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Thematic note
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Planned Transatlantic Trade and Investment Partnership (TTIP)

Progress review and possible impacts for occupational injury and disease insurance

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comprendre les risques professionnels en Europe
understanding occupational risks in Europe

Introduction

Since the negotiations began in 2013, the Transatlantic Trade and Investment Partnership (TTIP) has aroused numerous discussions. For some, it represents a hope of extraordinary economic growth. For others, it means the dismantling of public services. Now, in negotiations that are confidential it is very hard to measure what impact the agreement will have on social matters and in particular on occupational injury and disease insurance. There is no doubt that it will have impacts on occupational safety and health (OSH) standardization and certification.

On 17 June 2013, the European Council gave the European Commission a mandate[1] to negotiate a draft trade agreement with the United States: the TTIP, or Transatlantic Trade and Investment Partnership[2].

For more than a year, the negotiations were carried out confidentially. The mandate of 17 June 2013 was made public only on 9 October 2014 after organizations from civil society mobilized to obtain greater transparency. So far, there have been eleven rounds of negotiations, the last of which was in the United States, from 19 to 23 October 2015. Ignacio Garcia Bercero, from DG Trade, is the chief negotiator for the European Commission.

The objective of the TTIP is to create a transatlantic free-trade area, in which would be eliminated insofar as possible the customs duties and regulations hindering the sale and purchase of goods and services between the EU and the US. If the TTIP materializes, this transatlantic free-trade area would cover more than 45% of global GDP. Since customs tariffs between the EU and the US are already extremely low in most sectors (less than 3% on average), the objective is above all to eliminate non-tariff barriers by harmonizing standards and regulations on either side of the Atlantic. This harmonization concerns nine sectors for the time being: the automotive sector, pharmaceuticals, chemicals, cosmetics, engineering, pesticides, textiles, medical equipment, and information and communication technologies.

Progress in the negotiations

A mobilized civil society

Initially, the TTIP was negotiated confidentially, and this aroused great concern, even among national authorities. Since the start of 2015, the European Commission has decided to act more transparently and to keep civil society informed of progress in the negotiations. Nevertheless, opposition to the plan persists and is rallying growing numbers in several countries, especially in Germany and Austria.

The main fear is a downgrading of European legislation and standards (in the health, social and environmental areas), which are considered in the US as barriers to trade and investment. In particular, Europeans fear that public services[3] will be undermined despite the commitment by both parties in October 2014 to exclude any "privatization" of these services. Ignacio Garcia Bercero also asserted that "nothing will be done" in these negotiations that could endanger environmental protection, consumers or the security of private data.

Investor-State Dispute Settlement (ISDS)

Added to this are numerous criticisms regarding the establishment of the mechanism for "investor-state dispute settlement", or ISDS. This system, often included in inter-state investment treaties, provides for the possibility of having recourse to a private arbitration tribunal to judge disputes between multinationals and states, in the name of investment protection. It is highly criticized because of the risk of it being used by companies which consider that a state's policy impedes their commercial activity, even in the case of a public health or environmental protection policy.

Emblematic cases in the social domain are mediatized in numerous bodies, including the French Parliament[4]. For example, a report by MP André Chassaigne recounts a number of cases in which states were convicted to the benefit of multinationals:

"In another case ("Marvin Feldman", 2002), it is the existence of a tax on tobacco exports from Mexico which "justified"

(1) http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf

(2) TTIP or Transatlantic Free Trade Agreement - TAFTA

(3) Protecting public services in TTIP and other EU trade agreements (13/07/2015): http://trade.ec.europa.eu/doclib/press/index.cfm?id=1115

(4) In French: http://www.assemblee-nationale.fr/14/rapports/r1938.asp

the compensation that the Mexican state was sentenced to pay to a US company exporting tobacco, because, according to the ICSID[5], "some kinds of regulations can constitute a gradual expropriation". With this type of reasoning, it is therefore possible to reach situations where states are sentenced to repay to foreign investors all the taxes that might hinder their profit growth!

