TESTIMONY OF

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Submitted to the

European Parliament
Committee on the Internal Market and Consumer Protection
and the
Committee on International Trade

For the Joint Public Hearing on

TTIP: Public Procurement -- Challenges and Opportunities for the European Union and the United States

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April 20, 2016
09h00 - 11h00

European Parliament, Brussels
Paul-Henri Spaak (PHS) Building, Room P3C050
Summary of Testimony

I am pleased to present this testimony in support of the Committees’ joint hearing on procurement issues in the Transatlantic Trade & Investment Partnership (TTIP) negotiations.

I am a professor of law at the George Washington University Law School in Washington, D.C., where I am co-director of the program in public procurement law. Our program is the only public procurement law program in the United States, and it is one of the leading programs in the world. We teach, write and speak on U.S. federal and state procurement law, anti-corruption, international and comparative procurement law, and trade issues relating to procurement. We also work regularly with our colleagues across Europe and the rest of the world, both inside and outside the academy, to collaborate on emerging issues of procurement law, including TTIP.

The TTIP negotiations between the European Union and the United States have been buffeted by very strong disagreements over access to procurement markets. European negotiators want the United States to dismantle “Buy American” requirements, especially in transportation markets, and to allow broader access to sub-central (state) markets in the United States. The U.S. negotiators, for their part, argue that Europeans already have broad access to U.S. public procurement markets. These disagreements have, it appears, slowed the TTIP negotiations.

There is a potential way forward: compromise on structural reforms. One approach would be for the U.S. government to require that federal grants bar grantees from discriminating against foreign vendors. This would be an extension of current federal policy, which bars domestic geographic (state and local) discrimination by certain grantees, and it would address a market of over $600 billion. Another approach would be to encourage regulatory cooperation in procurement, as part of a broader effort to bridge regulatory differences between Europe and the United States. Cooperation in procurement rules regarding cybersecurity and sustainability, for example, is urgently needed, and is quite achievable. These initiatives in harmonizing procurement regulation could be folded, quite easily, into the European Commission’s current proposal for regulatory coordination, and they would mark an important step forward in cooperation between the European Union and the United States.

I would be glad to answer any questions the Committees may have.

Christopher Yukins
George Washington University Law School
Washington, D.C.
April 2016
Background: I am a professor in the government procurement law program at George Washington University Law School. Established in 1960, the GWU Law School program is the only one of its kind in the United States, and one of the leading public procurement law programs in the world. Established by Professors Ralph C. Nash, Jr. and John Cibinic, Jr., the program offers unparalleled faculty resources, course offerings, and professional development opportunities in public procurement law, policy and management.

The faculty and students in our program are regularly involved in issues of procurement reform, both domestically and internationally, and my colleagues and I have extensive experience in government service and in the private sector. I served for a nearly a decade as an advisor to the U.S. delegation to the working group which rewrote the UN Commission on International Trade Law (UNCITRAL) Model Procurement Law (a model law which addresses reverse auctions in detail), and I am active in procurement and anti-corruption training in academic centers throughout Europe. At George Washington University Law School, besides teaching a courses on international and comparative procurement law, I also teach a seminar on state and local procurement law.

As part of my work as a professor, I have written extensively on issues of international trade in procurement. Issues that arise under free trade agreements, including the WTO Agreement on Government Procurement and the Transatlantic Trade & Investment Partnership (TTIP), are a regular part of our curriculum. We have hosted a number of colloquia at our Law School on these issues, including sessions with current and former negotiators for the Office of the U.S. Trade Representative (USTR), senior economists from the European Commission, a number of prominent European lawyers and professors, and Minister Ardalan Shekarabi of Sweden. We also co-host an annual academic conference at King’s College, London (on September 19th this year), to discuss emerging issues in transatlantic procurement trade.

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Introduction to Procurement Issues Under TTIP: For several years, the European Union and the United States have engaged in ambitious negotiations to establish a new free trade area under the Transatlantic Trade and Investment Partnership (TTIP). Now, according to numerous press reports, the TTIP negotiations are foundering because of the United States’ unwillingness to yield to European demands to open U.S. procurement markets further. But it may be that those problems were predictable, because of the structural obstacles to the European demands, and perhaps the obstacles could be resolved -- or at least reduced -- by a slight shift in the parties’ negotiating positions.

