

# Transatlantic Trade and Investment Partnership (TTIP)

August 2016

EASPD is the European Association of Service Providers for Persons with Disabilities. We are a European not-for-profit organisation and represent over 12,000 social service provider organisations across Europe and disability. The main objective of EASPD is to promote equal opportunities for people with disabilities through effective and high-quality service systems.

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The following briefing presents the Transatlantic Trade and Investment Partnership (TTIP) in its current level of negotiations in August 2014. The briefing also presents our position on the matter, as well as what our members and partners can do to try and influence its process.

The briefing is structured as follows:

- Key points
- What is the Transatlantic Trade and Investment Partnership?
- What are the key issues for our sector? Arguments for/against
- What is EASPD's stance?
- What can you do?

## Key points

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- EASPD is in favour of further cooperation between the EU and the US, but only if it is in the interest of the people on both sides of the Atlantic, including people with disabilities and those most vulnerable.
- EASPD believes that the threats the TTIP could enact on our sector and Europe's social economy far outweigh any potential benefits it may bring.
- Public Services, both commercial and non-commercial, and in particular for social and health services, must be withdrawn from the negotiations. This is particularly the case with regard to public procurement. A failure to do so will have a negative effect on the quality of social services, which will have an important impact on enabling persons with disabilities and vulnerable groups to be fully included in society.
- The Investor-to-State Dispute Settlement (ISDS) mechanism must be withdrawn from the negotiations. There is no need for such systems when already well-established legal systems are already in place.

- The lack of transparency and involvement of organisations of public interest in the negotiations is a huge problem in terms of democratic legitimacy. The confidentiality argument does by no means excuse the lack of involvement of civil society in the negotiations, especially when the Trade sector is so heavily involved in the discussions.
- For these reasons, and if no significant changes are made in these areas, EASPD will call for national and European Parliament(s) to reject the proposed TTIP deal.
- As the EU is also currently negotiating other free trade agreements (CETA, TISA), EASPD calls for the EU to withdraw both Public Services and the ISDS from these negotiations, as well as to further involve civil society and the disability sector into the discussions. If this would not be the case, EASPD will also call the European Parliament to reject the proposed agreements.

## I. What is the Transatlantic Trade and Investment Partnership?

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TTIP is a **trade agreement** that is currently being negotiated between the **European Union (EU)** and the **United States of America (USA)**. It aims at **removing trade barriers** in a broad range of sectors to facilitate the trade of goods and services between the two partners.

In addition to the usual **cutting of tariffs** across all sectors as is the case in most Trade Agreements, the EU and the USA aim **at removing non-tariff barriers**, which include differences in areas such as technical regulations, quality standards and approval procedures.

The negotiations aim at defining the extent to which these differences should be aligned on a sector by sector approach. They will also be looking at how to best **open up markets for services, investment and public procurement**. Indeed, TTIP is a different type of trade agreement due its focus on regulation and investor protection rather than simply on tariff barriers to trade.

On the EU's side, Member States have endorsed the European Commission to negotiate on behalf of the EU.

In more concrete terms, the negotiators will discuss how to achieve the following objectives:

- **Mutual recognition of regulations** in areas such as manufacturing, chemicals and pharmaceuticals, food and environmental standards.
- **Open markets in the services sector**, including public services, to delivery from private companies.
- Introduce investment protection provisions such as the **Investor-to-State Dispute Settlement (ISDS)** mechanisms –via private courts- which allow multinational corporate investors to challenge actions which they perceive to be threatening to their investment.
- **Open up access to public procurement** markets and **eliminate preferential treatment** to local suppliers.
- **Remove the last remaining tariffs on goods** traded between the EU and the US.

Currently, the European Union is also negotiating two other key free trade agreements, the Comprehensive Economic and Trade Agreement (CETA) and the Trade in Services Agreement (TISA). CETA has been seen as a test run ahead of the TTIP negotiations, in particular with regard to the role played by the ISDS system<sup>1</sup>.

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<sup>1</sup> <http://euobserver.com/news/125270>

## II. What are the key issues for our sector? Arguments for/against

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. The following chapter presents 5 areas of TTIP of key concern to EASPD.

### 1. ECONOMIC BENEFIT OF THE TRADE AGREEMENT

#### Arguments for the Important Economic Benefit TTIP will Entail

- The main argument used by the EC to justify TTIP is the expected economic growth for the EU. Indeed, independent research shows that the agreement could provide **huge economic gains** both for the EU (119 billion EUR / year) and the US (95 billion EUR /year). Indeed, the negotiations were to achieve greater regulatory compatibility between the EU and the US, it is expected that every year an average European household would gain an additional 545 EUR and the EU economy boosted by 0,5% to up to 1% of GDP, once fully implemented<sup>2</sup>.