It is in the name of such a mechanism that a US firm, Lone Pine Resources, is currently demanding from the Canadian government $250 million in compensation for lost earnings due to the moratorium that the Province of Quebec has enacted on shale gas production. Cigarette maker Philip Morris used the same process in an agreement between Hong Kong and Australia to have warning messages prohibited on packets of Australian cigarettes, which could threaten the application of the future "tobacco" directive undergoing negotiation".

In 2015, the ISDS system became the chief factor of discontent for NGOs and civil society in general. On 16 September 2015 the European Commission, concerned by persistent criticisms on this subject, proposed replacing the private tribunals with a system of public courts to settle disputes.

In its proposal[6] sent to the US negotiators on 12 November 2015, the Commission mentions that:

- A public Investment Court System composed of a first instance Tribunal and an Appeal Tribunal would be set up;
- Judgements would be made by publicly appointed judges with high qualifications, comparable to those required for the members of permanent international courts such as the International Court of Justice and the WTO Appellate Body;
- The new Appeal Tribunal would be operating on similar principles to the WTO Appellate Body;
- The ability of investors to take a case before the Tribunal would be precisely defined and limited to cases such as targeted discrimination on the basis of gender, race or religion, or nationality, expropriation without compensation, or denial of justice;
- Governments' right to regulate would be enshrined and guaranteed in the provisions of the trade and investment agreements.

This proposal did not succeed in reassuring opponents of the TTIP plan, and mobilization against the agreement gathered strength. For example, three million Europeans have already signed a petition against the plan and major demonstrations took place in several countries on 10 and 11 October 2015.

The Americans are set to give a decision on the Commission's proposal in the coming weeks.

Consequences for occupational safety and health (OSH)

It should be specified that the very scarce information available on these negotiations opens the door to numerous assumptions which could ultimately prove unjustified. However, given the lack of certainty, we should mention the main grounds for concern expressed in many positions adopted by the DGUV[7], ESIP[8], etc.

Social insurance

The negotiating mandate does not indicate clearly whether the compulsory national social insurance systems (including occupational injury and disease insurance) are excluded from the agreement or not.

Although the mandate indeed contains an exemption clause for "services provided in the exercise of government power", the extent of the services provided by public authorities and protected by this article is not clearly defined.

Moreover, this exemption would be limited, because it would only cover services that are not provided either on a commercial basis, or in competition with one or more service providers. In light of the extent of the services, benefits and financial services provided by national insurance organizations, the concept can be variable.

European and national legislation on OSH

The objective of the TTIP is mutual recognition of regulatory provisions, standards and specifications between Europeans and Americans.

But it is not yet known for certain whether the European

(5) ICSID: International Centre for Settlement of Investment Disputes, founded in 1965 - Headquarters in Washington.

(6) http://europa.eu/rapid/press-release_IP-15-5651_en.htm

(7) http://www.dguv.de/en/News/Background/Position-on-TTIP/index.jsp

(8) http://www.eesc.europa.eu/resources/docs/esip-position-paper-on-ttip_final_20112014.pdf

directives concerning occupational safety and health (OSH), and in particular the social directives stipulating minimum OSH requirements and transposed into national law in the Member States, are excluded from the scope of mutual recognition. At the level of the Member States, this aspect would be not without consequences for the whole body of national regulations resulting in particular from the transposition of the directives and the minimum OSH requirements that they contain. This is because, in transposing these social directives into national law, Member States can go beyond the minimum requirements stipulated at the European level. The risk could therefore be that this national legislation might be considered as non-tariff barriers to trade.

OSH standardization

However, leaving aside the above aspects, it can be said with greater certainty that many related fields, including standardization, would be impacted by the agreement. And this could have major consequences for occupational injury and disease prevention.

The free circulation of goods in Europe is based on compliance with the essential health and safety requirements based on the "New Approach" directives (Art. 114 of the TFEU[9]). The Harmonized Standards are the best way of obtaining a presumption of conformity with these directives. However, either when the manufacturer so wishes, or for special products which so require, this conformity is established by the intervention of a certification organization.

Therefore, Europe is strongly focused on the principle of precaution "upstream", entailing allowance for risk prevention as of the product or workplace design stage, and with standardization as the main vehicle for the proof of conformity.

