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Karel De Gucht
Member of the European Commission
BE-1049 Brussels
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Brussels, March 07 2014

Dear Commissioner De Gucht

Re: Transparency and Anti-Corruption Chapter in EU – US Free Trade Agreement

Ahead of the 4th round of negotiations regarding the Transatlantic Trade and Investment Partnership (TTIP), we would like to draw your attention to Transparency International's recommendations for a transparency and anti-corruption chapter.

Following our letter dated 3 October 2013 urging the European Commission to ensure the highest level of commitment to government transparency and combating corruption in TTIP, we have consulted with Transparency International national chapters in the EU on more detailed proposals. Those proposals have been formulated as a draft transparency and anti-corruption chapter and can be found in the annex to this letter.

That such a chapter is necessary is evident from the way that corruption distorts competition and diverts the flow of international investment. The advantages are also clear. It will focus attention on the implementation of the transparency and anti-corruption obligations of each party to the agreement and will help drive best practices. And it will reinforce existing international anti-corruption obligations on a bilateral level where consultation and implementation reviews occur more often.

We are available to meet with you and your colleagues at any time for further discussion on this suggested text.

Yours sincerely,

Carl Dolan

Director
Transparency International EU Office

Annex



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Suggested Text for Transparency and Anti-Corruption Chapter in EU – US Free Trade Agreement

Please find below the proposed text for a Transparency and Anti-Corruption Chapters to be included in the Transatlantic Trade and Investment Partnership.

Transparency International EU is a non-governmental organisation that promotes transparency in the EU decision-making process.

Please note that as TI EU advocates for a “legislative footprint” in EU policy-making, we consider this submission as public by default. We will publish this document on our website. Please do not hesitate to reference those elements that you consider valid, i.e. in the form of a legislative footprint.

Section A. Transparency

Contact Points

1. Each Party shall designate, within 60 days of the date of entry into force of this Agreement, a contact point to facilitate communications between the Parties on any matter covered by this Agreement.
2. On the request of another Party, the contact point shall identify the office or official responsible for the matter and assist, as necessary, in facilitating communication with the requesting Party.

Publication

1. Each Party shall ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them.
2. Except where exceptions specifically have been noted in advance, each Party shall:
 - (a) publish in advance any such measure that it proposes to adopt; and
 - (b) provide interested persons and Parties a reasonable opportunity to comment on such proposed measures.

Each Party shall ensure that there is administrative or judicial review available for decisions not to provide notice and comment with respect to any measure.

Notification and Provision of Information

1. To the maximum extent possible, each Party shall notify any other Party with an interest in the matter of any proposed or actual measure that the Party considers might materially affect the operation of this Agreement or otherwise substantially affect that other Party's interest under this Agreement.
2. On request of another Party, a Party shall promptly provide information and respond to questions pertaining to any actual or proposed measure, whether or not that other Party has been previously notified of that measure.
3. Any notification or information provided under this Article shall be without prejudice as to whether the measure is consistent with this Agreement.

Administrative Proceedings

1. With a view to administering in a consistent, impartial, and reasonable manner all measures of general application affecting matters covered by this Agreement, each Party shall ensure that in its administrative proceedings applying measures referred to in Article ____ to particular persons, goods, or services of another Party in specific cases that:

(a) wherever possible, persons of another Party that are directly affected by a proceeding are provided reasonable notice, in accordance with domestic procedures, when a proceeding is initiated, including a description of the nature of the proceeding, a statement of the legal authority under which the proceeding is initiated, and a general description of any issues in controversy;

(b) such persons are afforded a reasonable opportunity to present facts and arguments in support of their positions prior to any final administrative action, when time, the nature of the proceeding, and the public interest permit; and

(c) its procedures are in accordance with domestic law.

Review and Appeal

1. Each Party shall establish or maintain judicial, quasi-judicial, or administrative tribunals or procedures for the purpose of the prompt review and, where warranted, correction of final administrative actions regarding matters covered by this Agreement. Such tribunals shall be impartial and independent of the office or authority entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter.

