

## TTIP: Access to consolidated texts and confidential documents

### SUMMARY

Like other negotiating documents, *consolidated texts*, which combine the ‘textual proposals’ of parties negotiating an agreement, are normally confidential. The text of an agreement is typically only published once negotiations are complete and the parties have reached agreement on a single text.

In response to growing public concern and calls for greater transparency in negotiations, the EU has begun to engage more with civil society on the content of its negotiating objectives. The controversy surrounding talks on the Transatlantic Trade and Investment Partnership (TTIP) prompted the European Commission to publish the textual proposals tabled by the EU in its negotiations with the US. However, the US has not reciprocated, which means that consolidated texts and other documents referring to US positions remain classified.

Initially, on the EU side, only officials with a ‘need to know’ and proper accreditation from the Commission or from a national government, as well as a limited number of Members of the European Parliament had access to these documents. However, in late 2015, the EU and the US reached an agreement under which all Members of the European Parliament and all members of the EU Member States’ national parliaments would have access to the consolidated TTIP negotiating documents.

*For further information on the ongoing TTIP negotiations, see the recent EPRS publication [‘EU-US negotiations on TTIP: A survey of current issues’](#), by Laura Puccio.*



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## Background on confidential negotiating documents and TTIP

The EU institutions and national governments regulate access to government and administrative documents by classifying them in one of several categories. Access to confidential documents is restricted in order to protect the public interest; access to information concerning negotiations between states (including negotiations on [trade agreements](#)) is generally restricted to avoid impeding the negotiations. Such information includes consolidated negotiating texts, which are documents combining the textual proposals for the agreement's provisions submitted by the negotiating parties. As a rule, consolidated texts are only made public once negotiations are complete and an agreement has been reached between the parties on a single draft.

In recent years, trade negotiations have aroused a great deal of public debate, and there have been a number of calls from civil society groups for more transparency in trade negotiations. In a communication published in October 2015, [Trade for all: Towards a more Responsible Trade and Investment Strategy](#), the European Commission recognised the need for enhanced transparency and for stronger engagement with the European Parliament (EP), the Member States and civil society.

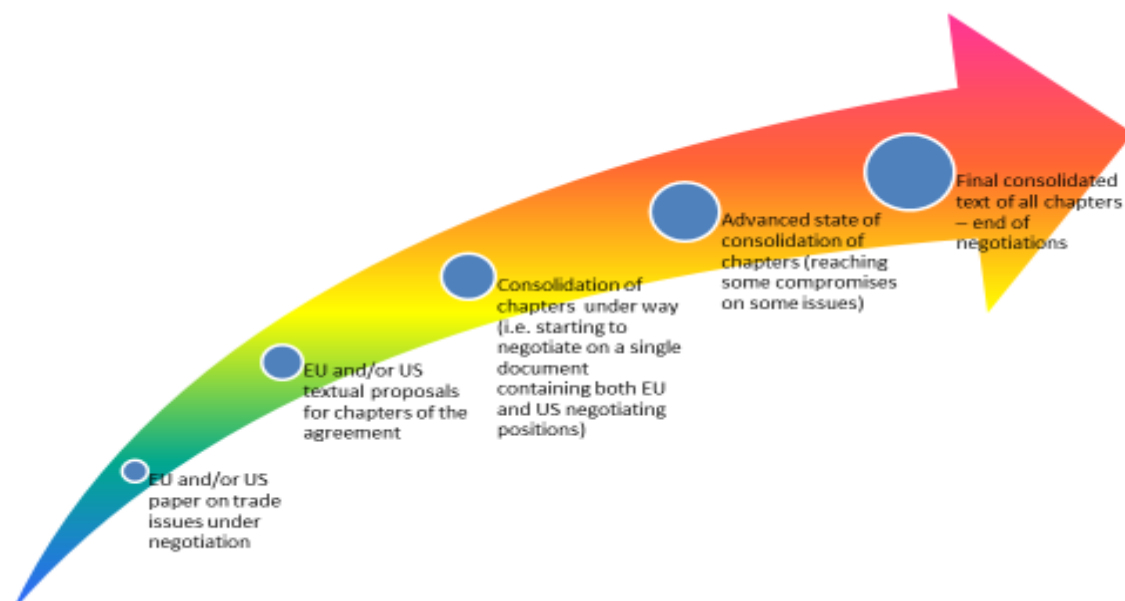
The European Commission therefore decided to make the negotiations on the Transatlantic Trade and Investment Partnership (TTIP) [more transparent](#), and to publish the [EU's official negotiating position](#). On the other hand, the US position has not been published, because the US authorities take the view that releasing classified TTIP documents would impede the negotiations. As a result, access to the consolidated TTIP negotiating documents also remains restricted for the general public.

