



EPSU update on the Transatlantic Trade and Investment Partnership (TTIP), the Trade in Services Agreement (TiSA) and the European Commission's new trade and investment strategy

June 2015

This note reports on recent developments in trade policy and on discussions about this topic that have taken place with the European Commission (EC) and the European Parliament (EP), and where EPSU has participated and highlights some issues around public services.

1) TTIP

European Parliament: INTA vote 28 May and plenary meeting

On 28 May, the EP's committee for International Trade (INTA) voted on Rapporteur Lange's (S&D) report on the recommendation of the EP to the Commission on the currently negotiated Transatlantic Trade and Investment Partnership (TTIP) with the US. For this report, almost 900 amendments had been handed in by no less than 14 parliamentary committees. The amount of proposed changes underlined the controversy that accompanies the discussions around the agreement. An amendment providing for a comprehensive exclusion of public services was supported but the majority of amendments adopted during the committee meeting were in line with the Commission's negotiation position in favour of wide-ranging liberalisation.

The adoption of amendments incorporating a modified version of the investor-state dispute settlement (ISDS) into the report on the basis of a proposal put forward on 5 May from the European Commissioner for Trade was in particular criticized by the ETUC and a wide range of NGOs and civil society organisations. The reform proposal from Ms Malmström recommends amongst other things the establishment of a fixed list of arbitrators and an appeal mechanism, but these measures are insufficient and fail to address the real problems deriving from ISDS. The Seattle 2 Brussels network has assessed the reform proposal and outlines in a report why it constitutes a failure: <http://www.s2bnetwork.org/isds-statement/>

In spite of opposition in particular to ISDS, the reform package found support in the INTA vote and the report was put forward for approval in the plenary session on 10 June. You can find more information on the INTA committee vote here:

<http://www.euractiv.com/sections/trade-society/meps-give-only-passing-vote-ttip-314959>

And on the report here: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bREPORT%2bA8-2015-0175%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>

In the days following the INTA vote, many members announced to table further amendments to the report before the upcoming vote on 10 June in the plenary session. EPSU and ETUCE wrote to MEPs asking them to maintain amendments pressing for public services to be kept out of TTIP and to support amendments rejecting ISDS. To read the joint letter see:

<http://www.epsu.org/a/11468>

The evening before the vote scheduled for 10 June, EP president Martin Schulz announced that it had to be postponed due to a too large amount of amendments to be voted on during a

plenary session. This very abrupt suspension of the discussion and vote in plenary reflects internal divisions. Martin Schulz justified his decision by referring to the high amount of amendments tabled, but in fact only 118 had been handed in – a number that had been surpassed for other reports in the past without any postponement. It therefore seems less a procedural than a political decision. Even though the resolution would have been non-binding, its delay means that the EP can not give the EC any guidance on the issue until a report is adopted. This is also why EPSU asked the Commission in a PR on 10 June to postpone further negotiations with the US until the Parliament has given the necessary guidance on how to proceed with the negotiations. Please follow this link to the press release: <http://www.epsu.org/a/11484>

You can find more information on the postponement of the vote under the following articles: <http://www.euractiv.com/sections/trade-society/delayed-ttip-vote-drives-wedge-between-grand-coalition-315274>
<http://pr.euractiv.com/pr/european-parliament-silences-itself-majority-two-votes-down-debate-ttip-128545>

The INTA Committee will now vote on the new amendments that were introduced to the plenary session on 29 June. It remains to be seen if the report can then be voted on in the following plenary session from 6th to 9th July already or whether it will take place after the summer break.

European Commission: Stakeholder Dialogue on TTIP and health 27 May

On 27th of May, the EU TTIP negotiating team for the pharmaceuticals, medical devices and cosmetics chapters held a stakeholder dialogue on the topic TTIP and health in which EPSU participated. The aim was to have a comprehensive discussion with a large variety of stakeholders on general implications of the agreement on health care and other public services and on pharmaceuticals, cosmetics and medical devices in particular.

Many subjects were addressed but the discussion raised more questions than it answered. For example, it remains unclear how TTIP might affect the mobility of patients or the portability of health insurance. The recently leaked TiSA documents intensify concerns on topics like this and a clarification is urgently needed. You can find a detailed report of the meeting in the annex. We also attach a literature summary on issues around public services and health. The summary also provides a list for further reading.