2. Each Party shall ensure that, in any such tribunals or procedures, the parties to the proceeding are provided with the right to: (a) a reasonable opportunity to support or defend their respective positions; and (b) a decision based on the evidence and submissions of record or, where required by domestic law, the record compiled by the administrative authority.

3. Each Party shall ensure, subject to appeal or further review as provided in its domestic law, that such decisions shall be implemented by, and shall govern the practice of, the office or authority with respect to the administrative action at issue.

Definitions

For purposes of this Section:

Administrative ruling of general application means an administrative ruling or interpretation that applies to all persons and fact situations that fall generally within its ambit and that establishes a norm of conduct but does not include:

(a) a determination or ruling made in an administrative or quasi-judicial proceeding that applies to a particular person, good, or service of another Party in a specific case; or

(b) a ruling that adjudicates with respect to a particular act or practice.

Section B: Anti-Corruption

Statement of Principle

The Parties affirm their resolve to eliminate bribery and corruption in international trade and investment. Considering that all Parties share a responsibility to combat bribery of foreign public officials in international business transactions, the Parties reaffirm their adherence to the OECD Anti-Bribery Convention and to its vigorous and comprehensive implementation and enforcement.

Anti-Corruption Measures

1. Each Party shall adopt or maintain the necessary legislative or other measures to establish that it is a criminal offense under its law, in matters affecting international trade or investment, for:

(a) a public official of that Party or a person who performs public functions for that Party intentionally to solicit or accept, directly or indirectly, any article of monetary value or other benefit, such as a favor, promise, or advantage, for himself or for another person, in exchange for any act or omission in the performance of his public functions;

(b) any person subject to the jurisdiction of that Party intentionally to offer or grant, directly or indirectly, to a public official of that Party or a person who performs public functions for that Party any article of monetary value or other benefit, such as a favor, promise, or advantage, for himself or for another person, in exchange for any act or omission in the performance of his public functions;

(c) any person subject to the jurisdiction of that Party intentionally to offer, promise, or give any undue pecuniary or other advantage, directly or indirectly, to a foreign official, for that official or for another person, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business; and

(d) any person subject to the jurisdiction of that Party to aid or abet, or to conspire in, the commission of any of the offenses described in subparagraphs (a) through (c).

2. Each Party shall adopt or maintain appropriate penalties and procedures, which are effective, proportionate and dissuasive, to enforce the criminal measures that it adopts or maintains in conformity with paragraph 1.

3. In the event that, under the legal system of a Party, criminal responsibility is not applicable to enterprises, that Party shall ensure that enterprises shall be subject to effective, proportionate, and dissuasive non-criminal sanctions, including monetary sanctions, for any of the offenses described in paragraph 1.

4. No Party shall allow persons subject to its jurisdiction to deduct from taxes expenses incurred in connection with the commission of an offense described in paragraph 1.

5. Each Party shall take such measures as may be necessary to provide that: (i) proceeds of crime of the offenses described in paragraph 1, (ii) property the value of which corresponds to that of such proceeds, and (iii) property, equipment or other instrumentalities used in or destined for use in such

offenses are subject to freezing, seizure and confiscation or that monetary sanctions of comparable effect are applicable.

6. In order to prevent corruption, each Party shall take such measures as may be necessary regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, to prohibit the following acts carried out for the purpose of committing any of the offenses described in paragraph 1:

- (a) The establishment of off-the-books accounts;
- (b) The making of off-the-books or inadequately identified transactions;
- (c) The recording of non-existent expenditure;
- (d) The entry of liabilities with incorrect identification of their objects;
- (e) The use of false documents; and
- (f) The intentional destruction of bookkeeping documents earlier than foreseen by the law.

Each Party shall provide effective, proportionate and dissuasive civil, administrative or criminal penalties for omissions and falsifications in respect of the books, records, accounts and financial statements.

7. Each Party shall adopt or maintain appropriate measures to protect persons who, in good faith, report acts of bribery or corruption described in paragraph 1 or 6.

