

June 12<sup>th</sup> 2016**TTIP: Legality, Legitimacy and the Media: Demystifying the treaty****INTRODUCTION**

The TTIP negotiation is one of the most controversial topics in the field of transparency at the EU level. The increasing saliency of the forthcoming treaty (if the negotiations succeed) is an opportunity to raise public awareness on such a key aspect of international trade and global regulation. However, because of the high amount of sometimes contradictory information on the subject, many questions are still left unanswered while the legitimacy of the Commission to handle the negotiation process is challenged.

This paper thus provides a critical assessment of the current TTIP negotiations in the light of its legal aspects, the legitimacy of the Commission and the role of the media in the treatment of the information.

This three-step analysis offers a global overview of the main concerns without falling into the downsides of the current public debate filled with myths and irrational fears.

**1) THE LEGAL CONTEXT OF the TTIP: follow-up of the right to access documents*****Transparency and international negotiations***

*“In the context of international negotiations, the positions taken by the European Union are, by definition, subject to change depending on the course of those negotiations, and on concessions and compromises made in that context by the various stakeholders. As has already been noted, the formulation of negotiating positions may involve a number of tactical considerations of the negotiators, including the European Union itself 1/4 it is*

*possible that the disclosure by the European Union, to the public, of its own negotiating positions, even though the negotiating positions of the other parties remain secret, could, in practice, have a negative effect on the negotiating position of the European Union”<sup>1</sup>.*

This statement of the General Court in the in ‘*T Veld*’ case law in 2013 clearly explains the complexity that surround the topic of transparency in international negotiations.

Nowadays, International Treaty negotiation is included in the Commission’s competence under the supervision of the Council. Regarding external relations competences, the Lisbon treaty provided clarification and gave express power to the EU to conclude FTAs on its own name.

More than an agreement, TTIP would be the biggest trade deal in the world. For this reason but not only, the TTIP is the most criticised deal in the history of the European Union. In fact, the TTIP content is especially critical and sensitive considering that its clauses would have impact far beyond trade matters. The regulatory cooperation aspects as well as the implementation of an arbitration system could affect the sovereignty of member states in a negative way.

Moreover, a multiplicity of actors are participating or influencing the negotiation process. Most of the influent EU firms increased their lobbying since the beginning of the negotiations and the civil society took also position on many points. Taking into consideration the importance of the TTIP for many issues and its potential impact on civil society, the public opinion gradually increased

<sup>1</sup> ECJ, 19 of march 2013, *Sophie in 't Veld v. European Commission*, T- 301/10, para. 125.

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its interest in those negotiations and demanded more information. As a result of this pressure, the European Institutions tried to answer this new need for transparency.

## *EU response to a need of public information*

As a result 2014 the Commission decided to publish its “negotiation mandate”: the “directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America”<sup>2</sup>.

However, this publication did not seem sufficient for many NGOs, who questioned whether this progress was a real step toward more transparency or if it was just a parody of democracy.

Beyond the specific issue regarding the legitimacy of the Commission, international negotiations have always been made of compromises and poker strikes. The US still does not provide for transparency on its side of the negotiation process, which creates a problem of balance between negotiators at international level. In a world where information is power, the EU having to share data for transparency purposes without the other side doing the same weakens its bargaining power. On the other side, the EU structure, according to the principles of openness and transparency contained in the Lisbon Treaty, obliges the Commission to publish enough internal documents so as to allow democratic scrutiny.

The first tool used by the Commission in that regards is the Transparency register, adopted in 2011. Interest groups willing to participate in the decision making process, by meeting

officials, are expected to sign up a public register. However, even if the Transparency Register provides a code of good administration, the fact that registration is not mandatory for all interest groups makes it questionably efficient for transparency purposes.

The second tool is public information, as the Commission is giving increasing access to its internal documents. This is supposed to allow more transparency regarding the decision making process, and therefore tackle legitimate corruption concerns.

Indeed, the possibility for citizens to find out the considerations underpinning legislative action is “a precondition for the effective exercise of their democratic rights”<sup>3</sup>. The right to access documents “guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system”<sup>4</sup>.

The main problem is not represented by the recognition of this right, but by the identification of the balance between access to document regarding future TTIP’s provisions and their practical consequences on the negotiation’s margins of the Commission.

This fundamental right is implemented by the regulation 1049/2001<sup>5</sup> regarding public access to European Parliament, Council and Commission documents. The regulation provides that: “*In principle, all documents of the institutions should be accessible to the public. However, certain public and private interests should be protected by way of exceptions. The institutions should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks*”<sup>6</sup>.

