PUBLIC SERVICES UNDER ATTACK

TTIP, CETA, and the secretive collusion between business lobbyists and trade negotiators

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Executive summary

Public services in the European Union (EU) are under threat from international trade negotiations that endanger governments' ability to regulate and citizens' rights to access basic services like water, health, and energy, for the sake of corporate profits. The EU's CETA (Comprehensive Economic and Trade Agreement) agreement with Canada, the ratification of which could begin in 2016, and the TTIP (Transatlantic Trade and Investment Partnership) treaty under negotiation with the United States are the latest culmination in such efforts. In a worst case scenario, they could lock in public services into a commercialisation from which they will not recover – no matter how damaging to welfare the results may be.

This report sheds some light on the secretive collusion between big business and trade negotiators in the making of the EU's international trade deals. It shows the aggressive agenda of services corporations with regards to TTIP and CETA, pushing for far-reaching market opening in areas such as health, cultural and postal services, and water, which would allow them to enter and dominate the markets. And it shows how those in charge of EU trade negotiations are rolling out the red carpet for the services industry, with both the consolidated CETA agreement published in September 2014, as well as drafts of TTIP chapters and internal negotiation documents that reflect the wishlists of corporate lobbyists.

Key findings:

1. **TTIP and CETA show clear hallmarks of being influenced by the same corporate lobby groups working in the area of services that have been built over the past decades during previous trade talks**, such as the EU's most powerful corporate lobby group BusinessEurope and the European Services Forum, a lobby outfit banding together business associations as well as major companies such as British Telecommunications and Deutsche Bank.

2. **The relationship between industry and the European Commission is bi-directional, with the Commission actively stimulating business lobbying around its trade negotiations.** This has been characterised as 'reverse lobbying', ie "the public authority lobbies business to lobby itself". Pierre Defraigne, former Deputy Director-General of the European Commission's trade department, speaks of a "systemic collusion between the Commission and business circles".

3. **The business lobby has achieved a huge success as CETA is set to become the first EU agreement with the 'negative list' approach for services commitments.** This means that all services are subject to liberalisation unless an explicit exception is made. It marks a radical departure from the positive lists used so far in EU trade deals which contain only those services which governments have agreed to liberalise, leaving other sectors unaffected. The negative list approach dramatically expands the scope of a trade agreement as governments make commitments in areas they might not even be aware of, such as new services emerging in the future. The same could happen in TTIP where the Commission is pressuring EU member states to accept the same, risky approach, meeting the demands of the business lobby.

4. **Big business has successfully lobbied against the exemption of public services from CETA and TTIP as both agreements apply to virtually all services.** A very limited general exemption only exists for services "supplied in the exercise of governmental authority". But to qualify for this exemption, a service has to be carried out "neither on a commercial basis nor in competition with one or more economic operators". Yet nowadays, in virtually all traditional public sectors, private companies exist alongside public suppliers – often resulting in fierce competition between the two. This effectively limits the governmental

authority exemption to a few core sovereign functions such as law enforcement, the judiciary, or the services of a central bank. Similar problems apply to the so-called 'public utilities' exemption, which only reserves EU member states' right to subject certain services to public monopolies or to exclusive rights: it contains so many loopholes that it cannot award adequate protection for public services either.

5. **Probably the biggest threat to public services comes from the far-reaching investment protection provisions enshrined in CETA and also foreseen for TTIP.** Under a system called investor-state dispute settlement (ISDS), thousands of US and Canadian corporations (as well as EU-headquartered multinationals structuring their investments through subsidiaries on the other side of the Atlantic) could sue the EU and its member states over regulatory changes in the services sector diminishing corporate profits, potentially leading to multi-billion euro payouts in compensation. Policies regulating public services – from capping the price for water to reversed privatisations – have already been targets of ISDS claims.

6. **The different reservations and exemptions in CETA and TTIP are inadequate to effectively protect the public sector and democratic decision-making over how to organise it.** This is particularly true as the exceptions generally do not apply to the most dangerous investment protection standards and ISDS, making regulations in sensitive public service sectors such as education, water, health, social welfare, and pensions prone to all kinds of investor attacks.

