New study "Model clauses for the exclusion of public services from trade and investment agreements"



On 21 April 2016 EPSU and AK EUROPA organised in Brussels an exchange with Professor Markus Krajewski on his new study “Model clauses for the exclusion of public services from trade and investment agreements”.

The impact of international trade agreements on public services has been a controversial subject for several years. In the current debate concerns about reliable safeguards for public services are more vocal because of the extended scope and disciplines of so called “new generation agreements” such as CETA, TTIP and TiSA. In general, the obligations of trade agreements limit the ability of governments to choose freely between different regulatory instruments and techniques for the organisation and provision of services, which are considered to be essential for the general public. While the “TiSA” negotiations are directly addressing the unfinished agenda of the stalled WTO (GATS), CETA and TTIP imply

at least one additional challenge, namely investment protection that poses also specific risks to public services. Any discussion on protecting public services had to include ICS/ISDS and investment protection.

A ‘gold standard’ protection for public services?

How to protect public services was the main question of the workshop. Would it be possible to create a ‘golden standard clause’ in order to protect public services in the current negotiated free trade agreements (FTAs)? What would it look like? The current EU model is based on three structural elements:

- Exclusion of services supplied in the exercise of governmental authority
- Limitation of commitment in certain sectors like on publicly-financed education & health services.
- “Public utilities” clause

These elements give rise to a number of problems. First, regarding the definitions of the terms. All too often there are hybrid forms of financing. Sometimes services are partly financed by the state and partly by consumers. How would you define that? Also, the ”public utilities” clause is unclear and narrow. The main issue, Krajewski said, is the topic, that public services protection is limited to trade and investment. Former public services protection in EU-FTAs was based on less expansive trade disciplines, so there is a lack of experience concerning so called “next generation” agreements. Accordingly, given pieces of exemptions do not cover chapters like investment protection or fails to meet the challenges of enhanced liberalisation techniques (for example due to scheduling mistakes).

“The tide is coming”

The European Commission argues, that 20 years of protection have worked, but actually this argument misses the point. Krajewski compared the given status of GATS-based exemptions (which was concluded in the 1990s) with a sandcastle. However, you have to care about the ebb and the flow. Times are changing, the interests in the world are changing. Former trade policy was less focused on regulatory measures and mainly dealt with public service markets in so called developing countries. Now countries, which are as developed as we are and host public service providers with offensive export interests are part of a much broader agenda, for example. “So what if the tide is coming?“, Krajewski questioned a lean-back attitude

Getting beyond “symbolic proclamations”

Core elements of model clauses should be:

- Clear definitions of public services
- Adequate level of protection
- Legally binding
- Avoiding language leaving the extent or level of protection open to future interpretation of agreement.

What are public services? The understanding of public services is dynamic
Krajewski presented the example of "education". During the time when he was young, childcare for your children meant only play. Now we childcare as part of education. Thus, there is a difference concerning the term and consequently we have to care about context and changes. Furthermore, it should be up to local and regional authorities to define their public services, Krajewski pointed out.

Krajewski also responded to potential critique that his proposals would lead to the unilateral determination of the scope of international agreements and a potential deviation from existing GATS commitments. He also added that an alternative less ambitious proposal could limit itself to the exclusion of public services from ISDS/ICS and a reference to public services in the general exception clause. In either case a broad approach to public services is needed, including energy and other network industries.

How to persuade politicians and citizens that a gold standard is needed?
In the conclusion Krajewski pointed out that "We should not wait for the tide to come in. We have to work on the protection of public services in a reflective and consistent way."

The joint workshop of AK EUROPA and EPSU, as well as the discussed study of Markus Krajewski are steps in this direction. Thus the challenge remains to meet the criteria for reliable safeguard for public services and to take into account the dynamic nature of public services among different social contexts. This endeavour has to be rooted on the rationale that next generation agreements like TiSA, TTIP or CETA "need to preserve more policy space for governmental regulations and activities in the public interest", as outlined in this timely study.

Below the study of Markus Krajewski, the report of the meeting and the PowerPoint presentation from professor Krajewski

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- meeting report workshop_EPSU_AK-EUROPA_16.04.21
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