Instead of pressing to open sub-central procurement markets directly, the EU might seek to leverage existing U.S. law to gain better access to procurements carried out, at sub-central levels, using federal grant dollars. And instead of pressing to remove explicit federal “Buy American” preferences, the EU may be better served to use TTIP to erect a permanent cooperative structure with the United States, to resolve regulatory anomalies that themselves create burdensome -- and often unnecessary -- barriers to procurement markets.

TTIP and Procurement: When the TTIP negotiations began, European negotiators signaled that they might make important concessions in other market sectors (such as agriculture) in return for broader access to U.S. procurement markets at the federal, state and local levels. The European Union hoped to use the TTIP agreement to increase both sides’ access to procurement markets, beyond the open markets already required by the World Trade Organization (WTO)’s Government Procurement Agreement (GPA). Though the United States and the European Union are among the leading members of the GPA, the TTIP agreement was envisioned to be “GPA-plus” -- a more advanced agreement, which (it was hoped) would point the way for future liberalization among the GPA’s widening membership, as more and more developing nations (including China) move to join the GPA.

As they entered the TTIP negotiations, the European negotiators sought, among other things, (1) broader access to U.S. “sub-central” (i.e., state) procurement markets, and (2) a reduction in

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3 See, e.g., Procurement, Ag Market Access at Fore in Froman-De Gucht TTIP Meeting, Inside U.S. Trade, June 20, 2014.


federal procurement preferences (commonly known as “Buy American” restrictions). These are lingering problems that European vendors face in U.S. procurement markets -- stubborn domestic preferences at the state and local levels (despite many states’ free-trade commitments under the Government Procurement Agreement), and an array of “Buy American” exceptions to the United States’ general commitments to open federal procurement markets. These key issues thus ultimately helped frame the European negotiating position.

The Ambitious European Negotiating Strategy: Crafting a negotiating agenda around the more acute complaints of U.S. protectionism may have been a tactical mistake, however, for the EU’s more ambitious negotiating demands may be practically unattainable:

- **Broader Access to U.S. Sub-Central Procurement Markets:** As noted, one key European complaint has been that U.S. sub-central governments (state and local governments, primarily) have discriminated against European vendors. Gaining access to those sub-central markets is increasingly difficult, however. Partly as a result of pressure from organized labor and the American political left, state governments are now less likely to agree to broaden access to their procurement markets. The number of states willing to open their procurement markets under U.S. free trade agreements, for example, has dropped dramatically, from the 37 that joined the GPA to the 9 that joined the recent U.S.-Colombia free trade agreement. Even if the federal government had the constitutional authority to force more states to open their markets -- which the federal

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8 See, e.g., Text On A/V, Procurement, Remedies, SOEs Altered In New Mandate Draft, 31 Inside US Trade, No. 21, May 24, 2013, 2013 WLNR 12791882 (draft EU position on procurement in TTIP negotiations).


government itself denies\(^{11}\) -- many of those states would likely be out of compliance with the GPA’s procedural requirements,\(^{12}\) and some state and local governments, even if forced to open their procurement markets, might spend years waging a war of administrative resistance to foreign vendors. Immediate, sweeping access to sub-central markets is, in other words, a prize the EU is unlikely to gain in the TTIP negotiations.

- **Eliminating “Buy American” Requirements in the Federal Market:** Nor are the European negotiators likely to persuade their U.S. counterparts to eliminate many of the “Buy American” requirements that pock the federal marketplace.\(^{13}\) These deeply rooted domestic preferences -- such as the preference for U.S.-based small businesses, which helps keep foreign companies out of nearly a quarter of the $500 billion federal procurement market -- are generally protected by sophisticated interest groups in the U.S. Congress. Those interest groups are, moreover, often aligned with the Obama administration’s political base. Charging hard at these preferences was, therefore, perhaps a quixotic effort.

**Impasse (Again) in TTIP -- on Procurement:** Although the original EU negotiating goals on procurement faced serious hurdles, the risks they posed was largely lost in the din of a much broader TTIP negotiating effort. But now, once again,\(^{14}\) these problems with procurement have come to the fore,\(^{15}\) largely focused on coverage\(^{16}\) and perceived limited access.\(^{17}\)


\(^{12}\) See, e.g., National Association of State Purchasing Officers (NASPO), Research Brief: State Bid Protests (not all states have GPA’s required remedy (bid protest) systems in place), http://www.naspo.org/documents/FINAL_NASPO_BidProtests_Research_Brief_042413.pdf.