<sup>2</sup> Conseil de l’Union européenne, negotiation mandate to the Commission for the TTIP, <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf>

<sup>3</sup> ECJ, 17 October 2013, *Council v Access Info Europe*, C-280/11 P

<sup>4</sup> ECJ, 18 December 2007, *Kingdom of Sweden v Commission*, C-64/05, para. 54

<sup>5</sup> Regulation 1049/2001 of 30 may 2001, JOEU L 145/43

<sup>6</sup> Recital 11 of the Regulation 1049/2001 of 30 may 2001, JOEU L 145/43

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Indeed, according to this regulation, the access to the document is not an absolute right. European Institutions are allowed to refuse access to a document if it goes against the public interest. Public interest is then defined in a number of situations, including the course of “*international relations*”. The interpretation of such exception and the balance between different conflicting public interests is therefore fundamental in order to know the limits of the right.

As a result, the main topic of the cases brought before the Court of Justice precisely regards the interpretation of the exceptions listed in article 4 of the regulation.

The “sensitivity” of a document is not necessarily linked with its nature, or its content. Those exceptions may sometimes require a careful analysis. Moreover, we may notice that those exceptions have an equivalent at national level.

The ECJ played a crucial role on this topic, despite the Council and Commission common hostility towards an open interpretation of the Regulation<sup>7</sup>. Several of the international negotiations lead by the Commission have been subject to document access demands before the Court. The main arguments brought by the parties were about the climate of confidence during this negotiation process on one side and the need of public debate on the other<sup>8</sup>. Both are valid arguments in the light of public interest. The climate of trust between negotiating partners, necessary to reach a comprehensive agreement, would be negatively affected by the one sided publishing of key information. On the other side, the potential impact of the final

agreement on citizen’s life creates a right to an informed public debate.

In some cases the Court asked the institution to establish a risk of a “*subsisting and specific injury*”<sup>9</sup>. But it considered that “*unilateral disclosure by one negotiating party of the negotiating position of one or more other parties, even if this appears anonymous at first sight, may be likely to seriously undermine, for the negotiating party whose position is made public and, moreover, for the other negotiating parties who are witnesses to that disclosure, the mutual trust essential to the effectiveness of those negotiations*”<sup>10</sup>. It adopted a rigid interpretation and recognised that a “legitimate interest in not revealing strategic elements of the negotiations”<sup>11</sup>. That interpretation takes into account the type of document<sup>12</sup>, the institution’s discretion, as well as the context of the disclosure of document<sup>13</sup>.

## Conclusion

The need of clarity here seems to be related to a larger context: on one hand, since the Lisbon Treaty clarified the EU competences at international level, the Commission benefits of a clear legal basis to negotiate Free Trade agreements, on the other hand, there is a need of legitimacy of EU institutions actions and an increasing of demand of access to documents.

Regarding the TTIP, the Commission went further in transparency with than with any other negotiation. It eventually published its mandate, and several information regarding the course of the negotiation. That can be explained by the pressure of public opinion, and it is a good step forward for institutional transparency.

<sup>7</sup>European Parliament, DG for internal policies: Openness, transparency and access to documents and information in the EU (PE 493.035), 2013

<sup>8</sup> Eg.: GC, 12 September 2013, Bresselink, T-331/11 about CEHR, and C- 399/13 P about EU-India treaty

<sup>9</sup> ECJ, 3 of July 2014, *Council of the European Union v Sophie in 't Veld*, C- 350/12 P

<sup>10</sup> ECJ, 3 of July 2014, *Council of the European Union v Sophie in 't Veld*, C- 350/12 P

<sup>11</sup> Ibid, para 86

<sup>12</sup> It can be a legal advice, a position paper, but also an exchange of letters or mails between the actor of the negotiations, or between institution bodies and private actors. In the case C- 399/13 P, the document access demand concerned a letter (hand written) between EU official and Business Europe representative

<sup>13</sup> Here the question is: at which stage of the negotiations is the document demanded?

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The question remains whether further publications are necessary in order to improve the balance between an effective protection of the right to access document and the efficiency of an international negotiation. In that regard, the Court of Justice still has to play an important role. In its case by case analysis, the Court should further define the criteria it identified, in order to limit the marge of discretion of the EU Institutions. That might solve the other problem of the Commission, which relates to public perception. Indeed, because the legitimacy of the Commission is currently challenged, anything less than full transparency will be considered suspicious, even if it means jeopardizing its efficiency during difficult negotiations.

## 2) LEGITIMACY IN THE TTIP NEGOTIATIONS

Regardless of the concrete level of transparency reached by the Commission, it is undeniable that its legitimacy itself is put in question when it comes to the TTIP. Because of this supposed lack of legitimacy, transparency is seen as the only way prevent abuse of power.

