

TTIP AND INFORMATION COMMUNICATION TECHNOLOGY



The Information and Communication Technology (ICT) sector is an important economic driver in both the US and EU, which together make up almost 50% of the global ICT market.¹ Trade in ICT involves both the provision of products (for example, computer hardware, software, and telecommunications equipment) and services (for example software development and financial services provision). ICT industry groups have therefore been eager to ensure that TTIP improves conditions for the technology sector and enhances market access.² However, the ICT negotiations also touch on several sensitive areas that could result in a loss of privacy, safety, and security for individuals, and as such civil society groups have also been paying close attention to TTIP's developing legal framework.

TTIP will likely affect the ICT sector in numerous ways. To begin with, it is probable that TTIP will reduce or eliminate tariffs on ICT goods and services, allowing US and EU manufacturers to expand their market access across the Atlantic. More significantly, however, TTIP will likely lead to a greater degree of regulatory cooperation between the US and EU on laws governing the ICT industry.

According to the European Commission's Factsheet on Information and Communication Technology (ICT), the EU's goals for regulatory cooperation on ICT in TTIP are:

- > To "set up ways of working together to better enforce regulations in the EU and US";
- > To "increase cooperation between regulators" in order to "avoid unnecessary differences in our rules and guarantee a high level of consumer protection"; and
- > To "set common principles for certifying IT products, especially for encoding and decoding information ('cryptography' in the jargon)."

With respect to the second point, the EU is particularly interested in pursuing regulatory cooperation in the areas of:

- > "e-labelling — setting standards for providing product information to consumers in electronic format, where this replaces labels and stickers for items with an integrated electronic display e.g. smart watches";
- > "e-accessibility — making ICT easy to use for people with disabilities"; and
- > "interoperability — enabling users to exchange data easily between different products."

In addition, the Commission issued a 20 March 2015 Position Paper on intellectual property (IP) in TTIP, which proposes "binding commitments on a limited number of significant IP issues" including some regulatory cooperation on ICT-relevant areas such as customs enforcement, patent procedures, and copyright.

Some of TTIP's probable interventions in regulatory cooperation on ICT are relatively unproblematic. For example, ensuring number portability (the ability to keep the same phone number when switching operators) and strong competition (antitrust) rules in the telecom industry could be positive steps. However, as noted above, the ICT negotiations also touch on several sensitive areas that could result in a loss of privacy, safety, and security for individuals.

DATA PROTECTION AND PRIVACY

The exchange of data across borders is an important part of contemporary life. Companies must be able to communicate with their international branches, individuals must be able to access their data from various locations, and producers must be able to sell and service their ICT products overseas. TTIP could help to reduce barriers to e-commerce and data flows by improving regulatory cooperation between the EU and US. Trade associations like the European Services Forum have advocated for such cooperation to ensure the smooth functioning of the international ICT market.

However, civil society groups have expressed concern that such cooperation could result in a 'race to the bottom' for safety and privacy standards. Concerns about privacy and data protection have become particularly important in the wake of revelations regarding spying activities by the US government, controversy over the EU Directive on Data Protection (putting in place EU rules to protect the privacy and security of personal data) and Safe Harbour Directive (a recently-overturned work-around that had allowed some US companies to comply with EU privacy and data protection rules, despite the US's lack of a national protection regime), and the continued threat of data breaches orchestrated by criminals seeking financial gain.

The result has been a struggle between civil society groups campaigning for enhanced privacy rules that would limit the ways that data can be used and shared by companies and governments, businesses advocating more regulatory cooperation and greater freedom to use

data for commercial purposes, and the US government's insistence on its power to gather data for its own activities.

This battle over privacy rights and civil liberties is compounded by the complex legal rules that currently govern the exchange of data between the US and EU. Under the EU's current Data Protection Directive, EU companies cannot send personal data to countries outside the European Economic Area, including the US, unless there is a guarantee that such data will be protected. This protection could come in the form of a country's legal regime providing adequate protection (which the US regime does not currently do, since to date it has passed no comprehensive data protection laws), or from US companies themselves if they operate under binding corporate rules, under model contracts, or—until recently—self-certify that they comply with the Safe Harbour Directive. This area of law is currently in flux, however, as the European Court of Justice on 6 October 2015 invalidated the Safe Harbour Decision, stating that "legislation permitting the public authorities to have access on a generalised basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life." In response, the EU and US agreed on 2 February 2016 to a new 'Safe Harbour 2.0' framework for transatlantic data flows: the EU-US Privacy Shield. In the meantime, a new General Data Protection Regulation (GDPR) has been approved by the EU Parliament's Civil Liberties Committee, and may soon come to replace the 20-year-old Data Protection Directive.