2) TiSA

More leaked documents from Wikileaks on 3 June

On 3 June seventeen separate secret TiSA negotiation documents were leaked and published on Wikileaks which highlight the extreme secrecy around the agreement and reveal parts of its highly controversial content. Published were for example papers on sectors such as financial services, postal services, domestic regulations and labor migration. You can find the leaked documents on Wikileak's website: <https://wikileaks.org/tisa/>

As also stated on the EPSU website (<http://www.epsu.org/a/11480>), the secret papers show that whereas the EU and the US state that public services are properly protected in trade agreements, this does not appear to be the case from the papers. Concerns are also raised with regard to financial services and the governments' right to regulate. The leaked documents reveal that the agreement will constrain governments' right to regulate their

financial services at exactly a time when the global economy is still recovering from a crisis caused by deregulation. But it will also constrain their right to regulate health and environmental policies, education and others.

For further information, you can read the PSI report on the leaked documents here: <http://world-psi.org/en/massive-leak-tisa-trade-documents-highlights-madness-secrecy>

Independent of the newly gained information from the leaked documents, other aspects of TiSA remain very problematic. As reported in the last trade update - http://www.epsu.org/IMG/pdf/EPSU_Update_Trade_PublicServices_-_May_2015.pdf - some of these were discussed by the EP's Intergroup on public services on 6 May. Amongst others, Nikolai Soukoup from the Vienna Chamber of Labor (AK) outlined how the EU's TiSA proposal does not include a sufficient carve out of public services. The exemption clause for services carried out under governmental authority is too narrow and the applied public utilities clause exempts some public services from the prohibition of being provided as monopoly, but not from other obligations. Also the difference between publicly and privately funded and provided services is not clearly defined, which leaves too much space for interpretation. The application of negative listing, as TiSA is a hybrid agreement using both negative and positive listing, allows for ratchet and standstill clauses that endanger policy space for governments. Without having proper insights into the agreement though, the exact effects the provisions could have on public services remain unclear. A report of the intergroup meeting is included in the annex.

3) The new EC trade and investment strategy

On 25 March the European Commission announced the preparation of a new policy communication on a trade and investment - see <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1274> for details. The strategy is supposed to be published this autumn, following input for stakeholders and others, but no proper public consultation.

The ETUC held a discussion with EC representatives on 14 April, when some points regarding the effects on employment and European standards were mentioned. Please take a look at EPSU's last trade update of May to find out more about what was discussed:

http://www.epsu.org/IMG/pdf/EPSU_Update_Trade_PublicServices_-_May_2015.pdf

On 23 June – international public Services Day – the EC will hold a stakeholder event during which a variety of panels is taking place that address relevant issues around the new strategy, including the meaning of the new agenda for citizen's lives, sustainable development, labour standards and many more. For more information, follow this link to the EC's website: <http://trade.ec.europa.eu/doclib/events/index.cfm?id=1314>

Or check the program here:

http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153462.pdf

4) International Public Services Day on 23 June

23rd June is World Public Services Day. This year we focus attention on the dangers presented by the current trade and investment agreements such as TTIP, CETA, and TiSA. EPSU's Executive Committee endorsed the decision to campaign to exclude public services

from these trade agreements and to work with other organisations around a number of key demands. EPSU is also preparing a further paper on trade and public services (not yet finalised but coming soon).

We already asked affiliates to send us pictures of public service workers in front of their work place demonstrating against the inclusion of public services in the agreement. This way, we can visualize vividly what is at stake.

