

Transatlantic Trade and Investment Partnership (TTIP): implications for local government

29 October 2014

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Summary

This briefing updates readers on the progress of the negotiations on the Transatlantic Trade and Investment Partnership (TTIP) and comments on its possible implications for local government.

TTIP is currently being negotiated between the European Commission and the US. It is an extremely significant treaty and is highly controversial, with the debate between its supporters and critics getting more heated.

Public procurement and the delivery and regulation of public services will be affected by the treaty if it is ratified. There are clear implications for local government, but exactly how services such as social care and regulation of, for example, environmental standards will be affected, are in dispute. The main area of debate here has been the possible impact on the NHS.

This briefing will be of interest to all local authorities and to members and officers working in policy, social care, health, procurement, commissioning, environmental health and regulatory activities, and to trade unions and the voluntary and community sector.

Briefing in full

Background

Free trade agreements (FTAs) are set up between the governments of two or more countries to promote trading of goods and services. FTAs encourage the trading of goods across national borders by reducing tariffs (e.g. import duty) and establishing

rights to protection for transnational companies that wish to invest in services (including public ones). In the UK transnational companies are given the right to operate within the UK market and have the same treatment as national companies. International trade law takes precedence over national law – once signed a FTA involves irreversible commitments.

FTAs have proliferated since their beginnings in the Bretton Woods Agreement in 1944: The multilateral trade rounds have become more and more difficult to reach agreement over – such as the ‘Uruguay’ round which took eight years to reach agreement to set up the World Trade Organisation (WTO), and the ‘Doha’ round still being pursued after some 15 years, despite continual failures.

Transatlantic Trade and Investment Partnership (TTIP)

The Transatlantic Trade and Investment Partnership (TTIP) is currently being negotiated between the European Commission (EC) and the US.

The House of Lords EU Committee’s report on TTIP said this about it:

‘The Transatlantic Trade and Investment Partnership (TTIP) is the most ambitious trade and investment pact ever attempted, due both to its scale—the European Union and the United States together account for nearly half of world GDP—and because in tackling non-tariff barriers to trade, a deal could set the template for a new generation of 21st century trade and investment agreements’.

According to the Office of the United States Trade Representative, the main aims of the partnership are *‘to increase trade and investment between the US and EU by reducing tariffs (particularly on agricultural products), aligning regulations and standards, improving protection for overseas investors, and increasing access to services and government procurement markets by foreign providers’.*

Negotiations were launched at the G8 summit at Lough Erne in June 2013. Services and public procurement issues were the key focus of the 6th round of negotiations held in July 2014. The 7th round started on 29 September.

Negotiations are split into working groups (24 in the first round) discussing specific sectors and area.

In the EU, once negotiations are completed, the deal will be presented to the Council and the European Parliament, both of which must agree the outcome, which is then subject to signature and formal ratification. The deal has also to be separately ratified by the national parliaments of each of the EU Member States before it formally enters into force. In the UK this will be done through secondary legislation – a draft Order in Council laid in Parliament and it has to be approved by both the Commons and the Lords under the affirmative procedure, and then by the Privy Council. However, under ‘provisional application’ procedures, if member states agree to it via the Council, parts of the agreement can enter into force before it is ratified by national parliaments.

The objectives of TTIP

Although one of the stated aims is to reduce tariffs, the tariffs between the EU and US are already low, at around three per cent on average. Therefore the negotiations are focusing on reducing 'non-tariff barriers' to trade, such as regulation and on harmonising product regulation and standards, or eliminating them in areas where the negotiators believe they are not necessary.

The debate over TTIP

Like previous bilateral trade agreements (and multinational ones) TTIP is highly contentious. There are particular sectors that are causing the biggest debate - the ones that are of most relevant to local government here are food safety, environmental standards, public procurement and public services.

Public procurement and public services

The Commission's negotiating mandate included provisions that TTIP will increase mutual access to government procurement markets 'at all administrative levels... in the fields of public utilities... and ensuring treatment no less favourable than that accorded to locally established suppliers'. Local government procurement would be therefore included.

The House of Commons library research note on TTIP makes this reference to this issue:

'In the EU, there are concerns that liberalising public procurement markets, combined with measures to protect foreign investors from government action, could constrain the power of national governments to decide how public services are provided'.

