



EUA - BRIEFING NOTES

European University Association

TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (TTIP)

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EU trade negotiations can affect the conditions under which the European higher education sector operates. The position of EUA's Board and Council is that...

“the EU should not make commitments in the categories of HE and AE” (higher and adult education) and that it...

“should make absolutely clear to its negotiating partners that elected member state governments reserve the right to determine the character of their HE and AE systems.”

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

Since the previous EUA Update, EU and US negotiators have maintained their slow progress towards agreement. The successful conclusion of negotiations on TPP – the Trans-Pacific Partnership, which the US has prioritised over TTIP – may assist them, although there can be no guarantee that TPP will get through a hostile Congress. Moreover, their work may be hampered by the Volkswagen scandal, which saps the credibility of European regulators, and by the agreement within the EU on the General Data Protection Regulation, which is bound to anger US tech companies.

Contents

1. Political background	Page 2
2. Higher and adult education (HE and AE) services	Page 4
3. The EU's revised TTIP offer: education services	Page 6
4. Copyright and data protection	Page 11
5. Investor-state dispute settlement (ISDS)	Page 13
6. The question of transparency	Page 13
7. The Trade in Services Agreement (TiSA)	Page 14
8. Future negotiating rounds	Page 16

1 The political background to TTIP

1.1 Despite the Volkswagen débâcle and the tension over data protection issues, the professed commitment of the EU and the US to TTIP remains as strong as ever. The **justifications** have not changed: to boost economic growth; to ease the access of SMEs to transatlantic trade; to put in place an agreement which, with other negotiations (the Trans-Pacific Partnership (TPP) and the Trade in Services Agreement (TiSA)), will determine the shape of future multilateral agreements in the WTO. Yet public opposition, particularly in Germany and in the UK, shows no sign of weakening.

1.2 Following its success in achieving the trade promotion authority which allows the fast-track ratification of trade deals, the Obama administration has now hailed the agreement reached by 12 countries on the text of **TPP**: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the US and Vietnam. It will come into force once it has been ratified by six countries representing 85% of its economic activity. In the US, its passage through Congress is uncertain and its fate will become apparent in February, once a 90-day review period is over.

1.3 The full **TPP text** is available on relevant government websites.¹ Commentators think that its liberalising impetus will be felt more in service sectors than in traded goods, where tariffs are already low. TPP provides for copyright to be extended from 50 to 70 years and, following hard lobbying by American pharmaceuticals, strengthens intellectual property rights (IPR). Education is likely to feature prominently: Australia, in particular, will look to extend its delivery of HE services (online programmes, branch campuses), notably to Malaysia and Vietnam, as well as to make government procurement bids to all signatory countries.²

1.4 The **EU**, which is not party to TTP, intends to begin bilateral free trade talks with New Zealand³ and Australia in 2016, as well as to update its 2000 free trade agreement (FTA) with Mexico. Its talks with Japan have so far gone through 14 rounds with no discussion of services. It is assumed that all of these negotiations, as well as TTIP itself, will go ahead more rapidly once TPP is completed.

1.5 In August, the EU announced the completion of an FTA with **Vietnam**. It was signed in December and is expected to come into force in 2018. The draft text will be made available online; it is expected that a re-modelled investor-state dispute settlement system (ISDS) (see section 5 below) will be included. The EU memorandum⁴ promises EU access to a “broad range” of services, which, according to an internal European Services Forum (ESF) document, includes HE.

1.6 In October, Commissioner Malmström travelled to **Tunisia** to open negotiations on a Deep and Comprehensive Free Trade Area (DCFTA). DCFTAs differ from standard FTAs in that they aim for a much higher degree of regulatory integration; they are offered to countries within the ambit of the European Neighbourhood Policy. Meanwhile, an FTA is to be developed with the Philippines.

1.7 The Comprehensive Economic and Trade Agreement (CETA) with **Canada** will go to Council and Parliament for signature and ratification early in 2016, probably coming into force

¹ For example, the US Trade Representative site at <https://ustr.gov/tpp/#text>

² For a critical overview of the impact of Australian trade policy on higher education, see the briefing posted by the National Tertiary Education Union at <http://www.nteu.org.au/article/TPP-impacts-on-education-and-education-services-18172>

³ New Zealand and the EU launched the negotiations on 29 October; see http://europa.eu/rapid/press-release_STATEMENT-15-5947_en.htm

⁴ http://trade.ec.europa.eu/doclib/docs/2015/august/tradoc_153674.pdf

in 2017. It includes HE services, but it is not yet clear whether it will be a “mixed agreement” (see 1.8 below).

