



EDRI'S RED LINES ON TTIP

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ABOUT EDRI

European Digital Rights is a network of 34 privacy and civil rights organisations from across Europe.

In addition to monitoring the TTIP negotiations and providing analysis of available documents, EDRI, in collaboration with its members, will work to ensure these red lines are respected so as to protect citizens' digital rights.

EDRI'S RED LINES

- 01** Ensure real transparency
- 02** Protect the right to regulate
 - a. No ISDS
 - b. The right to regulate
- 03** Guarantee the rule of law
- 04** Include a Human Rights clause
- 05** IP out of TTIP
- 06** No rules on data protection
- 07** No lock-in of encryption standards
- 08** No provisions on net neutrality

INTRODUCTION

The Transatlantic Trade and Investment Partnership (TTIP) is an agreement which is currently being negotiated between the United States and the European Union.

The aim of the agreement is to guarantee a better protection for investors and their investments and to lower barriers on trade. These barriers are not only financial in nature, like tariffs and taxes, but also address technical barriers, such as different rules or standards. TTIP seeks to reduce these barriers and to prioritise protection for investors.

As companies often consider legislation protecting citizens' rights to be barriers to trade, TTIP risks threatening fundamental rights. This danger is increased by the non-transparent negotiations and the specific risk to digital rights manifests itself most clearly in clauses covering:

- 1) ISDS and regulatory cooperation,
- 2) copyright and other so-called "intellectual property rights", and
- 3) the right to privacy and data protection in telecommunications, e-commerce and cross-border trade in services.

This document defines the position of EDRI and its members on TTIP, both on the form and the substance of the negotiations.

As access to the content of the discussions is very limited, our red lines may be updated in the future, as more information becomes available.



01 ENSURE REAL TRANSPARENCY

Since the launch of the negotiations on the Transatlantic Trade and Investment Partnership in July 2013, the European Union and its US counterparts have conducted these talks behind closed doors. Prior to this launch, both sides agreed to keep the negotiated documents secret for up to 30 years, bypassing EU legislation on access to documents. Given the broad scope of the talks and their potential impact on all aspects of EU society, transparency is critical in order for this agreement to earn any legitimacy in the eyes of citizens.

The restricted access to documents prevents parliaments from openly discussing their content. It impedes public scrutiny, as citizens are left in the dark and obstructs democratic accountability, leaving civil society groups with no other option but to work on the basis of a few leaked documents.

It creates a catch-22 situation for both parliaments and citizens alike. Neither the public nor the politicians are able to supply adequate input during the negotiations. If it is only possible to truly analyse the text once the negotiations have ended, at which time any suggestions to amend the text will be close to useless, as the negotiations cannot (easily) be reopened.

The European Commission and the Member States represented in the Council of the European Union acknowledged the damage caused by conducting the negotiation process behind closed doors. However, they seem to put the emphasis on selling the concept to citizens, civil society organisations and other stakeholders as a means of addressing and attenuating criticism. This approach does not generate transparency. This is about democracy and not public relations. Transparency will only be achieved by opening the negotiations to the public – to the benefit of democracy, accountability and the development of trade itself.

EDRi demands real transparency not only in TTIP, but in all trade and investment agreements by:

- opening the negotiations to the public,
- publishing the negotiating mandates and negotiating texts,
- publishing all documents that were transferred to the US and to the EU,
- involving civil society groups meaningfully in the negotiating process, through meaningful, targeted dialogues,
- consultations and meetings with the negotiators.



02 PROTECT THE RIGHT TO REGULATE

Leaked TTIP documents have revealed several provisions that risk governments' competence to legislate in the public interest: ISDS and regulatory cooperation.

a. No ISDS

In June 2013, the European Commission received the negotiating directives for the TTIP. These specify that the inclusion of an Investor-State Dispute Settlement (ISDS) mechanism is conditional and not compulsory.

The European Union is currently considering including ISDS in TTIP. By enabling companies to sue governments if changes in legislation affect their (expected) profits, ISDS puts businesses at the same legal level as states and could provide a way for foreign companies to undermine, prevent, alter and circumvent EU legislation. Weak safeguards that are being proposed ignore both the personal and institutional vested interest of arbitration panels to interpret their powers as widely as possible, as well as the history of extreme, expansionist rulings by such panels.

As a result, the inclusion of the ISDS within the TTIP would impair democracy. Legislative decisions would not be based on the interest of the population of the country, but would be constrained by the power of foreign investors.

Any future legislation on data protection, software patents or other intellectual property rights, for example, could be challenged under ISDS in traditionally secretive, non-judicial tribunals that lack institutional independence and that enable corporations to avoid domestic courts. We call on the European Commission to take into consideration the huge number of responses received from citizens in the ISDS consultation that opposed bypassing European democracy and judicial systems.