#### Arguments against the Claimed Economic Benefit TTIP will Entail

- However, liable estimations of GDP growth are **very difficult** to make, if not **unrealistic**. Indeed, one can wonder how realistic such projections can be when governments continuously fail to correctly predict the economy one or two years ahead.
- The Commission's independent research was done by the Centre for Economic Policy Research (CEPR), **an organisation funded by a long list of central banks, large transnational banks and corporations**. As such, it can hardly be argued that the research was "independent".
- Furthermore, many **research institutions are very critical** of the methodology used in the research and the claimed economic benefits, including the Austrian Foundation for Development Research<sup>3</sup>, the Austrian Federal Chamber of Labour<sup>4</sup>, the London School of Economics (in a study commissioned by the UK Department of Business Innovation and Skills)<sup>5</sup>, the UN Conference on Trade and Development<sup>6</sup>.
- The "independent research" does not take into account factors such as the **costs of unemployment** (which the CEPR study admits will occur), the **costs of ISDS/ICS cases** when governments lose cases or settle out of court and have to pay public money to corporations that have used ISDS/ICS against a public policy, etc<sup>7</sup>.
- All this goes to show that it would be a mistake to consider the economic benefits, as presented by the EC and most proponents of TTIP as fact, and therefore is not a particularly convincing argument when one takes into account the negative sides to the deal, such as the costs of ISDS/ICS cases, the effect on the privatisation of public services or the damages it would do to Europe's social economy.

### 2. TRANSPARENCY AND INPUT FROM CIVIL SOCIETY

#### Arguments for Confidentiality:

- The European Commission (EC) argues that a **certain degree of confidentiality is necessary** in any trade negotiations. Indeed, they argue that if there were to be no confidentiality,

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<sup>2</sup> <http://trade.ec.europa.eu/doclib/press/index.cfm?id=918>

<sup>3</sup> [http://guengl.eu/uploads/plenary-focus-pdf/ASSESS\\_TTIP.pdf](http://guengl.eu/uploads/plenary-focus-pdf/ASSESS_TTIP.pdf)

<sup>4</sup> [http://www.akeuropa.eu/en/publication-full.html?doc\\_id=325&vID=43](http://www.akeuropa.eu/en/publication-full.html?doc_id=325&vID=43)

<sup>5</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/260380/bis-13-1284-costs-and-benefits-of-an-eu-usa-investment-protection-treaty.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260380/bis-13-1284-costs-and-benefits-of-an-eu-usa-investment-protection-treaty.pdf)

<sup>6</sup> [http://unctad.org/en/docs/itcdtab39\\_en.pdf](http://unctad.org/en/docs/itcdtab39_en.pdf)

<sup>7</sup> <http://stopttip.net/trade-background/busting-the-economic-arguments/>

negotiations would be held like a card game where you would show the other player(s) your own cards.

- The EC argues that TTIP negotiations are **more transparent and more open for stakeholder involvement** which is usually the case in such trade agreements. The EC indeed took the unprecedented step of publishing important documents at the start of the negotiations and invited stakeholders to submit their views.<sup>8</sup>
- Throughout the negotiations, the EC is keeping the EU Member States in the Council and the European Parliament (EP) regularly informed of all key developments. In the end, once the negotiators have come up with an agreement, it will be the Council, together with the EP, which will examine and approve or reject the final agreement, and as such provide it with the necessary **democratic legitimacy**.

#### **Arguments against the Lack of Transparency and Input from Civil Society:**

- Although the outcome of the negotiations will have an effect on virtually every facet of our daily life, very little information about the real content of the negotiations have been made available to the public. Indeed, **citizens are being excluded** and public interest organisations are barely – if at all – represented at the negotiating tables<sup>9</sup>. The general public should have the right to be informed about negotiations which are being done on their behalf, as a matter of principle. This is especially the case for the disability and vulnerable groups sectors due to the changes TTIP would have on the social and health services sector.
- Another key concern is the **lack of input from Civil Society and Public Interest Organisations into the negotiations**, whereas the **Trade Sector is very heavily involved**. Indeed, following access-to-document requests from Friends of the Earth Europe and the Corporate Europe Observatory (CEO), the EC published two reports which revealed the extent at which corporations have been able to lobby the Commission and dominate stakeholder input. According to the documents accessed by CEO, of the 560 lobby encounters that DG Trade held to prepare the negotiations, **520 (92%) were with business lobbyists**, while only **26 (4%) were with public interest groups**. As such, whereas the general public has not been sufficiently included in the discussions, the corporate sector has been a strong player all along the process. In discussions of such importance to the day to day life of European citizens, it is of absolute importance that the input of public interest organisations are further taken into account and take part in the negotiations process. This is currently not the case.

