



The Consumer Voice in Europe

Consumers at the heart of the Transatlantic Trade and Investment Partnership (TTIP)

BEUC Position Statement¹

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¹ Last update 21 May 2014. Further detailed information can be found in BEUC sector-specific position papers (published here once available: <http://www.beuc.org/publication/position-papers>).

Summary

- Trade liberalisation has the potential to benefit consumers where it is promoting a sustainable economy. Therefore, for TTIP to deliver consumer benefits, several conditions must be met.
- A positive agenda for delivering consumer benefits under TTIP would for instance include deleting caps and duties for personal imports (i.e. personal allowances) and lowering, if not eliminating, roaming fees for transatlantic telecommunications. It would also be key to protect consumers against discrimination based on their place of residence.
- Transparency and openness in the process will be vital to achieving a deal with positive implications for consumers. BEUC wants consumers to be acknowledged as a key interested party and their views to be proactively sought as part of the negotiations. It will be difficult to support a deal when being left in the dark about what it contains. This is particularly important in the context of negotiations where vital issues such as consumer safety and other fundamental protections are being negotiated. A failure to be more transparent runs the risk of generating civil society distrust.
- There is no need for an Investor-to-State-Dispute Settlement (ISDS) mechanism: the EU and US both have well-functioning court systems and robust private property rights. As such, the threats to investors that justify the establishment of ISDS mechanisms in some parts of the world do not exist in the EU and US. We should not be creating two parallel systems: as ordinary citizens and national investors, foreign investors should make use of the existing US and EU domestic court systems
- Consumer protection laws are there to benefit the society as a whole. We are supportive of regulatory co-operation, when this is being done as a way to promote best practices and to improve the well-being of our citizens. However, significant bodies of legislation and regulation have been built up over the years giving US and EU citizens considerable protections in diverse areas including health, safety, the environment and consumer and worker's rights. The focus of TTIP on reducing non-tariff barriers inevitably therefore raises concerns about the deal being used as a backdoor mechanism to reduce protections. To counter these policy makers must ensure, on the basis of a sound engagement with civil society, the identification of those regulations that are important and fundamental and may not be compromised on. It will also mean ensuring that 'trade impact assessments' take proper account of consumer related benefits and risks.
- There are particularly sensitive areas such as food, e- and m-commerce, intellectual property, data protection and financial services, which will be briefly mentioned in this paper and dealt with more in detail by BEUC in sector-specific position papers, as soon as negotiations progress and more information on their content is available.

1. Introduction

Trade liberalisation has the potential to benefit consumers where it is promoting a sustainable economy. Therefore, BEUC is in principle supportive of a TTIP agreement, but fully aware that, for TTIP to deliver consumer benefits, several conditions have to be met that are outlined in this position paper.

Benefits could come from both reduced tariffs as well as eliminating non-tariff barriers through mechanisms such as regulatory convergence. It is however vitally important that this is achieved without reducing existing regulatory protections in important areas such as health, safety, the environment and consumer protection. Many of the potential benefits are at this stage theoretical and, therefore, much more focus will be required on the details as negotiations progress.

Much stress to date has been put on the potential gains of this trade agreement in terms of economic growth and jobs and this has long been the general argument in favour of trade liberalisation. However, it should not be forgotten that trade liberalisation will deliver these announced benefits only if there is consumer spending which might subsequently lead to growth and jobs. Therefore, it is so crucial that consumers are provided with the guarantees for trust in the transatlantic market. It must be highlighted that TTIP must be in line with sustainable development, this concept including environment, health but also economical sustainability for consumers in a long term perspective.

There are direct consumer benefits that could be achieved and that are particularly important to consumers and consumer organisations, such as diversity of products and services and lower prices. An agreement that opens up markets has the *potential* to realise such positive outcomes *provided that* it preserves existing consumer protections, guarantees to its signatories the right to regulate in the future and/or improves protections and is compatible with sustainable development.

