EPSU briefing
Are public services are protected in EU trade agreements?
No, they are not!

The European Commission and most EU governments give assurances that TTIP, CETA and TiSA and other trade agreements safeguard public services. These assurances are in stark contrast to the liberalisation commitments that are actually being taken which risk to lock in a societal model where there is little space for public services - a sort of 'market totalitarianism' where public services and other solidarity-based instruments are subjugated to the free market. By opening up more public services to private competition and granting private investors extensive rights trade agreements undermine the principles on which public services are built. Quality healthcare, clean water, efficient and affordable energy supplies and responsive and people-friendly administration are intrinsically linked to solidarity, universality, accessibility, continuity, affordability and democratic control - not to the free market.

Public services principles are also challenged by national and European domestic policies that promote austerity, greater inequality, precarious work, and short-term profit for some long-term losses for (most) others. The difference with the trade agreements however is that trade agreements take this 'battle of ideas' and power relations to another level – a level beyond the reach of political intervention. ISDS sums up this fundamental shift away from politics to business interests.

This briefing picks up six of the claims made by the European Commission (EC) and the United States (US) regarding the 'protection' of public services in trade agreements and it explains why they are false, or at best, only 'half-truths. The briefing is based on two main sources of information:

- the joint statement on Public Services by U.S. Ambassador Froman and EC Trade Commissioner Malmström of 20 March 2015. This statement emphasises the important role played by public services in the US and the European Union (EU) and explains how TTIP and other trade agreements safeguard them.[1]
- information on the EC website. The Director-General (DG) for Trade offers a variety of fact sheets on public services, as well as speeches and other statements from the EC on public service sand trade.[2]

The aim of the briefing is to illustrate why the assurances provided are not sufficient..

1) Overall public services are properly safeguarded

The EC refers to GATS Article 1:3 as one of the main pillars of protection for public services in trade agreements. This Article states the exclusion of services in the "exercise

[1] The joint statement can be found here: http://europa.eu/rapid/press-release_STATEMENT-15-4646_en.htm

[2] In June 2015 DG trade updated its website page on the "protection of public services in TTIP and other EU trade agreements" - see http://trade.ec.europa.eu/doclib/press/index.cfm?id=1115

of government authority". Such services are defined as "supplied neither on a commercial basis, nor in competition with one or more service providers".
The EC claims that this clause protects public services from liberalisation, but it is in fact too narrow to fulfil that objective. Today, most services are supplied by a variety of providers, even if the provision has no commercial component. Likewise there are a lot of services that have commercial aspects even though they are not meant for profit generation. The exemption clause offers no real explanation of how to interpret the specifications. This means that de facto only a very limited amount of services are excluded by this Article. These services comprise solely the core sovereign functions of a State, such as administration, judicial or police services. Other services that are essential for the functioning of a society like education or health services are not covered by this exemption and must be protected through other means. Even statutory social security systems are not excluded, as the recent EU services offer in TTIP shows.[3] Indeed, the regulatory cooperation provisions of TTIP and other agreements expressly cover administration.

Apart from the GATS Article 1:3, the EU often also applies the so-called "public utilities clause". This clause is used by member states to make horizontal exemptions in their schedules of specific commitments or reservations and lays down that "services considered as public utilities at national or local level may be subject to public monopolies or to exclusive rights granted to private operators". The problem about this clause is that the term "public utility" is not defined and its interpretation is up to the member states. Even though there is a common understanding that public utilities somehow mean services that are provided for the public need, the ambiguity of the term can raise legal difficulties and confusion amongst member states. Moreover, the clause does not protect services from national treatment obligations or investment provisions and is hence not very comprehensive.

A similar problem occurs with the often used wording for sectoral commitments or exemptions that publicly-funded services are not covered by treaty provisions. No clear lines are drawn between publicly and privately funded or provided services and it remains thus unclear to what extent exemptions based on this wording apply. A proper exemption would cover public services independent of how they are financed and supplied. Indeed, the EU has promoted a model of public services that precisely takes no account of the 'public' or 'private' nature of the service provider, favouring instead the protection of the 'general interest' of the service in question.

Lastly, many other questions remain unanswered and exacerbate an assessment of how well public services are exempted. For example, it remains unclear how EU and member state commitments relate to each other. If the EU sets exemptions from the provisions of the agreement, but a member state decides to make them subject to these provisions through their schedules of commitments, it is not explained which application prevails.

[3] The EU offer only excludes services that are part of a public retirement plan or statutory system of social security where these are not supplied in competition with public entities or private institutions.

A carve out of public services based on the GATS Article 1:3 [the presented exemptions] exemption is insufficient. Therefore, the statement that public services are properly safeguarded is misleading.

