

Transatlantic Trade and Investment Partnership

An analysis done by Diandra Jinadasa, Cultural policy intern at IMC

CONTEXT

In 2013, the European Union started negotiations for a free trade agreement (TTIP) with the United States. The US has a strong interest in gaining access to markets for services related to films and television – so-called audiovisual services. The EU, however, believes such services play a special part in culture and so should be treated differently to other services = 2 very different visions of the scope of the agreement. Concerns also exist about the potential impact of TTIP in other sectors related to culture. The EU has strong cultural and creative industries which are also one of the continent's most dynamic sectors and an important provider of quality jobs.

- ⇒ The importance of culture to society and the economy is why protecting and promoting cultural diversity are key aims of the EU. These aims influence all areas of the EU's activity. The basis for this is an explicit mandate in the Treaty on the Functioning of the European Union (TFEU), which in Article 167, paragraph 4, states that: "*the Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.*"
- ⇒ The EU is also a party to UNESCO's 2005 Convention i.e it is legally-bound to promote cultural diversity
- ⇒ The EU's standard practice in trade agreements is not to negotiate the circumstances in which public subsidies can be granted – in particular for services. TTIP is no exception: it will not affect the ability of the EU or EU Member States to provide financial support to cultural industries.

DISCUSSIONS AT EU LEVEL – STEP BY STEP

1. **A draft report was issued in 2014** by the EU Parliament Committee on International Trade defining the basic guidelines and scope of the TTIP.

The draft report refers to the issue of the cultural diversity in the following terms: "*market access (b) (x) to keep in mind that the agreement should not risk prejudicing the Union's cultural and linguistic diversity, including in the audiovisual and cultural services sector, and that existing and future provisions and policies in support of the cultural sector, in particular in the digital world, are kept out of the scope of the negotiations*",

and regarding non-tariff barriers: "*c (i) to ensure that the regulatory cooperation chapter promotes an effective, procompetitive economic environment through the facilitation of trade and investment while developing and securing high levels of protection of (...) the cultural diversity that exists within the EU; negotiators on both sides need to identify and to be very clear about **which regulatory measures and standards are fundamental and cannot be compromised**, which ones can be the subject of a common approach, which are the areas where mutual recognition (...) is desirable and which are those where*

simply an improved exchange of information is possible, based on the experience of one and a half years of ongoing talks.”

The EU Parliament Committee on culture and education, through its Vice-President Helga Trüpel (who was also the rapporteur for this opinion), issued a draft opinion in February 2015, considering that the concept of cultural exception may not be enough to safeguard culture and education. Positive action and legally-binding rules must be taken in order for the field of culture to be truly protected and not bought and sold like any other commodity. The Committee therefore suggested a general clause excluding audio-visual services from the TTIP agreement in a broad manner **and for all chapters of the treaty**. However, audio-visual services – though falling under the umbrella of “culture” – do not alone represent culture. Culture encompasses much more (music, literature, paintings, sculpture, art in all its various and diverse forms). This is why many cultural institutions (such as Austrian arts and culture associations) have created a movement pleading in favour of a general exception for art and culture in the TTIP.

2. In April 2015, the **EU Parliament Committee on culture and education issued a **consolidated opinion** giving the following recommendations to the Committee on International Trade:**

(a) ensure, via a general clause in the agreement, in full compliance with the GATS [i.e cultural exception] and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, that the parties to the agreement reserve the right to adopt or maintain any measure (in particular of a regulatory and/or financial nature) with respect to the protection or promotion of cultural and linguistic diversity, media pluralism and media freedom, and to preserve or develop, in accordance with the principle of technological neutrality, a regime for audiovisual services in line with democratic, social and cultural requirements;

(b) reaffirm that services with a strong cultural component will not be challenged by the TTIP agreement;

(c) clarify that the fixed book price system will not be challenged by the obligations under the TTIP agreement;

(d) ensure with a general clause the right to adopt or maintain any measure with regard to the provision of all educational services which receive public funding or state support in any form and ensure that privately funded foreign providers meet the same quality and accreditation requirements as domestic providers;

(e) specify that nothing in the agreement applies to subsidies or government support with respect to cultural, educational and audiovisual services;

(f) use the positive list approach in order to specify the sectors that fall within the scope of the agreement;

(g) refrain from introducing the ISDS system in the agreement, bearing in mind that the parties to the agreement have fully developed legal systems and procedures.

Helga Trüpel put forward a suggestion to establish a list referencing the various fields which would be subject to liberalisation = a **positive list approach** in which only the areas explicitly listed could be opened to free trade. **This idea was rejected** in favour of a negative list which gives greater leeway to the negotiators which are not bound to a pre-defined, explicit list of areas which fall within the scope of the TTIP.

3. On July 8th 2015, the European Parliament adopted a **non-binding resolution** in which a **series of recommendations** were made to the European Commission, regarding what the content of the TTIP should be.

