



TTIP AND CULTURE

In 2013, the European Union (EU) started negotiations for a free trade agreement (FTA) – the Transatlantic Trade and Investment Partnership or TTIP – with the United States (US), the largest economy in the world. The EU and US are key trading partners.

The US has a strong interest in gaining access to markets for services related to films and television – so-called audiovisual services. The EU, however, believes such services play a special part in culture and so should be treated differently to other services. Sometimes, concerns also exist about the potential impact of TTIP in other sectors related to culture.

This paper explains how the European Commission deals with cultural matters in trade negotiations and, more particularly, in TTIP.

- what are 'cultural sectors' from the trade perspective?
- how do trade talks deal with the so-called 'cultural exception'?
- legal issues surrounding EU practice in trade agreements

Culture and the economy

Cultural diversity is a distinctive feature of the EU because of Europe's history and its rich variety of traditions. The EU also has strong cultural and creative industries. These are not only essential for Europe's cultural diversity, but also one of the continent's most dynamic sectors and an important provider of quality jobs. Around five million people across the EU work in the creative industries. They include:

- Performing arts
- Visual arts
- Cultural heritage
- Film, television & radio
- Music
- Book publishing
- Press
- Video games
- New media
- Architecture
- Advertising
- Graphic & fashion design

These sectors contribute around 2.6 % to EU GDP and have a higher growth rate than the rest of the economy. They contribute more to EU GDP than the chemicals and plastic products industry (2.3 %) or real estate activities (2.1 %).

The EU's vibrant cultural industries are a major element in the region's attractiveness and part of its strategic vision for economic and social development. Good cultural projects contribute both to the competitiveness and to the social cohesion of cities and regions. In addition, investment in culture also leverages large returns. For example, the European Capital of Culture scheme brings benefits to the nominated cities that last well beyond the year in which they hold the title.

Culture and trade

The importance of culture to society and the economy is why protecting and promoting cultural diversity are key aims of the EU. These aims influence all areas of the EU's activity. The basis for this is an explicit mandate in the Treaty on the Functioning of the European Union (TFEU), which in Article 167, paragraph 4, states that:

"the Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures."

Trade negotiations are one of the *"other provisions of the Treaties"* so they are covered by this obligation. Furthermore, by signing the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, the EU is also legally-bound to promote cultural diversity.

This means that in trade talks the EU takes positions that make it possible for all concerned – the EU and its Member States, but our trade partners too – to take the measures they consider necessary to support and promote cultural activities. Here are some examples:

- In both multilateral and bilateral trade negotiations the EU traditionally excludes the audiovisual sector from any commitments it makes to open its markets to foreign competition. So, when it comes to audiovisual services, almost none of the EU's FTAs allow foreign (non-EU) companies access to the EU market or the right to be treated the same as their EU counterparts.

The result is that the EU and its Member States are fully free to discriminate against foreign providers of audiovisual services. The best example is the quota system. TV quotas were first regulated in the 'Television without borders' Directive of 1989, which in 2007 became the 'Audiovisual Media Services Directive' (AVMSD). Today, this Directive is the main EU-wide law regulating the sector.

- In the World Trade Organization (WTO) it is the EU that has been the big defender of cultural diversity. The EU has insisted that every new country joining the WTO take the necessary safeguards not to limit its right to introduce laws to support the audiovisual sector. The EU has been practically alone in its efforts, very often attracting criticism from other WTO partners.
- In one or two cases the EU has agreed to allow non-EU companies to provide audiovisual services in specific circumstances (the FTAs with Korea and with Cariforum – a group of Caribbean countries). In these agreements the EU put in place so-called Cultural Cooperation Protocols. These protocols provide safeguards whereby the EU allows non-EU companies to be treated the same as EU firms only in very narrow circumstances.

TTIP is no exception. The TTIP negotiating mandate the EU Member States (meeting as the Council) gave the European Commission expressly excluded the opening of the European audiovisual sector to competition from US firms. This means the Commission is not allowed to negotiate commitments in the sector and that TTIP will clearly exclude audiovisual services from any provisions granting access to EU markets.

The EU also wants the preamble (the introductory language at the beginning of the agreement) to TTIP to underline that the EU's partnership with the US is based on values consistent with the principles and objectives of the EU's foreign policy. And to stress the right of the parties to take measures necessary to achieve legitimate public policy objectives for promoting cultural diversity as laid down in the UNESCO Convention.

Cultural sectors

Throughout the history of EU trade negotiations the audiovisual sector has had special treatment. This treatment does not necessarily extend, however, to other sectors that might be considered as relating to culture. As a matter of fact, as far as trade is concerned, there is no commonly agreed definition of what counts as 'culture'.

The General Agreement on Trade in Services (GATS) – an international agreement signed by all members of the WTO, including the EU – classifies '*recreational/cultural/sporting services*' as a sector. It divides it into sub-sectors such as:

- Entertainment services (theatre, live bands, circus services)
- News and press agency services
- Libraries, archives, museums and other cultural events
- Sporting and other recreational services

Although all these have a fairly strong cultural component, it is clear that they do not exhaust the ordinary meaning of 'cultural services'. This does not mean that from a trade perspective any culture-related activity will be necessarily considered as part of the cultural sector. Printing and publishing, for instance, are classified as 'business services' and not as a cultural sector. Likewise, the wholesale and retail of video tapes is considered to be part of the 'distribution' sector, not culture.

