



EDRi and Bits of Freedom would like to thank INTA for issuing its [draft report](#) on TTIP. In line with our published red lines on the proposed agreement, we would like to make some comments on the paragraphs proposed that fall within our scope of work and suggest amendments to the text.

For ease of reading, ~~deletions~~ are strike-through and **additions** are highlighted in bold. *Comments* are provided in each case when relevant.

(...)

- having regard to the **97% negative responses to the** Commission report of 13 January 2015 on the online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the TTIP (SWD(2015)0003),

*Comments:* This amendment is important to reflect the concerns of the majority of the stakeholders in response to the public consultation on ISDS.

(new recital) **Having regard to the Decision of 6 January 2015 of the European Ombudsman in which she adopted ten recommendations, requesting more transparency in the TTIP negotiations.**

*Comments:* It is important to refer to the Decision of the Ombudsman requesting more transparency in the TTIP negotiations. The Ombudsman has identified several areas where transparency could be improved in the TTIP negotiations.

1.  
(...)

(b) (viii)

to ensure that the EU's acquis on **the fundamental rights to data protection and** privacy is not compromised or undermined through the liberalisation of data flows, in particular in the area of e-commerce and financial services; to ensure that no commitments on data flows are taken up **in trade or investment agreements** ~~before European data protection legislation is in place;~~

*Comments:* Firstly, the words "protection and" must be included in this paragraph. Both data protection and privacy are human rights, enshrined in the EU Charter of Fundamental Rights and the European Convention on Human Rights. The terminology in this paragraph must be precise.

Secondly, the phrase "before European data protection legislation is in place" should be deleted. Including this phrase would incorrectly imply that there is no current European data protection in place. Even if the phrase would only refer to the forthcoming European data

protection regulation for the transfer of data to third countries, this would be incorrect. There are rules for such transfers in the current EU legal framework.

Thirdly, the negotiating directives given to the Commission by the Council do not include data protection. Any adjustment to the current European data protection framework, including regulation for the transfer or flow of data to third countries should be discussed in other fora than trade agreements. Fundamental rights may not be negotiated on or traded away. Consequently, this paragraph should not implicitly or explicitly encourage negotiations on data protection or privacy in TTIP.

See also new amendments on data protection proposed below.

(...)

1 (c) (iii)

with regard to the horizontal regulatory cooperation chapter, to give priority to fostering bilateral cooperation between regulatory bodies through enhanced information exchange and to promote the adoption, strengthening and timely implementation of international instruments, on the basis of successful international experiences such as, for instance, ISO standards or under the United Nations Economic Commission for Europe's (UNECE) World Forum for Harmonisation of Vehicle Regulations (WP.29); to establish that the prior impact assessment for the regulatory act, as defined in the horizontal provisions on regulatory cooperation, should also measure the impact on consumers and the environment next to its impact on trade and investment; to handle the possibility of promoting regulatory compatibility with great care and only without compromising legitimate regulatory and policy objectives, **without compromising the autonomy of the EU legal system and decision-making processes.**

*Comments:* It is good to point out that regulatory cooperation may not compromise legitimate regulatory and policy objectives, but it is important to add to this paragraph that the regulatory cooperation chapter cannot lead to undermining the autonomy of the EU legal system, as enshrined in article 344 TFEU and constantly held by the Court of Justice of the European Union. According to the CJEU, "an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system". Cf. Opinion of the CJEU 2/13, para. 201.

(...)

1 (d) (xiv)

to ensure that foreign investors are treated in a non-discriminatory fashion and have a fair opportunity to seek and achieve redress of grievances, which **must** ~~can~~ be achieved without the inclusion of an ISDS mechanism; such a mechanism is not necessary in TTIP **nor in any other trade or investment agreement given the EU's and the US' developed legal systems**; a state-to-state dispute settlement system and the use of national courts are the most appropriate tools to address investment disputes;

*Comments:* ISDS is a flawed mechanism, as the 97% of respondents to the public consultation launched by the European Commission demonstrated. Unless trade and investment agreements like CETA or EUSFTA are changed, the European Union would leave the door open for forum shopping, as multinationals can afford to start substantial business activities in Canada or Singapore in order to exploit the ISDS mechanisms in those instruments.