You can find examples in our Flickr gallery under the following link:

<https://www.flickr.com/photos/94657608@N02/sets/72157653466865189>

5) Upcoming dates to note

- INTA vote on the Lange Report on 29 June
- *Possible* plenary vote on the Lange Report 6 - 9 July
- 10th Round of TTIP negotiations in Brussels 13 - 17 July
- Next TiSA round ("stock-taking exercise") in Australia during the week of 6 July
- EC'S European Trade Policy Day on 23 of June

Annex I

EPSU report of EC stakeholder dialogue on TTIP and health 27 May

(27 May 2015) The EU TTIP negotiating team for the pharmaceuticals, medical devices and cosmetics chapters held a stakeholder dialogue on the topic TTIP and health in which EPSU participated. The aim was to have a comprehensive discussion with a large variety of stakeholders, ranging from business representatives to civil society organisations. Amongst the participants were mainly representatives of industry, such as Eurochambres, Cosmetics Europe or the European Business Council. At the same time, but to a much smaller extent, other civil society groups like the European Consumer Protection Organization (BEUC), the European Public Health Alliance (EPHA) and Health Action International took part.

The Commission was, amongst others, represented by officials from DG Trade as for example Mr Fernando Perreau de Pinninck, Head of the unit covering Tariff and Non-tariff Negotiations; Ms Ivone Kaizeler, Negotiator in the Unit for Tariff and Non-tariff Negotiations; or Mr Marco Dueerkop, Deputy Head of Unit in the unit covering services. But also officials of other DGs took part, as for example Mr Sebastien Goux, Policy officer in the unit covering medicinal products from DG SANTE. For more information on the participants see <http://trade.ec.europa.eu/doclib/events/index.cfm?id=1302>

In a short introductory note by Fernando Perreau de Pinninck he briefly pointed out that regulatory cooperation between the EU and the U.S. is supposed to align, develop and harmonize legislation whilst at the same time maintaining or improving European standards and respecting the regulators' sovereignty. Following this short opening statement, questions could be raised by the participants on the topics of cosmetics, medical devices and pharmaceuticals. The EC introduction also recognized that some stakeholders (including EPSU) have more general concerns regarding the potential impact of TTIP (and other FTAs) on the right for all to good health, and to good healthcare and other public services. These concerns could also be addressed.

The following points were mentioned and partially elaborated on:

Cosmetics

- Chemicals that were banned through regulations such as REACH will not find their way in EU products through TTIP. This concerns provisions that exist up to today
- EU will continue to act according to precautionary principle
- Ban for animal testing will further be in place in the EU, but as EU and US have different definitions for cosmetics and drugs, the EU can only encourage its trading partner to do the same, but cannot and does not want to enforce anything. For example, whereas sunscreens are regarded as cosmetics in the EU, they are considered to be drugs in the US because they contain UV filters. This means in the US sunscreens are tested on animals. Both parties will keep their own definitions.

Medical devices

- For medical devices no automatic mutual recognition will take place
- E-health not yet discussed

- Position paper on ICTS in health to come; problem that not yet any EU approach to e-health

Pharmaceuticals

- In area of health related IP there wont be many difficulties, as quite similar standards
- On the impact on prices or reimbursement:
 - No provisions on either considered
 - The subjective is that patients have access to medicine. The member states' prerogatives will therefore stay in place
- On trade secret and impact on innovation:
 - Concerning the exchange of information between regulators, the system needs trade secrets and confidentiality. The regulatory cooperation body instead will create more transparency as all meetings to be published.
 - Not the same as information on IP: here no secrets at all: when a product is authorized in the EU, it is subject to EU policies on data access and vice versa
- The current patent right systems of each country will remain

Especially the last points are problematic, as the current system counteracts innovation in favour of patients. Instead of promoting a continuation of it, decision-makers should re-consider to give the responsibility of developing new and better medicine into the public hand in order to ensure a fair share of necessary and affordable new innovative products between all patients.

As well as these specific areas, some representatives of civil society, including EPSU, used the occasion and addressed further relevant general issues as well as specific questions with regard to health and other public services. Concerning these points, the discussion can be summarized as follows:

- The EC said that there is no intention of creating in TTIP something similar to an internal market. Not all basic concepts of the IM are applicable here, e.g. neither the Services Directive nor the EU's patient's mobility directive do apply.
- What is done in services in terms of broadening market access:
 - Eliminate discriminations
 - Eliminate quantitative restrictions (equity caps, foreign restrictions)
- In all FTAs, exceptions are listed in the annexes. Within them, in all sectors, EU and member states on all levels, also regional and local, can continue with monopolies and exclusive rights.
- The public utilities clause covers monopolies and exclusive rights
- Services of government authority will not fall under the scope of the agreement
- All publicly funded health services can be listed in there, too
 - No definition provided because served well in past to leave this to member states, as e.g. in TiSA or CETA
 - Basically it means any form of state support
- According to the EC, also privately funded services protection can be protected:

Member States can maintain economic needs test.

