

Why TTIP matters for local governments

Policy Brief for EUROCITIES¹

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Abstract

The Transatlantic Trade and Investment Partnership (TTIP) has generated unprecedented attention and debate within the European Union. This has also made itself felt at the local level. Local governments are confronted with TTIP in two ways. First, citizens, individually or collectively, interpellate their local representatives about the possible (negative) consequences of TTIP. Second, politicians face the more specific question what the effects of the transatlantic agreement on local policies could be. This policy brief examines especially the second theme. It is argued that TTIP is relevant for local governments particularly with regard to three of its components: services, government procurement and investment protection. The policy brief explains how different possible provisions in the agreement affect local governments in different ways. Most importantly, this study concludes that because they face local political activism on and potential consequences of the agreement, local governments should be significantly informed about and involved in the negotiations. This policy brief is based on a presentation made by the author during the EUROCITIES Executive Committee political debate on 23 February 2016 in Brussels.

Introduction

Since mid-2013, the European Union (EU) and the United States (US) are negotiating a Transatlantic Trade and Investment Partnership (TTIP) to further liberalise trade and investment flows across the Atlantic. At the time of writing (end-April 2016), 13 negotiating rounds have been held. These negotiations have been confronted with unprecedented public attention and debate, especially on the European side. Fearing that TTIP might lead to a hollowing out of ambitious social, environmental, health or consumer protection policies and of the democratic process through which such policies



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"The information contained in this evaluation does not necessarily reflect the official position of the European Commission".

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are set, non-governmental organisations (NGOs) have organised to mobilise against the negotiations with considerable success.

The debate on TTIP has not been limited to the European quarters in Brussels. Also on the local level, citizens, individually or organised collectively, regularly voice their concerns about the negotiations to their local representatives. Citizen committees, often loosely part of a national and even international coalition of similar groups, in different EU member states have asked their local councils to debate the TTIP and adopt motions, which have no legal effects but potential symbolic value. In that way, several hundreds of local governments have declared their municipality or town 'TTIP-free' while others have adopted a critical but less outright rejectionist position. Also organisations representing local governments at the national and European level have issued position papers on TTIP³.

That the intense debate on TTIP has also filtered through to the local level is not the only reason why local governments (should) care about the negotiations. TTIP might also directly affect local policies. Because this transatlantic agreement is not restricted to the elimination of tariffs but is predominantly about removing so-called 'behind-the-border-barriers' to trade and investment, also local policy measures (might) come into focus. This policy brief aims to clarify to what extent and how TTIP might have an impact on the autonomy of local governments to adopt policy measures. It will become clear that this effect is more probable for some components of the agreement than for others and that, with regard to these chapters, the exact (constraining) effect depends on the precise provisions included.

The remainder of this policy brief is organised as follows: in the next section, we perform a brief *tour d'horizon* of TTIP to conclude which of its components might directly affect local policies and, hence, merit special attention of local governments. Then, we analyse in more detail the three components of the negotiations that are most likely to have an impact on local governments. The policy brief ends with conclusions and recommendations.

Tour d'horizon

The Transatlantic Trade and Investment Partnership is conceived as a very comprehensive agreement. Currently, it is foreseen that TTIP should have 24 chapters⁴. These are grouped in three pillars: market access, regulatory cooperation and rules. The scope is not only broad in terms of issue areas covered. Several chapters of TTIP also apply to all levels of government, including the local level.

³ See e.g. EUROCIITIES: <http://www.eurocities.eu/eurocities/allcontent/EUROCIITIES-statement-on-the-Transatlantic-Trade-and-Investment-Partnership-WSP0-9PK7Y2> or CEMR:

http://www.ccre.org/img/uploads/piecesjointe/filename/CEMR_position_paper_TTIP_EN.pdf.

⁴ See <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230>.

In today's interconnected world and because of the 'behind-the-border' nature of the agreement⁵, most aspects discussed in TTIP can have some kind of impact on local governments. For example, economic restructuring following tariff liberalisation might result in an increase in employment and revenue for some cities but in a decrease for others. A change in pesticides regulation through the agreement might lead to more or less pollution of the local ground and consequent higher or lower costs for soil improvement. This makes TTIP automatically of interest for local governments, but not necessarily more than other policy measures of higher levels of government.

This policy brief will focus primarily on those components of TTIP that might have a *direct* effect on local policies by constraining the autonomy local governments have in adopting policy measures.

Local governments can be excluded from the direct effects of chapters in TTIP implicitly and explicitly. First, chapters can cover issue areas for which local governments do generally not have competence. Examples in TTIP include trade in goods and customs duties or customs and trade facilitation (traditional at-the-border issues). Within the European Union, establishing import duties is the exclusive competence of the supranational level. Second, the local level might be explicitly excluded from the application of chapters. For example, it is stipulated that the obligations of the chapter on 'good regulatory practices' only apply to regulatory acts at the EU level.

