This paper aims to offer an ‘early warning’ regarding several troublesome areas of the on-going negotiations of the TTIP: the production of knowledge relevant to the TTIP, and its use for the justification of the project, participation, the emergent institutions as well as underlying rationality of the project. While many Europeans fear this ‘economic integration’ as a way to undercut European protective standards, our analysis suggests that the hazard is equally salient for the US. The negotiation documents so far produced, in particular by the EU (the European Commission), leave an impression that the EU, a skilled market polity, has taken up to impose a postnational market discipline on its more traditional counterpart. The irritation with the democratic processes, constitutional structure of the US and a possible influence of the lower levels of government, frustration with the non-profit motivations in the market, eagerness to substitute democratic discourse with the scientific discourse, or democratic process with international standards, and

*This is a shorter version of the paper as required by the organisers. The marked parts are included in this draft.*

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1 The main sources for the analysis have been the Report of the High Level Working Group, the Report of the London based think tank ‘the Centre for the Economic Policy’, and the European Commission’s ‘Non Papers’.
finally a foundational belief in the market mechanisms permeate the EU negotiation position in the wake of the negotiations.

2. PARTICIPATION AND PARLIAMENTARY ACCOUNTABILITY

We examine two important aspects of the legitimacy of the TTIP. The first concerns the question ‘who effectively participates’ in the development of the TTIP. The inquiry goes beyond formal participation, so as to incorporate the aspects of quality of participation, and in particular the power to produce the policy-relevant knowledge. The second aspect we address is that parliamentary accountability. For example, the European Commission claims that the TTIP will acquire democratic legitimacy on account of parliamentary approval, similar to Congress in the US, it raises the question as to the strength of parliamentary processes to provide such justification.

2.1. Who Participates?

What is today coined as ‘Transatlantic Relations’ has evolved in a series of official and permanent dialogues, formalised first under the Transatlantic Declaration of 1990\(^2\) and expanded through the New Transatlantic Agenda in 1995.\(^3\) The ‘permanent dialogues’ include the Transatlantic Business Dialogue, Transatlantic Labour Dialogue, Transatlantic Consumer Dialogue and Transatlantic Environment Dialogue. These permanent dialogues are organised during Annual Summits between EU and US leaders, and are supported by thematic entities such as the Transatlantic Economic Council and the EU-US Energy Council, as well as High Level Working Groups. While the ‘permanent dialogues’ have had variable degrees of success or failure in their own terms,\(^4\) one dialogue stands out. The Business Dialogue was acclaimed both to have had the most success as a rule-making instrument,\(^5\) as well as criticised for giving certain economic actors (the CEO’s of large US and EU corporations\(^6\)) privileged access to policy makers.\(^7\)

The last chapter in the history of Transatlantic Relations has commenced in the 2011 with the establishment of the EU-US High Level Working Group on Jobs and Growth (HLWG). This HLWG was to examine the potential benefits of the EU-US economic integration:

*The Working Group was tasked to identify policies and measures to increase EU-US trade and investment to support mutually beneficial job creation, economic growth, and international competitiveness. Leaders asked the Working Group to work closely with all public and private sector stakeholder groups, and to draw on existing dialogues and mechanisms, as appropriate.*\(^8\)

This group has produced an influential report, widely used in public discourse and drawn upon by the Commission’s ‘non-papers’. This six page report is an ode on the benefits of economic

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2 See Pollock, Transatlantic Political Economy [10].
3 See Pollock, supra. None of these instruments is a binding legal Treaty. E. Fahey, ‘On The Use Of Law in Transatlantic Relations: Legal Dialogues Between the EU and US’, *European Law Journal* (forthcoming).
4 See M.G. Cowles, ‘The Transatlantic Business Dialogue: Transforming the New Transatlantic Dialogue’ in Pollack and Shaffer, *supra*, at 215, on TBD as most successful dialogue and also as to its relationship to and development of NTA. The Transatlantic Business Dialogue was launched in 1995 roughly at the time as the creation of the New Transatlantic Agenda. As documented by Cowles, the TABD consists of CEOs of over 100 of the largest firms on each side of the Atlantic.
5 See M.G. Cowles, supra.
6 Cowles Green; Shaffer and Nicolaidis.
7 Ibid.
integration - both in abstracto as well as in the case of the EU-US relations. The main message of the Report is then that the deepest possible economic integration between the two partners should be preferred.

An agreement of this kind [most comprehensive trade agreement] could generate new business and employment by significantly expanding trade and investment opportunities in both economies; pioneer rules and disciplines that address challenges to global trade and investment that have grown in importance in recent years; and further strengthen the extraordinarily close strategic partnership between the United States and Europe.\(^9\)

Who is the HLWG?