 - A Member State can limit market access by restricting the number of providers
 - or by prohibiting access for public providers

- It is up to Member States to decide if and how they want to liberalise public services, and also if they want to 'lock in' such liberalisation in FTAs.
- In the EC's view, negative and positive listing of commitments and/or reservations lead to the same results. Also in negative list it is possible to protect, but have to be more diligent. (Is this true about future services? If a negative list approach is used, exemptions for services that do not yet exist would need to be anchored in very general wording)
- In both approaches, negative or positive, it is not possible to add exemptions at a later stage. One will be bound to what is in the agreement, i.e., → no reversibility.
- In TTIP the EC uses a 'hybrid approach' as in TiSA (positive for market access, negative for equal treatment). However some aspects normally considered to fall under market access may (as in TiSA?) come under national treatment (equity caps, economic needs test).
- The EC does not seem to be concerned about moving away from a positive list approach towards a 'a la carte' approach to current FTAs..

These and many more issues still need to be clarified.

Annex II

EPSU report of the EP public services intergroup meeting on TISA, 6 May 2015

Speakers:

- Ignacio IRUARRIZAGA DIEZ, European Commission, DG TRADE, Acting Head of Unit in charge of Trade in Services
- Viviane REDING, MEP, Rapporteur on TISA for the European Parliament – Represented by George Bach
- Luisa SANTOS, Businesseurope, Director of international affairs
- Rainer PLAßMANN, CEEP, Chair of the Services of General Interest Task Force; Stadtwerke Köln Holding, Head of personal and organisation, Head of unit for SGI
- Nikolai SOUKOUP, Vienna Chamber of Labour, Department of EU and International affairs

Introductions:

Iruarrizaga Diez

The EU has a very large surplus of trade in services. In comparison to other regions the EU is more open towards foreign competition. TISA could remove barriers and thus help getting rid of the surplus.

More countries joining the agreement, most recently Mauritius. But the scope will cover only such countries that are of economic interest to the EU.

Member states will preserve full ability to introduce regulation (given its non-discriminatory) and as Malmström already pointed out on 20th of March, the ability to set standards in the services sector remains – in TTIP as well as in TISA.

With regards to transparency: copies of every single document are given to the groups involved, from the TPC in the Council to the INTA in the EP.

George Bach (representing the rapporteur Ms Reding)

TISA and public services are two different subjects that must be separated. Public services are enshrined in our European social model and must not be touched upon (Art. 14 TFEU)

Generally supports TISA but strives for protection of public services and their removal from the agreement to focus on real economic problems.

There's still a long way to go to a good TISA because of public concerns and technical problems such as the fact that foreign providers are allowed to provide public services on our territory and even though some important services are excluded it must be ensured that no changes can be made to these exemptions. By end 2015: adoption of report containing red and blue lines, gold standard provisions.

Louisa Santos

There's a strong interplay between industry and services and with the modernization of industry/manufacturing sector, the EU's competitive advantage does not lie in low costs but in services.

TISA should open up for even more countries like China, Brazil etc. A multilateral approach is needed as scope still very limited today.

Also, regulatory costs should be reduced. Where possible, standards should be harmonized. As we invest more outside the EU, the mobility of workers is relevant. This concerns temporary movement to pass on innovation.

Public procurement is the key for industry and services.

With respect to public services: TISA does not discuss their standards and the TISA mandate clearly excludes them. But it should be noted that only such services are excluded that are completely publicly funded. Services such as education should be opened to business when they are privately funded. Keep in mind the distinction between public services and public markets.

Rainer Pläßmann

The acquis we have on services had been fought for for many years.

The principal problem of trade agreements is that one loses something when trying to find a common denominator.

Fear that acquis on general services is threatened but cannot really say anything as text of the agreement unknown.

TISA is a hybrid agreement that uses negative as well as positive listing and no one understands this mixture. It is hard for SMEs and other non-experts to understand the differences.