\(^{14}\) Procurement has been a recurring sticking-point in negotiations. For example, on July 10, 2014, *Inside U.S. Trade* reported that the two sides had reached deadlock in the TTIP negotiations, largely because of problems with procurement:

> Heading into the sixth round of the Transatlantic Trade and Investment Partnership (TTIP), prospects are growing dim that the United States and European Union will meet their goal of tabling all market access offers by the end of the summer because of a deadlock over what constitutes a sufficiently meaningful government procurement offer.


\(^{15}\) EU Official: TTIP Negotiations Hardest on Procurement, Services, AG, GIs, Inside U.S. Trade, Mar. 25, 2016, 2016 WLNR 9208408 (“A senior European Commission official last week told the European Parliament that negotiators are dealing with the most difficult part of the negotiations for a Transatlantic Trade and Investment Partnership (TTIP), which he identified as market access for government procurement, services, geographical indications (GIs), and agriculture.”); Malmstrom Seeks TTIP Deal This Year, But Says It Must Reflect EU Priorities.
a critical report from the European Commission, which pointed out that the United States has not afforded more access to public transportation markets, a senior U.S. trade official recently told the U.S. trade press that the United States will not, in fact, be offering a revised position on procurement in upcoming TTIP negotiations:

A senior U.S. official said March 31 that the U.S. has no intention of submitting a revised government procurement offer to the European Union this summer in the Transatlantic Trade and Investment Partnership negotiations, despite a request by EU Trade Commissioner Cecilia Malmstrom that it do so.

The U.S. official said that negotiators just exchanged offers, a reference to Feb. 29, and need to work on that basis. He made clear that he considers the U.S. offer to have met the agreed upon TTIP objective of increasing market access, and signaled the U.S. does not have to offer as much procurement access in TTIP as the EU since the U.S. market is twice as open.

Footnote continued from previous page
Inside U.S. Trade, Mar. 11, 2016, 2016 WLNR 7660296 (“European Union Trade Commissioner Cecilia Malmstrom . . . emphasized that efforts to conclude a Transatlantic Trade and Investment Partnership (TTIP) this year cannot be successful without securing some of the key EU priorities, such as more access to the U.S. government procurement market, more protection for food names known as geographical indications (GIs), and an innovative regulatory cooperation chapter.”); Malmstrom Likely to Reject U.S. Procurement Offer as Insufficient to Advance TTIP, Inside U.S. Trade, Mar. 8, 2016, 2016 WLNR 7411929 (“European Union Trade Commissioner Cecilia Malmstrom in a March 18 meeting is expected to tell her U.S. counterpart that a U.S. government procurement offer in the Transatlantic Trade and Investment Partnership (TTIP) is insufficient to advance negotiations to a point where the EU can consider concessions on its sensitive agricultural tariffs, according to informed sources.”).

See, e.g., Keating: Administration Aiming To Keep Spotlight On TPP, Not TTIP, Inside U.S. Trade, Mar. 28, 2016, 2016 WLNR 9429743 (“Informed sources have said the U.S. procurement offer in TTIP would lower the thresholds for central government entities.”).

Much of the current debate centers on differences over interpreting trade data. As one recent press report noted:

In the GPA, the EU claimed that $467 billion out of the EU’s $553 billion per year procurement market is open to GPA parties -- roughly 85 percent -- compared to the U.S. market that opens $236 billion out of $732 billion per year, which amounts to 32 percent.

In contrast, the U.S. at the time claimed that it offered more than $400 billion annually in procurement market access to foreign bidders (Inside U.S. Trade, March 30, 2012). Last week, U.S. ambassador to the EU Anthony Gardner said the EU government procurement market of $333 billion has a limited opening of 1.6 percent for other member states and foreign firms. Of that, 88 percent goes to the other member state firms, leaving the U.S. firms with 0.016 percent, he said.

EU Official: TTIP Negotiations, supra.
He said the "narrative" of EU officials that the EU market is more open than the U.S. is false. In criticizing the U.S. procurement offer, EU officials in early March made that argument.18

Possible Solutions -- Structural Changes to Reduce Barriers: To break this deadlock, it may be an appropriate time to reconsider realigning both sides’ negotiating positions on procurement, to focus less on coverage and instead find compromise in more structural reforms on procurement.