7. **The European Commission follows industry demands to lock in present and future liberalisations and privatisations of public services, for instance, via the dangerous 'standstill' and 'ratchet' mechanisms** – even when past decisions have turned out as failures. This could threaten the growing trend of remunicipalisation of water services (in France, Germany, Italy, Spain, Sweden, and Hungary), energy grids (in Germany and Finland), and transport services (in the UK and France). A roll-back of some of the failed privatisations of the UK's National Health Service (NHS) to strengthen non-profit healthcare providers might be seen as violations of CETA/TTIP – as might nationalisations and re-regulations in the financial sector such as those seen during the economic crisis.

8. **Giving in to corporate demands for unfettered access to government procurement could restrict governments' ability to support local and not-for-profit providers and foster the outsourcing of public sector jobs to private firms**, where staff are often forced to do the same work with worse pay and working conditions. In CETA, governments have already signed up several sectors to mandatory transatlantic competitive tendering when they want to purchase supplies and services – an effective means for privatisation by gradually transferring public services to for-profit providers. US lobby groups such as the Alliance for Healthcare Competitiveness (AHC) and the US government want to drastically lower the thresholds for transatlantic tendering in TTIP.

9. **Both CETA and TTIP threaten to liberalise health and social care, making it difficult to adopt new regulations in the sector.** The UK's TTIP services offer explicitly includes hospital services. In the CETA text and recent TTIP drafts no less than 11 EU member States liberalise long-term care such as residential care for the elderly (Belgium, Cyprus, Denmark, France, Germany, Greece, Ireland, Italy, Portugal, Spain, and the UK). This could stand in the way of measures protecting the long-term care sector against asset-stripping strategies of financial investors like those that lead to the Southern Cross collapse in the UK.

10. **The EU's most recent draft TTIP services text severely restricts the use of universal service obligations (USOs) and curbs competition by public postal operators**, mirroring the wishes of big courier companies such as UPS or FedEx. USOs such as daily delivery of mail to remote areas without extra charges aim at guaranteeing universal access to basic services at affordable prices.

11. **TTIP and CETA threaten to limit the freedom of public utilities to produce and distribute energy according to public interest goals**, for example, by supporting renewables to combat climate change. Very few EU member states have explicitly reserved their right to adopt certain measures with regard to the production of electricity (only Belgium, Portugal, and Slovakia) and local energy distribution networks (amongst them Belgium, Bulgaria, Hungary and Slovakia) in the trade deals.

12. **The US is eyeing the opening up of the education market via TTIP** – from management training, and language courses, to high school admission tests. US education firms on the European market such as Laureate Education, the Apollo Group, and the Kaplan Group could benefit as much as German media conglomerate Bertelsmann, which has recently bought a stake in US-based online education provider Udacity. The European Commission has asked EU member states for their "potential flexibilities" on the US request relating to education services.

13. **The US film industry wants TTIP to remove European content quotas and other support schemes for the local film industry** (for example, in Poland, France, Spain, and Italy). Lobby groups like the Motion Picture Association of America (MPPA) and the US government have therefore opposed the exclusion of audiovisual services from the EU's TTIP mandate, fought for by the French Government. They are now trying to limit the exception as much as possible, for example, by excluding broadcasting from the concept of audiovisual services – seemingly with the support of EU industry groups like BusinessEurope and the European Commission.

14. **Financial investors such as BlackRock engaged in European public services could use TTIP and CETA provisions on financial services and investment protection to defend their interests against 'burdensome' regulations**, for example, to improve working conditions in the long term care sector. Lobby groups like TheCityUK, representing the financial services industry based in the UK, are pushing heavily for a "comprehensive" TTIP, which "should cover all aspects of the transatlantic economy".

15. **US services companies are also lobbying for TTIP to tackle 'trade barriers' such as labour regulations.** For example US company Home Instead, a leading provider of home care services for seniors operating franchises in several EU member states, wants TTIP to address "inflexible labour laws" which oblige the firm to offer its part-time employees "extensive benefits including paid vacations" which it claims "unnecessarily inflate the costs of home care".

What is at stake in trade agreements such as TTIP and CETA is our right to vital services, and more, it is about our ability to steer services of all kinds to the benefit of society at large. If left to their own course, trade negotiations will eventually make it impossible to implement decisions for the common good.

One measure to effectively protect public services from the great trade attack would be a full and unequivocal exclusion of all public services from any EU trade agreements and negotiations. But such an exclusion would certainly not be sufficient to undo the manifold other threats posed by CETA and TTIP as many more provisions endanger democracy and the well-being of citizens. As long as TTIP and CETA do not protect the ability to regulate in the public interest, they have to be rejected.