The resolution defined the **scope of the TTIP** and what it is set to achieve beyond the agreement itself = the TTIP is viewed as a strategic and ambitious agreement meant to open opportunities for both partners (job opportunities, direct positive impact on both economies). It is also meant to be a “stepping stone for broader trade agreements” i.e help stimulate the conclusion of multilateral agreements and make sure this type of treaty is preferred to the conclusion of simply bilateral agreements. The TTIP is meant to shift the plates when it comes to trade agreements; the chore reasoning is that an agreement must benefit the largest possible number of actors and economies, which means such agreements should be concluded between more than 2+ partners. “The more the merrier” is the basis upon which this type of agreement should be built.

According to the resolution, the TTIP should recognise that in certain areas, the EU and US models have very different rules; these areas are *de facto* excluded from the scope of the agreement (public healthcare services, GMOs, use of hormones in the bovine sector and the cloning of animals for farming purposes). However, in areas in which the set of rules are very similar (inter alia product safety) unnecessary duplication (i.e duplicated or redundant administrative burdens and formalities) should be avoided and rules harmonised.

The resolution also tackles issues related to **market access**. Non-discriminatory market access (visa facilitation, open competition...) should be reciprocal and benefit both partners equally. The main objective of this agreement is the elimination of all tariff barriers and the establishment of common standards in order to facilitate trade (end goal); however, the resolution does acknowledge the fact that certain fields are more sensitive than others (the resolution cites “agricultural and industrial products”) which implies that **strict** exceptions will be made and certain areas will be excluded from the scope of the TTIP after negotiations. **One of the restrictions mentioned and which are of direct relevance to the music sector (and therefore IMC members in the US and in Europe) first hand is the field of culture.** The resolution mentions specifically the UNESCO 2005 Convention on the diversity of cultural expressions, stating that a “**legally binding general clause applicable to the entire agreement** [should be included in the treaty ensuring] **that the parties reserve their right to adopt or maintain any measure with respect to the protection or promotion of cultural and linguistic diversity.**” = exception to the TTIP. The resolution recommends to specify that “**nothing in the agreement shall affect the ability of the EU or EU Member States to subsidise and provide financial support to cultural industries and cultural, educational, audiovisual and press services**” = further proof that educational and cultural services are set apart in the TTIP.

The resolution also addresses the private data issue stating the need for the US to abandon its mass surveillance activities and ensure the data privacy rights of EU citizens.

According to the resolution, the TTIP should ensure that the **regulatory cooperation** chapter promotes a transparent, effective, pro-competitive economic environment through the identification and prevention of potential future non-tariff barriers to trade and the facilitation of trade and investment.

The resolution also gives a series of **rules** by which the agreement should abide. It lists various areas which should be addressed in the TTIP, amongst which labour and environmental standards, sustainable development, energy, investment, the promotion of green goods and services, the sustainable management of fishery resources, intellectual property rights and small and medium-sized enterprises.

The resolution recommends the explicit exclusion of provisions on the liability of internet intermediaries or on criminal sanctions as a tool for enforcement with regards to intellectual property rights.

Regarding investors, the resolution specifies that foreign investors should be treated in a non-discriminatory fashion, while benefiting from no greater rights than domestic investors, and recommends the replacement of the ISDS system with a new system for resolving disputes between investors and states.

According to the resolution, **transparency** throughout negotiations is fundamental and benefits all actors involved: the general public, stakeholders (including **civil society**) as well as the immediate partners to the agreement. Transparency means national parliaments must also be involved in this process through structured dialogue in order for the scope and possible benefits of the agreement for European citizens to be better communicated to the general public. **Transparency = one of the elements which will ensure the success of the negotiations.**

Confronting the Committee on culture and education’s recommendations with the EP resolution

Committee recommendations	Resolution recommendations	Comments
<i>a) ensure, via a general clause in the agreement, in full compliance with the GATS [i.e cultural exception] and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, that the parties to the agreement reserve the right to adopt or maintain any measure (in particular of a regulatory and/or financial nature) with respect to the protection or promotion of cultural and linguistic diversity, media pluralism and media</i>	<i>1 ensure via <u>a legally binding general clause applicable to the entire agreement</u>, in full compliance with the UNESCO Convention on the protection and promotion of the diversity of cultural expressions, that the parties, reserve their right to adopt or maintain any measure (in particularly those of a regulatory and/or financial nature) with respect to the protection or promotion of cultural and linguistic diversity, in line with the relevant Articles as established</i>	Though the resolution mentions the UNESCO 2005 Convention as well as recommends not just a general clause but a “legally binding” one on this particular point; it fails to mention the GATS and the existence of the concept of “cultural exception”. Even though, admittedly, the mention of “cultural exception” is not enough to safeguard the culture sector from the scope of the agreement (a legally-binding clause would be needed to do so), mentioning it would have been a plus. Instead, the resolution reproduces word for word the Committee’s recommendation regarding the protection and promotion of cultural diversity.