1.8 All agreements successfully negotiated by DG Trade on behalf of the Commission must be ratified. But where and by which bodies would **ratification** of, for example, TTIP and CETA take place? Can the EU 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” has been unclear for some time. Outgoing trade commissioner De Gucht said that he would seek advice from the European Court of Justice (CJEU). EurLEX has a summary of procedure, but this was last updated in August 2010.⁵ More recently, questions have been asked in Parliament and answered by Commissioner Malmström in respect to TTIP. We now know that it is the Commission which determines, on a case-by-case basis, whether or not an agreement is “mixed”:

After a text is finalised, initialled and translated, the Commission submits a proposal on the signature and conclusion of the agreement to the Council. After the agreement is formally signed, the Council transmits the agreement to the European Parliament for consent, which decides by a vote in plenary. If an agreement also requires ratification by member states, this will happen in accordance with their respective constitutional requirements, which means that it will have to be approved by their national Parliament.

Regarding diversity, the Commission's consistent position is that the nature of every international agreement, and hence every trade agreement, and whether it is to be concluded as EU-only or mixed, depends on its content. When it comes to TTIP, the Commission will reflect this determination in its proposal for signature of the agreement. This will therefore only take place once the agreement is finalised and initialled.⁶ [answer dated 26 January]

1. The Commission can only take a view on the legal nature of the agreement after the text is finalised. Once the negotiations are concluded the Commission will examine the TTIP text to determine whether its content is fully covered by EU competence. In this case it should be signed and concluded as “EU only”. In the alternative, it should be considered as a “mixed” agreement to be concluded by the EU and its member states. In the latter case, the agreement will have to be ratified by member states in accordance with their own domestic procedures. Such national ratification would be in addition to the conclusion by the Council, following the consent of the directly-elected European Parliament.

2. The European Parliament will have to give its consent for the ratification of TTIP by the majority of the votes cast.

3. The Council ratifies the agreement following the consent obtained from the European Parliament. The Council acts by qualified majority unless the agreement covers a field for which unanimity is required. In this case, the Council shall act unanimously.⁷ [answer dated 17 August]

⁵ <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1410949127767&uri=URISERV:I14532>

⁶ <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2014-010028&language=EN>

⁷ <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2015-008423&language=EN>

Effectively, this means that the Commission will be lobbied energetically by member states anxious to preserve the sovereignty they enjoy in HE policy making and delivery, as well as by those in stronger trading positions and keen to export HE services.

1.9 Commissioner Malmström has launched a **new trade strategy** in support of her efforts to boost both the transparency and the volume of EU trade deals. Entitled Trade for All: towards a more responsible trade and investment policy,⁸ it sets out the EU's basic principles:

- transparency
- human rights
- core labour standards
- sustainable development
- anti-corruption
- investment protection.

.... and a number of strategic objectives:

- to secure greater involvement of SMEs;
- to ensure that agreements take account of global value chains and the digital economy;
- to re-energise multilateral trade negotiations by, for example, pushing ahead with the plurilateral Trade in Services Agreement (TiSA) (see section 7 below);
- to launch talks with, among others, Australia, Indonesia, New Zealand and the Philippines.

1.10 Parliament's International Trade committee (INTA) will consider the strategy through the first half of 2016, with a final report going to the June plenary. **INTA** has also published its list of standing rapporteurs – by global region and by country – which will be of interest to HE lobbyists.⁹

1.11 2016 may see the UK leaving the EU, the so-called **Brexit**. The *Financial Times*¹⁰ reports Michael Froman, US Trade Representative, as “pouring cold water” on the idea that the UK might negotiate a separate FTA with the US. “We have no [trade agreement] with the UK so they would be subject to the same tariffs — and other trade-related measures — as China, or Brazil or India.”

2 Higher and adult education services

2.1 In the last six months, two interesting studies have been published – offering nuanced views on the vexed topic of the place of public services within TTIP. The *Observatoire social européen* has posted¹¹ a briefing by Martin Myant of the European Trade Union Institute. Myant considers TTIP to be essentially, but unnecessarily, deregulatory in intent and in likely outcome. He concludes that growth in transatlantic trade, desirable in itself, is not incompatible with preserving the integrity of the public sector and the right of elected governments to regulate.