1. INTRODUCTION

Europe's public services, from health, to education, to social welfare, and beyond, are under serious threat from the EU's free trade agreements with Canada and the United States of America. While the ratification of the EU-Canada deal known as CETA (Comprehensive Economic and Trade Agreement) could begin in 2016, the EU-US deal TTIP (Transatlantic Trade and Investment Partnership) is currently under negotiation.

While there is growing concern in Europe among citizens and some parliamentarians about the fate of public services under trade agreements, the EU's official negotiators are all too often siding with corporations to expand markets into public services – endangering citizens' access to basic services in the hunt for quick returns.

The European Union's secretive and largely corporate-driven approach to trade negotiations has attracted strong criticism from civil society. Research has revealed the close links between corporations and the European Commission's DG Trade, entrusted with leading trade negotiations for both CETA and TTIP on behalf of EU member states. While Commission officials held some public hearings and regular civil society dialogues over these trade deals, these have been vastly outweighed by numerous parallel meetings behind closed doors with big corporations and their lobby groups, collecting inputs for CETA, TTIP and other free trade agreements (FTAs).[1]

The resulting trade agreements threaten to be a veritable corporate wish-list of public services opened up to the free market. This will be a major blow to attempts to regulate markets in the public interest, taking decisions about these rules beyond elected parliamentary scrutiny and into the undemocratic realm of trade bureaucracy. The principle of profit will be enshrined in the deals, coming before public interest objectives to provide citizens with services key to their welfare and prospects in life.

The Commission has been a reliable advocate for corporate interests, pushing for the very same liberalisation of services and opening of markets as the European business community, whose views they have courted. After each TTIP negotiation round, DG Trade representatives have refined their joint strategies with business lobbyists, while trade unions, consumer groups and other NGOs have been sidelined.

Despite the many assurances from the European Commission claiming public services will remain unaffected by TTIP and CETA, analyses of texts and drafts of these agreements prove the contrary. The recently published consolidated CETA text as well as the latest draft of the TTIP services and investment chapter contain many provisions that put public services in severe jeopardy, not to mention the aim of governing them in the public interest.

The CETA process is far more advanced than the TTIP talks, and so give us some idea of what may be coming with TTIP, as core elements of both agreements are likely to be similar. However, when it comes to the detail, the first TTIP drafts point to an agreement with even harsher liberalisation commitments going beyond those already contained in CETA.

Both agreements closely mirror corporate demands, promoting the opening-up of ever-more public services to private competition, the liberalisation of public procurement at all levels of government, as well as the locking-in of current liberalisations and potential future deregulations. By doing so, CETA and TTIP put democratic decision making into a dangerous straitjacket, impeding reversals of past privatisations which have so often proved to be outright failures.

These dangers, coupled with the privileged access of business representatives to the Commission, are fueling growing public discontent with these trade agreements, with citizens increasingly questioning the democratic legitimacy of the European Union as a whole.

1 See, for instance: Corporate Europe Observatory 2015: TTIP: a corporate lobbying paradise, 14 July 2015, http://corporateeurope.org/international-trade/2015/07/ttip-corporate-lobbying-paradise

This report sheds some light on the collusion between corporations and trade negotiators in the making of these deals. The imminent risks are examined in two main chapters: the first lays out the aggressive agenda of corporations with regards to TTIP and CETA, and the second shows how the European Commission is lending a helping hand to big corporations in these negotiations. But let's first take a brief look at the history of services in trade agreements and the role played by big business.

Box 1

What are public services?

Public services are those provided by a government to its population, usually based around the social consensus that certain services should be available to all regardless of income. These include provisions to advance the health, well-being, and social advancement of society, particularly of those groups commonly disadvantaged. Depending on societies' preferences, public services may include health, education, social welfare, pensions, as well as transport, communication, banking, postal, housing, emergency, cultural and recreational services. They can also include utilities such as the provision of gas, electricity, and water, as well as waste collection and disposal. Services rendered in the public interest have not traditionally had profit as a primary goal, eg serving the health needs of the elderly who cannot afford to pay for medicine, or combating social deprivation through free education.

However, the private, for-profit sector is increasingly being contracted by governments to provide public services. Yet even those public services contracted out are usually subject to more stringent government regulation than other private sector areas. With free trade treaties like CETA and TTIP, governments will lose policy space to organise public services according to societies' preferences by locking in liberalisation and privatisation. This is raising great concerns about whether profit will distort the ability of these services to be run in the public interest. Moreover, government attempts to regulate them could be deemed 'barriers to trade' and overturned.