2) "Defining the appropriate balance between public and private services is up to the discretion of each government"

The EC- US joint statement claims that "no EU or US trade agreement requires governments to privatize any service, or prevents governments from expanding the range of services they supply to the public". If governments wish, they can organize services so that just one supplier provides the service. This service provider can either be publicly owned, so a "public monopoly", or a private provider with exclusive rights.

Free Trade agreements usually have the purpose to prohibit the establishment of monopolies by introducing free market access to both parties in each others' markets. Governments can therefore only continue to establish monopolies if they make explicit exemptions to this rule. Exceptions to market access provisions in TTIP and TiSA are made by means of positive listing. This means that Member States make an exhaustive list of all the services that they open up for liberalization.

The problem here is at least two-fold: Firstly, the understanding of what public services are changes over time. Whereas member states might list only such areas that are not considered as public services today and thereby protect them from market access, parts of the services they commit to liberalisation may in the future develop the need to be protected, an action that would be in breach with the treaty provisions. Secondly, even if public services were not listed in the schedule of commitments for market access, they may well be subject to national treatment, as TiSA and TTIP are based on a hybrid approach that asks for negative listing for these obligations.

Whereas the above mentioned positive listing might allow for the protection of all relevant public services, it is important to note that conventional measures of regulating market access, such as for example economic needs tests, in future trade agreements might not be part of their actual set of provisions, but belong to the measures applied under national treatment provisions. Public services are thus only then properly protected from liberalization if they are also exempted from national treatment obligations.

This mix of instruments is not only confusing, but also misleading. And as the requirements for national treatment exemptions differ from the ones for market access rules, it becomes extremely difficult to create a comprehensive carve out of public services. For countries where public services are mainly a local or regional responsibility it is even more difficult to protection local autonomy.

3) "EU governments can regulate certain services in whatever way they choose"

In its fact sheet on the protection of public services in TTIP and other EU trade agreements, the EC claims that governments can offer subsidies, choose service providers or decide who can operate or invest in their market even if it means that domestic suppliers are treated differently than foreign ones.

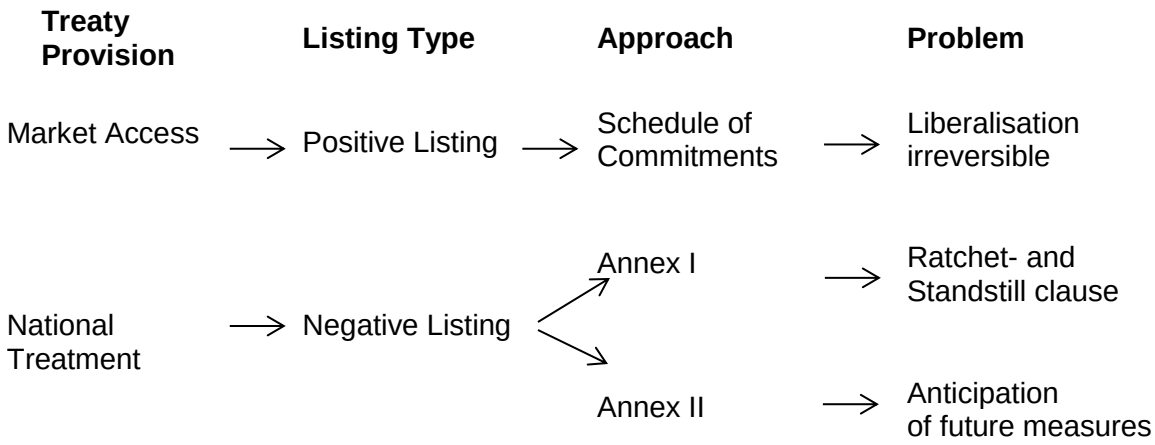
What they do not mention though is that in order to have these rights, governments must list the sectors for which national treatment requirements do not apply to, so-called negative listing. National treatment requirements lay down that foreign providers are no less favourable treated than domestic ones.