### **3. THE PROTECTION OF FOREIGN INVESTORS THROUGH ISDS**

#### **Arguments for the Investor-to-State Dispute Settlement (ISDS) / Investment Court System (ICS)**

- The Corporate Sector and the TTIP negotiators, currently argue that **companies will not invest unless they are adequately protected** through a neutral, comprehensive, state of the art ISDS mechanism. ISDS is an instrument which grants a foreign investor the right to initiate dispute settlement proceedings against a foreign government based on what they believe to be “expropriation” or, in other words, threats to their investment. Proponents of this mechanism believe that the mechanism protect the investors’ rights and enables to launch legal action on “neutral ground” and without politically sensitive considerations if a state breeches the rules established in the trade agreement. Proponents also argue that the ISDS cannot overturn public policies; it can only be used to allocate compensation for damages to parties whose rights under the trade agreement have been violated. The new EU proposal for an Investment Court System unlike the previous ISDS, establishes that ICS judges would not be allowed to act as advocates

<sup>8</sup> [http://europa.eu/rapid/press-release\\_EO-14-1\\_en.htm](http://europa.eu/rapid/press-release_EO-14-1_en.htm)

<sup>9</sup> <http://www.euractiv.com/sections/trade-industry/backroom-talks-dangerous-ttip-agreement-must-end-303520>

for companies in other cases, in order to avoid conflict of interest<sup>10</sup>. Another change regards companies which can choose whether to use the domestic law system or the new ICS<sup>11</sup>. The ICS introduces also an appeal system, involving the creation of a new appellate body consisting of six judges<sup>12</sup>. Moreover, the ability of investors to take a case before the Tribunal would be precisely defined and limited to cases such as targeted discrimination on the base of gender, race or religion, or nationality, expropriation without compensation, or denial of justice<sup>13</sup>.

### Arguments against the Investor-to-State Dispute Settlement (ISDS) / Investment Court System (ICS)

- In the past, **ISDS has been used by private investors to sue –or as a threat to sue- whatever government regulation may be doing in the interest of the general public**. Indeed, as an example, ISDS was once used against the Slovakian authorities when it sought to bring health insurance back into the public sector or when the Egyptian government was trying to increase the minimum wage<sup>14</sup>. The EC and proponents argue that the ISDS as well as the proposed ICS cannot limit a country's right to regulate as they would always have the "option of paying compensation instead"<sup>15</sup>. However, if a country decides to pass a new law or regulation in the public interest, it is likely that taxpayers' money could be paid to corporations, including for future lost profits that they hypothetically could have earned. This is what happened in a case against Libya which was ordered to pay US\$ 905 million to a company which had only invested US\$ 5 million<sup>16</sup>. Thus, having to pay (several billions of dollars worth of<sup>17</sup>) compensation to a private investor when passing some forms of legislation will intrinsically **limit the willingness of governments to pass such legislation** in the first place, even if it addresses important public concerns and enjoys democratic legitimacy. Another possible effect is the curtailing of desirable policymaking. There is already evidence that proposed environmental and health protections have been abandoned, delayed or otherwise adapted to corporate wishes because of expensive claims or the threat of litigation<sup>18</sup>. UNCTAD's recently updated online data shows that foreign investors launched more ISDS cases in 2015 than in any prior year – twice the number launched just five years earlier. 52% of concluded ISDS cases have ended in an outright loss for the government or a settlement with the foreign investor<sup>19</sup>.
- Through the ISDS system, claims are often dealt with via "**secret and unaccountable arbitration tribunals**"<sup>20</sup>, thus **bypassing the effective national court system** already in place. Originally, ISDS was put in place to support businesses investing in countries where the rule of law is not predictable. However, it is clear that this is not the case in both the EU and the US, two areas of the world with the most developed and stable democracies in the world. This is the argument used by the **Australian government for refusing the ISDS system** in a trade agreement with the US in 2005 stating that their own existing legal system was robust enough to resolve problems. The exact same reasoning could and, indeed, should be said by the EU. However, the EU proposal for the new Investment Court System is still too ambiguous as it establishes that investors can choose between the ICS or domestic courts<sup>21</sup>. As a result, companies would not have to use domestic courts –well-established in the US and EU- and they can choose the

<sup>10</sup> CBA/ABC National, **ISDS: What's in a name?**, Septembre 2015 <http://www.nationalmagazine.ca/Blog/September-2015/ISDS-What-s-in-a-name.aspx?lang=FR>