2. DANGEROUS LIAISONS: BUSINESS, SERVICES, AND TRADE

Many have asked why services are being included in trade agreements at all? Many service sectors, from health to education, have been national affairs, requiring proper state regulation in order to be run in the interests of the public. But corporate lobbyists, spying a huge potential market, along with the collusion of trade negotiators, succeeded in overcoming policy-makers' reticence to exposing services to international competition.

Before delving deeper into the current trade deals, it is worth taking a look at the recent history of trade agreements in services, and the role played by corporations. TTIP and CETA show clear hallmarks of being influenced by the very same corporate lobby groups working in the area of services that have been built over the past couple of decades during previous trade talks. Analysing the relationship between these services lobbyists and trade negotiators, including the European Commission, is key to understanding the dynamics of these agreements.

2.1 A brief history of services lobbying: the birth of GATS and ESF

During the multilateral trade negotiations known as the Uruguay-Round (1986-1994) which led to the creation of the World Trade Organisation (WTO), industry groups strongly advocated for the inclusion of a services agreement. Their efforts were rewarded: the General Agreement on Trade in Services (GATS) became one of the founding treaties of the WTO. Under GATS, WTO members committed to liberalisation of a broad range of services, which included many traditional public services such as health, education, energy, social, sewerage, waste, postal, telecommunications, and cultural services.

Among the most influential GATS proponents were the US Chamber of Commerce and a newly created group, the US Coalition of Services Industries (CSI).[2] Founded in 1982, CSI originally focused on the financial sector (banking and insurance) but soon developed into a broader alliance representing corporations also active in information technology, telecommunication, express delivery, retailing, life insurance, health, and film industry. Among its current members are multinationals as varied as AIG, Metlife, Citigroup, FedEx, UPS, IBM, Google, Walmart, and The Walt Disney Company.[3]

Meanwhile in 1985, at the urging of the European Commission itself, European services exporters created a lobby group dedicated to the Uruguay Round negotiations, the European Community Services Group (ECSG). The group was composed of national chambers of commerce, employers' federations, and national service coalitions such as the UK's LOTIS committee (Liberalisation of Trade in Services).[4]

Ahead of the new GATS talks of the WTO's 'Millennium Round' in 1999, then EU trade commissioner Leon Brittan initiated the creation of another business group, the European Services Forum (ESF),[5] to which he said: "You are the driving force of the consultation system which we have established; my door is open for any matters of concern."[6] Michel Servoz, former head of the services unit of DG Trade, the Commission's trade department, admitted that for "the Commission, the contribution of the ESF is absolutely decisive. We need them in permanence… or we simply cannot negotiate".[7] Today, ESF's membership consists of national and European business associations such as MEDEF, France's largest employer federation, and the EU's most powerful corporate lobby group BusinessEurope, as well as CEOs and board members of several major companies including British Telecommunications and Deutsche Bank.[8]

2.2 Brothers in arms: the EU negotiators soliciting corporate lobbying

The examples of ECSG and ESF illustrate the special relationship between the European Commission and business circles, characterised as a kind of 'reverse lobbying', where EU officials actively request the close input of Europe's most powerful corporations, ie "the public authority lobbies business to lobby itself".[9] The Commission's 'reverse lobbying' has

2 Marchetti, Juan A./Mavroidis, Petros C., 2011: The Genesis of the GATS (General Agreement on Trade in Services), The European Journal of International Law, Vol. 22, No. 3, 689-721, doi: http://ejil.oxfordjournals.org/content/22/3/689

3 Coalition of Services Industries, CSI Members: http://servicescoalition.org/about-csi/csi-members

4 Arkell, Julian 1990: The Draft Services Agreement at GATT: a European private sector perspective, conference paper, Budapest, 11 September 1999. Arkell, Julian 1991: British Invisibles, the EC single market, and the Services Agreement at GATT, conference paper, Toronto, 15 January 1991.