To analyse the content of the report we need to ask what was the membership and the task of the Group. Thus who has participated in this group? The first significant issue worthy of reflection is that the membership of the group is not made public at the website of the EU Commission: just the two chairs (EU trade Commissioner and US Trade Representative). This secrecy seems to be a deliberate decision: the Brussels based NGO ‘Corporate Europe Observatory’ has failed on numerous occasions to receive the information from the European Commission pursuant to freedom of information requests. The Commission has responded to the requests by saying that ‘[t]here is no full membership list of High Level Working Group on Jobs and Growth (HLWG)’ or ‘[U]nfortunately we are not in a position to provide you with the information requested as your request does fall outside the purpose of Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents. As mentioned before, there is no document containing the list of authors of the reports prepared by the High Level Working Group on Jobs and Growth (HLWG).’\(^{10}\)

Finally, the information has been made available to the NGO and the public – thanks to the courtesy of the US administration.

As already mentioned, the HLWG has been chaired by highest EU and US trade officials. The ordinary members of the HLWG were the executive officials of the European Commission and US administration. An interesting moment is that – unlike the US – the European Commission has not nominated any representatives of the Labour and Environment to take part in the preparation of the Report. Rather, the representatives of the DG Trade and the Internal Market should have defended these normative concerns.\(^{11}\)

Vast scholarship addresses the question of disciplinary or functional bias of ‘trade’ officials (broadly construed), the institutions committed to the ‘free trade’/’open markets’ mandate (such as the WTO, IMF, WB or the EU) as well as the mechanisms of the entrenchment of this bias.\(^{12}\) This line of critique holds that the normative commitment to free trade and open markets will tend to shove

\(^9\) Report, p2.
\(^{10}\) www.asktheeu.org/en/request/high_level_working_group_on_jobs
\(^{11}\) The list of members of the HLWG is not accessible on the website of the Commission. It can be found at the website of Corporate Observatory Europe, which was unsuccessful from claiming the documents from the European Commission, and received it only from the US administration. http://corporateeurope.org/sites/default/files/hlwg-members.pdf (Last accessed 20th Aug 2013)

See also
other normative concerns to a secondary status – usually as themselves a ‘product’ of this primary normative concern. Entrusting then the environmental and labour concerns to the EU trade and internal market officials, the European Commission as an institution demonstrated its own economic assumptions and normative priorities: more politicisation of either of these is crucial.

Whom did the HLWG listen to?

The second question that we need to address is the stakeholder participation in the preparation of the HLWG report. The Report claims that the ‘HLWG has engaged intensively with key stakeholders – including business, environmental, consumer, labor, and other representatives.’

Let the put forth solely few crude numbers here. In the initial consultations to the TTIP, out of the 48 stakeholders consulted, three stakeholders were the representatives of states, two stakeholders were private parties and finally 43 stakeholders were the industry representatives or their representative organisation. In the latest consultations, out of 52 submissions, only one submission did not come from industry. To be sure, the information regarding the so called ‘public consultation’ (both the stakeholders’ submissions or the Commission’s summary or report) are again not even available at the Commission’s website. The industry participation and support continue to be a crucial source of ideas and legitimacy also in the Commission’s non paper:

The purpose of this paper is to present some possible elements for a TTIP annex on pharmaceutical products. It is based on ideas put forward by EU and US industry and builds on existing cooperation between EU and US regulators in this area. It is anticipated that stakeholders will continue to support the process and could play an active role towards the implementation of some of the identified objectives. (p 14)

‘Industry’ is hardly a uniform group with common interest. Which industry is then supplying ideas to the rule-makers? The participants in the consultations were mainly lobbying firms, industry associations or large industry. The empirical question whose interests these entities represent goes well beyond the scope of this paper, yet the link with the mentioned ‘Business Dialogue’ may ground an informed intuition. The (empirically based) critique of Cowles Green posits that the Business Dialogue has given a ‘privileged access’ to the European Commission to the largest EU and US industry. Aside thus of the consideration regarding the highest resources and highest incentives of the big industry to influence the process, a previously established ‘intimacy’ may further tilt the .

13 As the above cited paragraph of the HLWG Report suggests, the employment is an automatic product of more free trade: it does not require a self-standing consideration.
14 Report, p2
15 The letter sent by one of the private parties is worth reproducing here:
J’envoie ce message pour contester parce que les valeurs citoyennes, écologiques, sociales et syndicales passent au second plan et loin derrière les valeurs marchandes et commerciales.
Toutes ces mesures n’ont qu’un seul but réduire l’être humain à l’état de consommateur dénué de tout sens critique, privé de culture et d’intelligence.
La compétitivité internationale n’est signe de richesse que pour un petit nombre de privilégiés, concourt à l’appauvrissement d’un grand nombre de travailleurs avec ou sans emploi et a comme objectif de ruiner un système de solidarité qu’est la sécurité sociale.
Cecilia Siddi