Transparency in Reporting on Anti-Corruption Efforts

8. Each Party, when participating in the UNCAC and OECD Convention implementation review process, shall provide a mechanism for consultation with civil society and the private sector as part of a review process and shall permit a country visit by a peer review team. Each Party shall publish the full peer review report and its responses to any deficiencies identified in the report.

Penalties for Bribery of Foreign Government Officials

9. Each Party shall adopt or maintain effective, proportionate and dissuasive penalties and procedures to enforce the criminal measures that it adopts with respect to bribery of foreign government officials which shall include denial for a set period of time of access to public subsidies, licenses, public procurement contracts, contracts funded by official development assistance, officially supported export credits or other public advantages. Each Party shall make publicly available information on any penalties and procedures imposed.

Mutual Legal Assistance

10. The Parties shall make full use of the Agreement on Mutual Legal Assistance between the European Union and the United States of America in order to effectively implement the provisions of this Chapter.

Promoting Integrity among Public Officials

11. (a) Each Party shall require senior and other appropriate public officials to make declarations to appropriate authorities regarding their outside activities and employment, and investments and assets of the official and immediate family and substantial gifts or benefits given to the official and immediate family which can be used to prevent, detect, investigate, impose administrative remedies and prosecute offenses regarding conflicts of interest, illicit enrichment and other forms of corruption. For the most senior officials, this information should be made as widely available as possible, both within the government and to the general public.

(b) No Party will allow elected public officials to enjoy immunity when charged with corruption offenses.

Curbing Illegal Financial Transactions

12. To reduce illegal financial transactions, each Party shall require the creation and maintenance of registries of beneficial ownership of trusts and companies and the disclosure of information in those registries to relevant investigative and judicial authorities.

Application and Enforcement of Anti-Bribery Laws

13. (a) Neither Party shall fail to effectively enforce its anti-bribery laws, including those it adopts or maintain in accordance with Article XXX, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties or in third countries, after the date this Agreement enters into force.

(b) The Parties recognize that each Party retains the right to exercise prosecutorial discretion and to make decisions regarding the allocation of enforcement resources with respect to anti-bribery laws. Accordingly, the Parties understand that with respect to the enforcement of anti-bribery laws and all laws, regulations, and other measures to fulfill a Party's obligations under this Agreement, a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable, articulable, bona fide exercise of such discretion, or (b) results from a reasonable, articulable, bona fide decision regarding the allocation of such resources.

Definitions

For purposes of this Section:

act or refrain from acting in relation to the performance of official duties includes any use of the official's position, whether or not within the official's authorized competence;

foreign official means any person holding a legislative, administrative, or judicial office of a foreign country, at any level of government, whether appointed or elected; any person exercising a public function for a foreign country at any level of government, including for a public agency or public enterprise; and any official or agent of a public international organization;

OECD Anti-Bribery Convention means the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

public function means any temporary or permanent, paid or honorary activity, performed by a natural person in the name of a Party or in the service of a Party, such as procurement, at the central level of government; and

public official means any judicial, legislative or executive official or employee of a Party, at any level of government, whether appointed or elected.

Suggested Text for Government Procurement Chapter

Ensuring Integrity in Procurement Practices

Further to Article ____ (Anti-Corruption Measures), each Party shall adopt or maintain procedures to declare ineligible for participation in the Party's procurements, either indefinitely or for a specified time, suppliers that the Party has determined to have engaged in fraudulent or other illegal actions in relation to procurement a Party shall identify the suppliers determined to be ineligible under these procedures and make that information publicly available and, upon request, provide it to the other Parties.

Each Party shall require the winning supplier of a covered procurement, (i) within 30 days of the award of a contract, to (A) have a written code of ethics and conduct and (B) make a copy of the code available to each employee engaged in the performance of the contract and (ii) within 90 days of the award of a contract, to (A) have an ongoing business ethics awareness and compliance program and (B) an internal control system; provided that this provision (x) shall only apply to covered procurements valued at €_____ or more and (y) subclause (ii) shall not apply to covered procurements of commercial goods or services.