⁸ <http://ec.europa.eu/trade/policy/in-focus/new-trade-strategy/>

⁹ <http://ec.europa.eu/trade/policy/in-focus/new-trade-strategy/>

¹⁰ 29 October 2015

¹¹ At http://www.ose.be/files/publication/OSEPaperSeries/Myant_2015_OSEBriefingPaper11_nov2015.pdf

2.2 In the Parliament, the Internal Market and Consumer Affairs Committee (IMCO) sponsored a study of “TTIP: Challenges and Opportunities in the Area of Services”.¹² It regards the EU position on public education as essentially defensive – aiming to retain the right to regulate, “while recognising that there may be opportunities for individual member states, should they wish to do so, to selectively open such sectors to international competition.”

2.3 As regards private education, by contrast, the EU posture is regarded as aggressive: “Under each of the four modes of service delivery opportunities exist to develop the export of education services to the United States, whether through cross-border trade in educational materials, the movement of students, physical presence of educational establishments in the US or the short-term movement of teachers and administrators.” Such opportunities would no doubt be taken by MSs with an interest in knowledge export, notably France, Germany, Netherlands, Spain and the UK.

2.4 Author Kenneth Heydon¹³ addresses **EUA’s observations** on the uncertain status of HE. He agrees that “GATS cannot solve the issue of access to higher education services”, but indicates various ways in which countries can protect their HE sectors while retaining the power to decide the extent to which private providers might be allowed in. Heydon comments:

As pointed out by the European University Association, many European “public” higher education institutions do not unambiguously meet the criteria for services provided in the exercise of government authority. Should measures extended to public institutions be deemed to fall under the agreement in question, this could trigger equal treatment of like foreign services and service suppliers (under the market access and national treatment obligations). The government would then be required, in the absence of appropriate limitations, to extend financial and other benefits to the services and/or suppliers concerned.

The key here, however, is the application of the “appropriate limitations” and there are indeed many ways in which PTA [preferential trade agreement] signatories can and do effectively limit their liberalisation commitments and associated obligations. In the area of education services, this ranges over confining commitments to private education, excluding certain sub-sectors (primary and secondary education are often excluded) or excluding certain fields of activity (such as medical education or teaching).

In addition, specific limitations can be placed on market access. For Mode 1 (cross-border trade) this might involve provision for compliance with domestic regulations. Mode 3 (commercial presence) commitments often include provisions requiring joint venture or twinning arrangements with foreign equity limits, economic needs tests, compliance with domestic regulations, limits on geographic location, on the number of students, the number of foreigners in senior posts, or, in the case of US PTAs, the number of licenses in a particular field. Mode 4 (temporary movement of service suppliers) is mostly “Unbound” with provisions limiting movement to intra-corporate transferees. US commitments in education under GATS tend to stipulate the need for compliance with minimum skill levels, limits on the length of stay and compliance with national labour laws.

¹² http://www.europarl.europa.eu/RegData/etudes/STUD/2015/563443/IPOL_STU%282015%29563443_EN.pdf
The study contains useful summaries of the EU-Korea FTA and the EU-Canada CETA.

¹³ Formerly Director of Trade at OECD, now Visiting Fellow at the London School of Economics

Finally, specific limitations can be placed on national treatment. The United States, under the GATS, has thus reserved the right, for all four modes, to limit granting of state funding or subsidies to state-owned institutions and to bestow tax preferences to such institutions. Moreover, all US negative-list PTAs (including KORUS, US-Australia and US-Chile) have reservations providing the right to adopt or maintain any measure with respect to the provision of public health or education services.

2.5 GATS Mode 4 (temporary cross-border movement of professionals) involves the **recognition of professional qualifications**, which also features in CETA and TiSA. In TTIP, discussions continue with regard to architects and auditors; it is understood that the US will not agree to consider lawyers.

2.6 While EU services providers in general complain about the lack of transparency characterising the US sub-federal level, the US has begun to devote considerable attention to the **reservations lodged by the 28 EU MSs**. Those relating to HE and AE are set out in section 3 below. As far as EUA can ascertain, the German HE sector – of all those in EU member states – is alone in closely following trade negotiations. The position of HRK, the rectors' conference, is that HE should have the same protected status as the audio-visual sector and that education services which fall outside the narrow definition should be subject to positive listing. The German government position is similar.¹⁴

3 The EU's revised offer on services in the framework of TTIP: education

3.1 As already indicated, education figures in the **EU's revised offer on services**.¹⁵ DG Trade has always argued that education cannot be the object of exclusion, since individual MSs are free to privatise public services if they wish to do so. Instead, 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, it retains the right to discriminate in favour of publicly-funded education, while leaving MSs free to take commitments on private education. Readers of the EUA Updates will be familiar with the uncertainty surrounding the definition of “public”. It is interesting to see that on page 85 of the revised offer the wording is more specific:

“The EU reserves the right to adopt or maintain any measure with respect to [...] education services which receive public funding or State support in any form, and are therefore not considered to be privately funded [...]”