In terms of normative desirability, one may wonder whether we should base the regulation on the ideas (understand knowledge) provided by the industry. Moreover, the regulatory mixture of industry and regulators equally fails short the best mix to represent the common citizens of either the EU or the US. While industry can hardly be considered as an impartial representative of common interest, a large body of literature on ‘regulatory capture’ demonstrates that we are not ‘safe’ with regulators as well. In particular, groups and individuals with high-stakes in the outcome of regulatory decisions can gain influence over the regulatory agencies. They do so through lobbying, the ‘revolving doors’ problem (the officials professionally come from/go to industry) and, most importantly, through the intellectual capture. The sympathy here emerges as a consequence of dependency on the industry for information (information asymmetry), cooperation or shared professional, social or educational background (for instance attending the same universities). The threat of regulatory capture increases with the growth of regulatory units and, as we learn from the accompanying documents, the TTIP would be the greatest market in the world. In this light, the sole fact that the Commission is presenting the ideas of ‘industry and regulators’ as a one self-supporting intellectual unit should be considered as problematic.

Who is to assess the impacts of the TTIP?

A significant democratic concern regarding the process comes from yet another corner. While consulting stakeholders has so far usually implied listening to industry, assessing the impacts of the TTIP has been contracted out to ‘independent contractors’. The much publicised and disseminated Report of the London based think tank ‘the Centre for the Economic Policy’, commissioned by the DG Trade has supplied the basic of hard data (e.g. €119 billion a year for the EU) for the discourse of the Commission, but also other actors. The practice of outsourcing is with us to stay:

‘Now that the negotiations have begun, the European Commission will launch a trade sustainability impact assessment (Trade SIA). The Trade SIA will look particularly at the potential environmental and social impacts of the TTIP. It will be done by an independent contractor and will include a representative consultation process involving stakeholders and civil society from both the EU and the US. The process will provide genuine opportunities for consultation, information gathering, and dissemination of results.’

The first question that comes to mind in this regard concerns the ‘impartiality’ of the contractors. The lack of conflict of interest is normally ensured through the ‘no conflict of interests’ declarations and/or the declarations of professional honesty and diligence. Yet, one may doubt the sufficiency of such guarantees. The financially dependency of usually for-profit consultancies from the contractee (the European Commission in this case) renders any declarations of lack of conflict of interest rather

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20 In fact, as we will see further below, the Commission is more dissuasive of other market motivations than commercial ones.
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futile. Surely, none will be surprised that the Centre for the Economic Policy has brought forward the results entirely in line with what the contractee (the European Commission) calls for.

More importantly however, this approach aims to suggest that the knowledge regarding the benefits and costs of the TTIP is an uncontroversial objective set of facts, which solely needs to be collected and calculated by - basically anyone. Yet, this is entirely to misrepresent the political nature of knowledge on which these reports are based: it is not natural facts, but rather interpretative, controversial and political concepts and theories that ground these data.\textsuperscript{27} Outsourcing the impact assessments, along with the ‘technical’ presentation of data, aim to avoid the problematisation of knowledge that underpins these reports. This is a major concern for epistemic (reliability of the information) and democratic (how do we ascertain the valid knowledge) reasons.

The Commission, in order to appease all sorts of similar democratic concerns (including the executive dominance over the process, as well as the dominance of industrial interests), appeals to the fact that the deal between the EU and the US will be finally approved by both European Parliament (as well as the US Congress). The question arises however as to whether we can “postpone” democracy to this stage.

2.2. The TTIP and Parliamentary Accountability in the EU

From the outset, the new powers of the European Parliament and the existing powers of US Congress to consent to and thereby legitimize International Agreements has been an important part of the marketed legitimacy of the TTIP. Generally, the European Parliament endorsed the TTIP early in the process of securing a Council mandate.\textsuperscript{28} The US surveillance scandal however, and the inquiry of the European Parliament set to take place, may alter the context for the use of its powers, as noted here elsewhere.\textsuperscript{29}

The traditional debate regarding the powers of the European Parliament in the foreign relations has been concerned with the balance of powers between the Council and the European Parliament. Pursuant to Article 218(3) TFEU, it is the Council that shall authorize the opening of international relations negotiations, adopt negotiating directives and may authorize the signing and conclusion of agreements.\textsuperscript{30} Eeckhout for instance considers this process to exclude the European Parliament.\textsuperscript{31} Similarly, as Schütze contends the Council is not primus inter pares with the Parliament but instead is primus in relation to the negotiation of international agreements, and thus executive-dominant.\textsuperscript{32}

While these questions dominate the debate regarding the democratic legitimacy of the EU international trade law-making, a less exposed yet democratically highly relevant conflict may be found at a different stage: namely, the relations of the European Commission and the European Parliament. The underlying problem relates to who, how and why produces knowledge that frames

\textsuperscript{27} R. Dworkin, \textit{Justice for Hedgehogs}, (Ronald Dworkin, 2011)
\textsuperscript{28} EP Endorsement___
\textsuperscript{29} Surveillance enquiry___
\textsuperscript{31} See Eeckhout, EU External Relations Law, 2nd edn, (Oxford University Press, 2011) at 199.
the political debate and on which the Parliament should/will base its conclusions regarding the desirability of the TTIP.