There was a motion for a resolution of the European Parliament that called for the Commission to explicitly exclude from the negotiating mandate market access to public services, but this was not passed.

The WTO defines that only 'services supplied in the exercise of government authority' and only on a non-commercial basis and not in competition with other suppliers, are exempt from trade liberalisation. The European Commission has claimed that public services will be kept out of TTIP by virtue of an exclusion of services "supplied in the exercise of governmental authority", as defined in the General Agreement on Trade in Services (GATS), which comes under the WTO.

However, this definition of what would qualify for exclusion is narrow. As many of the UK's public services are open to competition, using this exemption could be open to challenge.

TTIP can be expected to reinforce the creation of new markets in public services and further deregulate them.

In the UK the main opposition has focused on the NHS. Since the opening up of health services here in the 1980s, critics have said that trade agreements have

threatened universal access to health care and that the Health and Social Care Act (2012) increases the risk of the NHS being included within FTAs.

TTIP will give foreign companies the right to bid for all government spending, including on health. It could put restrictions on the ability of the UK government to control costs (e.g. of medicines) and to regulate any transnational companies that provide health services.

There has been some suggestion, following the leaking of a letter from the EC negotiator, that the NHS will be 'carved out' of TTIP – that health services will not be included. This has, however, been disputed by opponents of TTIP. TTIP negotiations are based on 'negative listing' – if negotiators don't specifically list a sector like health as exempt, it will count as being included in the treaty. The only exemption proposed on the European side is for audio-visual services (films and broadcasting), which is at France's request.

Supporters of TTIP say that health will anyway be exempt from the treaty because it is a public service. In the context of FTAs, the term 'public service' refers only to those services that are not supplied on a commercial basis, or are not in competition with other service providers. There is an argument that since the passing of the Health and Social Care Act (2012), the NHS does not conform to this description.

The environment and food safety

Opponents of TTIP claim that it threatens to undermine key environmental regulations within the EU, which are known to guarantee higher safety levels than in the US.

EU legislation in these areas is based on the Precautionary Principle. The precautionary principle is detailed in Article 191 of the Treaty on the Functioning of the European Union (EU). It aims at ensuring a higher level of environmental protection through preventative decision-taking in the case of risk. However, in practice, the scope of this principle is far wider and also covers consumer policy, [European legislation concerning food](#) and human, animal and plant health.

US regulations, however, follow the weaker principle of only banning something if harm from it is proven 'scientifically'.

On the environment, the European Commission has openly admitted that TTIP will further intensify pressure on the environment, as "every scenario" for future EU-US trade under TTIP will increase the production, consumption and international transfer of goods. The Commission's own impact assessment goes on to note that this increase in production will in turn create "dangers for both natural resources and the preservation of biodiversity". Greenhouse gas emissions will increase - the Commission states that its preferred outcome from TTIP will add an extra 11 million metric tons of CO₂ to the atmosphere.

The 'investor-state dispute settlement' (ISDS)

ISDS are provisions in trade treaties that allow corporations to bring proceedings against a foreign government that is party to the treaty. These proceedings are brought under commercial tribunals rather than national courts. Therefore, trans-

national corporations under TTIP will have the power to sue individual countries directly for loss of profits suffered as a result of public policy decisions, including predicted reductions of profits in the future.

The ISDS has been a key area of concern among critics of TTIP. Some commentators believe that these provisions undermine the power of national governments to act in the interest of their citizens. They argue, for example, that a future UK government may not be able to reverse policies that further open up competition in the NHS.

The level of interest and concern across the EU and US over the ISDS led to the European Commission in January this year announcing it was halting the negotiations on the ISDS proposal to carry out a three month consultation that began in early March.

Transparency and consultation

The way the treaty is being negotiated has been a cause for concern. Critics have said that transnational corporations had early opportunities to lobby the European Commission about the treaty but the same opportunities have not been extended to trades unions or civil society groups. Of the 560 meetings that the Commission's Directorate-General for Trade held in preparation for negotiations, 520 were with business lobbyists and only 26 were with public interest groups.

The French Government has been critical of the apparent lack of transparency in the negotiations. Matthias Fekl, the French Secretary of State for Foreign Trade, has said that the continued lack of transparency in the negotiations could lead to the failure of TTIP.

National governments and MEPs from the European Parliament's trade committee have only limited access to documents. Once the treaty is signed by negotiators, the UK parliament, like other EU member states, will only be able to vote to accept or reject the treaty as a whole: they will not be able to amend it in any way.