Based on such *de facto* and *de jure* considerations of the potential impact of TTIP on local governments, the remainder of this policy brief will focus on the three components of the agreement that might have a direct impact on local policy measures: services, government procurement and investment protection.

Services

One area where TTIP can interfere with local policies is in the area of services. TTIP aims to significantly liberalise trade in services beyond what both parties have already committed to in the General Agreement on Trade in Services (GATS)⁶. Local governments are, to varying extent across the EU, significant regulators or providers of services such as healthcare, social care, public transport, housing, waste management and water supply.

Most of the services that local governments provide or regulate are considered as public services. The European Commission is of the opinion that 'every EU trade deal comes with solid guarantees which fully protect public services. TTIP will too. These guarantees mean EU governments can't be forced to privatise. ... Governments can

⁵ Meaning that the agreement is supposed to tackle barriers to trade and investment in the domestic sphere, beyond tariffs and quota administered at-the-border.

⁶ Besides binding the existing level of liberalisation and 'future proofing' such liberalisation by including a ratchet that would capture any future autonomous liberalisation, the objective set in the 'ambitious comprehensive scenario' in the European Commission's impact assessment on the TTIP negotiations is to reduce barriers to services trade with 25%. See

http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150759.pdf.

decide, or change, who delivers a public service at any time. This means there's no so called "ratchet clause" for public services'⁷.

However, some legal scholars specialised in the effects of trade liberalisation on public services provision in the EU argue that the protection of public services in EU free trade agreements is not as solid as the Commission claims it to be. In a study on TTIP specifically, Krajewski and Kynast concluded that "TTIP is likely to affect public services in multiple ways. The effectiveness of approaches to public services available in current EU practice with regard to free trade agreements is only limited: on the one hand, they lack legal and conceptual clarity, while on the other hand, they do not appear sufficiently flexible to be able to adapt to a transformation of public services'⁸.

While an exhaustive analysis of the impact of specific legal formulations on the autonomy of local governments to provide or regulate services is beyond the scope of this policy brief, two general observations can be made. First, the approach to services liberalisation that is adopted in trade negotiations matters. Services can be liberalised through a positive list approach – where parties explicitly list the sectors for which they want to undertake liberalisation commitments – or through a negative list approach – where parties commit to liberalise all services sectors except where they explicitly list exceptions or reservations for current (in Annex I) or future (in Annex II) restrictive measures. Hybrid listing that combines both approaches is also possible and is the strategy that is followed by the EU in TTIP. Positive listing offers the most solid guarantee that no services are liberalised as an unintended consequence.

Besides the approach to making liberalisation commitments, the impact of TTIP on local public services can be limited by at the same time legally clear and flexible definitions of public services⁹.

Government Procurement

Local governments do not only supply or regulate services, but also buy goods and services through what is called 'government procurement'. The ambition for TTIP is to significantly reduce barriers to participation of firms from the EU and the US in the other parties' public procurement markets¹⁰. This aim applies to 'all government levels'¹¹, including the local level.

⁷ See <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1115>.

⁸ See <http://www.boeckler.de/pdf/fof/S-2014-720-1-2.pdf>.

⁹ In the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, a negative list approach is used (a first for the EU) together with a combination of reservations and exceptions that differ in substantive scope and levels of protection. For local governments specifically, it is foreseen that certain liberalisation commitments in the areas of, inter alia investment and cross-border trade in services do not apply to existing local non-conforming measures (e.g. art. 8.15(a)(iv) or art. 9.7(a)(iv)).

¹⁰ The 'ambitious comprehensive scenario' has set the goal of 50% reduction of barriers to participation in public procurement.

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http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153000.3%20Public%20Procurement.pdf.

Commitments in the area of government procurement can have direct effects on local governments in different respects. In theory, although this is not likely, TTIP could change the public contract value thresholds above which public tenders must be published for competitive international (transatlantic) competition. Besides these threshold values, also the procedures in tendering for public contracts could be adapted with the aim of maximising transparency and hence affect the process by which local authorities purchase work, goods or services.

Besides threshold levels and procedural requirements, TTIP could proscribe or prescribe which considerations could or should be taken into account when awarding public contracts. Under the Directive 2014/24/EU¹², public authorities in the EU can include social and environmental considerations in their public procurement decisions. For local, as well as other, governments' autonomy, it is therefore important that TTIP will not constrain their ability to integrate social and environmental considerations when purchasing work, goods or services. Especially short supply chain considerations, like short food chain programmes in procurement by for example public local schools, could come into conflict with TTIP if the agreement would include provisions that prohibit or constrain "buy local" policies¹³.

Finally, in the past there has been some uncertainty about the status of inter-municipal cooperation under EU public procurement and competition law. It is important for local governments that TTIP does not constrain the possibility of local authorities to form or join municipal cooperation to execute local public services.