The main sources of ‘knowledge’ on which the European parliament is to rely is the report of the HLWG, staffed by the members of the European Commission. Further, the Impact Assessments outsourced (and paid for) have been outsourced to the ‘independent’ contractors by the European Commission. Other supporting documents, such as non-papers, further self-referentially refer to the HLWG report as a source authority. Of course, the ‘stakeholders’ worth to listening during the process were also chosen by the Commission. Overall, the majority of TTIP relevant knowledge is (and will be) produced under the directorship of the European Commission, and reflecting thus its normative commitments.33

One may wonder the extent to which the European parliament may be ‘trapped’ in such a set up. If the European Parliament has mainly access to knowledge that exalts the benefits of the EU – US market integration as the cheapest way to economic growth in the crisis tormented Europe,34 the space for the politicisation of agreement may be considerably narrowed down. European parliament may indeed produce its own knowledge, yet that requires considerable resources and the incentives may be lacking. This is thanks to the special position of the European Commission in the EU institutional framework: as an independent, technical and apolitical apparatus of the Commission can be expected to produce the best available knowledge.

According to the Inter-Institutional Framework Agreement, the Commission shall take due account of the Parliament’s comments throughout the negotiations.35 One may worry however what is that the European Parliament learns, so as to be able to successfully comment throughout the negotiations. For instance, was the European Parliament informed about the members of the HLWG, and in particular that the EU representatives of the labor and environment will not be present in the HLWG? The ratification (consent to) of international treaties poses further problems for the parliamentary accountability. In particular, the ‘take it or leave it’ situation does not endow much space for political deliberations in parliaments.

To conclude, leaving ‘democracy’ to the last stage of the TTIP creation, and the deliberations in front of the European parliament, is hardly satisfactory from a democratic perspective. European parliament has little resources and incentives to produce alternative knowledge, which could be a basis for the problematisation of the normative standpoint of the European Commission. The ‘independent’ position of the European Commission in the EU institutional structure then triggers far too little opposition in the Parliament, creating a serious democratic vacuum.

3. EMERGING INSTITUTIONS

3.1. Institutional Chapter
In its non-paper, the European Commission has proposed the institutional framework for the TTIP. It envisages a three-fold structure: the institutionalisation of the consultation in market regulation, a streamlined procedure for amending the Annexes without ratification and finally establishment of the Regulatory Committee, assisted by sector specific advisory committees.

33 Bartl, ‘Internal Market Rationality’.
34 Gucht
35 See Schütze, supra. See Framework Agreement on Relations between the European Parliament and Commission, Annex III.
The Consultation procedure seems to be the least intrusive instrument – in particular considering that in the past it has not proved too successful. The HLGW report ascribes however large significance to the enhanced consultations between the EU and the US regulators, and envisages its role in the review of current legislation (and the non-necessary behind the borders barriers), as well as a timely consultation about the future regulation. If the cooperation is successful, twofold danger may ensue. On the one hand, a slippage of regulatory agencies further away from democratic processes in their respective countries. On the other hand, the growing threat of regulatory capture.

The TTIP institutions should be, according to the Commission, also equipped with powers to amend the sectoral annexes of the agreement without recourse to the domestic ratification procedures. It remains unclear however, who and under which conditions will exercise this power.

Finally, a new body with regulatory competences shall be created. This body should be assisted by various sectoral working groups, staffed by the members of the regulatory agencies. The sectoral working groups will be charged with overseeing the implementation of the regulatory provisions of the TTIP and making the recommendations to the body with decision-making power under TTIP. The breath of competences of regulatory body is however not specified in any way.

The European Commission appeases the concerns by saying that the decisions of the regulatory body will not enjoy supremacy. One would like to add, however, this holds true unless the adjudicatory body reads in the supremacy (as the EU example shows). The supremacy is however not the only democratic challenge that the decisions of such a body may pose. For instance, the prevalence of technocratic functional rationality, which favours the functional objective (trade liberalisation) above other normative concerns, is a far more proximate democratic concern.

3.2. Horizontal Chapter

While the institutions are to be specified in the ‘institutional chapter’, the competences of the newly established institutions are to be set forth in a ‘horizontal’ chapter to the TTIP, which means they should be applicable across the whole regulatory field. According to the Commission, the horizontal chapter should have three building blocks. It should start with so called ‘underlying principles’, which will likely serve as the interpretative guidance for the TTIP. These include the right of each party to pursue public policy objectives as well as the focus of the agreement on the sector specific regulation.