Comment

The debate over TTIP seems to be gaining more momentum. Supporters of the treaty argue that its critics have misrepresented key issues and provisions. Jacqueline Minor, the Head of the European Commission office in London, in a

recent letter in the Guardian in response to an article by Owen Jones, said this about the implications for the NHS:

'On behalf of the European commission I would like to reassure Owen Jones that the TTIP trade deal with the US will be no threat to the NHS. Publicly funded health services are excluded from most trade deals. Healthcare services are excluded from the general government procurement agreement at the World Trade Organisation. They are even in large part exempted from the EU's own single-market rules.

TTIP will be no different. The deal the commission will propose will not require the UK government or NHS to put anything out to private contract. TTIP will not give US companies leeway to sue a future UK government for returning privatised or contracted-out health services to direct public provision. Neither will we be compromising on food safety in the EU, as some of your other correspondents have alleged'.

Sir Frank Berman QC from the Essex Court Chambers, London, an arbitrator of trade deals says (again in response to Jones' article):

'What investment treaties typically do is offer investors (in either direction) reciprocal guarantees of basic principles such as fair and equitable treatment, protection and security, non-discrimination both generally and by comparison with local investors, and against expropriation without compensation (also guaranteed by the European convention on human rights'.

However, reassurances such as these are not accepted by opponents of TTIP. Critics include many NGOs, trade unions, and campaigners on the environment and social justice.

Governments in the EU, the US Government and the EU Commission have promoted TTIP as a boost to growth and jobs. In their written evidence to the House of Lords inquiry into TTIP, the UK Government pointed to the Centre for Economic Policy Research studies commissioned by the Department for Business, Innovation and Skills and the European Commission to suggest that TTIP could over the long-term be worth up to £10 billion (or 0.35 per cent of GDP) annually to the UK, up to £100 billion (or 0.5 per cent of GDP) annually to the EU, and up to £80 billion (or 0.4 per cent of GDP) annually to the US. The GDP gains would be relative to projected GDP levels without TTIP in place.

The House of Lords report, however, reflects some commentators' caution about these figures. Dean Baker, of the Center for Economic and Policy Research (this is a different institution to the Centre for Economic Policy Research cited above) noted that the projected GDP increases in the study produced for the European Commission would not materialise in full until 2027, and that they reflected a best-case scenario. In a less ambitious, and "presumably more realistic" scenario, the GDP gain for the US by 2027 would be "roughly equal to a normal month's growth" and thus in Mr Baker's view, "too small to notice".

Professor Richard Baldwin from the Graduate Institute, Geneva, advised the committee to treat the figures with caution, pointing out that figures were projected against a "status quo" world, and that experience—for example with predictions on the effect of the North American Free Trade Agreement (NAFTA)—had shown that

the status quo world "was nothing like what actually happened, because a thousand things happened". It was consequently "very difficult" to sort out what NAFTA did, and it might in future be similarly difficult to disentangle the effects of a TTIP agreement from other factors. Though he did judge that the numbers "will be realistic, but over a medium run."

The TUC in its evidence to the Lords Committee said that while they would "welcome the creation of decent quality jobs and higher wages", they saw a need for "an independent analysis of the labour market impact of the TTIP so negotiations can be guided to maximise the deal's potential to create higher skilled jobs, and industries likely to be negatively impacted by the TTIP are supported to retrain their workforce." Other unions such as the AFL-CIO (American Federation of Labor and Congress of Industrial Organisations) and the UK's GMB expressed concern that jobs in those EU member states that have higher wages and more employment rights might be lost, rather than created, if reductions in tariff and non-tariff barriers as part of the TTIP led to a reallocation of investment.

The projections given by the EU Commission in relation to jobs and growth are, therefore, not universally accepted; some commentators express a degree of caution, others outright scepticism.

Negotiators of TTIP say that the process has been more open than in previous trade agreement deals. This may be the case but there is still real concern about transparency and the degree of genuine consultation.

An example of this concern is how the Commission has treated the European Citizens' Initiative on TTIP. The European citizens' initiative (ECI), which has been in place since the Lisbon Treaty, provides a platform for citizens to present a legislative proposal to the Commission, if they collect over a million signatures from at least seven member states.