Does this mean that an HEI which receives any amount, however small, of State support could be regarded as public? Yes... but when “considered” by whom? By the MS authority, since that is where the principal competence lies.

3.2 The revised offer is “mixed”. A **negative list for national treatment** embodies the assumption that in all service sectors foreign providers will be treated in a manner no less favourable than domestic providers, unless explicitly stated. A **positive list for market access**

¹⁴ See <http://www.hrk.de/presse/pressemitteilungen/pressemitteilung/meldung/freihandelsvertraege-ceta-und-ttip-weiter-offene-fragen-zur-hochschulbildung-3838/>

¹⁵ Having been partially leaked in June, the text of the tabled, published and revised offer (Annexes 1-3) is available at http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153670.pdf

means that those sectors, in which an MS wishes to limit the volume of foreign provision, must be listed at the outset.¹⁶

3.3 Twelve EU MSs have “taken no reservations” (i.e. set no limits) to trade in HE services in the framework of TTIP: Belgium, Croatia, Estonia, Germany, Ireland, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal and the UK. Back in March it was reported¹⁷ that the Commission was nervous about the number of **reservations taken by the 16 remaining MSs** and that, under pressure from the US, it was asking them to think again.

All national rectors’ conferences and HEIs should check with their ministries of education and trade that the reservations are appropriate and secure.

3.4 The reservations taken by MSs are set out in **three annexes to the schedule**:

- Annex 1 (pp.4-54): reservations on national treatment in respect of existing measures (i.e. in force before 1 May 2015)
- Annex 2 (pp.55-116): reservations on national treatment in respect of future measures
- Annex 3 (pp.117-170): reservations taken on market access

It is important to note that reservations in Annex 1 are subject to the **ratchet**: the degree of liberalisation cannot be reversed. This does not apply to Annex 2.

3.4.1 **Annex 1 reservation 9** (p.42) concerns education, but has to be read in conjunction with various non-sectoral conditions set out in reservations 1-4. These relate to such considerations as: the status of subsidiaries of foreign companies, the composition of the management of foreign companies, their rights to purchase real estate, etc.

3.4.2 Only **three MSs** have stated reservations, as cited and tabulated below:

DK	Nationality condition for university professors
EL	Education at university level shall be provided exclusively by institutions which are fully self-governed public law legal persons. However, the law permits the establishment by the EU residents (natural or legal persons) of private tertiary education institutions granting certificates which are not recognised as equal to university degrees.
FR	Nationality condition in order to teach in a privately funded educational institution. However, foreign nationals may obtain an authorisation from the relevant competent authorities in order to teach. Foreign nationals may also obtain an authorisation to establish and operate educational institutions. This authorisation is granted on a discretionary basis.

3.4.3 **Annex 2 reservation 17** (p.85) lists the following limitations, set by 11 MSs, on the favourable treatment of foreign companies in respect of future measures:

¹⁶ DG Trade has posted a ‘Services Text Reading Guide’ at http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153668.pdf

¹⁷ <http://www.vieuws.eu/eutradeinsights/wp-content/uploads/2015/03/EU-trade-insights-special-TTIP-17.03.2015.pdf>

AT	restricting the provision of privately funded higher education services; the provision [of] privately funded adult education services by means of radio or television broadcasting
BG	restricting the provision of privately funded higher education services
CY	restricting the provision of privately funded higher education services; restricting the provision of privately funded adult education services
CZ	restricting the provision of higher educational services except post-secondary technical and vocational education services; requiring the majority of the members of the board of directors of an establishment providing privately-funded education services must be Czech nationals
FI	restricting the provision of privately funded higher education services; restricting the provision of privately funded adult education services
IT	requiring that only Italian juridical persons may be authorised to issue state-recognised diplomas
MT	restricting the provision of privately funded higher education services; restricting the provision of privately funded adult education services
RO	restricting the provision of privately funded higher education services; restricting the provision of privately funded adult education services
SE	restricting the provision of privately funded higher education services; restricting the provision of privately funded adult education services
SI	requiring that the majority of the members of the board of directors of an establishment providing privately funded secondary or higher education services must be Slovenian nationals
SK	requiring EEA residency for providers of education services other than post-secondary technical and vocational education services; requiring that the majority of the members of the board of directors of an establishment providing education services must be Slovak nationals