- **Gaining Assurances That Federal Grantees Will Not Discriminate:** One way forward would be for the European Union to ease its demands for direct access to sub-central markets, and instead to seek broader U.S. assurances that federal grantees (local governments, for example, using federal dollars to procure) presumptively will not discriminate against European vendors. As the table below reflects, federal grants to states, local governments and other entities have consistently exceeded federal procurement contracts over past years. Opening sub-central contracts using federal dollars to European competition would, therefore, be an important step forward for European exporters, especially since the federal grants typically cover only part of each grantee’s project, so the hundreds of billions of dollars of federal grants have a multiplier effect across many procurements in the sub-central markets. The legal framework for opening the market fed by federal grants is already there -- the next step is to clarify foreign firms’ access to that market.

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Source: USAspending.gov. Dollar figures are in billions of dollars.

Nor is this idea new to the negotiations, for many in the European procurement community have already suggested that European vendors could gain nondiscriminatory access to state procurement markets indirectly, through the federal government’s grantmaking authority.19 Although Congress has often imposed severe domestic content requirements on grantees, to preserve U.S. jobs, the argument is that the federal government could also use its grantmaking powers (and over $600 billion in annual grants) to open opportunities for foreign vendors.


19 See, e.g., European Commission Non Paper on Public Procurement, supra, at 3.
Notably, the U.S. Office of Management & Budget (OMB), a part of the Executive Office of the President, recently revamped the various circulars and guidance which govern federal grants to states, local governments and other grantees, in revised guidance (now known as the “Omni-Circular”).

For over two decades, the common rule which governed federal grants barred grantees from discriminating based on state or local procurement preferences, though this rule apparently did not apply to the states themselves. Even when OMB’s procurement standards for state grantees were largely abolished during the Reagan administration, the revised rule still banned state and local procurement preferences. When OMB published its revamped circular in December 2013, the new guidance still barred federal grantees (aside from states themselves) from “the use of statutorily or administratively imposed state or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference.”

The real question, therefore, is not whether federal grantees can be barred from discriminating based on geography, but instead how broad that bar should be. Should, for example, states themselves also be barred from discriminating when they procure using federal grant dollars -- and will the bar be one that explicitly protects foreign vendors? These would, it seems, be productive points for discussion in the TTIP negotiations, because requiring that federal grantees not discriminate against European vendors would, in practice, give Europeans much of the access to sub-central procurement markets they currently seek -- access, because denied, which has contributed to the current difficulties in TTIP negotiations.

- **Using TTIP as a Flexible Structure for Harmonizing Procurement Regulations:** At the same time, rather than fixing static provisions regarding procurement coverage in TTIP, the parties could bring procurement into their broader effort to establish permanent structures for cooperation in regulation. As the Office of the U.S. Trade Representative noted, in other regulatory spheres the negotiating parties “seek greater compatibility of U.S. and EU regulations and related standards development processes,” so as to reduce

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22 *See id.* at 8096.

23 *See id.* at 8039.


“costs associated with unnecessary regulatory differences and facilitating trade.” To do so, the parties would promote “transparency in the development and implementation of regulations,” and pursue “regulatory cooperation initiatives where appropriate.”

Although European business groups suggested that TTIP be used to establish “an expedited consultation process on future issues and concerns related to public procurement,” to increase “transparency regarding rules and future developments,” the earlier European statements of negotiating position treated procurement separately from the broader U.S. - EU initiative to cooperate in regulation-writing.

Shifts in the negotiations have, however, created an opening for regulatory cooperation in procurement. The most recent European Union proposal on regulatory cooperation, which is very broadly drafted, would accommodate regulatory cooperation between the European Union and U.S. federal procurement regulators. Under the EU proposal, regulatory cooperation could extend (at each party’s option) to “any . . . areas or sectors covered by this Agreement that has or is likely to have a significant impact on trade or investment between the Parties, in relation to which regulatory authorities of both Parties have determined common interest.” Procurement would certainly fall within such a zone of “common interest.”

Making procurement part of a broader effort to coordinate transatlantic regulations makes a good deal of sense:

- **The U.S. and European procurement systems are in many ways converging.** Article 57 of the new European “classic” procurement directive, 2014/24/EU, for example, brought Europe much closer to a U.S. system of debarment, see FAR Subpart 9.4, 48 CFR Subpart 9.4, and Article 29 of the new directive (“competitive procedure with negotiation”) allows for relatively unstructured, simultaneous exchanges very similar to competitive negotiations under Federal Acquisition Regulation Part 15. The EU and U.S. systems should not converge by accident, though -- they are likely to collide -- and the EU and the United

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States would be well served to establish a formal mechanism for sharing best practices in their regulatory processes.

- **There are critical areas for cooperation, including cybersecurity and sustainability.** Procurement reaches vital areas of national security and public policy, and regulatory cooperation is essential.