The function of the TTIP is then set forth as the ‘overall objective’:

‘The overall objective of the regulatory provisions of the TTIP will be to eliminate, reduce or prevent unnecessary “behind the border” obstacles to trade and investment. In general terms (although this may not be applicable in all cases), the ultimate goal would be a more integrated transatlantic market where goods produced and services originating in one party

38 Non paper
39 Marija Subsidiarity
in accordance with its regulatory requirements could be marketed in the other without adaptations or requirements.

The objective of the TTIP is to create a supranational instance of functional market integration. The functional integration carries however specific epistemic and democratic risks. The main epistemic challenge is that the functional orientation skews epistemic processes in these entities: endowing institutions with an objective to pursue one primary goal, they tend to rephrase all social reality in that functional framework, prioritising that goal against all other public policy objectives. This may result in wrong policies to the extent that these entities marginalize important concerns to the extent that they are not harmonious with the main objective. Moreover, over time these entities accumulate knowledge which is justificatory for their functional vision of the world, further narrowing down the space for the internal (within the institution) problematisation of the underlying premises.

This epistemic limitation turns into a major democratic challenge. Democracy requires problematisation (politicisation) of the politically controversial questions. Yet, the functional integration combines several legal and institutional mechanisms which push out such politicisation (by parliaments or publics). First, the juridification of the main objective and other ‘specifying’ purposes takes these out of the sphere of the political. Secondly, the technocratic ‘expert’ institutions are put in place that should further these goals (be that the regulatory body or adjudicatory body), which will further perpetuate the functional bias. Finally, when the integration of these entities is so deep that we call for democratisation – it becomes almost impossible since the remaining space for the democratic politics is squeezed to zero.

The ‘partial objectives’ of the TTIP further reinforce this trend. First objective is promoting cooperation between regulators from both sides at an early stage. This question has been discussed above in the part… We have underlined there is an urgent need to shield these structures against regulatory capture. Second partial objective is to promote compatible regulations by achieving increased compatibility/convergence in specific sectors, including through recognition of equivalence, mutual recognition. We discuss the mutual recognition in the part 1 and part 5, and we warn about possible redistributory consequences and the exclusionary impacts thereof.

Finally, the last partial objective of the TTIP should be, according to the Commission, to affirm a particular importance and role of international disciplines (regulations, standards, guidelines and recommendations) as a means to achieve increased compatibility/convergence of regulations. The European Commission thus suggests that endorsing the normative power of the ‘international disciplines’ should become an objective of the entire agreement. While this term covers the instruments of international law, it more importantly covers so called ‘international standards’, empowering thus private, or public-private bodies (not infrequently dominated by large industry), to become an major source of normativity within the TTIP (and as eventually also globally).

We should wary however such unequivocal and unconditional endorsement, without significant reservations. Robert Howse has shown, in the case law of the WTO, how these international disciplines have curtailed domestic democratic choices, without much regard for their legitimacy from the side of the WTO.\footnote{Howse} We can link this disregard with our discussion of the skewed epistemic processes, which prompts the functional institutions to interpret available material with a main concern to further their primary objective. Now, this public impetus toward the privatisation of law making in the international arena will result in the imposition of further ‘disciplines’\footnote{Foucaultian underpinning of the concept is far from amusing.} on the
democratic processes in the TTIP countries (regional and sub-regional) - very likely at the expanse of pursuing ‘other’ (the non trade) policy objectives in the TTIP countries.

Even more serious impetus toward the privatisation of law making is embedded in the Commission’s stress on the scientific evidence as a condition for justifying the behind the borders barriers to trade. The Commission posits:

‘SPS related import requirements and certification conditions for all commodities should be available upfront, grounded in scientific evidence or the relevant international standards and apply to the entire territory of the exporting Party. Among other issues, it is paramount to set up a clear procedure which will include timelines for the recognition of animal health status, pest status and regional conditions, in line with international standards. Provisions on safeguard measures or emergency measures should ensure that trade is not unnecessarily or unjustifiably restricted. Pragmatic and open procedures should be established to recognise alternative measures.’

It is perplexing that the European Union, which alone has been fined by the WTO because it has refused to let the GMOs organisms into its territory on the basis of precautionary principle and citizens’ preferences, at once advocates through the European Commission just the opposite: the restriction based solely on the scientific evidence or international standards are required. The precautionary principle has not been mentioned in the Commission’s non-papers not even once: this may ground the illegality of the ensuing instrument if this is to remain absent.

This position of the Commission is strongly deregulatory and it has significant redistributory implications. If a default position is pro-free-trade, the burden on proof lies on science to show potential harm and thus serve as a reason to regulate. First of all, such step shifts the costs of proving the (lack of) harm from businesses to the public (broadly conceived). Secondly, it also greatly enlarges the number of issues that should be investigated from public resources, adding in additional the costs of selection. Most importantly however, it indirectly redirects public resources from potentially socially more useful purposes to investigating the harm posed by various new technologies.