EP and national legislature members were initially also barred access to consolidated texts and other classified TTIP negotiating documents (for example, the tactical state of play or US position papers). For its part, under the new [Trade Promotion Authority Act](#), the US administration is required to make classified TTIP documents (including the consolidated negotiating documents) available to members of the US Congress. An [EP resolution of July 2015](#) called for all Members of the European Parliament to be given access to the consolidated documents. It also called on Member States to engage with their national parliaments and to keep them properly informed on the ongoing negotiations. The Conference of EU Affairs Committees of Member State Parliaments ([COSAC](#)) also repeatedly called for more transparency in the negotiations, and several Member State parliaments requested permission to consult the consolidated texts and other classified negotiating documents. In December 2015, access to consolidated texts was granted to MEPs and members of national parliaments.

## Introduction to consolidated documents

There are a number of documents used in negotiations, but of these, consolidated documents play a pivotal role in working towards an agreement. They combine the negotiating parties' textual proposals for each chapter (in this case the EU and US positions) in one single document to facilitate discussion and the reaching of agreement on a single text.

Consolidated documents are documents that are still in the process of being negotiated, and therefore incomplete and subject to change. These documents may contain provisions opposed by one of the parties, which are then used as bargaining chips by the other negotiating party. Consolidated documents may lack provisions that could be added subsequently as last minute compromises are reached.

**Figure 1: The process of consolidation**

(1) These documents being incomplete, very few conclusions can be drawn from them since, according to international public law, any provision of a treaty or agreement must be interpreted in the light of its context<sup>1</sup> (which includes the entirety of the text itself, from preamble to annexes, as well as any other agreement or instruments made by the parties in connection with it). As these documents are being negotiated they will evolve. The final text is issued at the end of the negotiating process, and is the only one which can offer a basis for a proper analysis of the agreement and its policy implications.

(2) These documents, combining in a single text the EU and US positions at the time, can only provide a snapshot of the topics currently being negotiated which remain controversial (in the form of differences in formulation between the US and EU proposals), as well as providing some indication of the EU and US positions on certain issues. However, these documents are not complete; there are both missing chapters and missing provisions within the consolidated chapters. The absence of a provision within a consolidated text does not mean that this provision is not being negotiated or will not be part of a final treaty text. Moreover, as mentioned above, the presence of some provisions in the consolidated text does not mean that they are uncontroversial, or will not be deleted or modified at the end of the negotiation once a compromise is reached. Thus, these documents give only a partial view of some of the negotiating positions.

**Table 1: Status of consolidation of negotiating positions**

| <i>Negotiating area</i>               | <i>Status</i>                   |
|---------------------------------------|---------------------------------|
| <b>Agricultural Market Access</b>     | Consolidation underway          |
| <b>Anti-corruption</b>                | US paper                        |
| <b>Competition</b>                    | Advanced state of consolidation |
| <b>Cross border Trade in Services</b> | Consolidation underway          |
| <b>Customs and Trade Facilitation</b> | Advanced state of consolidation |
| <b>E-Commerce</b>                     | Consolidation underway          |
| <b>Energy and Raw Materials</b>       | EU paper                        |
| <b>Financial Services</b>             | Consolidation underway          |
| <b>Investment Protection</b>          | EU and US proposals             |
| <b>Intellectual Property Rights</b>   | EU and US proposals             |

|  |                                 |
|--|---------------------------------|
| Legal and Institutional                      | US proposal                     |
| Market Access/Industrial Goods               | Consolidation underway          |
| Procurement                                  | Consolidation underway          |
| Regulatory Coherence                         | Consolidation underway          |
| Regulatory Cooperation                       | Consolidation underway          |
| Rules of Origin                              | Consolidation underway          |
| Small and Medium-Sized Enterprises (SMEs)    | Advanced state of consolidation |
| Sanitary and Phytosanitary Measures (SPS)    | Consolidation underway          |
| State-to-State Dispute Settlement            | Advanced state of consolidation |
| Subsidies                                    | EU proposal                     |
| Sustainable development: Labour, Environment | EU and US proposals             |
| Technical Barriers to Trade (TBT)            | Consolidation underway          |
| Telecom                                      | Consolidation underway          |
| Textiles and Apparel                         | US proposal                     |
| Trade Remedies                               | Consolidation underway          |
| Sector-specific Chapters (9)                 | EU and US proposals and papers  |

