

European Digital Rights (EDRi) thanks AFCO for issuing a [draft Opinion on TTIP](#). In line with [EDRi's redlines](#) on TTIP, we would like to make some comments on the paragraphs that fall within the scope of our work and suggest amendments to the text, when relevant.

For ease of reading, deletions are ~~strikethrough~~ and **amendments** are highlighted in bold. *Comments* are provided in each case.

(...)

A. whereas the Lisbon Treaty extended the scope of the Common Commercial Policy to include foreign direct investment, and whereas it gave Parliament new powers in the field of international trade agreements by strengthening its right to **be fully and intermediately informed at all stages of the procedure** ~~regular information~~, and by giving it a decisive role in the definition of the Union's trade policy, as its consent is now required for the implementation of international trade agreements;

Comments: This amendment includes the wording Article 218(10) of the TFEU, which is stronger than the text proposed in the Draft Opinion.

(new recital) **B. whereas the Lisbon Treaty made the EU institutions and the Member States subject to the Charter of Fundamental Rights of the European Union, and therefore its provisions must be respected by international trade and investment agreements like TTIP;**

Comments: The entry into force of the EU Charter of Fundamentals rights is a milestone in European law. Member States and the EU Institutions must now abide by the Charter. Accordingly, all trade and investment agreements negotiated on behalf of the European Union and its Member States shall respect the rights enshrined therein.

(new recital) **C. whereas Article 344 of the Treaty on the Functioning of the European Union (TFEU) states that "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein."**

Comments: The European Court of Justice, in cooperation with the courts and tribunals of the Member States, has the exclusive competence to apply and interpret EU law. The inclusion of a mechanism such as ISDS in TTIP may violate Article 344 TFEU. As the ECJ stated in its recent Opinion 2/13, cf. para. 201:

"The Court has consistently held that **an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system**, observance of which is ensured by the Court. That principle is notably enshrined in Article 344 TFEU, according to which Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein (see, to that effect, Opinions 1/91, EU:C:1991:490, paragraph 35, and 1/00,

EU:C:2002:231, paragraphs 11 and 12; judgments in *Commission v Ireland*, C-459/03, EU:C:2006:345, paragraphs 123 and 136, and *Kadi and Al Barakat International Foundation v Council and Commission*, EU:C:2008:461, paragraph 282)."

(new recital) **D. whereas the European Ombudsman adopted ten recommendations in a Decision of 6 January 2015, requesting for more transparency in the TTIP negotiations;**

Comments: The Rapporteur of AFCO's Opinion correctly pointed out to the [Decision of the European Ombudsman](#) on transparency in TTIP. Due to its importance, we recommend including it in the recital.

(...)

(ii.) while the investor-state dispute settlement (ISDS) ~~is an appropriate tool to protect investors and assure that investments are treated in a fair and non-discriminatory way, to oversee that it does not~~ **has already** undermined the capacity of European, national and local authorities to legislate their own policies **and may contravene Article 344 TFEU, in particular social and environmental policies, calls the Commission to exclude ISDS from TTIP** and therefore respect the constitutional framework of the Member States **and the legal framework of the European Union;**

Comments: See our comment on new recital "C" above.

(new paragraph) **considers that since ISDS tribunals would interpret both national and EU law, both interpreting and applying EU fundamental rights and general principles of EU law, the inclusion of ISDS would be incompatible with the CJEU's exclusive jurisdiction over the definitive interpretation of European Union law; to therefore insist that the Commission ascertain which adjudicative systems in trade agreements are compatible with the Treaties;**

Comments: The Commission launched a public consultation last year. Its report shows 97% of the responses rejected its inclusion due to the major [concerns](#) it raises. Former and ongoing cases involving ISDS demonstrate that this procedure creates a chilling effect on decision-making. The inclusion of ISDS would bypass European democracy and judicial systems.

(e) regarding transparency, civil society involvement and public outreach:

(iii.) while a certain **degree** ~~extent~~ of confidentiality is necessary for effective negotiations on a trade agreement of such high economic and political importance, **the Commission to continue its effort to should** render TTIP **and other trade or investment** negotiations more transparent and accessible to the public, as European institutions should be at the forefront of promoting transparency **and accountability; insists that all preparatory documents must, in any case, be released before the European Parliament is asked to vote on the final text;**

Comments: This amendment goes line with the European Ombudsman's Decision for further transparency in TTIP, requests made already by this Parliament and civil society concerns. It is important that all trade and investment agreements enjoy the same degree of transparency. Otherwise, EU's trade policy would not be consistent.



(iv.) to implement the recommendations of the European Ombudsman from 6 January 2015 to further enhance the legitimacy and transparency of the negotiating process by fully complying with the rules on public access to documents, by making available relevant documents on its website more proactively and comprehensively, **by carrying out a proper classification of documents and publish the references to non-public ones, by not allowing a possible mere displeasure of the US for a document not to be released as a justification for non-transparency, by proactively disclosing agendas and records of meetings held by the Commission and its officials, by publishing the feedback received by stakeholders, by making sure citizens are treated equally in the consultation process,** and by ensuring more balanced and transparent public participation;

Comments: The amendment summarises the ten recommendations the European Ombudsman made to the European Commission. Otherwise, the reference to the [Decision's](#) recommendations would be incomplete.

(...)

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