 Needless to say, the ‘harm’ is sometimes impossible to establish – in particular if a longue durée is concerned. This is the case for instance with regard to the impact of GMOs in our biosphere. Any assessments would be a guess at best, depending in its content more on a normative commitment of a scientist (whether they believe in this technology or not) than on existing evidence. For this reason, and contrary to what the Commission suggests in its non-paper, many of the ‘risk related’ questions at the frontiers of scientific knowledge (Jasanoff describes these as ‘low certainty low consensus’) can not be justifiably transferred from the hands of democratic collective into the hands of experts. And this is exactly what the Commission seems to be after.

Finally, the horizontal chapter of the TTIP should be concluded, according to the European Commission, by ‘substantial elements’ of the institutional framework. The first two elements best practice and transparency on the one hand, and the requirement of impact assessment on the other, have been discussed earlier in this paper. What will interest us here is a third substantial element of the horizontal chapter - the ‘cooperation towards increased compatibility/convergence of regulations’.


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According to the Commission, while many issues will be resolved in the TTIP, a number of issues will remain unresolved: the so-called inbuilt agenda. If the TTIP is to become a ‘living’ agreement’, the TTIP institutions have to be afforded competences to deal with this inbuilt agenda. In particular:

- **Provision of a general mandate** (understood as a legal authorization and commitment) for regulators to engage in international regulatory cooperation.
- **Provision to launch**, upon the request of either party, discussions on regulatory differences with a view to moving toward greater compatibility. The request could be based on substantiated proposals from EU and US stakeholders.

While a ‘general mandate’ may serve as a gate for expansion of powers of the TTIP, the Commission seems to be concerned that this expansion is propelled by a same motor as the European one – business interest.\(^{45}\) The industry activity so far suggests that the TTIP has a chance to become indeed a very ‘lively’ entity.

Let us finally address the crucial element of the TTIP – the dispute resolution mechanism. We can indirectly infer from the non paper that such mechanism is at least considered. The DG competition in fact is trying to shield its field from subsuming it to the dispute settlement mechanism: ‘Provisions on antitrust/mergers shall not be subject to the general dispute settlement mechanism of the agreement.’ While we learn very little about so far, the dispute resolution mechanism will be one of the most important parts of the TTIP. The rights the ‘stakeholders’, ‘investors’, other TTIP institutions, other EU/US institutions, sector specific regulators and ordinary citizens will have in its framework are crucial for the future of the EU. Judging only on the basis of our experience in the framework of WTO,\(^{46}\) the EU\(^{47}\) or the investors state arbitration,\(^{48}\) there is very much at stake. *Democratic debate* should be a precondition for accepting any such mechanism. This is not an issue that should be simply a ‘part of the deal’.

**4. THE SUBSTANCE OF THE TTIP**

The market as a main (and a best) organisational apparatus is the red line of the non-papers. The regulatory disposition of the European Commission is best summarized by the Commission itself: *ideally, mandatory legislation should only set general requirements (e.g. health, safety, and the protection of the environment) and then leave flexibility to the market as to how compliance should be assured*. We will look at several substantive issues, which are exemplary of this disposition. First, we will examine some of the marketed benefits of the TTIP, and the knowledge that underpins it. After we turn to the substantive provisions on marking and labelling in TBT agreements, and finally we will discuss the ‘market activity’ of state in the perspective of the Commission.

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\(^{46}\) See e.g. Kennedy, “Challenging Expert Rule.”

\(^{47}\) See e.g. Stone Sweet and Sandholtz, “European Integration and Supranational Governance.”

4.1. The Benefits of the TTIP

The report of the ‘independent contractor’, a London based think tank Centre for the Economic Policy, has so far served as a main justificatory tool to assert the overwhelming positive impact of the TTIP. The report’s main conclusions are, first, the most comprehensive trade deal with the EU will bring an economic benefit of €119 billion a year for the EU, and €95 billion a year for the US. One shall add in 2027, once the agreement is fully implemented. This benefit, according to the Report, translates to an extra €545 in disposable income each year for a family of four in the EU. Second this TTIP will benefit also the rest of the world, increasing the world GDP by 100 billion per year.

Several issues come to our attention when we reflect on the marketed €119 billion a year for the EU. First, this prediction is based on the deepest integration scenario considered by the Report. This impact can be achieved only through a most comprehensive imaginable level of economic integration. As the previous history of the transatlantic relations suggest, to achieve such level of integration is far from simple.49

More importantly however, one has to inquire whether the theoretical assumptions, on which the report is based, are reliable - and thus whether any of the promised positive impacts will actually take place. The institutional questions loom large here. There is indeed little certainty that the ‘best available’ knowledge has come to fore in the preparation of the Report. While the benefits of ‘market integration’ have its proponents and critiques, the critiques have not gained much space and the Report does not consider any ‘counter-knowledge’: in fact, the report commences the whole exercise by counting the benefits, thus a priori revealing what will be the outcome.