The General Agreement on Trade in Services (GATS) is completely based on positive listing as explained above. And yet the agreement leads to problems. Now, new free trade agreements make it even worse – in CETA as most vivid example, no positive listing is used at all. Instead, for both market access and national treatment a negative list approach is applied. This listing type is also called “list it or lose it”-approach because it means that Member states have to make a very deliberate choice of what services to exclude, since the services are automatically subject to non-discriminatory treatment if they are not mentioned in the list. Therefore, no exhaustive list of exemptions is possible. Negative lists usually consist of two Annexes:
Measures listed in Annex I are exempted from the provisions and can be changed as long as any alterations do not decrease the conformity with the agreement. It is therefore extremely difficult to de-liberalize a service if it was once made subject to market access, as the changes to the service will be understood as a lowering of the level of conformity with the treaty. This is also known as the ratchet-effect, a quasi built-in dynamic towards liberalization. Another problem that occurs with this Annex is the standstill-clause, which means that only existing measures can be listed here. Should future measures or services be developed, they cannot be exempted from the agreement through a listing in Annex I.
In contrast to that, measures listed in Annex II are excluded from national treatment obligations even if they are subject to future changes. This means that policy space is only ensured as long as member states manage to list all relevant services in this Annex. This also means that they must anticipate future services and name them if they want them to be protected. This is especially problematic for services such as health and education. Here, technological development leads to many changes, as for example the emergence of online teaching platforms or cross-border provision of medicine via the internet. The same problem occurs with regard to renewables: Should a member state decide to change its energy system, it can only do so as long is it made extensive reservations in the field. If not, a change from conventional to renewable energy can automatically unlock the sector to liberalization.

Negative listing per se is already highly critical: If future public services will automatically be subject to the trade provisions, it will be more difficult for governments to ensure a high level of quality of public services. Today, many countries chose to ‘de-privatize’ their public services. For example, France is currently remunicipalizing many of its water works and Estonia renationalized its railway. Such steps will be difficult to be taken in the future should the agreement include a ratchet-clause. In a time of new emerging services and changes in the design of service provision, it is impossible to properly safeguard public services by negative listing.

But on top of that, new trade agreements such as TiSA and TTIP render the situation even worse than a purely negative list or the positive listing applied in the GATS: They are based on a “hybrid”-approach that uses positive listing for market access and

negative listing for national treatment obligations. So if member states are to exclude a public service comprehensively, they must be aware of the different listing types. The following graph gives an overview of the confusion system:



The mix of instruments is confusing and may lead to services being protected only from parts of the agreement's provisions. Another problem that can occur here is "Treaty-shopping": If member states exempt services from an agreement even though they committed it in another, the legal status of the services is ambiguous and can legally be challenged.

4) "Governments can continue to protect important public interest objectives"

In the EC-US joint statement, it is claimed that there are no limits to governments' ability to act in favour of the public interest. But even if Member States were to succeed in surmounting the challenges of positive / negative / hybrid listing of commitments and comprehensively list of public service exemptions, a proper safeguard would still not be ensured: Whereas the schedules allow to restrict the application of some Articles, such as market access and national treatment, there are no exemptions to the dispute settlement mechanism. New trade agreements such as CETA include investor-state dispute settlement mechanisms (ISDS). This is also envisaged for TTIP. These are private arbitration systems that allow foreign investors to sue states if they consider them to legislate in a way that harms their business. This means that governments, when de-liberalizing a service for the sake of the public interest, may be sued for taking actions that restrict a companies anticipated profit to the disadvantage of the citizens or the environment.

Cases like these have already occurred, such as the company Achmea suing the Slovakian government, or the case of Vattenfall against Germany and the amount of firms taking governments to court is rising. And even if a government is not actually taken to court, the inclusion of ISDS in trade agreements can lead to a so-called regulatory chill. This means that the sheer possibility of being sued and dragged into a long lasting legal dispute process keeps governments from adopting legislation in favour of the citizens well being.

It is therefore not true that governments can continue to act for public interest objectives without constraints.

5) "Trade agreements do not impede governments' ability to adopt or maintain regulations to ensure the quality of services"

The Commission claims on its website that governments' right to regulate public or private service providers will not be impeded in any way. But trade agreements usually have a chapter on domestic regulation. Such chapters lay down disciplines on measures relating to licencing and qualification requirements and procedures that apply to all four GATS Modes and must be met in all sectors that were not exempted from the treaty provisions. Therefore, governments' ability to regulate as they wish is indeed restricted by free trade agreements. Chapters on domestic regulation clearly take regulatory space as they impose guidelines on governments in these fields.

As put by Canadian expert Scott Sinclair: *"With a few exceptions, trade agreements have not usually been the direct cause of privatization. Instead, their negative impacts on public services are mainly structural – confining public services within existing boundaries, increasing the bargaining power of corporations, applying 'pro-competitive' regulation to previously socialized services, and locking in future privatization*." Already in 2011 the EC 'reflections paper' on public services and trade announced that the EC wanted to shift the EU practice away from listing liberalisation obligations explicitly in the "Schedule of Commitments", i.e. to move away from a "positive" to a "negative list" approach (mirroring the Services directive). This shift facilitated liberalisation as any omission of an exemption can result in a liberalisation commitment ("list it or lose it").