  - **In cybersecurity,** for example, although the European Commission has recognized that, given the “the global nature of NIS [network information system] problems, there is a need for closer international cooperation to improve security standards and information exchange, and promote a common global approach to NIS issues,” in practice cybersecurity is not proceeding down common pathways in the EU and U.S. public procurement markets. In the European Union, where policymakers are pressing for coordination in cybersecurity standards across Europe, cybersecurity often follows ISO (International Organization for Standardization) standards, while in the U.S. federal marketplace, cybersecurity generally follows standards set by the National Institutes for Standards and Technology (NIST). Practice in the United States shows that it is possible to accommodate dual cybersecurity standards, and procurement regulators need to work out how, exactly, that should be done.

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32 For a comparison of the ISO and NIST standards, see, e.g., Joseph Granneman, IT security Frameworks and Standards: Choosing the Right One, http://searchsecurity.techtarget.com/tip/IT-security-frameworks-and-standards-Choosing-the-right-one (“The ISO 27000 series is the magnum opus of information security frameworks with applicability in any industry, although the implementation process is long and involved. However, it is best used where the company needs to market information security capabilities through the ISO 27000 certification. NIST SP 800-53 is the standard required by U.S. federal agencies but could also be used by any company to build a technology-specific information security plan.”).


34 See, for example, Defense Federal Acquisition Regulation Supplement sec. 252.204-7008 Compliance with Safeguarding Covered Defense Information Controls, which calls presumptively for NIST standards to protect unclassified information at the U.S. Department of Defense, but allows vendors to propose technology which uses other standards for cybersecurity protection, and sets up a process for the Defense Department to assess whether another proposed standard is equally effective.
• Sustainability is also an area of important potential cooperation. Take, for example, the very controversial question of environmental standards, which governments on both sides of the Atlantic are ever more likely to incorporate into their procurements. Indeed, both the European procurement directives[^35] and the U.S. Federal Acquisition Regulation[^36] endorse broader use of “eco-labels” -- standards for products with reduced environmental impact. Those standards will almost invariably diverge, and so cause discrimination against foreign vendors. The Court of Justice for the European Union has already addressed this question, however, in the *Max Havelaar* case; there, the court held that differing socioeconomic and environmental standards can be imposed as procurement requirements, so long as the standards are open and clearly state the goals being sought, so that other vendors -- new to the standards -- can explain how they too meet those standards[^37]. The court’s thoughtful approach is an excellent example of how differences in procurement regulations can be bridged, rather than erased.

• Nor, finally, would regulatory cooperation in procurement be a revolutionary new innovation. When negotiations on the revised GPA closed, the GPA parties agreed to continue to work to address procurement regulations that raise barriers to trade, including preferences for small- and medium-sized enterprises (SMEs), and standards for sustainability[^38]. As noted, the European Union and the United States hope through the TTIP agreement to develop a “GPA-plus.” By expanding on the GPA work programs -- by establishing a

[^35]: E.g., European Procurement Directive 2014/24/EU, Recital (88) (“Contracting authorities should be able to require that environmental management measures or schemes be applied during the performance of a public contract. Environmental management schemes . . . can demonstrate that the economic operator has the technical capability to perform the contract. This includes Ecolabel certificates involving environmental management criteria.”).

[^36]: 48 C.F.R. § 23.103, FAR 23.103 (“Federal agencies shall advance sustainable acquisition by ensuring that 95 percent of new contract actions for the supply of products and for the acquisition of services (including construction) require that the products are— (1) Energy-efficient (ENERGY STAR ® or Federal Energy Management Program (FEMP)-designated); (2) Water-efficient; (3) Biobased; (4) Environmentally preferable (e.g., EPEAT-registered, or non-toxic or less toxic alternatives); (5) Non-ozone depleting; or (6) Made with recovered materials.”); see also U.S. Environmental Protection Agency, Understanding Eco-labels for Electronics (June 19, 2006), https://www.epa.gov/sites/production/files/documents/ecolabel.pdf.

[^37]: European Commission v. Kingdom of the Netherlands, Case C-368/10, Court of Justice of the European Union (May 10, 2012) (agency erred by stating in solicitation that “products to be supplied bore specific [socioeconomic and environmental] labels would give rise to the grant of a certain number of points in the choice of the most economically advantageous tender, without having listed the criteria underlying those labels and without having allowed proof that a product satisfies those underlying criteria by all appropriate means”).