ISDS must not be included in trade agreements.

ISDS should not only be excluded from TTIP, but from all trade and investment agreements, including the agreements with Canada and Singapore.



b. Regulatory cooperation

TTIP is much broader than a trade agreement on tariffs; it also aims to harmonise any planned or existing rules and standards between the EU and the US, putting at risk governments' right to regulate and reinforcing the already immense corporate lobbying influence on legislation. In the currently proposed chapter on regulatory cooperation, the EU and the US would agree to:

- Conduct periodic information sharing on planned legislation possibly impacting international trade;
- Develop regulatory dialogues to establish common regulatory goals; and
- Establish a "Regulatory Cooperation Council" meeting twice a year to identify key areas for harmonisation.

Trade would then be prioritised over governments' sovereign right to regulate and to take decisions. The EU would need to consult the US administration before initiating any changes of legislation that might potentially impact international trade. Such rules might also enable the US authorities to directly or indirectly impose enough pressure to prevent proposed legislation which conflicts with their interests, or to re-negotiate existing regulations.

This and any other restrictions on the right to regulate or that would undermine actions taken in the public interest must be excluded from the TTIP and from any other trade or investment agreement.



03 GUARANTEE THE RULE OF LAW

The Internet's success has contributed to the promotion, protection and enjoyment of fundamental rights online and offline. However, we are increasingly seeing governments pressuring private companies to actively interfere with, monitor or police online content, in order to achieve various political or public policy goals (e.g. the enforcement of "intellectual property rights"). These arbitrary restrictions imposed via "voluntary" arrangements between policy-makers and the internet industry undermine basic human rights principles and are illegal in the EU under Article 52 of the Charter of Fundamental Rights of the EU.

In recent years, EU and US governments were particularly involved in developing measures to encourage and/or coerce intermediaries not just to police online content, but even to impose sanctions, such as the unilateral suspension of services to online service providers that allegedly breaching copyright law for instance.

The imposition of sanctions by intermediaries, outside the rule of law, undermines the presumption of innocence, the right to due process of law, and, depending on the policing methods used, the right to privacy and freedom of communication and of assembly. As a result, the internet increasingly seems more like a weapon that undermines rights rather than a tool to foster them.

As most of the global online companies are American, there is an obvious temptation for the US administration to pursue a strategy of having US law or public policy priorities imposed globally and "voluntarily" by US companies. The proposals for the "[Stop Online Piracy Act](#)" (SOPA) and the "[Anti-Counterfeiting Trade Agreement](#)" (ACTA) are examples of (failed) attempts to police the web outside of the rule of law. No trade agreement should directly or indirectly subject EU citizens to non-judicial regulation by non-EU companies on the basis of non-EU law and foreign commercial interests.

Given the serious threat that this recent trend poses to the protection of human rights and the rule of law, any provisions leading to direct or indirect privatised enforcement measures must be excluded of the TTIP and of any trade or investment agreement concluded by the EU. This covers intermediary liability provisions or "safe harbour" provisions for ad hoc punitive measures imposed by internet intermediaries.



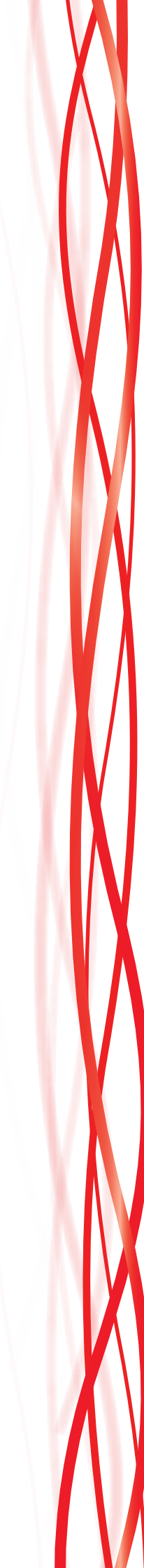
04 INCLUDE A HUMAN RIGHTS CLAUSE

International human rights standards articulate the rights of individuals and States' duties and obligations to protect them. However, the process of globalisation and other global developments over the past decades have increased the impact of business on human rights. On 16 June 2011, the UN Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights for implementing the [UN "Protect, Respect and Remedy" Framework](#), providing a global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity.

In the particular relationship between trade agreements and human rights, the EU has been a standard setter. Since the 1990s, the European Union has included human rights clauses in its international trade and cooperation agreements requiring signing parties to protect human rights and democratic principles.