In the United States, the approach is fundamentally different: the principle of upstream precaution does not have the same force and it is basically preventive measures by the user which compensate for this difference. It is therefore acceptable, and even required by insurers and courts, that employers take organisational measures to compensate for any lack of built-in safety as of the product design stage. For example[10], "in the EU, respiratory masks used as personal protective equipment and for emergency aid must undergo testing by a notified body before being placed on the market. These tests include a mask tightness test. Users count on the fact that these third-party tests have been passed. In the United States, third-party tests are not compulsory. Instead of that, companies are obliged to check the tightness of respiratory masks before using them, in accordance with occupational safety and health regulations. Safe use of respiratory masks can be ensured by each of these approaches. However, if the masks from the United States were to be placed on the market in the EU without having performed third-party tests, and if users had no way of knowing that the third-party tightness tests had not been performed, the consequences could be fatal".

These differences in systems should not lead to the conclusion that the final risk prevention levels would be better or worse on one side of the Atlantic or the other.

The two parties' standardization and certification systems are also very different (see table on page 5).

These very different approaches in the EU and US seem extremely inappropriate for mutual recognition of OSH standards (as things stand) to ensure an equivalence of protection levels without sacrificing established practice on either side.

One of the solutions often suggested would be to evolve gradually toward a harmonization of levels of standards. The international standards produced by ISO and the IEC could provide an initial basis for agreements concluded within the framework of the TTIP.

Another possible solution would be to create an ad hoc procedure for producing, in the absence of ISO or CEN standards, transatlantic standards expressing safety requirements worked out on the principle of consensus. This would make it possible to reconcile technical harmonization for the transatlantic trade of goods with the high level of safety required by the EU treaties.

Conformity assessment

As regards conformity assessment, the procedures in Europe are based on the provisions set out in the legislation and in European and international standards.

For the EU and the United States to be able to align their provisions in this area, a common base is needed, e.g. for the accreditation and auditing of organizations, test methods, interpretation methods, etc.

Mere mutual recognition of conformity assessment organizations would therefore be unadvisable, because it would not make it possible to create such a common base.

Technical harmonization is a prerequisite for the alignment of conformity assessment.

These (non-exhaustive) examples show that approaches and policies in the field of occupational safety and health are very different on either side of the Atlantic, and that harmonization via mere mutual recognition in this sensitive field could have unsuspected consequences for legislation and the quality of the OSH standards used in this free-trade area.

The next round, scheduled for February 2016, is expected to cover access to public contracts. The European Union would like to discuss three important sectors of its economy in particular: energy, transport and environmental services.

(9) http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN

(10) Example taken in the DGUV Position on TTIP: http://www.dguv.de/de/mediencenter/hintergrund/papier_ttip/index.jsp

COMPARISON OF STANDARDIZATION AND CERTIFICATION SYSTEMS IN EUROPE AND THE US	
IN EUROPE	**IN THE US**
In principle there exists one standard for a product. The standard is binding for the whole EU. The European standards must be replicated in the standards collections of the EU Member States.	There can be several standards for a single product. It is the federated States or else manufacturers and federations which choose which standards to apply.
Any national standard dealing with the same subject as a European standard is cancelled.	There exists no uniform normative collection for all the States. The standards can contain alternative provisions, or even contradictory provisions.
All the stakeholders are invited to produce the normative references.	All the stakeholders are not necessarily invited.
The international standard is the standard produced in the ISO in accordance with rules ensuring consultation of all the stakeholders and consensus-based decisions.	An American standard applied by the market is considered an "international standard" in the same way as an ISO standard.
There exists a body of harmonized standards giving a presumption of conformity with the essential health and safety requirements defined in the design directives. This constitutes an essential basis for the free circulation of safe and sound products such as work equipment and personal protective equipment. Based on the manufacturer's EC Declaration of Conformity, the buyer of a product can presume that the Community regulations that it refers to are complied with.	Nothing like this exists. The buyer receives a declaration of conformity based on a certification standard. The certified conformity indicates that the product complies with a particular standard.

Founded in 1991 within the French Disease-Occupational risks Insurance, EUROGIP is an interest grouping, whose activities are organized around five areas: enquiries, EU projects, information-communication, standardization and coordination of notified bodies. All have in common European aspects of the insurance or the prevention of accidents at work and occupational diseases.

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