[^38]: See [Jean Heilman Grier, Work Programs for Unfinished Business in Revision of GPA, Nov. 18, 2013](http://trade.djaghe.com/?p=162); WTO Doc. GPA/113, at 438-47 (listing work programs).
permanent structure for cooperation on these and other issues in procurement regulations -- the European Union and the United States will be reducing barriers to procurement trade across the Atlantic, and helping to develop durable rules systems for the many nations around the world that look to the EU and the United States for best practices in procurement.

**Conclusion:** The TTIP negotiations between the European Union and the United States have faltered, in part because the EU set very high negotiating goals for procurement -- goals regarding access to sub-central markets and “Buy American” requirements which may not be achievable, for practical and political reasons. There are possible ways forward, however. The European Union could, for example, press for U.S. assurances that European vendors will not be discriminated against when competing for sub-central procurements funded with federal grants, because longstanding federal guidance already bars many sub-central entities from imposing geographic preferences when they procure with grants support from the federal government. And the European Union and the United States could find common ground by incorporating procurement into their broader efforts to coordinate regulations across the Atlantic, as procurement regulations in Europe and the United States are already very similar, and would benefit from a thoughtful sharing of best practices.
ILLUSTRATIVE SLIDES
TTIP: Public Procurement -- Challenges and Opportunities for the European Union and the United States

European Parliament
Committee on the Internal Market and Consumer Protection
Committee on International Trade

Joint Public Hearing

Testimony of:
Professor Christopher R. Yukins
George Washington University Law School
Washington, DC

April 20, 2016
Summary – TTIP/Public Procurement

- Difficult EU-U.S. negotiations
  - Access to U.S. sub-central markets
  - Coverage, especially in U.S. transportation
- Possible Points of Compromise
  - Access to sub-central markets: international non-discrimination in U.S. federal grants
    - Extension of current domestic non-discrimination policy
      - Existing U.S. statutory preferences honored
  - Regulatory cooperation
    - Easy fit within current European proposal
    - Examples: Cyber-security and Sustainability
Current U.S. Grants Policy: Domestic Non-Discrimination

“(b) The non-Federal entity must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference

- Office of Management & Budget “Omni-Circular,” sec. 200.319(b)
European Proposal – TTIP

This TETXUAL PROPOSAL is the European Union’s proposal for legal text on “Regulatory Cooperation” in TTIP. It was tabled for discussion with the US and made public on 21 March 2016. The actual text in the final agreement will be a result of negotiations between the EU and US.

TTIP- EU proposal for Chapter: Regulatory Cooperation

Article 13. Scope

1. The provisions of this Chapter shall apply to:

   a) Cooperation covered by specific or sectoral provisions concerning goods and services in this Agreement [to be identified];

   b) Cooperation in any other areas or sectors covered by this Agreement that has or is likely to have a significant impact on trade or investment between the Parties, in relation to which regulatory authorities of both Parties have determined common interest

GW LAW

19
U.S. Defense Department Regulation –
Integrating Cyber-security

252.204-7008 Compliance with Safeguarding Covered Defense Information Controls.

(1) By submission of this offer, the Offeror represents that it will implement the security requirements specified by National Institute of Standards and Technology (NIST) Special Publication (SP) 800-171, “Protecting Controlled Unclassified Information in Nonfederal Information Systems and Organizations” . . . not later than December 31, 2017.

(2)(i) If the Offeror proposes to vary from any of the security requirements specified by NIST SP 800-171 . . . the Offeror shall submit to the Contracting Officer, for consideration by the DoD Chief Information Officer (CIO), a written explanation of—

(A) Why a particular security requirement is not applicable; or

(B) How an alternative but equally effective, security measure is used to compensate for the inability to satisfy a particular requirement and achieve equivalent protection.

(ii) An authorized representative of the DoD CIO will adjudicate offeror requests to vary from NIST SP 800-171 requirements in writing prior to contract award. Any accepted variance from NIST SP 800-171 shall be incorporated into the resulting contract.
Integrating Sustainability: 
*Commission v. Netherlands ("Max Havelaar")*
Court of Justice of the European Union 
(May 2012)
“[B]y providing, in the specifications, that the fact that certain products to be supplied bore specific labels would give rise to the grant of a certain number of points in the choice of the most economically advantageous tender, without having listed the criteria underlying those labels and without having allowed proof that a product satisfies those underlying criteria by all appropriate means, the province of North Holland established an award criterion that was incompatible with . . . Directive 2004/18.”
Conclusion

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