3.4.4 **Annex 3** deals with **market access** and lists all relevant MS reservations. It begins with general EU-wide considerations on such factors as acquisition of real estate and mobility of professionals under GATS Mode 4, before proceeding to HE on page 152. Here the reservations are listed in terms of the GATS modes 1, 2, 3, 4. In the context of HE cross-border service provision, they might signify inter alia:

- Mode 1: “cross-border supply”, the delivery, from one country, of distance learning programmes taken up in others
- Mode 2: “consumption abroad”, programme mobility out of the student’s home country
- Mode 3: “commercial presence”, a branch campus established abroad
- Mode 4: “presence of natural persons”, see definition in para.7.2 below

3.4.5 The full list for **Modes 1-3** is set out in the table:

Market access		
Mode 1	MS	Reservation
	AT	Unbound for HE. Unbound for AE services by means of radio or television broadcasting. NB Unbound = retaining the right to introduce further limiting measures in the future
	BG	Unbound for HE
	CY	Unbound for HE and AE

	CZ	Unbound for HE services, except post-secondary technical and vocational education services
	ES	Economic needs test for establishing private universities authorised to issue recognised diplomas or degrees. The relevant procedure involves the advice of the Parliament. Main criteria: population and density of existing establishments
	FI	Unbound for HE and AE
	FR	Nationality condition. However, foreign nationals can have authorisation from competent authorities to establish and direct an education institution, and to teach
	IT	Nationality condition for service providers to be authorized to issue State recognised diplomas; Economic needs test for establishing private universities authorised to issue recognised diplomas or degrees. The relevant procedure involves the advice of the Parliament. Main criteria: population and density of existing establishments
	MT	Unbound for HE and AE
	RO	Unbound for HE and AE
	SE	Unbound for HE and AE
	SK	Unbound for HE services, except post-secondary technical and vocational education services
Mode 2	AT	Unbound for HE
	BG	Unbound for HE
	CY	Unbound for HE and AE
	CZ	Unbound for HE services, except post-secondary technical and vocational education services
	FI	Unbound for HE and AE
	MT	Unbound for HE and AE
	RO	Unbound for HE and AE
	SE	Unbound for HE and AE
	SK	Unbound for HE services, except post-secondary technical and vocational education services
Mode 3	AT	Unbound for HE. Unbound for AE services by means of radio or television broadcasting
	BG	Unbound for HE
	CY	Unbound for HE and AE
	CZ	Unbound for the supply of HE services except for post-secondary technical and vocational education services
	EL	Unbound for HE institutions granting recognised State diplomas
	ES	Economic needs test. Main criteria: population and density of existing establishments.

FI	Unbound for HE and AE
HU	The number of [HE and AE] schools being established may be limited by public authorities
IT	Economic needs test. Main criteria: population and density of existing establishments.
MT	Unbound for HE and AE
RO	Unbound for HE and AE
SE	Unbound for HE and AE
SK	Unbound for the supply of HE services except for post-secondary technical and vocational education services; The number of [HE and AE] schools being established may be limited by public authorities

3.4.6 For **Mode 4**, the EU offer is concerned with three sub-categories of mobility:

- **BVEP Business visitors for establishment purposes:** “natural persons employed in a senior position within a juridical person of one Party [...] who are responsible for setting up an establishment. They do not offer or provide services or engage in any other economic activity than required for establishment purposes. They do not receive remuneration from a source located within the member state concerned. The service provider has its principal place of business in the territory of a Party and has no other representative office, branch or subsidiary in that member state. Entry and temporary stay is permitted for a period of up to 90 days in any twelve month period.”
- **ICT Intra-corporate transferees:** “natural persons who reside outside the territory of the Member states at the time of the application and who have been employed by a juridical person of one Party [...] or its branch or have been partners in it for at least one year immediately preceding the date of admission, and who are temporarily transferred in the context of the provision of a service through commercial presence in the territory of the Member state concerned. The natural person concerned must belong to one of the following categories: managers [...], specialists [...], graduate trainees [...]. Entry and stay is limited to a maximum of three years in the case of managers and specialists, and to twelve months in the case of graduate trainees.”
- **SeSe Service sellers:** “natural persons who are representatives of a services supplier of one Party seeking entry and temporary stay in the territory of a member state for the purpose of negotiating the sale of services, or entering into agreements to sell services for that supplier. They do not engage in making direct sales to the general public and do not receive remuneration from a source located within the member state concerned, nor are they commission agents.”