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Because privacy protection is a conflicted and highly contested area of EU and US exchange, this will be an important area to watch during the TTIP negotiations. The European Parliament and civil society groups have expressed concern that TTIP may weaken, rather than strengthen, existing protections as negotiators attempt to remove 'barriers to trade', including those caused by regulatory differences. The European Parliament's Civil Liberties Committee, for example, issued a 7 April 2015

Opinion on TTIP, expressing ongoing concern regarding US surveillance programs, and arguing that personal data protection should be 'fully exempted' from the TTIP agreement. In particular following the invalidation of the Safe Harbour Decision, and anticipating the passage of the GDPR, US negotiators are reportedly seeking to use TTIP to enhance the 'interoperability' of EU and US data protection rules, which in practice could mean a downgrading of EU protection standards.

INTELLECTUAL PROPERTY

Another area of concern for the ICT sector is the protection of intellectual property (IP) in ICT products. Because digital products and designs can easily be shared across platforms and borders, ICT producers often rely heavily on copyright and patent law to protect their interests. ICT industry associations have advocated using TTIP to enhance IP protection by strengthening IP regulations, coordinating US and EU law enforcement efforts, and other mechanisms.

However, strengthening IP protection comes with a number of costs. As demonstrated by the 2012 protests against the Anti-Counterfeiting Trade Agreement (ACTA), which ultimately resulted in the rejection of that agreement by the European Parliament, civil society has many important concerns regarding how expanding IP rights could come at the cost of freedom of expression, privacy, and the public interest. Overly broad IP protections privatize knowledge and shrink the public domain, and can lead to problems such as creating patent trolls, encouraging abusive copyright suits against fair uses of images, text, and music, and expanding realms of civil liability for ordinary citizens.

Because of the secrecy of the ongoing TTIP negotiations, it is difficult to determine precisely what IP provisions are currently on the negotiating table. However, it is important for civil society to keep an eye on this sector, and to be aware of any IP protections written into TTIP, so that it does not become 'ACTA through the back door'. The European Commission has stated that it is aware of such concerns, and that the controversial portions of ACTA—such as its provisions on IP enforcement by ISPs and making file sharing a criminal rather than civil offense—will not be part of the TTIP negotiations. However, other controversial points (such as cooperation on copyright and patent enforcement) remain open to discussion. Though the EU's stated priorities in the area of IP protection are fairly narrow (it's primary priority is in the area of extending protection for European geographical indications such as 'champagne' and 'feta', which the US treats quite differently), it must also contend with the US policy agenda, as well as industry stakeholder demands, and it remains to be seen how far the proposed texts of the TTIP will go in providing enhanced IP protection for ICT.

INTERNATIONAL RULES

One final point of concern for civil society activists is the potential for any agreements reached under TTIP to become 'globalized'. A significant aim of ICT producers and trade associations has been the creation of international standards for ICT regulation. Because the ICT market is so globalized, they argue, maintaining diverse national and regional regulations only serves to impede the market, and international regulations would be vastly preferable.

A number of international ICT standards are already in existence, and such standards are not objectionable per se, but it is important to maintain a close eye on their continued development in order to ensure that global regulatory standards uphold high levels of protection for privacy, data security, safety, and fundamental rights, and do not enshrine overly restrictive IP regimes. Because TTIP would create rules covering nearly half of the global ICT market, it would be a natural baseline on which to build future versions of international regulatory standards. This means that any data protection and intellectual property rules written into TTIP are of potentially global importance.