There are no limits for waste and water services, or 'other' environmental services. There is a problem of unclear wording, not only in TISA but also in CETA. For example, 'public utility' – what is that? And what is the interconnection between TISA, TTIP and CETA? For example, whereas public lightning is neither listed in CETA nor in TISA, it means these services are excluded from privatization in the one, but not excluded in the other. There is a need for harmonized definitions within the treaties. Also, there is a possible leverage effect under MFN (when access in CETA then also in TISA).

Services of general interest are defined as services that cannot be provided for under normal market conditions. This is completely wrong and not the agreed definition.

There is absolutely no benefit in TISA for providers of services of general interest.

Nikolai Soukoup

It must be ensured that member states have the space to decide what are public services and how to design them.

Recently, there is a lot of public resistance against the liberalization of public services because there had been bad experiences with their liberalization. It led to worse working conditions, less quality and accessibility and job losses.

We need policy space to decide on the right regulations.

What is the role of Trade agreements in this area? Liberalization and treaties under international law. This renders it extremely difficult to have democratic deliberation or to take back decisions. Public services must be exempted from agreements.

In GATS there's no clear exemption of public services and the EU so far did not make any attempts to exclude them in TAs, also not in bilateral ones.

TISA bypasses political conflict by making them multilateral ('group of likewise'). There are individual provisions, but the exemption provisions on services are only very narrow and concerned the main essential services. It is highly relevant to include exemptions on investment provisions.

Questions and answers

Wouldn't the gold standard on TISA also be good for TTIP?

BE Definition of public services worrisome, as 'all fully publicly financed'. But what about services of general interest? As for example in Spain we see that privatization of electricity does not mean competition in the field. Or as people are getting older, we need expansion of health system. Trend towards privatization of hospitals. How can they be protected?

Some services are just not distinguishable between private or public, they simply are hybrids. How will they be defined and dealt with?

The approach of negative listing is difficult as some points will necessarily be forgotten and it will be difficult to safeguard them from privatization afterwards. How about going beyond exempting just 2 or 3 sectors?

Answers

Iruarrizaga Diez:

For all sectors we keep the ability to retain the right of monopoly. There is no definition for public utilities because it is a self-definition. It is on every municipality to decide on it. If one privatizes and wants to re-monopolize, that is possible. Just as in GATS.

If we can change the gold standards? We have now the same reservations as in GATS. If we make changes to this standard now we might run into legal difficulties if there is ever an international litigation.

Santos:

There are already companies operating in such sectors. What should we tell them? To close up because of TISA? MS remain right to set monopoly.

[Q: member states don't have the chance to de-privatize because the commission forces them to reduce debts]

Platzmann:

Difficult to make rules as changing environment, but there must be rules for world trade. The systematic of the current treaties is not enough for the future. The implementation must be kept in mind. What's not public now might be public in the future. How can we prepare for this?

Soukoup:

On the gold standard exemption provisions. Which services are exempted? And from which provisions? GATS distinguishes not enough. Instead of improving GATS, we move on to further agreements that cannot work properly because they are based on GATS.

Annex III

Trade Agreements and Health Policy – Literature summary

The new trade agreements the EU is currently negotiating with other countries constitute a challenge for policy space for health in several ways. This paper summarizes a number of relevant studies and reports that discuss the possible impacts of trade agreements on health policy space and the different measures that can be taken to safeguard it. It also provides a short summary of a paper that outlines how public health objectives are not always conform with trade objectives and how this conflict affects health policies. The summary covers:

- an introduction to the new challenges health policies face by trade agreements.
- possible ways to exempt public services in general
- different measures and their impact on health policy space by assessing the provisions directed to health concretely and by looking at other subjects within the treaties that can play a role.
- arguments made with regard to existing conflicts in the design of health policy.

Further information on the role of the WTO and the GATS for public services can be found in the working paper of the WTO by Rolf Adlung, which gives a detailed explanation of the variety of provisions in place: https://www.wto.org/english/res_e/reser_e/ersd200503_e.htm

1 Introduction: New challenges for policy space for health

Policy space is defined as the “freedom, scope, and mechanisms that governments have to chose, design, and implement public policies to fulfil their aims” (Koivusalo 2015, 2).