<p><i>freedom, and to preserve or develop, in accordance with the principle of technological neutrality, a regime for audiovisual services in line with democratic, social and cultural requirements</i></p>	<p><i>in the Treaty on the Functioning of the European Union, as well as media freedom and media pluralism, irrespective of the technology or distribution platform used and keeping in mind that the mandate given to the European Commission by the Member States explicitly excludes the audiovisual services</i></p>	<p>Why not mention the GATS and cultural exception? Reserving the right to the EU to adopt inter alia financial rules and regulations to protect and promote cultural and linguistic diversity de facto acknowledges the fact that culture should be treated differently from other commercial products.; so why not explicitly mention cultural exception?</p>
<p><i>(b) reaffirm that services with a strong cultural component will not be challenged by the TTIP agreement</i></p>	<p>x</p>	<p>The fact that the resolution does not mention this particular point is regrettable. Indeed, not recognising the particularity of services with “strong cultural components” or explicitly setting them apart from the agreement would technically allow them to be included in the negotiations. This emphasises the comments made by cultural institutions claiming that audiovisual services [see recommendation #1] (though indeed falling under the generic term “culture”) are not the only services that need and should be protected and excluded from the scope of the agreement. A definition of a “service with a strong cultural component” with objective criteria, a “culture-grid” would be helpful in recognising this concept.</p>
<p><i>(c) clarify that the fixed book price system will not be challenged by the obligations under the TTIP agreement</i></p>	<p>2 confirm that fixed book price systems and price fixing for newspapers and magazines will not be challenged by the obligations under the TTIP agreement</p>	<p>=</p>
<p><i>(d) ensure with a general clause the right to adopt or maintain any measure with regard to the provision of all educational services which receive public funding or state support in any form and ensure that privately funded foreign providers meet the same quality and accreditation requirements as domestic providers</i></p>	<p>3 ensure with a general clause the right of EU Member States to adopt or maintain any measure with regard to the provision of all educational and <u>cultural services</u> which work on a non-profit basis and/or receive public funding to any degree or state support in any form, and to ensure that privately funded foreign providers meet the same quality and accreditation</p>	<p>= It seems the resolution goes somewhat further than the Committee’s recommendation; mentioning not only educational but also cultural services. The resolution covers two situations:</p> <ul style="list-style-type: none"> - educational and cultural services which work on a non-profit basis (i.e public libraries) - also implies that educational and cultural services which work on a “for-profit” basis and receive State or public funding would also be guaranteed funding

	requirements as domestic providers	
<i>(e) specify that nothing in the agreement applies to subsidies or government support with respect to cultural, educational and audiovisual services</i>	<i>specify that nothing in the agreement shall affect the ability of the EU or EU Member States to subsidise and provide financial support to cultural industries and cultural, educational, audiovisual and <u>press services</u></i>	Again, the resolution not only mentions cultural, educational and audiovisual services but also press services; thus including a service which was not specified in the Committee's initial recommendations.
<i>f) use the positive list approach in order to specify the sectors that fall within the scope of the agreement</i>	x	This recommendation was sadly not followed by the EU Parliament. Adopting a positive list approach would have ensured a clear unequivocal vision for the realm of the negotiations. What specifically is negotiated? And what is therefore left out of the negotiations? Not following this recommendation means resorting to exceptions (a negative approach) which can be confusing and render difficult the safeguarding of certain fields: unless explicitly excluded from the scope of the agreement, every sector can potentially fall within the negotiated items.
<i>(g) refrain from introducing the ISDS system in the agreement, bearing in mind that the parties to the agreement have fully developed legal systems and procedures</i> Explanation: with the ISDS system, if a law adversely affects the profits of a corporation, it can sue the State for damages. Complaints will not be heard by ordinary courts but by arbitration courts made up of 3 lawyers whose decisions will be binding under international law.	<i>4 replace the ISDS system with a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives</i>	The European Digital Rights (EDRi) has voiced concerns about the fact that the new system the EU Parliament wishes to put into place will in reality be no different to the ISDS system. 

REACTIONS

It appears the EU Parliament resolution has not been able to reassure cultural stakeholders on the validity of the TTIP. Indeed, a demonstration is set to take place on October 10th, 2015 in Berlin “TTIP

and CETA [Comprehensive Economic and Trade Agreement between Canada and the EU] stop". A civil society coalition of more than 30 associations and organisations, including the German Cultural Council, calls for the negotiations between the US and the EU on the TTIP to stop and for the non-ratification of the CETA between the EU and Canada. Stakeholders seem to believe that no deal at all should be concluded between both parties. The agreement itself has been and continues to be questioned by civil society and many petitions are currently circulating (STOP TTIP a "self-organised European citizens' initiative) to stop the EU from concluding such a deal.

Interestingly enough, some international organisations have refused to comment the content of the EU resolution (inter alia WIPO) claiming this is an European Parliament matter and that no comments are made on rulings or decisions made by other organisations. This lack of input from international organisations whose fields of expertise are actually being discussed in the TTIP is open to criticism as it questions the transparency of the agreement itself. Have these organisations made their position clear to the European Parliament? Are they included in the negotiations? Is their input valued? What is their opinion on the TTIP? A plethora of unanswered questions.