### *The Commission legal legitimacy to negotiate the TTIP*

Before the Lisbon treaty, “EU trade policy did not appear very legitimate since it was carried out by unelected Commission officials, with almost no input from national legislatures and opaque procedures”<sup>14</sup>. The treaty revisions in Amsterdam (1997) and Nice (2000) fixed some issues and broadened the scope of the Commission's power regarding trade, and the Lisbon treaty completed the EU's powers with full competence in the services and intellectual property rights fields. As a result of those treaties, the European Commission became legally legitimate to sign international

agreements regarding trade (FTAs).

After the negotiations, the final agreement is controlled by all other major institutions. The vote of the Council is necessary, and since the Lisbon treaty, so is the one of the European Parliament (EP). The Court of Justice is also overseeing the scope of the agreement.

If its opinion is adverse, the agreement has to be revised before it can enter into force. On that question, the Court's approach “has been one of legal pragmatism”<sup>15</sup>. The court only asks that the agreement is “clear, precise, unconditional and must confer rights that are defensible before a court of law”<sup>16</sup>.

Finally, in the case of a “mixed treaty”, national parliament may also be consulted, but there is an ongoing debate about the exact nature of each free trade agreements, and the Court of Justice is currently working on it.

As a result, the Commission is legally competent for negotiating the TTIP, as far as the balance of powers and the institutional dialogue is concerned. Thinking otherwise would mean questioning the legitimacy of the EU institutions themselves, which is another debate.

### *Outcome legitimacy: legitimacy of the successful policy*

In terms of outcome legitimacy, the legitimacy obtained by an institution when it is objectively successful, the success of the Commission is difficult to define. Trade is usually considered a strong point of the EU but we still lack data regarding the expected benefit of such big agreement as the TTIP. Indeed, all free trade agreements so far have been concluded with smaller economies (Korea, etc.). Although they are not all ratified or fully in place, the ones that have been implemented are usually considered as favourable to the EU. For instance, the FTA with Korea has played a role in improving

<sup>14</sup>S. Meunier, *loc. cit.*

<sup>15</sup>P. De Lombaerde and S. Kingah, *loc. cit.* p.715

<sup>16</sup>*Ibid.*

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exportation in direction of Korea from 70%, reversing a 10 billion trade deficit into a surplus<sup>17</sup>.

As a result, although the balance of the cost/benefits of the TTIP is not certain, the fact that the EU would do better in negotiating with the US than any single country is hardly debatable. As a result, we can prudently affirm that the EU's trade policy regarding FTAs is so far legitimate from an "outcome legitimacy" point of view, and that it has good chances to be the same for the TTIP, despite the US being such a unique partner.

With the Commission having both legal and outcome legitimacy, the current worries regarding the TTIP negotiation can be found elsewhere.

### ***Perception legitimacy: public opinion's perception and transparency***

Trade is certainly a policy area that can arouse suspicions of illegitimacy because of its traditional reliance on delegation, executive authority, and technicality. In the EU as in the US, "trade policy-making has often given the impression of shutting off popular input from the process"<sup>18</sup>. The resentment is getting even bigger as citizens become increasingly aware that "a growing number of decisions affecting their daily lives are being taken at the EU level, while they feel excluded from the process"<sup>19</sup>. The Netherlands "no" vote for an economic agreement with Ukraine is a good example of the people's growing distrust, even though the current global rejection of the EU is also at play.

However, most free trade agreements signed so far are either unknown or misunderstood by the public. Saying that they lack perception legitimacy, the legitimacy given when people simply believe that something is legitimate, is

therefore difficult. For instance, only the TTIP is accused of being illegitimate, while all other treaties have been completely ignored by public opinion, even when they had important regulatory cooperation aspects like the one with Japan.

As a result, we can say that the TTIP is lacking perception legitimacy because it is associated with the Commission, with Trade, with the US, and in general with lowering European standards and favouring businesses over consumers.

As a result, the call for 100% transparency in the TTIP negotiation, regardless of the potential detrimental consequences on the Commission bargaining power, is a proof of that lack of trust for the European institutions.

Certainly, the EU Commission has responded to the wave of criticism by civil society organizations. Members of the European Parliament have now full access to the EU's proposals and positions while all the EU's negotiation positions and textual proposals are published, as well as detailed and extensive reports of the negotiations and summaries and explanations about the objectives of the negotiations in all EU official languages<sup>20</sup>. As a mentioned, the most important TTIP documents are indeed still unavailable, and until the US positions was leaked in April 2016, no one knew what the US was asking. Furthermore, the system put in place to make additional documents accessible to MEP and Member of National Parliaments through "reading rooms" is criticized as the inability to bring in specialist who could understand the technically of the issues or even translators for non-English speaking officials, which makes the process look even more suspicious<sup>21</sup>.

