regulatory cooperation under TTIP; a comparative overview of the EU and US legislative and regulatory systems’, European Commission, May 2014, downloadable from [http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc\\_152466.pdf](http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152466.pdf)

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|  | <p><a href="https://wikileaks.org/tisa-financial/">https://wikileaks.org/tisa-financial/</a><br/>[for leaked TiSA text on financial services]</p> <p><i>NB Documents leaked in trade negotiations<br/>are rarely final versions</i></p> |
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## 10 Future developments

10.1 The **seventh round** of TTIP talks will take place in September.

10.2 The next round of talks in the **Trade in Services Agreement (TiSA)** is provisionally scheduled for 15-19 September. A further round will take place 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](mailto:howard.davies@eua.be)