Source: European Commission, The Transatlantic Trade and Investment Partnership (TTIP) – [State of Play](#), 27 April 2016.

**Box 1: Clarifications given by the Commission on consolidated documents in the context of the ‘Greenpeace leak’ of certain TTIP documents:**

[Greenpeace Netherlands](#) released a package of leaked TTIP negotiation texts on 2 May 2016. On the basis of these documents the NGO made a number of accusations against the TTIP negotiators, including: (1) dropping the GATT general exception for regulatory purposes (Article XX GATT); (2) dropping the issue of climate protection; (3) abandoning the precautionary principle; and (4) allowing corporate lobbies to influence trade negotiations. The Commission responded to the accusations via Commissioner Cecilia Malmström’s [blog](#) and with detailed [comments](#) by EU chief negotiator Ignacio Garcia Bercero at a press conference on the [13th Round](#) of TTIP negotiations.<sup>2</sup> They argued that:

- The documents leaked **do not cover all the chapters** under negotiation (for example, the reference to Article XX GATT on general exceptions is part of an undisclosed chapter which has not yet been consolidated).
- The consolidated documents are **not ‘outcome’ documents**. Indeed, negotiations not yet having been concluded, the documents still lack some provisions or still contain some provisions not agreed on by the parties. Currently, the consolidated leaked texts **put only the EU and US position together**. Text that is shared by the two negotiating parties is not in brackets. Text in brackets refers to text proposed by one of the parties, with that party’s name explicitly mentioned at the beginning of the text. EU chief negotiator Bercero gave the example of X.12 in the leaked SPS chapter, referring to regulatory approval for products of modern agricultural technology (i.e. genetically modified organisms, or GMOs). This article is bracketed with a clear indication that it was suggested by the US. It is therefore a US proposal; the EU has proposed no such provision.
- The EU’s position in the negotiations is still the one stated in the EU proposals published on the website of DG Trade. The Commission reaffirmed its commitment to respect its own negotiating mandate and ruled out any EU proposals concerning GMOs. It also underlined that any regulatory cooperation in TTIP would respect domestic legislative and regulatory procedures, and that equivalence and harmonisation would be envisaged only on specific

aspects of regulation, and provided they enhance, or at least maintain, existing levels of protection.

- On the issue of the lobbies, the Commission underlined that equal consideration had been given to all public submissions by civil society, whether it be trade associations, consumer groups, or environmental or other NGOs.

Below are examples of how text in brackets should be read. When an article is proposed by only one party, this may mean either that the other party does not want the provision and that it remains a contentious point in the negotiations (for example in the case of GMOs for the EU), or simply that the other party has not yet drafted its own proposal for such a provision or has incorporated it in another article. The tables below show in one column the text exactly as it appears in the leaked consolidated chapters divulged by Greenpeace, and in the other two columns what can be understood from the leaked text about EU and US proposals.

*Provisions that are suggested by one party only*

| Text/<br>positions | Leaked consolidated version   | Derived EU proposed text  | Derived US proposed text |
|--------------------|---|---|--------------------------|
| Text               | <p><b>X.1 [EU: Objective</b></p> <p>The Parties progressively and reciprocally liberalize trade in goods over a transitional period starting from the entry into force of this Agreement in accordance with the provisions of this Agreement and in conformity with Article XXIV of the GATT 1994.]</p> | <p><b>X.1 [EU: Objective</b></p> <p>The Parties progressively and reciprocally liberalize trade in goods over a transitional period starting from the entry into force of this Agreement in accordance with the provisions of this Agreement and in conformity with Article XXIV of the GATT 1994.]</p> | Not present              |