1. (d) (xv)

to ensure that TTIP includes an ~~ambitious~~ Intellectual Property Rights (IPR) chapter that includes ~~strong protection of precisely and clearly defined areas of IPR, including~~ enhanced protection and recognition of European Geographical Indications (GIs), ~~and reflects a fair and efficient level of protection such as laid out in the EU's and the US's free trade agreement provisions in this area,~~ while continuing to confirm the existing flexibilities in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), notably in the area of public health;

*Comments:* As the Opinion states in the explanatory statement, the rejection of ACTA shows that the Parliament takes its role in trade agreements very seriously. The inclusion of such broad provisions in this paragraph risk harming our rights to culture and free expression. Previous proposals for international trade agreements, such as ACTA, which was rejected by the European Parliament in 2012, increased the privileges of certain economic operators at the expense of consumers and society in general. Provisions related to intellectual property rights should be discussed within democratic institutions, not rewritten in the course of a trade agreement, which is mainly focused on trade.

1. (d) (xvi)

to ensure that the IPR chapter does not include provisions on ~~criminal sanctions as a tool for enforcement~~ or **intermediary liability**, as having been previously rejected by Parliament;

*Comments:* According to the explanatory statement, it is clear that a new ACTA must be avoided. By referring to "penal enforcement" and adding "intermediary liability", this paragraph is fully in line with the explanatory statement. Furthermore, these adjustments comply with the wording used by the European Commission about not negotiating a new ACTA.

(new paragraph) **1. (d) (xvii)**

**to ensure that data protection cannot be negotiated as a non-tariff barrier in TTIP in order to respect Articles 7 and 8 of the Charter of Fundamental Rights of the European Union;**

*Comments:* We propose this amendment to reiterate the exclusion of data protection and privacy in the negotiating directives given by the Council of the European Union to the Commission, as underlined by many MEPs in several discussions. Data protection is already mentioned in 1 (b) regarding market access, but it should also be mentioned in point1 (d), "regarding the rules".

(new paragraph) **1. (d) (xviii)**

**to ensure that the inclusion of an enforceable, comprehensive and clear horizontal self-standing clause, taking Article XIV GATS as a basis, to fully exclude personal data protection from the agreement , without any condition that it must be consistent with other parts of TTIP;**

*Comments:* GATS Art XIV formulated long before the internet age and current data practices. While it represents a good template, it is not sufficient in TTIP on its own because, if challenged in the WTO, a country would have to pass the necessity test and in addition prove it is not an arbitrary and unjustifiable discrimination; there is limited case law on this issue. Furthermore, an additional exception for privacy protections is already present in the CETA agreement (Art X-03). A specific exception would eliminate the need for complex legal challenges and ensure clarity. It is also known that the US text specifically asks for provisions that run contrary to third-country transfer adequacy rules in the current data protection Directive.

(...)

1. (e) (ii) to continue ongoing efforts to increase transparency in the negotiations by making more negotiation proposals available to the general public; **demands that the European Commission puts further pressure on the United States to accept an adequate level of transparency.**

*Comments:* While welcoming the, albeit still limited, efforts of Commission with regard to transparency in TTIP, access to US documents does not enjoy even this level of transparency. The US side is still keeping its texts secret. This goes in line with paragraphs 19-21 of the European Ombudsman's Decision of 6 January 2015.

1. (e) (iii) to promote an even closer engagement with the Member States with the aim of forging their active involvement in better communicating the scope and the possible benefits of the agreement for European citizens and in order to ensure a broad, fact-based public debate on TTIP in Europe with the aim of ~~exploring~~ **resolving** the genuine concerns surrounding the agreement;

*Comments:* Concerns must be resolved, not just "explored".

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