5 Deckwirth, Christina 2005: The EU Corporate Trade Agenda. The Role and the Interests of Corporations and their Lobby Groups in Trade Policy-Making in the European Union, Editor: Seattle to Brussels Network, November 2005, Brussels/Berlin

6 Leon Brittan 1999: European Service Leaders' Group, European Commission, Office of Sir Leon Brittan, 26 January 1999

7 Cited in: Lietaert, Matthieu 2009: New strategy, new partnership: EU Commission as a policy entrepreneur in the trade policy, conference paper, 7-9 April 2009, Manchester

8 See: European Services Forum website (http://www.esf.be): Who we are, Members

9 Woll, Cornelia 2011: Who Scripts European Trade Policy? Business-Government Relations in the EU-Canada negotiations. In: Kurt Hübner (ed.): Europe, Canada and the Comprehensive Economic Partnership, London, 2011, p. 41-58. See also: http://corporateeurope.org/trade/2013/02/your-service-european-services-forum-privileged-access-eu-commission

been very much part of the TTIP negotiations, as internal documents of ESF and DG Trade reveal.

For example, in an email sent to the members of ESF's Policy Committee in March 2012 regarding the EU-US negotiations, the ESF secretariat wrote that "Ignacio Iruarrizaga-Diez, Services Unit Head of DG Trade, has asked sectors to provide specific services priorities directly to him by the 13th April". The secretariat goes on to explain that "the services unit is very eager to receive services sector specific information concerning the US. A trade agreement with the US will be unlike other agreements in that it will be deeper, the Commission therefore needs specific information on each sector in order to tackle and frame the correct issues from an early stage."[10]

In addition, Commission officials are regularly participating in ESF meetings themselves. DG Trade's Iruarrizaga-Diez, for instance, attended the ESF's 55th Policy Committee on October 16, 2012. According to the minutes, the DG Trade official reported on the progress of the High Level Working Group on Jobs and Growth (HLWG), a circle of EU and US technocrats engaged in the preparation of the TTIP negotiations: "On the EU-US HLWG work, the Commission welcomed ESF contribution and encouraged ESF and ESF members to provide as specific information as possible to help the negotiators in their tasks."[11]

According to an internal DG Trade memo, three of its officials also attended the ESF Policy Committee meeting of 25 February 2013 "to present a state of play on the ongoing and future services negotiations". One of the officials outlined the main TTIP features, which includes "regulatory co-operation" between EU and US bodies, a harmless sounding provision whose implications are far-reaching. 'Regulatory co-operation' is in theory the harmonising or mutually recognizing of regulations such as those on food safety or approval of new chemicals, between the US and EU. The idea is that one sides' regulations should not pose any barrier to trade. The DG Trade memo emphasizes: "Industry must play an important role here as well, in suggesting areas where regulators should focus their effort in order to bring greatest benefit to industry."[12]

FOR THE COMMISSION, THE CONTRIBUTION OF THE ESF IS ABSOLUTELY DECISIVE. WE NEED THEM IN PERMANENCE … OR WE SIMPLY CANNOT NEGOTIATE.

Michel Servoz, former head of the services unit of DG Trade

When DG Trade officials are requesting corporations to advise them in targeting regulations troublesome to industry, it becomes clear that 'regulatory co-operation' is a very serious affair. It is a set of mechanisms to ensure that rules governing the economy – in this case the framework for services – are slowly made to be more market friendly. Officials from the EU and the US, together with stakeholders mainly from the business community, would be authorised to assess the potential trade impact of proposed new regulations on the bottom line of businesses, even before democratically elected bodies such as parliaments could have a say over them.

The regulatory co-operation council envisaged in TTIP would become operational after the trade deal's entering into force. This means controversial issues that might otherwise derail the transatlantic trade agreement, such as GM food, can be dealt with away from public scrutiny, long after TTIP is signed. Regulatory co-operation enables the dismantling of current trade barriers and prevents the emergence of any new hurdles in the longer term.[13]

10 European Services Forum 2012: Electronic Mail, No. PC 22, Brussels, 28th March 2012

11 European Services Forum 2012: 55th Meeting of the ESF Policy Committee, Brussels, 16th October 2012, Minutes, 26 October 2012

12 DG Trade 2013: Subject: Meeting with ESF Policy Committee 25 February

13 For a critical assessment of this proposal see: Corporate Europe Observatory, Friends of the Earth Europe, Lobbycontrol 2014: TTIP: Covert attacks on democracy and regulation, September 2014, http://corporateeurope.org/sites/default/files/ttip_covert_attacks.pdf

Therefore, the open invitation to business groups such as ESF to provide inputs for the regulatory cooperation mechanism has to be taken very seriously. It is an invitation to help construct the rules of the future.