A positive agenda shall look for ways to further expand opportunities for consumers and microbusinesses. A pro-consumer view for example should tackle duties for personal imports². Another example would be the tackling of excessive pricing of transatlantic telecommunications (roaming fees) that would benefit business customers and private consumers, travelling or not. It would also be a very strong consumer friendly signal to ban territorial discrimination towards consumers depending on their place of residence when buying online in a transatlantic context. In addition, it is important to ensure that EU law providing consumers with strong rights such as cooling-off periods or legal guarantees are also enforceable towards companies operating from the US and are not considered a barrier to trade.

² In the United Kingdom for instance, at present the personal allowance before duties for goods from outside the EU, including the US, take effect is relatively low (£135 - http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageTravel_ShowContent&id=HMCE_CL_000014&propertyType=document#P34_3134).

2. Transparency

From the perspective of consumer groups, and public interest groups more widely, transparency and openness in the negotiation process will be vital to achieving an agreement with positive outcomes for consumers. We recognise that in any negotiation there is a need for discretion but that is not the same as secrecy. We want consumers to be acknowledged as key interested parties and their views to be proactively sought as part of the negotiations.

If members of civil society are not able to look into the details of the negotiating texts, we will not be able to share our collective knowledge and give input. It will also be hard to support a deal when we are in the dark about what it contains. This is particularly important in the context of negotiations where vital issues such as consumer safety and other protections are being negotiated. A failure to be open up runs the risk of generating civil society distrust. The Anti-Counterfeiting Trade Agreement (ACTA) was another high profile casualty of a failure to properly take on board the concerns of civil society.

Therefore, we want both the EU and US to commit to openness and transparency throughout the negotiations. Past experiences, particularly in terms of efforts to participate in the Transatlantic Economic Council and meetings around the High Level Regulatory Co-operation Forum have not worked well because of a lack of mutual engagement.

The new EU advisory group and the publication of some EU position papers are welcome developments but there is still a lack of clarity as to the level of detail that will be shared. Our fundamental principle is that there should be equal access to information for all interested stakeholders. Public interest groups should be given as much information as any business interest group. The advisory group will only be able to provide high quality input if detailed negotiation information is shared with its members, and if they can share this information with their experts to provide valuable input. Therefore, confidentiality restraints should be limited as much as possible and transparency should be the default rule.

3. Investor-state dispute settlement (ISDS)

ISDS mechanisms have historically been included in trade deals between countries with very different levels of legal and judicial standards, in order to allow investors to go to third party arbitration in case of possible arbitrariness by the host country (such as unlawful expropriation). In fact, European states started asking for the inclusion into international investment agreements of the possibility for their investors to resort to an international arbitration body precisely in order to compensate for the inadequacy of the counterpart's legal and judicial standards. We do not think it is appropriate to include these provisions in this deal. The EU and US both have well-functioning court systems and robust private property rights which mean that investors do not need to resort to an additional private court system.

ISDS mechanisms have been included so far in hundreds of investment treaties. However, questions are increasingly being asked about their use. Based on existing agreements around the world, investors have been increasingly able to use ISDS provisions to challenge and undermine legitimate public policy objectives such as cigarette plain packaging laws or the trade in toxic waste.

On this basis, developing countries are increasingly resistant to be subject to ISDS provisions and even developed countries are now having doubts. For instance, Australia decided recently to include ISDS mechanism only on a “case-by-case” basis. Many procedural challenges that exist with the current system have also been highlighted by the OECD and UNCTAD. These include the need to reduce the conflict of interest of arbitrators, provide for greater transparency, reduced costs, shorter time-limits and protection against frivolous claims.

In conclusion, we should not be creating two parallel unnecessary systems: as ordinary citizens and national companies, foreign investors should use the domestic court systems.

4. Non-Tariff Barriers (NTBs) and regulatory coherence³

Reducing tariffs has been the most important issue in most historical trade deals and, where this has been successful; there have been clear benefits for consumers in terms of the pass through of reduced costs as reduced consumer prices.⁴ However, a key aim of TTIP is to bring rules and regulations on both sides of the Atlantic in line with one another in order to achieve, besides tariff reduction, regulatory ‘harmonisation’ or compatibility. One particular aspect of this aspired regulatory coherence is the reduction of NTBs, or unjustified technical barriers to trade. The stated objective is to build on key principles and disciplines of the WTO Agreement on Technical Barriers to Trade (TBT) to achieve meaningful market access, and establish ongoing mechanisms for improved dialogue and cooperation on TBT issues⁵.