<sup>17</sup>Edouard Bourcieu, interview at the academic workshop 'The TTIP, issues and perspective for international Commercial law' at College of Europe, 15 April 2016

<sup>18</sup>S. Meunier, *loc. cit.*

<sup>19</sup>*Ibid.*

<sup>20</sup>C. Malmström, Transparency in the TTIP, European

Commission Blog, 21 August 2015, retrieved on April 30<sup>th</sup> 2016,

[http://ec.europa.eu/commission/2014-2019/malmstrom/blog/transparency-ttip\\_en](http://ec.europa.eu/commission/2014-2019/malmstrom/blog/transparency-ttip_en)

<sup>21</sup>*Ibid.*

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As a result, the public attention given to the TTIP have been a strong reminder that the legitimacy of the European Commission is far from obvious. The efforts of DG Trade to extinguish the fire were made more complicated by the legitimacy problem that the Commission itself already had, and by the fact that “trade policy is often presented as involving a fundamental trade-off between efficiency and legitimacy”.

## **Conclusion**

As we saw, the perception gap that is causing for such high standards in transparency, is very new and focused on the TTIP alone. The lack of interest of the FTA with Japan, or for the documents made public by the Commission regarding the TTIP, shows that perception legitimacy problems are caused by other problems, like a lack of pedagogy from Member States, demagogy from anti-trade movements, distrust in the EU institutions, etc.

On that regard, the media coverage of the TTIP also have a strong impact on the perceived legitimacy of the Commission, and therefore on the transparency issue.

## **3) THE EU VERSUS THE MEDIA: which supply, which demand?**

In response to the legitimacy questions stated in the previous section, the European Commission has set up an unprecedented system of access to documents and information for a free trade agreement negotiation (see section 1). Its communication strategy has developed because of (or thanks to) the pressure put by NGOs and civil society organisations. TTIP transparency initiatives, public consultations, websites and twitter accounts have flourished in order to provide information and key documents to the public and the media.

However, the documents released by the Commission do not seem to match NGO's

expectations, while national media tend to relay the contra arguments to the TTIP. Indeed, when one takes the case of Germany, « 85 per cent of all TTIP-related positions in German online media are originally authored and spread by anti-TTIP. Furthermore, 90 per cent of anti-TTIP online media penetration happens on Facebook and Twitter. »<sup>22</sup>.

Just like the ACTA campaign, the TTIP issue is an example of the mobilisation power by NGOs and civil society organisation. They manage to create public awareness at an enormous scale, winning the media battle while the businesses and the Commissioners struggle to make their arguments powerful in people's minds. The NGO narrative plays a major role in the debate, along with the importance of the social media as they appear as the main communication channel to shape public opinion. This reluctant opinion has modified the message carried by many national governments who now show less public support for the TTIP.

The raising concern among the citizens have thus had an impact on the increasing transparency from the Commission. But many NGOs disregard the « quality » of such transparency and tend to prove (like Greenpeace) that the secrecy of the negotiations threatens Europeans' health and safety norms.

## **Recommendations**

More than the NGOs, the media plays a crucial role in the development of a sound, well-balanced debate. As already stated above, most of the online articles on TTIP relay opinions from opponents of the TTIP. The very core information provided on the website of the Commission on a regular basis does not make it to the global media, and the general awareness in Europe on the TTIP does not correspond to a better understanding of the negotiations themselves.

<sup>22</sup> Matthias Bauer (24 February 2015), How Anti-TTIP Groups Dominate Online Media in Germany,

<http://www.atlantic-community.org/-/how-anti-ttip-groups-dominate-online-media-in-germany>.

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This does not mean that the Commission has done a perfect job at being transparent, far from it. However, it is important to understand that full transparency is not necessarily positive either, especially when it is one-sided, and that no amount of transparency will solve the Commission's image problem.

Four recommendations can thus be made in the light of the overview of the three European media websites<sup>23</sup>:

- Increase the quantity of reports that compare information from both sides of the argument instead of giving sole op-eds opportunities.
- Show nuances within civil society and business instead of opposing two categorical opinions.
- Bring EU transnational arguments in the debate.
- Bring US and EU arguments together. Knowledge between both sides of the Atlantic remains too low and mind-set constructs are still strong.

## **CONCLUSION**

The purpose of this paper was to demystify the TTIP negotiations and to provide a sound analysis of key issues in terms of legality, legitimacy and communication. This three-step approach has allowed to put the European Commission at the centre of the discussion as it is the key actor on the European side.

The paper also provides conclusions and recommendations for a better understanding of the ongoing negotiations. The issues of legality, legitimacy and communication, once addressed together, gather a rationale to discuss the TTIP issue and allow a more efficient debate, pushing the commitment of transparency further while acknowledging the progress already made.

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<sup>23</sup> Le Monde (France), Le Soir (Belgium), Der Spiegel (Germany).