CZ	Nationality condition for HE services, except for post-secondary technical and vocational education services
DK	Nationality condition for professors
FR	Nationality condition. However, nationals of the relevant Party may obtain authorisation from the competent authorities to establish and direct an education institution and to teach
IT	Nationality condition for service providers who are authorised to issue State-recognised diplomas
SK	Nationality condition for HE services, except for post-secondary technical and vocational education services

4 Copyright and data protection

4.1 These are issues closely bound up with the Commission's initiative on the **Digital Single Market (DSM)**, outlined in Update 4, but also with TTIP. Procedurally the relationship between the two is one of legal subordination – of TTIP to the DSM, which means that the EU will finalise relevant legislation before it commits to TTIP. The topic is highly charged, thanks to the Snowden revelations and to the European perception that US tech companies abuse the privacy of citizens.

4.2 Eight Parliamentary committees are deliberating on the DSM proposal for the January plenary, but the Commission, convinced of its urgency and harried by campaigning MEP Julia Reda,¹⁸ is anxious to push on. It is running two **consultations** up to the end of the year: on geo-blocking, which inhibits cross-border access to online content; and on the nature, scope and implications of online platforms.¹⁹ It is also making supplementary proposals on copyright (see below para.4.8).

4.3 Parliament's **Committee on Culture and Education** (CULT) has agreed an Opinion, which focuses mainly on the audio-visual, but also includes the following:

34. Stresses that the ability to use media independently and critically represents a lifelong learning task across generations, which is subject to constant change, in parallel with the development of the media and understood as a key qualification; stresses that the adaptation of education and training systems is vital to improve the level of ICT professionalism in Europe and to meet the increasing demand for digitally skilled professionals in the EU; encourages, in this regard, the Commission and the member states to create the basis for mutual recognition of digital skills and qualifications by setting up a European certificate or grading system, following the example of the European common framework of reference for language learning and teaching; stresses that further efforts are needed in the field of improving media literacy among citizens, and calls on the Commission and the member states to promote media literacy for all EU citizens, in particular vulnerable people, through initiatives and coordinated actions;

¹⁸ For an interview with Reda, go to http://www.euractiv.com/sections/infosociety/mep-reda-commission-too-cautious-geo-blocking-and-copyright-law-315219?utm_source=EurActiv+Newsletter&utm_campaign=286dcee17d-newsletter_innovation_enterprise&utm_medium=email&utm_term=0_bab5f0ea4e-286dcee17d-245356445

¹⁹ Details of the consultations are at http://europa.eu/rapid/press-release_IP-15-5704_en.htm

suggests that internet literacy be added permanently to the scope of efforts to increase media literacy.²⁰

Data flows and data protection

4.4 The Commission's position appears simple in essence, but complex in delivery: to maximise data flows, in support of increased trade, while guaranteeing that EU and MS standards of data protection will be maintained. The “**safe harbour**” scheme, which allowed US tech companies to commit in good faith to EU data protection standards, was intended to further this end, even though the Commission had long entertained doubts about its reliability (see Update 1, section 5).

4.5 In October, these doubts were dramatically underscored by a **Court of Justice** ruling²¹ that declared safe harbour invalid: invalid because it could not protect citizens in the way that it claimed. The consequences are still being mapped. An important insight is afforded by the joint statement put out by the 28 EU MS data protection authorities.²² It makes it clear that data flows which continue to use safe harbour as a legal basis are unlawful and that appropriate enforcement action may be taken if some provisional working arrangement cannot be agreed with the US before the end of January.

4.6 The CJEU ruling made it even more urgent to conclude the business of replacing Directive 95/46/EC on the protection of individuals' data, on which safe harbour was predicated. In June the Council of Ministers received the Commission's proposal for a **General Data Protection Regulation**²³ (GDPR) and in December agreement was reached between Commission, Council and Parliament on a measure which can fine non-compliant companies up to 4% of their global turnover.²⁴

4.7 Germany, with data protection laws among the strictest in the EU, had already begun to plan a **Bundescloud** for government data, together with controls which would effectively insulate from US intelligence agencies all personal data used for commercial purposes.²⁵

Copyright

4.8 The DSM Communication promised “greater legal certainty to enable researchers and educational institutions to make wider use of copyright-protected material, including across borders”. In its efforts to move towards copyright law common to all 28 MSs, the Commission has now indicated that it wants to regard **text- and data-mining for non-commercial purposes** (TDM) as an “exception”, meaning exemption from copyright restrictions. The beneficiaries targeted by the proposed measure are researchers and designers of online course materials.²⁶

²⁰ <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-565.210&format=PDF&language=EN&secondRef=02>

²¹ C-362/14 <http://curia.europa.eu/juris/celex.jsf?celex=62014CJ0362&lang1=en&type=TXT&ancre=>