<sup>11</sup> *Ibidem*

<sup>12</sup> *Ibidem*

<sup>13</sup> **Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations**, 16 September 2015, [http://europa.eu/rapid/press-release\\_IP-15-5651\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5651_en.htm)

<sup>14</sup> <https://www.unison.org.uk/upload/sharepoint/On%20line%20Catalogue/22410.pdf>

<sup>15</sup> [http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc\\_151791.pdf](http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151791.pdf)

<sup>16</sup> The zombie ISDS, rebranded as ICS, rights for corporations to sue states refuse to die, executive summary, March 2016, p. 2 [corporateeurope.org/sites/default/files/attachments/zombie-isds-ex-sum-en\\_0.pdf](http://corporateeurope.org/sites/default/files/attachments/zombie-isds-ex-sum-en_0.pdf)

<sup>17</sup> <http://corporateeurope.org/international-trade/2014/04/still-not-loving-isds-10-reasons-oppose-investors-super-rights-eu-trade>

<sup>18</sup> The zombie ISDS, rebranded as ICS, cit., p. 2

<sup>19</sup> Statement against Investor protection in TTIP, CETA and other trade deals. February 2016, p. 2 [corporateeurope.org/sites/default/files/attachments/s2b\\_statement\\_isds\\_ics\\_engl.pdf](http://corporateeurope.org/sites/default/files/attachments/s2b_statement_isds_ics_engl.pdf)

<sup>21</sup> CBA/ABC National, **ISDS: What's in a name?**, cit.

Investment Court System instead. **Summing up, both ISDS and ICS undermine the European and national jurisdictions as foreign investors can by-pass them, ignoring the fact that European, US and Canadian legal systems are capable of handling disputes with foreign investors, based on the law that applies to everyone else in society<sup>22</sup>.**

#### 4. PUBLIC SERVICES ARE PROTECTED

##### Arguments for the Three Guarantees Protecting Public Services in the Negotiations

- The EC argues that Public Services are protected in the deal through **three important guarantees** – on regulation, monopolies and so-called “national treatment”<sup>23</sup>. These three guarantees – they argue- ensure that EU governments remain entirely free to manage public services as they wish. Proponents also argue that TTIP will not force for the privatisation of public services and neither will it prevent returning such services to public service providers.

##### Arguments against the Claim that Public Services are Protected in the Negotiations

- In the international trade arena, “**Public Services**” are usually defined as “only services supplied in the exercise of government authority” and only on a “**non-commercial basis and not in competition with other suppliers**”<sup>24</sup>. Only these services are exempt from trade liberalization. As many elements of public services in Europe are now **open to commercialization, including social and health services**, it is clear that **the latter services are not considered as Public Services in International Trade and thus do not seem to be exempt from the current negotiations.**
- The two main horizontal provisions meant to protect public service regulations, the governmental authority clause and the public utilities clause, are largely insufficient because they do not exempt core regulations governing the provision of health and social services from the treaty rules. **As competition between suppliers is an almost ubiquitous characteristic of the health and social sectors in the EU, this clause does not have much bearing on the economic realities in these sectors<sup>25</sup>.**
- Furthermore, the argument that TTIP will play no role in the privatisation of public services, nor prevent returning such services to public service providers is **not entirely correct**. Indeed, any government aiming to do the latter –following prior privatisation- would lay themselves open to expropriation litigation under the ISDS mechanism the TTIP will set up. **The threat of having to pay a significant amount of compensation to private investors will certainly curtail any willingness the government have in doing this policy reform, even if it were to be in the interest of the general good. The trade accords incorporate a logic of permanent cross-border liberalisation enabling increasingly higher levels of commitments even after their entering into force. They are “living agreements” pushing trade rules ever deeper into the realm of public health and social services<sup>26</sup>.**

#### OPENING ACCESS TO PUBLIC PROCUREMENT

##### Arguments for Opening Access to Public Procurement:

<sup>22</sup> Statement against Investor protection in TTIP, CETA and other trade deals. February 2016, p. 1  
[corporateeurope.org/sites/default/files/attachments/s2b\\_statement\\_isds\\_ics\\_engl.pdf](http://corporateeurope.org/sites/default/files/attachments/s2b_statement_isds_ics_engl.pdf)

<sup>23</sup> <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1115>

<sup>24</sup> <http://www.ciel.org/Publications/PublicServicesScope.pdf>

<sup>25</sup> CETA and TTIP potential impact on health and social services, executive summary, 2016, p.4,  
[http://www.epsu.org/sites/default/files/article/files/Health-social-Services%20in%20CETA-TTIP%20Executive%20summary\\_2016.04\\_EN.pdf](http://www.epsu.org/sites/default/files/article/files/Health-social-Services%20in%20CETA-TTIP%20Executive%20summary_2016.04_EN.pdf)