Announced in July, the European citizens' initiative STOP TTIP was officially supposed to begin at the end of September, but the Commission has blocked the project. In a [letter](#) to organisers, the Commission writes: "*The proposed citizens' initiative falls manifestly outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.*"

The blocking of the initiative at this stage could be seen as counter productive – alienating many NGOs and undermining citizen involvement. The NGOs have responded by taking legal action, and simultaneously launching a new, 'self-organised' ECI – in effect, an independent Europe-wide petition opposing both TTIP and CETA. It has attracted over 742,000 signatures since its launch on 7 October.

Should local government be involved in the debate around TTIP? There could be an impact on how local authorities deliver services and on their regulation role. There are issues around democratic engagement. There will be unease in some councils that if the ISDS remains as part of the treaty, that even if it is not used in the way critics say it will be, that it causes the government to draw back from necessary regulation for fear of litigation.

Organisations in the UK (such as the BMA) working in the health sector have called for health (and related social care) to be specifically excluded from the treaty – if the

coalition wished to exclude the NHS or any other public service from the negotiations, they could request it as the French government did over broadcast media.

Civil sector groups across the EU have called for the Commission to respect the Voluntary European Quality Framework for Social Services and ensure that quality criteria in public procurement are not considered non-tariff barriers to trade in services.

Other implications of TTIP are also very much in dispute, as, for example, whether it would restrict the ability of local authorities and other public sector organisations to use contracts to promote social and environmental outcomes through their procurement and employment practices. Some in local government are worried that ISDS will give any US company operating in the UK health market the right to sue the government if it introduces new public health regulation, or health protection and health promotion policy measures that might affect these companies' future investment or profit opportunities.

These issues clearly need to be discussed openly and with the maximum information possible. The lack of transparency in the negotiations and access to key documents are matters of concern. Many civil society organisations are calling for the negotiating texts to be made public.

The Commission did finally publish the mandate for the negotiations in October this year. However, the detailed proposals for specific areas, based on the mandate, have not been published. On the other hand, at the WTO all negotiating texts are published as soon as they are tabled. Critics say there is no good reason to avoid the same degree of openness in TTIP and other bilateral agreements of the sort.

The process of negotiation is, of course, a dynamic one. What ends up in the treaty will be a compromise between what the EU wants and what the US wants. Regulations - or laws - affecting corporations are to be addressed either by means of "harmonisation" or "mutual recognition" and the legislation that comes out of the treaty will not necessarily have been debated by EU or US democratic institutions. It is therefore even more crucial that the negotiating process is as open as possible.

There will be citizens and groups in most communities who have concerns about TTIP. Councils could ensure that local people are aware of the Treaty and the debate, perhaps through the relationships with the voluntary and community sector, even if the council supports TTIP in principle.

The representative body of local and regional government in the EU – the Committee of the Regions – has been taking a close interest in TTIP. CoR recognises that there are elements in the treaty which will have a direct impact on local and regional level authorities, such as the investor-state dispute settlements (ISDS) provision and public procurement measures. It is in the process of drafting an Opinion on the treaty. Its rapporteur, Mr Markus Tons (DE/PES), Member of the North Rhine-Westphalia Landtag, has said that 'it is important to understand how local and regional authorities will be impacted by the provisions in the agreement'. CoR has not yet been consulted as a key stakeholder. He also comments that 'in recent years,

several cases have been brought under ISDS highlighting some of the flaws of this procedure. This illustrates the potential impact of ISDS on local and regional authorities in the EU and supports the need for this stakeholder group to be included in the dialogue on ISDS'.

It is clearly important that the local and regional dimension of TTIP is considered by the negotiators and local government in the UK does have an interest in ensuring that CoR should be granted interested party status on the EU side.

The debates around TTIP are not new, though this treaty is clearly of greater significance than most other bilateral ones. The debates around the General Agreement on Trade in Services (GATS), for example, were focused on concerns about the possible impact on accessibility and quality of services and universal access; about the lack of transparency of the negotiating process and the agreement itself; and on the virtual irreversibility of the commitments. The three main Westminster parties support TTIP, though some MPs have expressed unease about some aspects of it. Whatever the perspective of individuals, local groups or councillors, understanding the arguments for and against and having open discussion locally must be a boost to democratic engagement.

I would like to thank Tom Lines, a consultant specialising in international trade and agricultural markets, who kindly commented on a draft of this briefing.

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