²² http://ec.europa.eu/justice/data-protection/article-29/press-material/press-release/art29_press_material/2015/20151016_wp29_statement_on_schrems_judgement.pdf

²³ http://data.consilium.europa.eu/doc/document/ST-9565-2015-INIT/en/pdf?dm_i=CUG,3GWRN,AISKUN,CFE6X,1

²⁴ See the press release at http://europa.eu/rapid/press-release_IP-15-6321_en.htm

²⁵ See http://www.euractiv.com/sections/infosociety/germany-set-bundescloud-316939?utm_source=EurActiv+Newsletter&utm_campaign=180bfd7371-newsletter_uk_in_europe&utm_medium=email&utm_term=0_bab5f0ea4e-180bfd7371-245356445

²⁶ See the report by Jan Petter Myklebust in University World News, 11 December 2015, at <http://www.universityworldnews.com/article.php?story=20151211130648195>

5 Investor-state dispute settlement (ISDS)

5.1 From the outset, ISDS threatened to undermine the TTIP negotiations. The Commission's massively subscribed public consultation subsequently proved that the issue would not go away. Commissioner Malmström promptly produced a concept paper (summarised in Update 4) proposing a **new version of ISDS**. It featured much higher levels of transparency and credibility, greatly improving the chances of assuaging public opinion and winning the support of Parliament.

5.2 The concept paper has now been firmed up into a draft proposal for an **Investment Court System** (ICS) consisting of a Tribunal of First Instance and an Appeals Tribunal.²⁷ The Commission is currently consulting stakeholders, with a view to formally introducing the proposal into the TTIP talks. If and when approved, its relevance will not be confined to TTIP. Parliament has said that it wants the new dispute resolution system to be incorporated in other FTAs, including the EU-Canada CETA; whether this will require a re-opening of negotiations with the Canadians is not clear.

6 Transparency in the TTIP negotiations

6.1 Previous Updates have reported on Commissioner Malmström's efforts to bring more EU documentation into the public domain. Partly these are at her own initiative, as she attempts to ease the crisis of public confidence which characterised the mandate of her predecessor Karel De Gucht. Partly they result from pressure by Parliament, which in December claimed a "big win",²⁸ forcing an agreement which gives all **MEPs access to "consolidated texts"** in the Parliament's reading room, where they will be able to read and take written notes. The confidential "consolidated texts" include records of the US positions, as well as those of the EU.

6.2 A number of problems remain, which will not be allayed by the Commission's publication of **TTIP in plain English**,²⁹ however useful it might be for casual readers. Each TTIP round is followed by a published report, the most recent being more detailed than previously³⁰ – but inevitably less detailed than the Commission's internal report or the report lodged in its own secure reading room for consultation by accredited MS representatives. In August, the Commission denied that its heavily redacted correspondence with Philip Morris, the tobacco corporate, was related to TTIP, and to ISDS in particular.³¹ Even so, there is general agreement that the EU performs much better than the US. EU lobbyists complain, for example, that there is virtually no transparency at the state and other US sub-federal levels and that their ability to advise the Commission is compromised.

²⁷ See http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf for the full draft text. For a user-friendly fact sheet, see http://europa.eu/rapid/press-release_MEMO-15-5652_en.htm

²⁸ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bIM-PRESS%2b20151202IPR05759%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>

²⁹ http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153635.pdf

³⁰ See http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153935.pdf

³¹ http://www.euractiv.com/sections/trade-society/did-commission-censor-big-tobacco-documents-because-ttip-317138?utm_source=EurActiv+Newsletter&utm_campaign=6e4e0e87df-newsletter_eu_priorities_2020&utm_medium=email&utm_term=0_bab5f0ea4e-6e4e0e87df-245356445

7 The Trade in Services Agreement (TiSA)

- TiSA involves 20+ countries, including the EU. The number is not constant: Mauritius has opted in, while Paraguay and Uruguay have recently pulled out.
- The major players are Australia, the EU and the US, all seeking to establish a firm plurilateral framework which might eventually be extended to all WTO members, although this appears unlikely.
- TiSA is consistent with GATS: no ISDS; no labour or environmental standards; exclusion of public services delivered in the exercise of governmental authority.
- TiSA is a “mixed model” agreement: (A) a negative list for national treatment (in principle, all foreign service providers will be treated as favourably as national providers, unless an explicit reservation is lodged – “list it or lose it”); (B) a positive list for market access (any limitation on the volume of foreign service provision must be specified at the outset).³²
- Each country makes an offer based on its own best free trade agreement, which for the EU is Korea. The EU posture is “offensive”, i.e. it wants other countries’ service sectors to be as open as its own.

