

## **Establishment of a model clause for the exclusion of public services from trade and investment agreements: Pending issues & key concerns**

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### **Key Concerns:**

- Public services must be **entirely and definitely excluded from the full scope of application of trade and investment agreements**. The comprehensive protection of public services has to be guaranteed without any loopholes and must clearly take precedence over offensive commercial interests.
- In future, this will require **legal certainty** and a reliable safeguard clause to ensure that public services are not covered by any liberalisation and investment protection obligations of such agreements.
- Particularly with regard to major EU trade policy projects such as TTIP, CETA and TiSA, the **weaknesses, risks and gaps in previous regulations** have been a regular topic of academic and political debate. With this in mind, there is **ongoing public awareness** of the legal risks that this entails for the democratic policy space to protect and extend citizen-oriented public services. As a result, the need to implement a complete exclusion or **“gold standard” clause for all trade and investment agreements** is once again gaining ground (as repeatedly called for by f.ex. trade unions, local and regional authorities, municipal utility companies, NGOs, and the European Parliament).
- The model clause drawn up by **Prof. Markus Krajewski** (University of Erlangen-Nuremberg) responds to these legal issues and the strong public interest in providing comprehensive protection for public services. This constitutes a **concrete and viable proposal** from one of the most renowned experts in this field, and its implementation would set **new standards**. On the basis of three core elements, a model clause is proposed that enables a far more robust protection of public services. The model clause offers not only a significant improvement within the trade framework of the EU but also for other WTO states (these core elements are: *sufficiently binding legal quality*; an *adequate level of protection* that fully covers all relevant areas of new generation agreements without any loopholes; a *comprehensive concept of public services* that encompasses the variety of different models and takes into account the necessity of democratic policy space for competent national, regional or local authorities to promote public services – for more detail see the **report *Model Clauses for the Exclusion of Public Services from Trade and Investment Agreements*** commissioned by **Chamber of Labour Vienna** and **EPSU**).

### **Background:**

The controversies in the wake of TTIP, CETA, TiSA and the recurring reform debates on the future of the WTO show that there is a growing need to find comprehensive and reliable solutions for the sustainable protection of public services. This is also reflected in the recent **strong expansion of the trade policy agenda** to include

areas of negotiation and liberalisation objectives, which have to date not been enforceable in the context of the WTO's General Agreement on Trade in Services (known as "**GATS plus**" and "deep integration" as part of the "**new generation agreements**")<sup>1</sup>. Set against the background of these offensive commercial interests, an entire exclusion for public services would also provide more reliable protection. Otherwise, recurring efforts to steadily expand the trade policy agenda will lead to **even more risks due to the gaps and weaknesses of existing standard exclusions** (such as with regard to the EU's "**public utilities**" clause or Art. I:3 (b) and (c) exclusion based on the GATS).

The proposed model clause for the exclusion of public services can also be used to ensure that better standards of protection for public services are established at the global level. The implementation of the model clause would also substantially contain commercial interests in trade policy towards liberalising public services, not just within the EU but for all other parties to the agreement. The protection of the high collective value of public services is above all a matter of policy coherence – "within" and "beyond" Europe. On top of this, the EU cannot credibly argue that strong **public services are a key component of the European welfare model** and of globalisation based on solidarity unless it simultaneously pushes for these services to be liberalised in other countries.

It is also recommended that future **social impact assessments** (SIAs) for trade and investment agreements should be designed using more balanced methodologies. This is also highly relevant with regard to the liberalisation of trade in services and the regulatory frameworks for the definition, provision, organization and financing of public services (see also the detailed **report Assess TiSA** by Raza/et al. 2018). The resulting recommendations for the better protection of regulations in the public interest and the establishment of effective legal remedies to guarantee the necessary policy space are of great importance, not least for public services and infrastructure (e.g. by enabling a less burdensome withdrawal of liberalisation obligations).

***More information can be found here:***

Krajewski, Markus (2016): Model Clauses for the Exclusion of Public Services from Trade and Investment Agreements, Report commissioned by the Chamber of Labour Vienna and EPSU, [https://www.arbeiterkammer.at/infopool/wien/Model\\_clauses\\_for\\_the\\_exclusion\\_of\\_public\\_services\\_neu.pdf](https://www.arbeiterkammer.at/infopool/wien/Model_clauses_for_the_exclusion_of_public_services_neu.pdf)

AK Europa (2017): TiSA at a standstill – Risks for regulations in public interest remain, <https://www.akeuropa.eu/tisa-stalemate-risks-regulations-public-interest-remain>

Raza, Werner/Tröster, Bernhard/von Arnim, Rudi (2018): Assess TiSA – Assessing the Claimed Benefits of the Trade in Services Agreement, Report Commissioned by the Chamber of Labour Vienna, [https://media.arbeiterkammer.at/wien/PDF/studien/Assess\\_TiSA\\_2018.pdf](https://media.arbeiterkammer.at/wien/PDF/studien/Assess_TiSA_2018.pdf)

Sinclair, Scott (2016): Flimsy CETA declaration leaves public services, water policy vulnerable in Canada-EU deal, <http://behindthenumbers.ca/2016/10/14/flimsy-ceta-declaration-leaves-public-services-water-policy-vulnerable-canada-eu-deal>

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<sup>1</sup> These extended areas of negotiation include for example the liberalisation of service concessions and Public-Private-Partnerships (PPPs), enhanced disciplines on domestic regulation (incl. "necessity" or other "conformity" tests), provisions on investment protection, disciplines for state-owned enterprises (SOEs), or subsidies in the service sector. In addition to this, the EU has also recently promoted the use of new liberalisation techniques in its bilateral agreements, which have not yet been integrated into GATS and may generate additional commercial pressure (such as using the negative list approach to establish liberalisation obligations by a "list or lose it"-approach, including so called "ratchet clauses" – the latter can lock in liberalisation obligations even after entry into force of an agreement).