It is essential for negotiators to acknowledge that consumer protection laws may not be interpreted as trading rules, but are there to benefit the society as a whole. We are supportive of regulatory coherence, when this is being done as a way to promote and exchange best practices and to improve the well-being of our citizens. In particular, there are clear benefits from increased co-operation and information exchange between regulatory agencies on either side of the Atlantic.

However, this is an important and sensitive area. Significant bodies of legislation and regulation have been built up over the years giving US and EU citizens considerable protections in diverse areas including health, safety, the environment and consumer and worker’s rights. The focus on reducing non-tariff barriers inevitably therefore raises concerns about the deal being used as a backdoor mechanism to reduce protections, or to harmonise by levelling down. In the face of pressures from EU and US industries, it is important that the negotiators stick to

³ References are made to convergence, cooperation and coherence in official statements by DG Trade. It is not clear whether these concepts are mutually substitutable or only partially overlapping. For the sake of this general paper, we will refer to coherence as a generic concept.

⁴ Which?, ‘Trade Matters: How Freer Trade is Good for UK Consumers’, September 2005.

⁵ http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151627.pdf

the promises that they have made to ensure that levelling down is not an unwanted side effect of negotiations.

In light of these risks, we are clear that regulatory coherence must not erode existing protections. To do this, it will first be necessary for policy makers to ensure, on the basis of sound engagement with civil society, the identification of those regulations that are important and fundamental and may not be compromised on. In this context, trade impact assessments will need to take proper account of consumer related benefits and risks.

Principles such as mutual recognition or equivalence must be handled with utmost care, as it can also lead *de facto* to deregulation. The model could work in some areas and it is worth exploring to identify examples of rules or requirements that are genuinely duplicative. That said, there will also be areas of law where mutual recognition or equivalence will not be suitable, such as food, chemicals or financial service. In the case of food safety legislation in Europe for instance, decisions are inspired by the so-called farm-to-fork approach and based on the precautionary principle⁶, allowing the prohibition of certain substances or procedures on the basis of a justified assumption cannot be reconciled with mutually recognition or equivalence. The US system foresees exactly the opposite and it appears difficult to conceive how convergence could take place.

A basic principle that should inform the approach of negotiators must be that trade agreements are not the place to either increase or reduce regulation. One additional way of achieving good results in this area will be to focus on outcomes. This means carefully identifying the consumer needs or rights to be protected whilst sometimes allowing mutual recognition of the ways in which this is achieved. We must also ensure that differences can be maintained where appropriate and that we reserve the right to go beyond existing levels of protection in the future where risks justify further intervention. This still leaves open the possibility of progress by mutual recognition, in cases where it does not mean reducing existing regulatory protection.

The benefits and risks from these initiatives are difficult to identify precisely in advance of concrete proposals. As such, the impact on each sector under negotiation is likely to vary considerably and this should become clearer as talks progress, as long as there is sufficient transparency in the process.

6 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 preventive decision-taking in the case of risk. However, in practice, the scope of this principle is far wider and covers consumer policy, European legislation concerning food and human, animal and plant health. The precautionary principle may be invoked when a phenomenon, product or process may have a dangerous effect, identified by a scientific and objective evaluation, if this evaluation does not allow the risk to be determined with sufficient certainty (http://europa.eu/legislation_summaries/consumers/consumer_safety/l32042_en.htm).

5. Food

Food is a particularly important sector. Here, there are a number of areas in which co-operation could lead to consumer benefits. Firstly, we would like to see a global system for food alerts. At present, the EU uses the Rapid Alert System for Food and Feed (RASFF) which is not recognised by the US. We would also like to see co-operation on finding better ways to ensure traceability and food authenticity. Improved food labelling could also be an area where progress could be achieved.