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1. See Joachim Bühler, *Federal Association for Information Technology, Telecommunications and New Media (BITKOM), "TAFTA/TTIP in the Light of the Modern Digital Age and its Significance for the Future of the ICT Industry," in The Transatlantic Colossus: Global Contributions to Broaden the Debate on the EU-EU Free Trade Agreement (Daniel Cardoso et al. eds. 2013), at 68.*
2. Industry associations such as Digital Europe, the Information Technology Industry Council, the Telecommunications Industry Association, and the European Services Forum have all issued statements supporting various aspects of TTIP. Digital Europe & Information Technology Industry Council, "ICT Industry Recommendations for Regulatory Cooperation in the Transatlantic Trade and Investment Partnership," 2 February 2015; Telecommunications Industry Association, Letter to Douglas M. Bell, "Docket Number USTR-2013-0019, Request for Comments for the U.S.-EU Transatlantic Trade and Investment Partnership," 10 May 2013; European Services Forum, "Cross Border Data Flows: An Imperative for All Trading Companies in a Global World: ESF Position Paper," 10 May 2013.
3. The Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU, for example, will reduce tariffs on ICT products to zero, and the TTIP is likely to follow a similar path.
4. European Commission, factsheet, "Information and Communication Technologies (ICT) in TTIP" (2015), available at http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153009.pdf
5. *Id.*
6. European Commission, "Intellectual Property: EU Position Paper," 20 March 2015.
7. European Commission, "How Much Does the TTIP Have in Common with ACTA?" July 2013, available at http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151673.pdf
8. European Services Forum, "Cross Border Data Flows: An Imperative for All Trading Companies in a Global World: ESF Position Paper," 10 May 2013.
9. For example, the European Consumer Organisation (BEUC) has expressed concern that "including data flows (in TTIP) will result in a significant weakening of consumers' fundamental rights to privacy and to the protection of personal data." The European Consumer Organisation (BEUC), "Position Paper and Factsheet: Data Flows in TTIP," 2015.
10. Directive 95/46/EC of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 24 October 1995, L 281/31, at art. 25.
11. See European Commission website, "Overview on Binding Corporate Rules," available at http://ec.europa.eu/justice/data-protection/international-transfers/binding-corporate-rules/index_en.htm
12. See Decision 2001/497/EC; Decision 2004/915/EC; Decision 2010/87/EU.
13. Commission Decision 2000/520/EC pursuant to Directive 95/46/EC of the European Parliament and of the Council on the Adequacy of the Protection Provided by the Safe Harbor Privacy Principles and Related Frequently Asked Questions by the US Department of Commerce, 26 July 2000, L 215/7.
14. Case C-362/14, Maximilian Schrems v Data Protection Commissioner, 6 October 2015, at para. 94.
15. European Commission, Press Release, "EU Commission and United States Agree on New Framework for Transatlantic Data Flows: EU-US Privacy Shield," 2 February 2016, available at http://europa.eu/rapid/press-release_IP-16-216_en.htm.
16. Draft text available at http://www.emeeeting.europarl.europa.eu/committees/agenda/201512/LIBE/LIBE%282015%291217_1/sitt-1739884
17. European Parliament, Committee on Civil Liberties, Justice and Home Affairs, "Opinion on Recommendations to the European Commission on the Negotiations for the Transatlantic Trade and Investment Partnership (TTIP)," 2014/2228(INI), 7 April 2015. The European Consumer Organisation's position paper on TTIP expresses similar opinions. The European Consumer Organisation (BEUC), "Position Paper and Factsheet: Data Flows in TTIP," 2015.
18. See Joachim Bühler, *Federal Association for Information Technology, Telecommunications and New Media (BITKOM), "TAFTA/TTIP in the Light of the Modern Digital Age and its Significance for the Future of the ICT Industry," in The Transatlantic Colossus: Global Contributions to Broaden the Debate on the EU-EU Free Trade Agreement (Daniel Cardoso et al. eds. 2013), at 69.*
19. European Commission, "How Much Does the TTIP Have in Common with ACTA?" July 2013, available at http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151673.pdf
20. European Commission, "Intellectual Property: EU Position Paper," 20 March 2015.
21. See, e.g., European Services Forum, "Cross Border Data Flows: An Imperative for All Trading Companies in a Global World: ESF Position Paper," 10 May 2013.
22. See, e.g., the WTO Information Technology Agreement; WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

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