Source: Greenpeace-leaked consolidated text

*Provisions where there is no real consensus on how it should be written*

| Text/<br>positions | Leaked consolidated version  | Derived EU proposed text  | Derived US proposed text   |
|--------------------|--|---|--|
| Text               | <p><b>X.5. [EU: Reduction and Elimination of Customs Duties [EU: on Imports]</b></p> <p>1. [EU: Upon the entry into force of the] Except as otherwise provided in this Agreement, [EU: neither Party may] [US: no Party shall] increase any existing customs duty, or [US: adopt] [EU: introduce] any new customs duty [US: , ] on [EU: the importation of a good originating in the other Party] [US: an originating good].</p> <p>[EU: This shall not preclude either Party from raising] [US:</p> | <p><b>X.5. Reduction and Elimination of Customs Duties on Imports</b></p> <p>1. Upon the entry into force of the Except as otherwise provided in this Agreement, neither Party may increase any existing customs duty, or introduce any new customs duty on the importation of a good originating in the other Party</p> <p>This shall not preclude either Party from raising a customs duty to the level established in its Schedule following a unilateral reduction,</p> | <p><b>X.5. Elimination of Customs Duties</b></p> <p>1. Except as otherwise provided in this Agreement, no Party shall increase any existing customs duty, or adopt any new customs duty, on an originating good</p> <p>For greater certainty, a Party may:</p> <p>(a) raise a customs duty to the level established in its Schedule to Annex X-B</p> <p>following a unilateral reduction; or</p> |

|  |   |  |  |
|--|---|--|--|
|  | <p>For greater certainty, a Party may:</p> <p>(a) raise] a customs duty to the level established in its Schedule [US: to Annex X-B] following a unilateral reduction [EU: ,] [US: ; or</p> <p>(b) maintain or increase a customs duty as authorized under Article 22 of the WTO</p> <p>Understanding on Rules and Procedures Governing the Settlement of Disputes by the Dispute Settlement Body of the WTO].</p> |  | <p>(b) maintain or increase a customs duty as authorized under Article 22 of the WTO</p> <p>Understanding on Rules and Procedures Governing the Settlement of Disputes by the Dispute Settlement Body of the WTO</p> |
|--|---|--|--|

Source: Greenpeace-leaked consolidated text

## Parliamentarians' access to consolidated texts and confidential documents

### Consultation requirements and the Trade Promotion Authority Act

In keeping with the 2015 US [Trade Promotion Authority Act](#) (TPA), the Office of the US Trade Representative (USTR) must forward to Congress information about negotiations on trade agreements. The TPA has broadened the scope of the consultation requirements vis-à-vis Congress. Under Section 104 of the Act, members of Congress can request access to negotiating documents (including classified documents). The USTR has issued [guidelines](#) on the requirements concerning consultation with Congress.

Those guidelines state that US negotiating proposals and the consolidated documents must be made available to all members of Congress and to the staff of the Committee on Finance and Ways and Means, and of other committees concerned, who have been accredited after successfully completing a screening process. The TPA also provides for the setting-up of Congressional advisory groups on negotiations. Members of these groups can even be accredited to take part in negotiations themselves.

### European Parliament access to TTIP documents

Article 218(10) of the Treaty on the Functioning of the European Union ([TFEU](#)) stipulates that the European Parliament must be kept informed at all stages of negotiations on international agreements. Moreover, trade agreements fall within the broad category of international agreements which cannot be adopted without the EP's consent.

In keeping with Annex II of the [Framework Agreement on relations between the European Parliament and the European Commission](#), confidential documents are forwarded by the Commission to Parliament. As regards TTIP, the [following documents](#) have been made available by the Commission to the European Parliament and the Council: (i) EU proposals on the legal form TTIP should take; (ii) EU position papers setting out the EU's general (political) position on a given aspect of the negotiations; (iii) other EU documents, such as drafts, studies and other papers, used in the negotiations.

Until December 2015, only a few selected Members and officials had access to the consolidated negotiating documents: the chair and vice-chairs of the INTA Committee, the political group coordinators on the INTA Committee, and the rapporteur and shadow rapporteurs. In specific cases, the chairs and rapporteurs of the other committees



represented on the INTA US Monitoring Group could consult the consolidated negotiating documents. Since [December 2015](#), this group has been expanded to include all MEPs.