On top of that, the TTIP and CETA include chapters on so-called Regulatory Cooperation. Regulatory cooperation has the objective of "reducing unnecessary differences in regulation", which means that any differences, such as different standards in labour rights or in services covered by the agreement might be seen as an obstacle to trade and thus be challenged. Regulations in public services are particularly important and so public services are especially vulnerable. Regulatory Cooperation also requires the parties to share information on envisaged legislation, even before national, elected, parliaments get to see it. In order to coordinate and agree upon future legislation and the alignment of existing rules, a regulatory cooperation body will be established, that does not consist of democratically elected government officials, but of representatives from the EC. Not to mention the fact that the consultation with private entities is required, this whole chapter appears to heavily undermine governments' abilities in adopting their own legislation and threatens democracy altogether.

6) "Private sector activities can improve the availability and diversity of services…"

If this would be true, quality public services would a feature in all countries, irrespective of the amount of public funding, which is not the case. Evidence increasingly shows also that the private sector is not more efficient at *delivering* public services. A report from the

UK Institute of Government (July 2013) for example notes that after 30 years of liberalisation, there is "*still little evidence that the market - a more diverse and competitive landscape - has improved public service provision ." (*Institute of Government July 2013*).* In the 'network' industries - energy, post, telecoms, transport - where EU liberalisation policy is in place we have seen many problems and consumers have not benefited from lower prices and better services. Rather in most cases employment levels have fallen and the quality of jobs has suffered.[4]

Furthermore, private sector involvement can distort overall public services objectives. For example, outrageous amounts are charged in university fees of £9,000 a year in the UK and the average cost of employer-sponsored healthcare in the US is now $24,671 a year[5]. Also in countries like Sweden where public services are strongly rooted in societal choices, private sector involvement brings challenges: for example, example research on the evolution of school segregation finds that segregation has increased following the introduction in 1992 of universal school vouchers that spurred the establishment of new independent voucher schools.[6] EPSU's Public Services Monitor has a long list of research findings that point to the risks of private sector involvement and the need to always put able to intervene in order to put the general interest first.[7] An example of such intervention can be seen in the (re)municipalisation of services that takes place e.g., water and energy.[8]

In the view of the European Commission trade agreements have brought big benefits to consumers in the EU and worldwide in terms of '*broader choice and cheaper prices* ' and the European Commission advocates further boosting trade to '*bolster economic growth without drawing on severely constrained public finances*'[9]. But this is not true for public services - and increasingly questionable to for other services. Even Adam Smith recognised that trade does not aim to serve public interests: "I have never known much good done by those who affected to trade for the public good."[10]

EU policies however continue however to be directed at promoting liberalisation processes as opposed to focusing on improving real outcomes for citizens. We continue to see for example endless favourable references to public-private partnerships (PPPs) in official documents, in spite of overwhelming evidence of their failure.[11] In one of the EC 'non-papers' on TTIP we see a clear reference to developing more PPPs through the

[4] For EPSU contributions to past EC evaluations of the performance of network industries see http://www.epsu.org/r/232. See also comparative research from PIQUE http://www.pique.at/

[5] See http://www.milliman.com/mmi/

[6] See http://www.ifau.se/en/Research/Publications/Working-papers/2015/School-choice-and-segregation-evidence-from-Sweden/

[7] See EPSU public services monitor http://www.epsu.org/r/578

[8] Re-municipalising municipal services in Europe, a PSIRU report for EPSU, May 2012 (EN/RU) http://www.epsu.org/a/8683

[9] See EC paper 25.3.15 'How trade policy and regional agreement trade agreements support and strengthen EU economic performance'

[10] http://www.brainyquote.com/quotes/quotes/a/adamsmith136392.html

[11] See Public rescue for more failed private finance institutions - a critique of the EC communication on PPPs, by David Hall, PSIRU, March 2010 (EN only) http://www.epsu.org/a/6347

negotiations. The French-German television channel Arte has produced an interesting series of reports that try to grasp how PPPs work, how they are financed and if the State and the citizen benefit from them. They look at PPPs in various public services including water concluding that tax-payers are paying a very high price for PPPs, for example in the UK water industry where the private sector earns 2,4 billion EUR per year in profits.[12] The EC is yet to act to introduce legislation in follow-up to the ECI right2water campaign that calls for the recognition of the fundamental right to water.

Rather than actively constraining public finances, the EU should promote fair and progressive taxation, including a strong action EU plan on corporate tax[13] to release would the necessary finance to improve the quality and availability of democratically-run schools, hospitals, water treatment and other needed social and physical infrastructures in Europe and beyond, including in the Post-2015 sustainable development agenda.[14]

[12] The infographics and reports are available in French and in German For More on PPPs
[13] See ETUC/EPSU PR on the European Commission's action plan http://www.epsu.org/a/11504
[14] Sign the PSI petition on the development agenda.