Trade negotiations affect a government’s policy space for health system through four main processes. First of all, through the established market access and national treatment obligations in this sector. Secondly, by the way domestic regulation has been defined and addressed in the agreement. Thirdly, it depends on how investment liberalisation, performance requirements and government procurement have been defined, addressed and included into the agreement. And lastly, the implications on policy space depend on the extent to which investment protection is covered and how specific provisions for expropriation have been included (ibid., 14).

Therefore, trade agreements can be assessed with regard to trade flows of goods, services and capital and the impact of this on health and health systems; and by assessing the impacts of trade related legal and regulatory commitments to financial sustainability and regulation of health systems for equity and quality of the system and policy space for public health regulation (Koivusalo 2014, 29). This summary is also divided into these two modes of assessment in section 3 and 4.

Especially the latter constitutes a challenge to member states. Whilst the EU has the competence to lead negotiations with the trading partner, the member states remain responsible for the organisation and financing of their health services (ibid., 5). Insurance based health care systems and national health care systems have different regulatory needs and member states have to be aware of the different spill overs that emerge due to different treaty provisions and the possible ways of exempting national health care in a way that suits the individual system (ibid., 8). For example, where healthcare is publicly funded but privately provided, it becomes a potential part of broader services markets and the ways in which

national health systems subsidise health care provision is also affected by government procurement regulations. It is therefore essential that governments know their regulatory needs and are aware of the possible implications such provisions can have. Also, whilst governments, as in the GATS or WTO dispute settlement context, will rather not challenge the healthcare systems of other governments, the new trade agreements include forms of Investor-State-Dispute Settlement mechanisms and this form of corporate arbitration may lead to governments being sued by private providers for acting in the public health interest (ibid., 4). It can furthermore be anticipated that health tourism and mobility of health professionals will be part of future discussions as a result of pressure from low and middle income countries (ibid., 19).

2 Possibilities of exemption

In EU trade agreements, liberalization obligations are usually divided into three modes of supply. These are investment (covering mode 3 of GATS), cross-border supply of services (covering modes 1 and 2 of GATS) and temporary presence of natural persons for business purposes (i.e. GATS mode 4). Each of these obligations in turn must fulfil two requirements, namely national treatment, i.e. non-discrimination between domestic and foreign suppliers, and market access, as for example the abolition of monopolies (Krajewski/Kynast 2014, 13). The lists of obligations can be expressed differently – they may either be negative, which means that the sectors or measures not falling under the obligations must be explicitly mentioned, or positive, which means that only the listed sectors are subject to the obligations. Lists can furthermore contain either sector-specific restrictions or horizontal restrictions that apply to all sectors.

The protection of public services can take place in different ways and decreases in the following order (Krajewski 2013, 33):

1. Protection from the framework agreement
2. Sector specific annexes
3. Horizontal section of the schedule
4. Sectoral section of the schedule
5. Exemption clause applicable to a specific set of rules.

The protection of the whole scope of the agreement usually applies by referring to GATS Article 1:3 that states the exclusion of services “of government authority”. But academics agree that this definition merely covers government activities that are considered as core sovereign functions such as administration or judicial and police services, and therefore does not cover services such as health or education (Koivusalo et al. 2011, 6).

Horizontal commitments cover more or less all sectors or services and do not require specific decisions to be made with respect to each sector or service, unless exceptions within the horizontal commitments can be made. In the past, this was usually done by applying the “public utilities” clause, which preserved governments the right to put market restrictions on public services and to carry out discriminatory measures towards foreign providers. Nevertheless, the vagueness of what can be understood as “public utilities” undermines the

clause's efficiency in safeguarding public services comprehensively. It also only applies to certain market access obligations.

As mentioned before, the different listing systems also make a difference in how public services are safeguarded. Especially the purpose of the different annexes applied play a role.

Lastly, it should be mentioned that FTAs sometimes use pre-ambular statements. Whilst they give additional support to a particular interpretation of treaty provisions, they should not be seen as a proper way of securing policy space as they have limited relevance. Agreements may also include articles which emphasize the right to regulate, but these can be limited by further clauses, which make them subject to other treaty provisions.

