



BDI

The Voice of
German Industry

POSITION

Anti-Corruption in TTIP

22/09/2016

- We support the inclusion of a section aimed at reinforcing action against corruption in TTIP.
- The TTIP chapter on anti-corruption should reference and incorporate mechanisms foreseen in international conventions on anti-corruption. Streamlining anti-corruption efforts on the basis of an international standard levels the playing field and strengthens the global fight against corruption.
- Relevant provisions exist in UN Conventions (i) against transnational organized crime and (ii) against corruption. Reference to these conventions would support the harmonization of anti-corruption rules. This in turn would facilitate the implementation of such rules by internationally active companies.
- In cases where several parties could claim jurisdiction over the same case, the TTIP chapter on anti-corruption should foresee the creation of an upstream dialogue mechanism between the pertinent authorities. Such a dialogue mechanism would significantly improve the treatment of cases, the management of resources and has the potential to ensure that no parallel or multiple proceedings are initiated.

BDI supports the principle of including a section on anti-corruption in the Transatlantic Trade and Investment Partnership (TTIP) as this would strengthen the means available to fight corruption.

U.S. authorities have put forward a proposal for an anti-corruption section in TTIP.¹ The text proposed by the U.S. authorities has not been made available to the public. We therefore cannot comment on any specific feature of the proposal. We understand, however, that the U.S. proposal for anti-corruption in TTIP could be significantly inspired by the corresponding chapter in the Trans-Pacific Partnership (TPP). While the anti-corruption chapter in the TPP contains important provisions in the fight against corruption, these provisions are largely based on the U.S. Foreign Corrupt Practices Act (FCPA) and do not reference or incorporate existing international conventions on anti-corruption.

An anti-corruption chapter in TTIP should be based on and incorporate relevant international conventions on anti-corruption. The creation of new and diverging rules on anti-corruption in TTIP should be avoided because such developments undermine the international effort of harmonizing anti-corruption action. Reference to an international standard allows companies and countries to streamline resources in support of the global effort to combat corruption. Therefore, the anti-corruption chapter in TTIP should refer to existing anti-corruption conventions such as those of the OECD or the UN.

In reference to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997, the anti-corruption section of TTIP should contain provisions allowing to better manage the interplay between procedures in cases when several countries could claim jurisdiction and could launch parallel investigations. To this end, the TTIP chapter on anti-corruption should foresee the creation of an upstream dialogue mechanism between the pertinent authorities. In addition to improving the management of resources and the treatment of the case, such a mechanism could, as a desirable outcome, ensure that the case is handled by the authority best placed to prosecute. In cases where sanctions are applied, the principle of *ne bis in idem* on the inadmissibility of double jeopardy should be respected.

The specifics of how these provisions should be implemented need to be precisely determined. As a starting point, the dialogue mechanism could be based upon strong principles already existing in international anti-corruption conventions. Notably, under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, when several countries have jurisdiction over a given case they must consult with each other to determine which is the best placed jurisdiction to prosecute (see Art. 4.3 in the Annex below).

Given the benefits that such consultations could yield, the principle contained in the above-mentioned OECD Convention should be recalled in TTIP and a procedure should be added to ensure the effective implementation of this principle.

Relevant provisions also exist in UN Conventions (i) against transnational organized crime and (ii) against corruption. These could also be considered (see Annex).

¹ European Commission, "The Transatlantic Trade and Investment Partnership (TTIP) – State of Play, 27 April 2016", <http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154477.pdf> (accessed 15.07.2016)

Annex

Relevant provisions in existing international conventions (OECD and UN Conventions) include:

OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997

- Article 4 – Jurisdiction:
 1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.
 2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.
 3. When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

Other provisions that could be taken into account include:

United Nations Convention against Transnational Organized Crime, 2000

- Article 15 – Jurisdiction (mirrors article 42 of the UN Convention against corruption of 2003, specifically referred to in the anti-corruption section of the TPP)
 5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that one or more other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.
 6. Without prejudice to norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.
- Article 4 – Protection of sovereignty (mirrors exactly Article 4 of the abovementioned 2003 UN Convention against Corruption)
 1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.
 2. Nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.
- Article 11 – Prosecution, adjudication and sanctions
 6. Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal

principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law.

On the inadmissibility of double jeopardy, relevant provisions include:

Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces (19 June 1951)

- Article VII
 8. Where an accused has been tried in accordance with the provisions of this Article by the authorities of one Contracting Party and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offence within the same territory by the authorities of another Contracting Party. However, nothing in this paragraph shall prevent the military authorities of the sending State from trying a member of its force for any violation of rules of discipline arising from an act or omission which constituted an offence for which he was tried by the authorities of another Contracting Party.

Charter of Fundamental Rights of the European Union (2012/C 326/02)

- Article 50 - Right not to be tried or punished twice in criminal proceedings for the same criminal offence

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, Official Journal L 239 , 22/09/2000 P. 0019 - 0062

- Article 54

A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.

Imprint

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