As well as these potential benefits, there are also risks in this area. Concerns over these risks find also confirmation in various public comments by US food industry representatives and Government officials as well as members of Congress. On food standards we would not want a deal that limited EU countries from applying standards that give higher protection than that agreed under any treaty. This means equivalence will be unlikely to be an acceptable compromise in most areas. An example is that in Europe, Genetically Modified (GM) foods must be labelled as such, whereas in the US they don't. TTIP should allow the EU to continue prohibiting the use of veterinary drugs (hormones, beta-agonists and antibiotics) for growth promotion, but also that of the import and sale of foods from animals that have been undergoing such treatments.

As already indicated, the EU should maintain the use of the 'precautionary principle' as enshrined in the Lisbon Treaty but there is also a need to respect wider risk management criteria – for instance the EU recognises that food regulation should be based also on a broad social, ethical and economic dimension (in addition to scientific assessment)⁷

6. e-commerce, m-commerce, intellectual property and data

The last few years have seen a rapid growth in e/m-commerce activities and an expansion in both applications and platforms (e.g. eBay, Amazon) for this to happen. However, there is still much that could be done to further deliver its full potential. TTIP offers an opportunity to expand this in a way that allows consumers to access a broadened digital market. For example, it would be a huge win for consumers if an agreement could be reached on mechanisms to allow EU consumers to download digital products, movies, music or e-books from the US and vice versa, without any discrimination on the basis of nationality, place of residence or use of particular websites.

Bringing down the high cost of transatlantic telecommunications (e.g. roaming fees) could also provide a significant boost and a direct consumer benefit.

Related to this is the important issue of intellectual property (IP) and the balance that needs to be struck between protection of IP and access to information. This is an important consumer issue – as we have witnessed in the context of ACTA – which is linked partly to e/m-commerce but also to health and pharmaceuticals.

⁷ Examples might include the ethics of something like cloning or the desire to make decisions based on the origin of a product.

A broad range of other questions aimed at building consumer trust online could be addressed through these negotiations. They include reducing online fraud, tackling unfair practices and improving access to information about consumer rights and to tools to facilitate consumer redress. Finding ways to give access to a wider set of compatible and safe payment mechanisms could also help facilitate trade.

A particular important 'digital' issue relates to data protection and data flows. We would like to see TTIP negotiators remove any restrictions to the free flow of information on the Web. As part of this, data protection should be left out of the trade negotiations as the regimes in the two jurisdictions are fundamentally incompatible and EU regulations must still be allowed to apply the European system. In addition, we consider important to have an independent assessment of the effectiveness of the US-EU Safe Harbour Privacy Framework and make necessary changes to ensure that it is adequately implemented and harmonised with the provisions of the – currently being updated – EU data protection legislation.

7. Financial Services

In spite of pressure from the European Commission and some stakeholders, regulatory coherence in the financial services sector might not be part of a future TTIP agreement. While there is room for exchange of best practices, especially in the context of the impressive start made by the new Consumer Financial Protection Bureau in the US, it is difficult to see how, in the current economic context, the inclusion of financial services in the EU-US free trade agreement negotiations in view of regulatory harmonisation, will not lead to a 'race to the bottom' in financial services regulation. From the consumer perspective, a free trade agreement is not the right place to pursue regulatory convergence⁸ in financial services. Convergence in financial regulation is a good objective in interconnected financial market places but a free trade agreement seems to us the wrong place to pursue this goal, since there are already international bodies with mandates that include regulatory convergence, such as the FSB, BCBS and IOSCO⁹. We should not allow TTIP to undermine their efforts and superpose an additional level to already complex convergence talks.

8. Other Issues

In addition to these priority issues, there are a number of other topics that are of great importance for us, such as energy, pharmaceuticals, medical devices and product safety. These will be monitored throughout the negotiations¹⁰.

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⁸ This view is not shared by the UK consumer organisation Which?. Their analysis leads to a more positive assessment of the potential of reinforcing financial rules due to the exchange of best practices between financial regulators provided consumer protections are safeguarded.

⁹ Financial Stability Board, Basel Committee on Banking Supervision, International Organisation of Securities Commissions.

¹⁰ Please refer also to BEUC sector-specific position papers (<http://www.beuc.org/publication/position-papers>).