The other crucial moment is the redistribution of the benefits of the TTIP – not mentioned in any of the documents accompanying the negotiations. The Report touches this issue when it expounds the TTIP benefits as bringing 545 eur yearly for a family of four in the EU. While such information may sound attractive to European citizens, it is cynically misleading. The estimate is based on the arithmetic average of the expected benefits of the TTIP – thus entirely circumventing the question of the real redistributory impact.

Such use of ‘arithmetic’ data then underpins a broader structure in the discourse of the European Commission. The discourse of the ‘common interest’ that permeates the EU political rationality disguises the diversity of interests among various groups of citizens (see a paragraph above), among the EU member states as well as various regions within various MS.50 The original assumptions of the EU integration – free trade and market integration – is difficult to reconcile with the idea that interests could possibly differ to the extent that market integration with the US may harm for instance the Peripheral EU MS.51 Such ideas are foreclosed from the consideration in the TTIP framework.

Furthermore, if the TTIP results in the series of mutual recognition agreements rather than harmonisation, as it is so far more likely, the redistributory consequences for large as opposed to smaller industry will be far reaching. Even if we disregard the ‘race to the bottom argument’, the mutual agreements are deregulatory to the extent that they enable regulatory shopping for the ‘capable’ (i.e. transnational companies), which will be able to choose their regulatory environment. This will place them in a better position than less mobile corporations (SMEs) which cannot choose their regulatory environment.

49 See also De Ville
50 A more general critique has been very powerfully raised by Damjan Kukovec...
This Commission’s market rationality shows another trait. The Commission shows considerable irritation with the US territorial diversity and demands the US (to paraphrase the EU foreign affairs discourse) ‘speaks with one voice’ and discipline its regulatory units: ‘the Parties’ territories at all administrative levels in order to ensure its maximum efficiency and effectiveness. It is paramount in this regard, that the Parties recognise each other as single entities for SPS purposes.\textsuperscript{52} Similarly in TBT section ‘the EU considers that the aim of maintaining an overall balance of commitments in the TBT area can only be achieved if both the sub-regional (in the EU) and the sub-federal (in the US) regulations are covered.’\textsuperscript{53}

A second justificatory pillar of the TTIP are the benefits for the third countries. Thus the Report of the Centre for the Economic Policy research suggests that the TTIP will benefit the third countries and increase their GDP of the third countries by 100 billion euro.\textsuperscript{54} Yet, the ‘alternative’ scenarios of the future economic integration may dilute, or even harm, the third countries.

De Ville argues that since the current TTIP process is more likely to result in a system of mutual recognition agreements than the harmonisation (uniform set of rules) its benefits will be far more modest then claimed by the report. De Ville argues that there are several reasons why mutual recognition will prevail: the history of negotiations indicates the mutual recognition is a limit, but also the fact that industry favours such solution.\textsuperscript{55} Moreover, the Commission itself endorses convergence through mutual recognition as an objective of the TTIP: achieving increased compatibility/convergence in specific sectors, including through recognition of equivalence, mutual recognition.

The impact, which the shift to mutual recognition may have on the third countries, seems not to be considered by the Report. The HLWG Report suggests, as De Ville aptly notes, that the mutual recognition framework may not be applicable to the third countries:

\begin{quote}
‘Instead, the expected approach to be followed in the negotiations with the US would focus on regulatory coherence and a degree of mutual recognition between the EU and the US standards, particularly in the field of safety regulation relevant for electrical and electronic equipment. Sector experts assume that bilateral negotiations with the US would mainly lead to bilateral and not erga omnes recognition of standards. This in turn would mean, contrary to the 20 % general spillover effect assumed, a significantly more limited spillover effect in this sector, or even none at all.’\textsuperscript{56}
\end{quote}

This means that the third countries would still have to comply with two sets of rules, depending on the market where they export. They would be thus disadvantaged in this way in the comparison with the EU/US (transnational) companies.\textsuperscript{57}

\subsection*{4.2. The Non-papers and Substantive Issues}

We turn now to some substantive issues of the Non-papers, which are exemplary of the Commissions political rationality. The TBT agreement contains a part on the ‘Marking and Labelling’, a regulatory mechanism well known from the internal market law. From the Cassis de Dijon

\begin{footnotes}
\footnotetext{52}{Non papers}
\footnotetext{53}{P 35}
\footnotetext{54}{There is something disturbing on the attention afforded to the TTIP, while other bilateral agreements, where the ‘market power Europe’ imposes almost freely its own preferences on regularly economically weaker partners, is off the radar.}
\footnotetext{55}{De Ville}
\footnotetext{56}{HLWG Report}
\footnotetext{57}{De Ville}
\end{footnotes}
judgment, this mechanism has dominated the thinking about free movement of goods and mutual recognition in the EU. The CJEU has stroke down number of state product regulations that could be replaced by the internal market less restrictive marking and labelling. Marking and labelling have also become the main paradigm in the EU consumer law – according to some commentators at the expense of consumer protection. The high recognition achieved by marking and labelling in the EU may be ascribed to their ‘market rational’ character: they target certain market failure (information asymmetry between the producer/supplier and buyer), sometimes contributing to some additional objectives (such as consumer interests), while at the same time interfering little with the market and private autonomy.

