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The TTIP-gate: a tale of access to documents, secrecy and EU powers

Ana Ramalho (Maastricht University) · Wednesday, July 9th, 2014

"The Court added a cherry on top of the transparency cake."

It is no secret that secrecy in the TTIP negotiations has been bothering several sectors of civil society (apologies, but the links to back this up were too many to insert here). Just last week, the Court of Justice has issued a decision in Case C-350/12 that sheds further light into this matter.

The case concerns a dispute over access to a document – the opinion of the Council's Legal Service covering certain aspects of the opening of negotiations on an international agreement to make available to the United States some financial data. One of the elements of this document is an analysis of the legal basis and the respective competences of the EU to conclude the agreement. Note that, while the international agreement is not the TTIP, the considerations of the Court are important (and applicable) to it.

At the centre of the dispute is Regulation 1049/2001, on public access to documents of EU institutions. In a nutshell, the Regulation stands on the principle that such documents should be accessible to the public, subject to certain exceptions where given public or private interests are at stake. The widest possible public access to documents is the rule, and exceptions thereof are to be interpreted strictly (as in any case the CJEU made clear in paragraph 48 of the decision). One of those exceptions is the refusal of access to a document where disclosure would undermine the protection of the public interest as regards international relations (article 4/1 (a) of the Regulation). So, for example, documents conveying negotiating strategies could come under the exception to the wide access to documents.

Another exception is the so-called exception for legal advice (article 4/2 of the Regulation), under which an institution shall refuse access to documents if their disclosure would undermine the protection of legal advice (in the sense that it would be harmful to an institution's interest in receiving frank, objective and comprehensive

advice), unless there is an overriding public interest in disclosure. Both these exceptions were analysed by the Court.

The CJEU ruled that, despite the fact that the EU institutions have a wide discretion in their decision to refuse or allow access to documents, the institution refusing access must explain how disclosure "could specifically and actually undermine the interest protected by the exception". This risk should moreover be "reasonably foreseeable" and not "purely hypothetical" (see paragraphs 52 and 64 of the decision). Also, in the specific case of refusing access so as to not undermine the protection of legal advice, it is for the institution to weigh that protection against the public interest in accessing the document. The public interest can include, inter alia, guaranteeing that "the administration enjoys greater legitimacy" (paragraph 53).

This blogger is delighted to see that her views on how transparency can serve as a means to check the legitimacy of the EU to act on the basis of a certain competence appear also to be those of the Court. But she is even more delighted to learn that the Court added a cherry on top of the transparency cake by stating that a discussion concerning the correct legal basis cannot, if made public, automatically undermine the public interest as regards international relations (see paragraph 59 of the decision). Meaning: discussions on the competence of the EU to negotiate and conclude international agreements – including the TTIP – are not automatically covered by the exception of access to documents. If the institutions want to keep such documents (or parts thereof) secret, then it is for them to justify how "specifically and actually" that exception is applicable.

This is all the more important considering that the Commission has expressed its will to make the TTIP a dynamic agreement, capable of incorporating new areas over time. To achieve this flexibility, the Commission envisages a possible provision of a general mandate "for regulators to engage in international regulatory cooperation, bilaterally or as appropriate in other fora, as a means to achieve their domestic policy objectives and the objectives of TTIP" – which could effectively turn the TTIP into a trigger for other negotiations (which?), with further parties (which?) and further policy objectives (which?). Transparency requirements, and specifically an obligation to thoroughly justify refusal of access to documents, can be a means to check the legitimacy of such a broad mandate if/when the time comes.

Moreover, since transparency is a way to check the EU competence to act, this case should be read in tandem with the Daiichi case, on the external competence of the EU. There, the Court recognized that its earlier case law on the external competence of the EU is no longer applicable, as the commercial aspects of intellectual property are now part of the common commercial policy (CCP), which belongs to the sphere of the EU's exclusive competences. However, the Court has also pointed out that not every aspect of IP will fall under the CCP. A specific link to international trade is required. According to the Court, this requirement is not satisfied merely by the fact that the act has implications for international trade. Citing its old case law, the Court said that such link will be present only if the EU act is "essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade" (paragraph 51 of *Daiichi*). In the Court's opinion, that was the case of TRIPS, as this agreement: is part of the WTO system; has trade-related sanctions; and in fact uses the same

language of the TFEU ("commercial aspects of IP") – see paragraphs 53 to 55 of *Daiichi*.

