



European
Commission

Transatlantic Trade & Investment Partnership Advisory Group

Sub-group meeting on services

Meeting report, 21 November 2014

1. Discussion

Marco Dueerkop, lead negotiator on services for TTIP, introduced the session by setting out the context of EU trade negotiations and services. Mirosław Galar then worked through a presentation on how services are negotiated in trade agreements, including the structure of market access, national treatment, commitments and reservations. The group discussed a wide range of questions, during which additional information on public procurement was offered by Elina Laurinen, and on investment by Gabriela Alexandru.

The following points were raised in discussion:

- Members and experts discussed the **governmental authority exception** in GATS (Article I:3:b). The Commission explained that since all bilateral agreements take GATS as a starting point, this exception is valid and is significant for a number of public services (e.g. justice, policing). Beyond this, in all its trade agreements the EU then takes a broad horizontal reservation which reserves the right to have monopolies and exclusive rights for public utilities (“*services publiques*” in French) in EU Member States at all levels of government.
- In addition to this, the Commission explained that in public services (public education, public health and social services, and water) the EU retains very **broad reservations**. This means that public authorities at all levels do not have to treat foreign companies or individuals the same way as EU ones and do not have to provide access to their markets.
- One expert noted the difficulties that EU **postal services** companies face in operating in the US due to the postal monopoly. It is important that EU operators are fairly treated.
- **Domestic regulation.** Some experts queried the reason for the language on domestic regulation applicable to public services. For example, could this adversely affect the very diverse public education sector in different Member States? The Commission explained that domestic regulation applies only to the sectors where the EU takes commitments, therefore not including public education. Furthermore, the language follows the EU services directive and it represents good regulatory practice. He also explained that this language has not been problematic in EU trade agreements to date.
- **Positive and negative listing.** Members and experts wanted to know what differences positive or negative listing could make in practice and why the EU has used both approaches in the past. The Commission emphasised that the choice of listing is a technical point, as the same outcomes can be achieved through either method. The EU has tended to follow a

positive listing approach which is also used in the GATS, but some negotiating partners prefer negative listing. The architecture of an agreement is up for negotiation in the same way as substantive issues. One member explained that negative listing is clearer for business as it is easier to identify what is not open. A few members of the group expressed concerns that the negative list was more complex, more far-reaching in terms of liberalisation, and that it may bind sectors and services which do not exist today. The Commission explained that the EU has always included a reservation (for "new services") to safeguard against such scenarios.

- Some members referred to **the Treaty provisions regarding public services** (Protocol 26 on Services of General Interest, Article 14, Charter of Fundamental Rights). TFEU Articles 205 and 207(3) also require consistency between the EU's external and internal actions. It was suggested that there was a risk that if Member States do not sufficiently safeguard public services in their national reservations that that this might undermine the EU's position on public services, which would be unacceptable. The Commission agreed that public services need to be protected and referred in this context to the TTIP negotiating mandate, which clearly includes a reference to this objective. This position has been confirmed also by Commissioner Malmström. Furthermore, the Commission referred to the fact that the EU framework to protect public services in trade agreements has proven its effectiveness over the last 20 years, i.e. since the beginning of the GATS. (As an example, in CETA a number of Member States have not taken out reservations for long-term care, yet Member States (Social Protection Committee) and the EC recommend long-term care to be brought within the solidarity-based social protection systems for both equity and efficiency reasons.) The Commission requested clarifications how these measures would be incompatible with the EU trade agreements.
- **Annex 1 and Annex 2 reservations.** The Commission explained the differences between these two types of reservations. Annex 1 is for existing measures, while Annex 2 may also include future possible measures. Furthermore, any reservation in Annex 2 is not subject to a ratchet clause. Because the EU does not want a ratchet to apply to public services, they are reserved in Annex 2. There is no ratchet in the GATS. Some members pointed out that it is not easy to separate public and privately funded parts of services and that furthermore the regulation of the sector as a whole may be more difficult. The Commission explained that under its approach the term "publicly funded" was not defined on purpose to allow the EU and Member States the necessary flexibility in interpreting the EU's reservations. Furthermore, the Commission stressed that reservations are necessary for the Parties, in the case governments considered it is important to keep the right to discriminate or to impose non-discriminatory quotas. Other regulatory actions are fully compatible with the EU trade agreements, irrespective of whether services are privately or publicly funded.