2.3 Systemic collusion: DG Trade's calls for support

In its constant concern for the well-being of European business, DG Trade directly approached corporate groups requesting inputs to the TTIP negotiations. According to an internal report of a Commission meeting with BusinessEurope's International Relations Committee held in October 2012, former EU Trade commissioner Karel De Gucht "sent letters to several business federations encouraging them to identify the possible divergences in regulatory matters and, above all, propose practical ways to solve them".[14] By actively soliciting private sector input to shape the negotiations, the Commission has granted industry a privilege none of the other interest groups potentially affected by TTIP has so far enjoyed.

The Commission also encouraged the business community to do more to defend the alleged benefits of TTIP. At a couple of business meetings in February 2014 DG Trade's Director General Jean-Luc Demarty urged the importance of industry support, saying in one: "Business should be more vocal in defending TTIP publicly".[15]

BUSINESS SHOULD BE MORE VOCAL IN DEFENDING TTIP PUBLICLY.

Jean-Luc-Demarty, DG Trade's Director-General, at a meeting with businesses in February 2014

Box 2

TiSA: the "Really Good Friends of Services"

Business lobbies were also instrumental in the launch of secretive talks on another important trade accord, the Trade in Services Agreement (TiSA). Unhappy with the stalemate in the WTO's services negotiations, industry associations grouped in the "Global Services Coalition" launched a call for the start of plurilateral services negotiations in June 2011.[16] This coalition is a network of several national services associations, which include CSI and ESF. One year later, a self-selected club of developed and a few developing countries calling themselves the "Really Good Friends of Services" began the TiSA talks in Geneva. The EU, the USA, and Canada are among the partners currently negotiating this accord.[17]

Samuel Di Piazza, former Chairman of the Board of CSI, at a hearing in March 2013, said TiSA would offer the opportunity to create a framework by which "free market principles" govern the transnational delivery of services. Companies should be enabled to compete "according to economic determinants that are market-based, not government-based."[18]

14 DG Trade 2012: Meeting Report: MVH at the International Relations Committee of BusinessEurope, 5 October 2012

15 DG Trade 2014: Subject: Meeting JLD-Cefic 4 February 2014 – summary report

16 CSI et al 2011: Global Services Coalition calls for a start to plurilateral services negotiations at meeting in Hong Kong, Press Release, 6 June 2011

17 Gould, Ellen 2014: TiSA – Trade in Services Agreement: The Really Good Friends of Transnational Corporations Agreement, PSI Special Report, Public Services International, September. See also: Sinclair, Scott/Mertins-Kirkwood, Hadrian 2014: TiSA versus Public Services, PSI Special Report, Public Services International, April and the documentation and resources of the seminar "How to challenge the liberalisation of public services in TTIP, CETA and TiSA", 15-16 January 2015, organised by EPSU together with ETUCE, AK and ÖGB: http://www.epsu.org/a/11100

Overall, the internal documents prove that the relationship between industry and the Commission is a bi-directional affair with DG Trade playing an active role in stimulating corporate lobbying. Indeed, this relationship represents what Pierre Defraigne, former Deputy Director-General of DG Trade, termed a "systemic collusion between the Commission and business circles".[19]

The Commission apparently perceives large corporations as its preferred constituency. But the privileged partnership between DG Trade and big business systematically disadvantages workers, consumers, and the European citizenry at large. What also becomes clear is that the demands of the services industry will almost inevitably make it to the negotiation table.

18 CSI 2013: Notification of Request to Testify, International Services Agreement Hearing, March 12, 2013

19 Corporate Europe Observatory 2015: International Trade, Corporate Lobbying, and the European Political Project: A conversation with Pierre Defraigne, April 22nd 2015, http://corporateeurope.org/power-lobbies-economy-finance-international-trade/2015/04/international-trade-corporate-lobbying-and

3. BUSINESS WISH-LIST FOR EUROPE's PUBLIC SERVICES

From the beginning, business lobbyists from both sides of the Atlantic have joined forces in order to push TTIP negotiators to open virtually all services sectors to sweeping liberalisation. Back in 2012, when the High Level Working Group on Jobs and Growth (HLWG) prepared its recommendations on the EU-US trade agreement, the influential European Services Forum issued a joint statement with its US counterpart, the Coalition of Services Industries: "ESF and CSI strongly support the launch of trade negotiations between the EU and the U.S., calling for far reaching services commitments by both sides".[20]

3.1 Public services: everything must go!

To ensure maximum coverage of services in TTIP, the powerhouse lobby groups on both sides of the Atlantic, ESF and CSI, recommended a particular negotiation strategy known as a 'negative list' which means that all public services are subject to liberalisation unless an explicit exception is made.