### **Access for national parliaments to confidential TTIP documents**

In accordance with the [Protocol on the role of the national parliaments](#) annexed to the EU Treaties, the national parliaments should receive the following documents directly from the Commission: Commission consultation documents (green and white papers and communications, work programmes and other legislative programmes) and drafts of all legislative acts provided for in Article 288 TFEU, such as regulations, directives, decisions, recommendations and opinions. Member State governments can also pass on information they receive in the Council to their national parliaments. The detailed arrangements are laid down in national law. The rules laid down in the [Agreement](#) between the Member States, meeting within the Council, regarding the protection of confidential documents exchanged in the interests of the European Union, must be complied with. In addition, the Council has issued [guidelines](#) on dealing with information classified as 'Limited/Limité'. Nevertheless, neither the Commission nor governments are able to forward the consolidated TTIP negotiating documents to national parliaments, since no agreement to that effect has been reached with the United States.

At the end of 2014, the US agreed to give government officials of EU Member States access to [TTIP consolidated documents](#) on a 'need to know' basis. The TTIP consolidated texts, made available in the US embassies of EU Member States, could be consulted only by accredited civil servants of the Member State governments. Under this [procedure](#), a maximum of two accredited civil servants could consult the documents at any one time, on a date and at a time arranged in advance. The civil servants concerned had to sign a declaration stating that they would not disclose the substance of the documents. They could take a limited number of handwritten notes. Members of national parliaments, on the other hand, could not consult the negotiating documents in the relevant embassy.

National parliaments, including the [German Bundestag](#) and the [French](#) and [Italian](#) Senates, also requested access to the negotiating documents. The Conference of EU Affairs Committees of Member State Parliaments ([COSAC](#)) has repeatedly called for more transparency in the negotiations. In December 2015, the United States and the Commission reached an agreement, with the result that members of national parliaments can now consult the consolidated negotiating documents in specially equipped secure reading rooms. The general arrangements were discussed in [late December 2015](#) in the Committee of Permanent Representatives within the Council. The Member States were in charge of setting up the reading room for their parliament's members in the ministry of their choice (see table in annex). The procedure for consulting the documents (MD 349/15 REV 2, and set out in Council document [14029/15](#)), which is common to all Member States, was negotiated with the US by the Commission and submitted for approval to the Member States in the Council.

For all reading rooms, secrecy is the rule and members of national parliaments are only allowed a pencil to take notes, as is also the case for MEPs and government officials. Classified documents cannot be divulged under the rules stipulated in the Council Decision of 23 September 2013 on the security rules for protecting EU classified information.<sup>3</sup> Access to the documents was allowed in order to involve the legislature in discussion with the executive on the negotiations, and in view of a possible requirement for ratification by national legislatures in the event that the agreement is declared

‘mixed’.<sup>4</sup> Accordingly, [Belgium](#) also negotiated access to documents for the sub-federal level, considering the [role of sub-federal parliaments](#) in ratifying international treaties.

While the main rules for access to documents are common to all Members, there may be some differences between Member States in logistics (size of the room, and thus the number of MPs that can consult the documents at any one time; maximum amount of time allowed for consultation; office hours, etc.) and the rules for accreditation.<sup>5</sup> On this latter point, accreditation is normally given on a ‘need to know’ basis, this rule being interpreted differently according to national legislation (in some countries all MPs can ask to be accredited, in others, only if they serve as rapporteur or belong to a specific committee that deals with trade agreements or is in charge of legislature control functions). At the time of writing, it would seem that, in some countries, few MPs have asked to consult the documents.

## Overview of current access to TTIP documents

**Table 2: TTIP negotiating documents and access:**

| Documents                                       | EU positions | EU documents containing reference to US positions (e.g. tactical state of play) | Consolidated Texts** | US positions |
|---|--------------|---|----------------------|--------------|
| Public  | x*           |   |                      |              |
| Members of European Parliament                  | x            | x   | x                    |              |
| Members of national parliament                  | x            | x   | x                    |              |
| Government officials, on a ‘need to know’ basis | x            | x   | x                    |              |
| Negotiators                                     | x            | x   | x                    | x            |

\* EU positions are often published after they have been approved by the Council and tabled for discussion with the US.