<sup>26</sup> CETA and TTIP potential impact on health and social services, executive summary, 2016, p.3,  
[http://www.epsu.org/sites/default/files/article/files/Health-social-Services%20in%20CETA-TTIP%20Executive%20summary\\_2016.04\\_EN.pdf](http://www.epsu.org/sites/default/files/article/files/Health-social-Services%20in%20CETA-TTIP%20Executive%20summary_2016.04_EN.pdf)

- The EC and proponents also claim that **TTIP will eliminate existing discrimination between domestic and foreign companies** in areas that are already open to participation of private enterprises (including as previously mentioned the social and health services sector). This means that EU and US companies will have equal access to all projects that fall under the rules of public procurement<sup>27</sup>. They claim that removing the current barriers will allow EU companies to achieve their full potential by allowing them access to the US procurement market, and vice versa. Indeed, public tenders often currently include “local” clauses that give preference to domestic companies. Proponents argue that TTIP offers the unique opportunity to **address restrictions, simplify non-transparent rules and procedures and improve access to markets**<sup>28</sup>. BusinessEurope, an important Business lobby in Europe, argues that this will lead to a **more rational and efficient use of public resources** also allowing for a wider choice of goods and services<sup>29</sup>.

#### Arguments against Opening Access to Public Procurement:

- Opening access to bidding for social and health services will be **hugely damaging to Europe’s growing social economy and social system** as a whole. Indeed, when public procurement bidding is opened transnationally, **big corporations usually end up winning the contracts**; in most part due to political influence, economies of scale and access to credit and cheap labour. This is very noticeable when you can see how Veolia and G4S are winning contracts globally for public services such as waste management and security<sup>30</sup>. Public Authorities will no longer be able to apply discriminatory elements in favour of locally-based suppliers **motivated not just by profit** (as is the case for big corporations like Veolia and G4S), **but by a desire to achieve social or environmental benefits** (as is the case for Europe’s social economy). This would also potentially damage the transition to community-based services as, according to recent research<sup>31</sup>, smaller organisations already implanted in the local community have proved to be more suitable in providing personalised services, than large multinational corporations do. As such, opening up access to public procurement would be a **significant blow to the thriving social economy** in Europe and the transition towards quality community based services. If the EC is serious when it claims that it has placed the social economy (...) at the heart of its concerns, as stated in the Social Business Initiative<sup>32</sup>, then it must not open up access to public procurement in the sectors involved in the social economy.

### III. What is EASPD’s position on TTIP?

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EASPD believes that the TTIP in its current proposed form **brings far more threats** to our sector and the well-being of Europe’s social sector **than potential benefits**. In order to safeguard Europe’s social economy, **EASPD recommends the negotiators to**

- **Exclude all public services**, and in particular social and health services from the negotiations; in particular with regard to public procurement. This should be done through a positive list approach in order to ensure that only services explicitly stated in the agreement can be liberalised.

<sup>27</sup> <http://www.businesseurope.eu/Content/Default.asp?PageID=867#QA17>

<sup>28</sup> <http://www.businesseurope.eu/Content/default.asp?pageid=568&docid=32927>

<sup>29</sup> <http://www.businesseurope.eu/Content/Default.asp?PageID=867#Blog-043>

<sup>30</sup> <http://www.ethicalconsumer.org/commentanalysis/ethicaleconomics/ttipandprivatisation.aspx>

<sup>31</sup> Kathleen Hulgin (2004): Person-Centered Services and Organisational Context: Stock of Working Conditions and their Impact.

<sup>32</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0682:FIN:EN:PDF>

- **Remove the ISDS mechanism** from the negotiations. Such a system has no place in a trade deal between the EU and the US, two areas of the world with well-established legal systems and an already effective level of protection for foreign investors.
- Put in place a **structured partnership** between public interest organisations and negotiators in order to improve both transparency and input of civil society into the discussions.

If all three of these recommendations are not taken into account by the negotiators, **EASPD will call for the European Parliament and the European Council to reject the proposed TTIP deal**, when proposed by the European Commission.

As mentioned previously, the EU is also currently in negotiations in two other key free trade deals: notably, CETA and TiSA. If the end-result of these negotiations also includes the social and health services sector, as well as the ISDS system, EASPD will call on national and European authorities to reject these trade deals. It is also clear to EASPD that any trade negotiations must always include civil society in the discussions.

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