This 'list it or lose it' approach dramatically expands the scope of a trade agreement as governments make commitments in areas they might not even be aware of, such as new services emerging in the future (see box 7 on page 28). It marks a departure from the positive lists used so far in EU trade agreements containing only those services which governments have agreed to liberalising.

At the same time, transatlantic lobby groups are trying to prevent negotiators from exempting any public services from the trade agreement. Their alarm bells started to ring in February 2015 when the European Parliament's Committee on International Trade (INTA) drafted a TTIP resolution asking for "an adequate carve-out of sensitive services such as public services and public utilities (including water, health, social security systems, and education) allowing national and local authorities enough room for manoeuvre to legislate in the public interest".[21]

WE ARE CONCERNED ABOUT THE REQUEST TO EXCLUDE PUBLIC SERVICES – IRRESPECTIVE OF HOW THEY ARE PROVIDED AND FUNDED – AS THE EU SHOULD NOT PUT IN QUESTION ITS OWN MULTILATERAL COMMITMENTS.

BusinessEurope email sent to MEPs dealing with the European Parliament's TTIP resolution, 1 June 2015

BusinessEurope, the umbrella group of European industry and employers, intervened and reminded parliamentarians of international commitments already undertaken in agreements such as GATS: "Instead of asking for carve out, there should be a reference to the need to comply with international rules".[22] The European Services Forum echoed these demands: "ESF recommends maintaining, as already committed in the GATS, the possibility of European private investors to invest in 'privately funded' education and health services."[23]

Nevertheless, a more recent resolution approved by INTA on 28 May 2015 and submitted to the plenary for a final vote (which was later postponed) still contained language demanding the exclusion of public services.[24] But once again, BusinessEurope reacted immediately and sent an email to Members of the European Parliament saying: "We are concerned about the request to exclude public services – irrespective of how they are provided and funded – as the EU should not put in question its own multilateral commitments".[25]

20 ESF/CSI 2012: Regulatory Cooperation Component in the services sector to an EU-US Economic Agreement, October 2012

21 European Parliament 2015: Draft Report containing the European Parliament's recommendations to the Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP), (2014/2228(INI)), Committee on International Trade, Rapporteur: Bernd Lange, 5 February 2015: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML%2BCOMPARL%2BPE-549.135%2B01%2BDOC%2BPDF%2BV0//EN

22 Business Europe 2015: Comments to the Draft Resolution on TTIP negotiations, BusinessEurope Position Paper, February 2015

23 European Services Forum 2015: ESF Comments on INTA Draft Report Containing the EP's recommendations to the Commission on the negotiations for TTIP, 16 March 2015

24 European Parliament 2015: Report containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228(INI)), Committee on International Trade, Rapporteur: Bernd Lange, 1 June 2015: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2015-0175+0+DOC+PDF+V0//EN

25 BusinessEurope 2015: Subject: BUSINESSEUROPE message on TTIP resolution, sent 1 June 2015

3.2 Dismantling public health

The public health sector is one of the main targets of business lobbyists advocating for TTIP, hoping to capitalize on increasing health expenditure driven by aging populations in both the EU and the US, while public health sectors continue to suffer from fiscal pressures and harsh austerity measures. For instance, the powerful Washington-based Alliance for Healthcare Competitiveness (AHC) assembles companies and associations representing service providers, hospital operators, insurers, producers of pharmaceuticals and medical devices, as well as IT and logistics companies (including Abbott, Johnson & Johnson, Medtronic, UPS, Intel, United Health Group, CSI, PhRMA, and USCIB). It prides itself on being "the only coalition advocating for the freer flow of health goods and services at the healthcare sector level".[26]

AHC complains that "today's world of health care services is highly restricted and fragmented", but an "open trading world for these services would create a large new flow of revenue into the United States". It highlights its extraordinary interest in TTIP "as the European Union is the site of nearly a third of world health spending" and "the principal buyer of American exports of health products".[27] AHC wants health services in their entirety to be included in the EU-US-agreement: "TTIP should address services through a negative list, ensure that health services are not excluded from the negotiations, and remove barriers that impeded the operation of service providers".[28]

AHC also advocates for sweeping liberalisations of investment regulations inhibiting the expansion of private health providers in the EU: "Trade agreements should guarantee health services firms the freedom to establish as they choose", and US companies shall be allowed to establish operations abroad "with no artificial limits on their equity ownership". Economic needs tests are one of the many barriers TTIP is expected to remove. Subjecting the approval of establishments to criteria such as market saturation to prevent predatory competition, these tests are widely applied in the European health sectors. AHC, however, wants to get rid of them: "Certificates of Need" only have "the effect of reducing competition with inefficient state health care enterprises", claims the corporate coalition.[29] Essentially, these demands reflect an industry eager to expand its reach into areas that have so far been off-limits to them, due to national and local sensitivities and preferences to protect the public sector.