In the context of the objectives of TTIP however, even such market friendly measures seem to be placed on the black list:

Marking and labelling are mentioned briefly in the TBT Agreement, but it is suggested that some disciplines be added for trade between the Parties, so that compulsory marking requirements are limited as far as possible to what is essential and the least trade restrictive (...). Furthermore, consideration should be given to measures to inhibit the use of markings that may mislead consumers.

While the marking and labelling should be limited as far as possible, the exceptions for consumers’ interests is introduced by a phrase ‘consideration should be given’, suggesting there is little ground for optimism of consumer advocates. This discipline however goes against a belief in the private delivery of public goods - through consumers’ responsibility. The ‘process related’ labelling (such as labelling produced in sweatshops/by child labour) is at core of this programme: such initiatives however seem to be impeded by this provision.

The Non-paper on Competition, and most interestingly with the role of the state in the market, will be the second example of the political rationality of the European Commission. ‘The objective of the EU is to create an ambitious and comprehensive global standard to discipline state involvement and influence in private and public enterprises, building and expanding on the existing WTO rules.’ The default position, the most desirable institutional set up for the market seems to be private interest on the one hand and government discipline on the other. The need to discipline governments (democracy) should not only become the TTIP standard, but a global rule. The democratic concerns entirely disappear in this rationality.

While the EU has not only become quite accustomed to this narrative, it has also juridified this rationality, we may wonder what the reaction of the US side will be. While we have seen a considerable upsurge of market rationality in the US in the recent decades (the history of public management, cost-benefit analysis or economic analysis of law), the US still remains a nation state, and a relatively traditional democratic polity.


The US, and its states, may have some difficulties full heartedly sharing the EU concerns and suspicions: The EU is concerned about the subsidization not only of SOEs [state owned enterprises] /SERs [special or exclusive rights enterprises] but also of the private sector in some situations, e.g. by direct grants, below-market interest rates on loans or unlimited guarantees. Or the Commission’s concern with the ‘non-commercial’ consideration in the market: ‘An obligation for SOEs [state owned enterprises] /SERs [special or exclusive rights enterprises] to act according to commercial considerations.’

The rationality of a (redistributive) state may entertain some difficulties to embrace, without reservations, the neo-liberal rationale that the formal concerns over global market and level playing field should categorically overweight a democratic decision to preserve employment (and social order) in the peripheral region of the US. Even more so since the promises of the neo-liberal market order, even if credible to some, will surely take some time to materialise.

5. CONCLUSION

Whereas we have embarked into the analysis with a concern regarding possible lowering of the EU regulatory standards through the economic integration with the US, we end with much more mixed feelings. The overall impression is that the EU, an experienced market polity, has taken up to impose a postnational market discipline on its more traditional counterpart. Market language, the irritation with the constitutional structure of the US and a possible influence of the lower levels of government, eagerness to substitute democratic discourse with the scientific discourse, or democratic process with international standards, and finally an almost religious belief in the market mechanisms permeate the Commission position.

The question which remains in for us, Europeans, to respond is the impact on this agreement on the balance of powers between the EU institutions, and the de-democratising potential of the agreement. Shoving the regulatory power over the market ‘higher’, and essentially to the hands of the EU executive, will significantly impact the capacity of the European Parliament to affect the shape of internal market. The EU Member States however also the risk run. While the Core MS promote this integration so as to ensure markets for their products, the cumulative effect of the TTIP may decrease the MS power to influence the regulation of the internal market to a democratically unacceptable level.

The ensuing threat for the democratic legitimacy of the EU decision-making is best evoked by the GMOs saga. The Commission, adopting a ‘free market’ default position, has been consistently open to authorise the GMOs in the EU market - relying on the presumed lack of scientific evidence regarding the GMOs harmful effects. Only when the strong opposition mounted among the Member States and the European Parliament did the Commission fail to authorise. Yet, the TTIP unwinds the powers of the Commission. The Commission (seconded at times by national regulators) will be able or even required (if we recall the provisions of the non papers) to further a similar pro-free-trade de-regulatory approach at this new level of functional integration. This time, however, with considerably less oversight from the side of the political institutions.