Following this tradition, we strongly encourage the European Commission to include in the TTIP (as well as in other trade and investment agreements) a Human Rights clause including:

- Confirmation of states obligations under the [Universal Declaration of Human Rights](#) and other relevant international human rights instruments including, but not limited to, the [European Convention on Human Rights](#) and the [International Covenant on Civil and Political Rights](#).
- Assurance that state parties will interpret the provisions in the agreement in accordance with international human rights law.
- Assurance that none of the obligations arising from the agreement will have the effect of modifying the obligations to respect, protect, and fulfil fundamental rights in the EU.
- An exception permitting parties to suspend their obligations arising from the agreement if there are grounds to believe that it will result in a breach of fundamental rights.
- A mechanism putting forward periodic human rights impact assessments to be conducted jointly by a designated committee of the US Congress and the European Parliament.
- A mechanism to bring complaints in front of national courts in order to initiate an investigation by the designated authority into human rights disputes arising under the agreement.

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- Procedures to ensure that citizens and businesses have equality before the law.
 - Assurance that the Parties to the agreement will not in any way whatsoever relatively privilege their own citizens, or otherwise discriminate against non-citizens, merely according to their citizenship status in any matter affected by this agreement, concerning public order, national security, crime or grounds of important public interest; such as internationally recognised labour standards, environment, public health or food safety standards.
 - An accessible mechanism to impose sanctions when fundamental rights and standards are abused and dialogue or mediation have been exhausted.

Fundamental rights of EU citizens cannot be subject to trade. Trade is negotiable. Fundamental rights are not. Nothing in the TTIP or in other trade and investment agreements shall prejudice the rights and freedoms embedded in the Charter of Fundamental Rights of the EU.



05

IP OUT OF TTIP

Before the starting of the TTIP negotiations, civil society groups produced a [joint declaration](#) calling for “intellectual property rights” to be excluded from TTIP. We reiterate this demand and insist that the TTIP exclude any provisions related to patents, copyright or other forms of the so-called “intellectual property.” As EU Member States and the EU have not decided whether a comprehensive harmonisation of IP is desirable and if so, what the substance should be, any form of harmonisation between the EU and the US on IP should be prevented. Such provisions could harm our rights to culture and free expression and otherwise affect our daily lives.

Past international trade agreements have significantly increased the privileges of multinational corporations at the expense of society in general. Provisions in these agreements can, among many other concerns, limit free expression and constrain access to educational materials, such as textbooks or academic journals.

To ensure that citizens’ interests are upheld, rules on intellectual property must be debated and adopted within democratic institutions and not be rewritten in the course of the TTIP negotiations, in the absence of democratic scrutiny.

“Intellectual property” rules must therefore be excluded of the TTIP.



NO RULES ON DATA PROTECTION IN TTIP

The US Administration has put forward a proposal for a chapter on e-commerce, with a general proposal on data flows, to be included in the TTIP. While privacy has been excluded from the negotiating mandate, the inclusion of “data flows” necessarily draws privacy and data protection into the discussions.

Data protection and privacy are fundamental rights recognised under the [EU Charter of Fundamental Rights](#). Trade negotiations are neither a forum to discuss measures for the protection of privacy nor a place where to establish new standards.

Discussions on standards of data protection should be kept separate and only included in agreement(s) devoted exclusively to transfers of personal data, negotiated by experts in that policy area. TTIP must not include provisions which would create architecture for data flows between the EU and US. No provisions on data protection should be included in this deal and any lock-in of existing data transfer agreements should be prevented.

Human rights must not be addressed as a barrier to trade and the question of whether a regulation concerning human rights is ‘reasonable’ or ‘acceptable’ must not be addressed by means of dispute settlement or regulatory cooperation.



NO LOCK-IN OF ENCRYPTION STANDARDS

While encryption is of paramount importance to ensure the security of personal and sensitive data as well as sensitive infrastructure, any lock-in of a particular standard might create vulnerabilities, putting at risk critical information of both businesses and citizens.

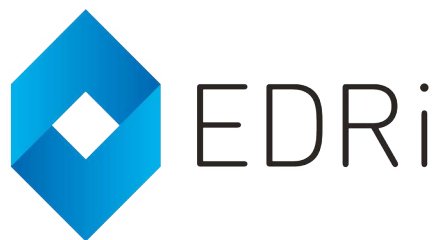
In order to ensure the constant update and improvement of high standards for encryption to the benefit of the rights to privacy and data protection, TTIP should not include any lock-in of encryption standards in the TTIP.



NO PROVISIONS ON NET NEUTRALITY

At the time of writing, neither the United States nor the European Union have adopted a clear position on net neutrality. Any provision in a trade agreement that would create a lock-in for the future reform of the Telecommunications package should be excluded from the TTIP and from any trade or investment agreement.

Trade agreements are not the place to discuss net neutrality, especially when reforms are taking place in both the US and the EU.



PROTECTING DIGITAL FREEDOM

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