\*\*These include partially consolidated texts, i.e. texts for which work has begun on merging the positions, even if some provisions are still missing.

Source: Author.

## Main references

Andreas Mauer, [Comparative study on access to documents \(and confidentiality rules\) in international trade agreements](#), Directorate-General for External Policy, European Parliament, April 2015

Wilhelm Schöllmann, Classification of information: An overview, European Parliamentary Research Service, forthcoming

Micaela del Monte and Laura Puccio, [Role of the US Congress in Trade Agreements – The Fast Track Procedure](#), European Parliamentary Research Service, March 2016



**Annex: TTIP reading rooms in EU Member States**

| Country               | Reading room  | Date          |
|-----------------------|---|---------------|
| <b>Austria</b>        | Ministry of Science, Research and Economy                                     | February 2016 |
| <b>Belgium</b>        | Federal Public Service Foreign Affairs  | February 2016 |
| <b>Bulgaria</b>       | No reading room   | None          |
| <b>Croatia</b>        | Office of the National Security Council                                       | n.a.          |
| <b>Cyprus</b>         | n.a.  | n.a.          |
| <b>Czech Republic</b> | Ministry of Industry and Trade  | January 2016  |
| <b>Denmark</b>        | Ministry of Foreign Affairs   | March 2016    |
| <b>Estonia</b>        | Ministry of Foreign Affairs   | February 2016 |
| <b>Finland</b>        | Ministry of Foreign Affairs   | February 2016 |
| <b>France</b>         | General Secretariat for European Affairs                                      | February 2016 |
| <b>Germany</b>        | Ministry for Economic Affairs and Energy                                      | January 2016  |
| <b>Greece</b>         | Ministry of Foreign Affairs of the Hellenic Republic                          | n.a.          |
| <b>Hungary</b>        | Ministry of Foreign Affairs and Foreign Trade                                 | February 2016 |
| <b>Ireland</b>        | Department of Jobs, Enterprise and Innovation                                 | May 2016      |
| <b>Italy</b>          | Ministry of Economic Development  | May 2016      |
| <b>Latvia</b>         | Ministry of Foreign Affairs   | February 2016 |
| <b>Lithuania</b>      | n.a.  | n.a.          |
| <b>Luxembourg</b>     | Ministry for Foreign and European Affairs                                     | February 2016 |
| <b>Malta</b>          | n.a.  | n.a.          |
| <b>Netherlands</b>    | Ministry of Foreign Affairs   | February 2016 |
| <b>Poland</b>         | Ministry of Development   | n.a.          |
| <b>Portugal</b>       | Secretary of State of European Affairs  | April 2016    |
| <b>Romania</b>        | Romanian Minister of Economy, Trade and Relations with the Business Community | February 2016 |
| <b>Slovakia</b>       | Ministry of Economy   | February 2016 |
| <b>Slovenia</b>       | Ministry of Economic Development and Technology                               | February 2016 |
| <b>Spain</b>          | Ministry for Economic Affairs and Competitiveness                             | April 2016    |
| <b>Sweden</b>         | n.a.  | n.a.          |
| <b>United Kingdom</b> | Department for Business, Innovation and Skills (BIS)                          | February 2016 |

Source: EPRS.

## Endnotes

<sup>1</sup> See, article 31 of the [Vienna Convention on the Law of Treaties](#), 1969

<sup>2</sup> Speech by EU chief negotiator Bercero on the 13th round of negotiations for the Transatlantic Trade and Investment Partnership (TTIP), EC on-the-record technical debriefing on the 13th round of TTIP negotiations ([video](#) last accessed on 26 May 2015).

<sup>3</sup> Council Decision of 23 September 2013 on the security rules for protecting EU classified information, (2013) *OJ L* 274/1.

<sup>4</sup> 'Mixed agreements' also require ratification at Member State level, in line with national procedures. At the time of publication of this briefing, no official decision had been made on the nature of TTIP, even though the Commission mentioned the possibility that TTIP could be a mixed agreement.

<sup>5</sup> The information in this paragraph and the annexed table is derived from information received by EPRS from the offices of the different national parliaments, or from other national sources, on the precise arrangements for granting MPs access to TTIP reading rooms.

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