Investment Protection

Provisions for investment protection through investor-state dispute settlement (ISDS), which has been renamed Investment Court System (ICS) in the new European Commission proposal for investment protection in future trade and/or investment agreements¹⁴, is probably the most contentious issue of the TTIP negotiations. Investment protection provisions do not directly liberalise trade or investment and cannot lead to the obligation for governments to change certain measures. However, they do offer protection post-establishment to investors by allowing them to challenge government measures before an international investment tribunal without having to go through the national legal system, which can eventually result in compensation offered.

For local governments, at least two issues are important with regard to investment protection. First, clear and legally forceful language to protect the right to regulate against claims from foreign investors helps to safeguard policy autonomy at all

¹² <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014L0024>.

¹³ No textual proposal from the EU on public procurement has been made public at the time of writing. In their analysis of the Public Procurement Chapter in CETA, the Canadian Centre for Policy Alternatives has argued that it threatens "buy local" food policies in schools, hospitals or other municipal institutions, which the federal government has claimed to be safe', see https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2014/09/making_sense_of_the_ceta_PROCUREMENT.pdf. Public procurement is considered as one of the most difficult negotiating areas in TTIP.

¹⁴ See http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

governmental levels, including for local governments. Some legal scholars doubt that the new approach proposed by the European Commission sufficiently protects the right to regulate of governments¹⁵.

Second, for the de facto autonomy of local governments, it is important to know which potential (financial) burden investment protection provisions in TTIP can bring for them. If a local government measure (e.g. a public service obligation, a price ceiling, a decision on a concession) is challenged by an international investor, an important question is who will be responsible and who will pay for both defending the local government and for compensating the investor if it wins the dispute. Under customary international law, a State assumes international responsibility for the conduct of any organ of that state, including local governments¹⁶. In international investment disputes against local measures, such as in *Metalclad vs. Mexico*¹⁷, the State has indeed acted as Respondent. For local governments, it is then key to know which internal agreements within the EU, including financial arrangements, will be foreseen in case an investor raises a claim against a local measure under the investment protection provisions of TTIP, and how it will be ensured that this does not constrain the local policy autonomy, within the boundaries of national and EU law.

Conclusions and recommendations

Local governments are confronted with TTIP in two ways. First, because of the unprecedented debate on TTIP that has reached the local level, local politicians' role as representatives closest to the citizens, demands that they are able to respond to questions and concerns and to debate about the agreement with a sufficient level of knowledge. Second, the local level is not excluded from commitments undertaken in TTIP and hence the agreement might not only indirectly impact on local circumstances and policies but might also have direct effects on the autonomy of local governments to adopt policies in the local general interest.

The possibility of direct effects of TTIP on local governments is highest in three components of the negotiations: services, government procurement and investment protection.

Because of the debate about TTIP on the local level, the indirect and, especially, the possible direct effects of the agreement on local policies, local governments should be kept well-informed about and involved in the negotiations. This information and participation should focus particularly on the components of the negotiations that might have direct effects on local governments and could, for reasons of feasibility, occur through the European representative organisations of local governments such as the Committee of the Regions, EUROCITIES and the Council of European Municipalities and Regions (CEMR).

¹⁵ See http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2692122.

¹⁶ Article 10 of the draft articles on state responsibility adopted by the International Law Commission of the United Nations in 1975, see *Yearbook of the International Law Commission*, 1975, vol. ii, p.61.

¹⁷ See

https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC542_En&caseId=C155.

In sum, this policy brief results in the following recommendations:

- Local governments should be informed about and involved in the TTIP negotiations because they are addressed by their citizens about these negotiations and because TTIP might indirectly *and* directly affect them
- Local governments should be especially consulted and notified about those components of the negotiations that could have a direct impact on their policy autonomy. Currently, these include primarily the chapters on services, government procurement and investment protection
- With regard to these components, local governments should get clear answers – going beyond mere reassurances – to the following questions:

With regard to services:

- How will it be assured that local governments can provide and regulate public services as they decide, within the limits of European legislation? Is the current approach sufficient in the light of critical comments made by legal scholars?
- Will local governments face no additional constraints (including in the form of potential additional lawsuits that can lead to compensation) if they want to remunicipalise services?

With regard to government procurement:

- Will it be guaranteed that there will not be any changes to value thresholds for international competitive tendering compared to current obligations?
- Will it be assured that there will not be any limitations to the possibility of local governments to apply social and environmental considerations in procurement decisions, including preferences for short supply chains?
- Will it be guaranteed that there will not be changes to other procedural tendering obligations that might complicate the purchase of goods and services for local governments?
- Will it be assured that there will be no conflict between government procurement commitments made in TTIP and inter-municipal cooperation?

With regard to investment protection:

- Which internal EU agreement, including financial arrangements, will be foreseen in case an investor under investment protection provisions in TTIP sues a local government?
- How will it be ensured, under such arrangements, that a local government is not constrained to execute its local authority within the boundaries of national and EU law?