This is important because how an activity is classified affects whether the EU may be subject to certain obligations under the GATS Agreement. For example:

- Under the GATS, many EU Member States have allowed theatre companies from outside the EU to establish themselves freely on their territory and to carry out their activities on an equal footing to any EU theatre company.
- In news and press agency services (a sector GATS defines as culture) the EU is highly exposed to international competition under the GATS. This is not a concern, however. Rather the opposite is true because the EU's own press industry is very competitive and seeks to gain access to the markets of other countries.

Every time the EU negotiates a bilateral deal on services it needs to take into account its existing GATS obligations. This does not prevent the EU from treating culture differently from other parts of the economy, nor from acting assertively to protect its culture. The so-called 'cultural exception' – the idea that culture should be treated differently from other commercial products – has no legal status under EU law. Instead, EU law refers to the concept of 'promotion of cultural diversity'.

In TTIP – as in other free trade agreements it has negotiated – the EU will thus be able to exclude from the talks any sectors with a strong cultural component, such as libraries, archives or museums. As it happens, the EU has few or no GATS commitments in these sectors.

Book pricing and e-books

Under the GATS, printing and publishing are not classified as 'cultural services' but rather as 'other business services'. So some people are concerned that TTIP might jeopardise some Member States' policies of fixed prices for books. They claim TTIP will affect online distribution of books and e-books, and compliance with Member States' laws on book pricing.

In particular, they worry that US companies could use investor-to-state dispute mechanisms to challenge laws on book pricing. This is not the case. Insofar as rules for fixed-prices apply on a non-discriminatory basis – in other words both to books produced in the EU and to imports – there is no problem. There is not even a need to flag fixed prices for books as a restriction to any additional market opening for

publishing activities (on top of GATS) that the EU may or may not grant in TTIP. There is no reason why TTIP should affect how book sellers comply with the law. The book price law in Germany, for example, applies without exception to all sellers of printed or electronic goods, whether they be German or foreign.

Every investor – domestic or foreign – needs to respect the rules of the country in which it invests. On that basis, it is a country's sovereign right to decide its pricing policy for books - Germany, for example, has signed more than 100 investment protection agreements since the 1960's; none of them has interfered with its law on book pricing, in force since 1888.

The same principle applies to all national legislation which is non-discriminatory and does not constitute a discriminatory barrier to enter the market. TTIP has no effect on such laws. The agreement does not tackle legislation which seeks to regulate a sector, only measures that make it more difficult for foreign service providers to enter the market or that discriminate against them once they are in the market. Examples of non-discriminatory measures that are not affected by TTIP are:

- the need for an insurer to register;
- the need for a bank to have an amount of capital deposited in the central bank;
- the need for telecoms companies to comply with certain conditions in order to participate in the distribution of radio spectrum.

Some people also wonder about the potential effect of TTIP rules on investment protection on policies of fixed prices for books. The scope of investment protection provisions in trade agreements is limited. They aim at ensuring non-discrimination, fair and equitable treatment (for example, access to justice, an absence of arbitrariness) and no expropriation without compensation. All these principles are well established in our legal systems.

Subsidies and culture

The EU's standard practice in trade agreements is not to negotiate the circumstances in which public subsidies can be granted – in particular for services. TTIP is no exception: it will not affect the ability of the EU or EU Member States to provide financial support to cultural industries.

National authorities will remain free to subsidise any type of cultural activities, such as live performances, festivals, theatres, musicals and publishing. They will also be able to discriminate against US suppliers. Such public financial support may take a variety of forms, such as direct grants, tax advantages, debt offsetting and guarantees. The only legal constraint is that the subsidy complies with EU rules on state aid. TTIP – like all

previous trade agreements – will not have any effect on this. Claims that TTIP will limit subsidies to cultural activities are simply wrong.

Copyright

TTIP will not cover the kind of intellectual property enforcement issues that were included in the Anti-Counterfeiting Trade Agreement (ACTA). Any claims that it will be merely 'urban myths'.

TTIP might, however, include a limited but important number of issues that would benefit European artists and producers:

- European music is very popular in the US, yet in the US musicians and singers do not receive any royalties when their music is broadcasted on over-the-air radio. Similarly, in the US composers and songwriters receive no remuneration when their songs are played in bars or restaurants. In Europe they do: we believe it is essential to reward the creativity and talent of our musicians. TTIP can address the way they are treated differently in the EU and the US.
- In Europe, by law, painters and sculptors (so-called plastic artists) receive a percentage of the selling price of their works of art when they are resold by an art-market professional such as an auctioneer or an art gallery. The aim is to allow artists to share in the seller's profit on the increased value of their works if they became more famous and their works become more appreciated. It restores some balance between artists (who can only sell their work once) and that of other creative workers who have the possibility of exploiting their works several times over. There is no such right in the US, but it could be introduced in through TTIP, thereby encouraging European artists to market their works in this important market.

Conclusion

Some people worry about the impact that TTIP will have on how national, regional or local authorities manage cultural policies.

Experience shows that culture – particularly audiovisual services – have usually enjoyed special treatment in trade talks. Since subsidies to culture are systematically excluded from trade agreements, national authorities remain free to discriminate between domestic and foreign organisations when giving financial support to cultural activities.

Investment provisions in trade agreements are meant to protect, not expose, EU cultural industries. Promoting cultural diversity will remain a guiding principle for TTIP, just as it has been in other EU trade agreements.