The Court also mentioned that the TRIPS standardization of world rules on IP (namely on the availability, scope and use of IP rights) has the effect of facilitating/liberalizing international trade, which would in turn cause TRIPS to come under the CCP (see paragraphs 59 and 60 of *Daiichi*). This could mean that an international harmonization of IP standards would be enough for the specific link to trade to be established, thereby making the negotiation and conclusion of the TTIP an exclusive competence of the EU. It remains to be seen how this situation could be reconciled with article 207/3 TFEU, which mandates the compatibility of international agreements with internal policies and rules (e.g., the limited competence in cultural matters). But the tale is already too long.

Let us finish with the catch-22 of the TTIP-gate: in order to know whether the TTIP carries out a harmonization of IP rules, access to the content of the agreement would be necessary; and at several points of the decision in case C-350/12 (see e.g. paragraphs 67 and 109) the Court of Justice, following the General Court's decision, draws a divide between the content of the international agreement (which in that specific case was justifiably covered by the refusal to grant access to the document) and the competence to negotiate the agreement (which could be disclosed). If the same logic is applied to the TTIP – which is by no means a far-fetched scenario, as we are dealing here with the ability to justify decisions taken under discretionary powers – access to the content of the TTIP might be denied and we'll be back to square one.

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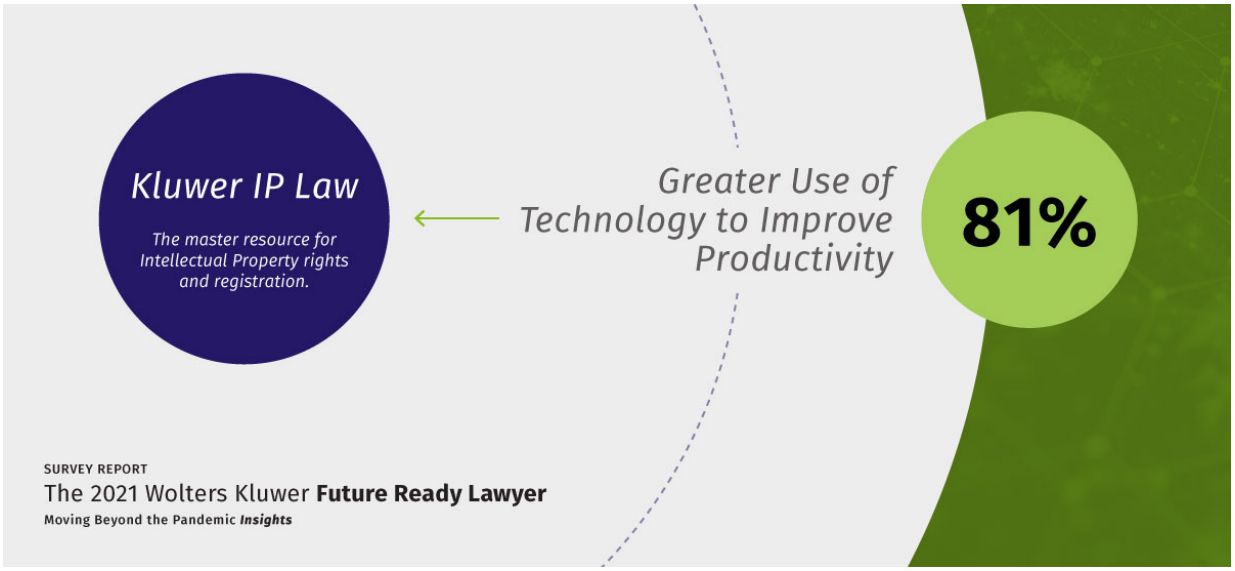

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