7.1 In respect of **education**, 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 DG Trade, the EU retains the right to discriminate in favour of publicly-funded education, while leaving MSs free to take commitments on public and private education. As in TTIP, this is said to be a domestic policy choice. EUA persists in pointing to the unresolved content of the term “public” and argues that the freedom to discriminate is cancelled out by the obligation to guarantee “competitive neutrality” between public and private providers.

7.2 EUA’s policy recommendation of “no commitments” is justified by the uncertain potential use of other mechanisms brought into play by TiSA, carrying the agreement into the territory of so-called **GATS+**. These 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.

³² The next EUA Update will tabulate the member state reservations.

7.3 The most significant ongoing development is the slow passage of Parliament's own-initiative report³³ drafted for INTA by **Viviane Reding**. Having fallen behind schedule, it will be voted in Committee on 18 January and progress to plenary in February. Parliament's recommendations to the Commission will carry weight, having been considered³⁴ by nine committees (proposing nearly 600 amendments), although not, it must be said, by CULT.

7.4 The **Reding draft** accepts the need to expand the access to foreign markets by EU service industries. At the same time, it is mindful of widespread anxiety regarding public services and data protection. Repeatedly, it recommends "specific carve-outs for sensitive sectors", the exclusion of public and cultural services, "current and future Services of General Interest as well as Services of General Economic Interest [...] (including but not limited to water, health, social services, social security systems and education." Explicitly, it recommends that the Commission "ensure that European, national and local authorities retain the full right to introduce, adopt, maintain or repeal any measures with regard to the commissioning, organisation, funding and provision of public services [...] irrespective of how the public services are provided and funded."

7.5 Reding urges the Commission to stand firm on what is already posted on the DG Trade website regarding the **ratchet** mechanism. Ratchet means that "a country cannot reintroduce a particular trade barrier that it had previously and unilaterally removed in an area where it had made a commitment."³⁵ However, "it does not apply to commitments on 'market access' (deciding the extent to which foreign suppliers can operate – for example whether there is a monopoly or not)."³⁶ This would appear to mean that in countries where HE is not unambiguously a public service, national and regional governments retain the right to backtrack on the extent to which they allow foreign investors and providers to enter their markets. If this is indeed the case, it will reassure anxious stakeholders, particularly in view of the fact that in TiSA there is no ISDS. On the other hand, it raises the interesting question of whether any future EU-US dispute would fall within the scope of TiSA or TTIP.

7.6 Equally relevant to higher education is the stress that the draft Reding report places on **data protection**. It is a fundamental right, not a barrier to trade. EU citizens must be able to rest assured that the data flows crucial to the growth of the digital economy do not compromise their right to data protection.

7.7 Finally, the report makes precise recommendations regarding **GATS Mode 4**, the short-term mobility of professional service providers. Europe's need for highly qualified personnel requires the Commission, in TiSA, "to strive for the mutual recognition of training, academic levels and professional qualifications, in particular in the architectural, accounting and legal sectors, while ensuring the competence of the supplier and thus the quality of the services provided."

7.8 The Commission produces reports after each round.³⁷ The report on the 15th round³⁸ included reference to Mode 4 mobility of professional service providers. The discussion centred on "the procedural commitments on the entry and temporary stay of professionals." The report continues: "For the first time the EU was ready to engage on substance. It suggested, however, addressing these issues in a complementary protocol, where the commitments could be balanced by the inclusion of the necessary safeguards." The intention

³³ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-567.814+01+DOC+PDF+V0//EN>

³⁴ And rejected by IMCO, the Internal Market and Consumer Affairs Committee

³⁵ <http://ec.europa.eu/trade/policy/in-focus/tisa/questions-and-answers/>

³⁶ Ibid.

³⁷ For the report on the 14th round, see http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153917.15.pdf

³⁸ At http://trade.ec.europa.eu/doclib/docs/2015/december/tradoc_154062.doc.pdf

is not to allow considerations of visa and temporary entry to complicate the text of the final agreement. This debate is also taking place within TTIP.

8 Future negotiating rounds

8.1 The 13th round of TTIP will address the sensitive topic of public procurement in early 2016, in the hope of exchanging offers for the first time.

8.2 The 14th round of EU-Japan talks are due to be held in January.

8.3 The 16th round of TiSA talks will be held in the US in February, covering inter alia Mode 4, market access and e-commerce, with a further round in April.

This Update is posted at

<http://www.eua.be/policy-representation/higher-education-policies/trade-agreements>

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