For a more detailed overview of all treaty provisions that can play a role for public services, the study of Krajewski and Kynast (2014) is highly recommended. You can find the link to the study in the list of references at the end.

3 Provisions related to public services and possible exemptions for health systems

In the services sector any exclusion would need to include and specify all four modes of services. However, these may not be listed in the same way as in GATS. As mentioned before, in new FTAs, services can be dealt with in separate chapters with cross-border services covering modes 1 and 2, mode 3 as part of investment liberalization and mode 4 again in a separate chapter on professional or temporal mobility (Koivusalo 2014, 34f).

3.1 Exclusions for publicly funded services

Exceptions to health apply primarily to public health. The protection basis in TTIP is the reference to the GATS Article 1.3 exclusion clause on the scope of the treaty with respect to services supplied in the exercise of governmental authority. As this definition is extremely narrow, health services are usually not understood as being covered by it. Whilst this exclusion is necessary, it is not sufficient to exclude health services when these are publicly funded but provided by non-governmental or commercial providers in competition with commercial providers. The broadest policy space for publicly funded services would be allowed if public funding was defined on the basis of any public funding and applying also to MFN principle. But again, whereas this can be sufficient for a range of public services, it is not enough for health services where this needs to be maintained also for privately funded services.

3.2 The implications of different listing types

In trade agreements there are usually two types of listings than can be applied.

The GATS uses bottom-up approach based on positive listing, but the EU applied a negative list approach in CETA and even though it was stated by the European Parliament that the CETA should remain an exception in this regard. It appears that the EU is applying this method – at least partially – also in other negotiations.

Negative listing is an example of top-down negotiations, as e.g. TRIPS or NAFTA. This listing type forms a greater challenge because it may consist of different annexes on the basis of the nature and extent of the exclusions sought by different governments. The first annex may

permit non-conforming legislation only, i.e. existing laws and regulations. This means that sector are automatically included in scope if regulation gets changed, called the ratchet-mechanism. Existing legislation is therefore the baseline for liberalization and regulatory measures for health services. This is known as standstill mechanism. If a government just opened a market with very little regulation in place this is problematic. This is particularly challenging in health care, as in many countries health care provisions became liberalized only recently, with relatively little regulation in place initially (Koivusalo 2014, 33f).

The Second annex applies to services where any future measures are allowed for service providers, but in order to ensure a proper protection, member states must be aware of current and future regulatory needs and list them accordingly. In relation to this it should be mentioned that whereas a listing in Annex II does allow for future changes, de-liberalising services in the future or changing regulation is in practice not that easy. As the EU gained full competence for negotiating investments, new free trade agreements have provisions on them as well and as a consequence the ISDS mechanism is integrated in the agreements. This in turn has consequences for the future actions taken by governments, a point that will be outlined later in more detail. (Krajewski 2013, 10f).

Another challenge are horizontal provisions, which cover all sectors. They are in practice negative listing for a set of commitments. This includes negative listing to all services, which have not formally been exempted or excluded. In FTAs where positive listing is used there can be horizontal elements due to broad categories of services included.

The consequence of the new more comprehensive negotiation tactics is that member states may not realize that sectors they never consciously committed could still become governed on the basis of these agreements.

4 Trade related legal and regulatory commitments touching on health

4.1 Domestic regulation, mutual recognition, mobility of professionals

Trade agreements can include either “light” provisions with focus only on the process of application of licenses, permissions and professional qualifications, or full provisions which seek to limit extent to which these regulatory measures affect markets and trade. The mobility of health professionals is usually negotiated under professional services or so-called mode 4 on movement of natural persons (Koivusalo 2014, 36). Many issues covered by domestic regulation are the competence of local and regional authorities.

4.2 Investment liberalization and establishment

Like services, investment provisions are divided into requirements for national treatment, market access and performance requirements.

Governments are usually not keen to make commitments in investment liberalization of publicly funded health services. But so far there is no proper definition as on what is understood as a publicly funded or privately funded services. Investment liberalization in privately funded services can put challenge for governments to cope with different regulatory regimes within their overall health system.