- One expert asked **how a service could be un-committed** in future, and gave the examples of Bolivia and Ukraine that both wanted to un-commit health services from GATs. The Commission gave the example of EU accession, which has sometimes meant that a new EU Member State has had to modify some commitments in the GATS. It was noted that Parties to an agreement can always change it if they agree.
- Related to this, the Commission explained that under the EU's approach, **decisions to close a market** cannot be challenged by individual investors (investors cannot “sue their way into the market”). If a Member State chooses to close a particular market which had previously been open, then this raises the question of investors who are already operating in it. It is only towards these investors that the State might have some obligations. However, as is made clear in the EU's consultation about ISDS in TTIP, investors cannot resort to ISDS whenever they suffer a business loss, but only in very limited cases where they have been, e.g. expropriated without compensation, or where existing contracts have not been respected. It is only in those very limited cases that the standards of investment protection would be breached, but then so would be the domestic law of the country.
- One expert asked why **broad carve-outs** are not more commonly used, in particular for services of a sensitive nature such as public services. The Commission explained that the EU's approach since the GATS had always ensured that such services are protected from liberalisation in trade agreements as described above. This approach has proven its effectiveness. Depending on the drafting, exclusions from the scope of the agreement can lead to the same results as reservations included in services/investment offers.
- Members and experts asked a number of questions about how in practice the EU and Member State governments retain enough **policy space** to regulate. The Commission gave the example of the financial services sector, which on the one hand is very open in the EU, but on the other hand is highly regulated. This was particularly illustrative during the recent crisis which led to intensive regulation at EU level and in Member States, including in parts of the financial sector that had not been previously regulated. None of this was in conflict with the EU's GATS commitments or those in other trade agreements. The Commission added that the central purpose of trade agreements is to prevent discrimination (except where we have Annex 1 or Annex 2 reservations). Legitimate policy objectives such as ensuring health standards, defining school programmes or setting qualification requirements are fully compatible with EU trade agreements and there is no need to take reservations for such measures.

- Members and experts discussed the EU's objectives on **public procurement** in the TTIP negotiations. The Commission explained that the EU aims to achieve broader access to government contracts on the US side. This would have no impact on governmental entities' authority to decide whether they procure a service from an external service provider, or use an "in-house" operator to provide the service. The EU takes into full consideration the recently adopted Public Procurement Directives. This means also that the negotiations would not affect social, environmental or labour law considerations in public procurement procedures. One expert noted that it would be important to be very clear about commitments in the area of concessions and that these should not go further than EU law. The Commission agreed and clarified that in view of this the Commission is exploring in detail how the US operate in the area of public-private partnerships in order to understand the differences and commonalities between the EU and US legal frameworks and practices in this area. It was also noted that ISDS would not apply to any commitments in the public procurement chapter.
- Relationship between TTIP and the **Trade in Services Agreement (TiSA)** negotiations. The Commission clarified that the EU's position in TiSA regarding public services reservations is the same as it is in the TTIP, CETA and other bilateral negotiations, despite the different architecture of these agreements
- **Mode 4.** A number of questions were asked about how Mode 4 services works in practice and the EU's approach to this in the TTIP negotiations. The Commission noted that Mode 4 provisions are always subject to domestic immigration and visa rules. Furthermore, the "labour" and "strike" clauses ensure that domestic labour standards and laws are not affected by trade agreements. If necessary a follow-up discussion dedicated to these issues could be held at a later date.
- **Links between services and other chapters.** One expert asked to what extent commitments negotiated in other sectoral chapters, for example telecoms, were linked with commitments in the services chapter, in particular on regulation. The Commission made clear that general rules negotiated in the services chapter would apply horizontally, but could be supplemented by sector-specific rules where appropriate.

2. Next steps

Attendees agreed to reflect on any questions or concerns that they would like to work through in more detail. Members of the Advisory Group agreed to reflect on the format of the meeting and how this might be improved in future. A report would be produced for the Advisory Group's attention.

Attendees

Members of the TTIP Advisory Group and their associated experts

KLEIS Johannes (BEUC)	Consumers
ROSSOGLOU Kostas (BEUC)	Consumers
IMPERIALI Clelia (TACD)	Consumers
WOODFORD Emma	Health
MARSCHANG Sascha (EPA)	Health
CLASSENS Maurice (Solidar)	Health
JENKINS Tom	Public services
CLARKE Penny (EPSU)	Public services
HOJ-LARSEN Louise (ETUCE)	Public services
KERNEIS Pascal	Services
BROUSSAUDIER Claire (Le Groupe La Poste)	Services
COLLET Guenaelle (EBU)	Services
NEUGART Felix	Small business
BOUCSEIN Dominic (Eurochambres)	Small business

Commission officials

DUEERKOP Marco	TTIP lead negotiator on services
ALEXANDRU Gabriela	Official
DAWKINS Miranda	Official
GALAR Miroslaw	Official
LAURINEN Elina	Official
DAVANNE Claire	Trainee