Investment protection can be negotiated as part of an overall chapter on investment or as a separate chapter. This implies that investment protection provisions can include services and

sectors excluded from investment liberalization or establishment, thereby undermining the policy space that governments have sought in the form of exclusions and reservations made otherwise!

The definition of investment usually includes IPR. Challenges on the basis of IPR cannot affect prices for medicines and other measures with respect to pharmaceutical policies. But it can affect public health promotion policies, which could affect trademark protection or other IPR provisions and in turn lead to legal disputes again.

Investment protection chapters can have specific provisions, which carve out policy space for regulation for purposes of public policy either as part of the chapter or in annexes (ibid., 37f).

4.3 Government procurement

Provisions on government procurement apply to both goods and services and have particular implications for health systems, which are government funded, but use private suppliers and contracts. Provisions on government procurement also have importance to markets for medicines, health technologies and ICT products for health systems. In the TTIP, the goal with respect to government procurement is to achieve further market opening at all levels of government (ibid., 39).

This can affect health policy with regard to:

- Maintaining quality of products and services when there is obligation to go for the lowest bid
- Sustainability, continuity and cross-subsidization of services provision within health system
- Maintaining national or local knowledge-base and capacities and
- Lack of flexibility and problems of oversight and continuity for contracts between local or state governments.

After having outlined the different treaty provisions that may affect health policy and governments' space for regulating health policy systems as well as the different methods of protection and their shortcomings, this paper will conclude by an elaboration of how common health policy interests shape global pharmaceutical policies.

5 Common Conflicting Interests in Health Policies

In her Article "Common Health Policy Interests and the shaping of global pharmaceutical policies" Koivusalo argues that when global pharmaceutical policies are examined from a health policy perspective, it is easier to find greater disagreement between commercial and health policy priorities within and across countries than between the priorities of rich and middle-income/poor ones. If the global health negotiations would be based on the primacy of health policy considerations, there would be more scope for agreement than currently seems to be the case (ibid., 400). In her article, she outlines the shortcomings in the current health policies and outlines in what these are routed.

The author starts by explaining the circumstances for access, availability and safety of medicines (p.401f).

Access and affordability can be sought, for example, in the form of direct public financing through different types of reimbursement or insurance arrangements, but this requires political will. There are increasing concerns about 1. Limiting clinical benefits of more expensive new products in comparison to existing treatments and 2. New, very expensive treatments priced on the basis of “what markets can bear”. New medicines providing limited or no clinical value can still be substantially more expensive than older products. The protection of patients and consumers of dangerous or ineffective medicines is a core concern, yet global efforts on counterfeiting have been geared more towards protecting trademarks and patents from infringement. Governments need to be able to regulate the quality and safety of medicines, as well as have sufficient knowledge, capacity and time to do so.

She continues by elaborating on guidance on R&D efforts on the basis of public health needs p403f and argues that current IPR based incentives for research and development do not ensure results relevant to diseases where profitable markets for pharmaceutical products do not exist. For example, orphan drugs are not profitable for private research as too few patients exist to gain benefit. In a market-driven context of R&D, investments are made on the basis of commercial prospects, which are not necessarily the same as health policy needs and the funding of R&D should therefore be reformed.

Furthermore, national policy space for health and pharmaceutical policies is often limited by trade agreements p.405. This is shown by the Australian example with Phillip Morris where enhanced intellectual property protections were cast as policies designed to strengthen competitiveness and innovation, shifting regulatory support more toward private investments emphasizing commercial and private rights. Another example makes this even more clear: The Office of the United States Trade Representative issues an annual Special 301 Report, which examines the adequacy and effectiveness of US trading partner’s protection of IPR. The US then communicates its concerns to nation states, which puts pressure on these countries. The pharmaceutical policies of several European countries have come under scrutiny in the context of their trade relations with the US. Finland for instance was listed and national pharmaceutical industry put high pressure on government to change legislation in favour of US position, even though the Finnish proposal was in line with international and EU law. Finland went on with their regulation, but the example shows how countries can be put under pressure due to impacts their national policies may have on their trade relations.

These findings show how pharmaceutical interests and health policy interests can contradict each other and that provisions deriving from new trade agreements can lead to a further bias towards the former.

6 List of references

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