The business alliance repeatedly lashes out at state-owned enterprises (SOEs) and state-supported enterprises (SSEs) in the health sector, be they hospitals, care facilities, or health insurers. "Regulatory favoritism", as it puts it, only creates "market distortions" and prevents "taxpayers from getting the best deal". Consequently, governments "should not offer advantages to SOEs and SSEs at the expense of private capital". AHC's recommendation to the US government is blunt: "U.S. negotiators should seek high-standard disciplines on SOEs that enforce competitive neutrality".[30] However, state-owned and state-supported enterprises such as public hospitals are virtually indispensable to guarantee equal access to health care for everyone, since private hospitals tend to cherry-pick the better-off patients and those with lower health risks in order to maximise their profits.

3.3 Competitive tendering: bidding for health contracts

The Alliance for Healthcare Competitiveness (AHC) is particularly keen to achieve unfettered access for private health companies to government procurement in the EU. Public procurement can mean private companies being paid to offer direct provision of health services such as hospitals, purchases of pharmaceuticals

26 Alliance for Healthcare Competitiveness 2014: The transatlantic trade and investment partnership: increasing opportunities for the healthcare sector, improving health outcomes, TTIP Stakeholder Forum, October 1, 2014

27 Alliance for Healthcare Competitiveness 2013: Transatlantic Trade and Investment Partnership, May 10, 2013

28 Alliance for Healthcare Competitiveness 2014: The transatlantic trade and investment partnership: increasing opportunities for the healthcare sector, improving health outcomes, TTIP Stakeholder Forum, October 1, 2014

29 Alliance for Healthcare Competitiveness 2013: Transatlantic Trade and Investment Partnership, May 10, 2013

30 Ibid.

and medical devices, construction contracts for health facilities, or the delegation of care services to private entities. AHC demands that the procurement chapters of TTIP and other trade agreements "should cover health care", while exemptions "should be minimal".[31]

Governments often have thresholds, below which foreign companies are unable to bid for procurements, in order to support local providers. But health corporations want these thresholds drastically reduced, thus expanding their potential market. In the WTO's Government Procurement Agreement (GPA),[32] the EU and the US have committed to a threshold of 130,000 special drawing rights (SDR) for the procurement of supplies and services. SDR is a currency basket used by the International Monetary Fund (at the time of writing, 15 July 2015, 1 SDR corresponds to 1.27 Euros).[33] AHC, however, expects TTIP partners to accept an extreme reduction of this limit: "The procurement chapters of future FTA agreements should cover all tenders at 1,000 SDR and above."[34] As a consequence, virtually all public contracts for health-related goods and services would have to be subject to competitive transatlantic tenders.

REGULATORY SYSTEMS SHOULD SEEK TO ELIMINATE THE USE OF PRICE CONTROLS.

Alliance for Healthcare Competitiveness submission to a hearing on TTIP, May 2013

Mandatory tendering is an effective means for privatisation by gradually increasing the amount of public health services transferred to commercial providers. Through outsourcing, companies take over the management or delivery of a whole raft of former public services including cleaning, catering, and facility management, as well as the provision of a range of clinical services and treatments (see chapter 4.8). In an open public tender, contracting authorities may even offer the management of an entire hospital to for-profit providers. In many countries, the obligation to carry out competitive tendering has already led to the transfer of thousands of public sector jobs to private companies, with staff often forced to do the same jobs with considerably worse pay and working conditions.[35] Lowering the thresholds for mandatory tenders restricts governments' ability even further to maintain services within the public sector by providing them in-house.

In order to control their health expenditures, some European governments have implemented a range of cost-containing measures, including price controls for medicines. Price controls, however, may limit the profits of the pharmaceutical industry. For AHC, these cost-containing measures represent "onerous" non-tariff barriers which TTIP could help to dismantle: "Regulatory systems should seek to eliminate the use of price controls".[36] However, giving in to these demands to end or reduce price controls would hit public coffers and be a massive capitulation to pharmaceutical industry pressure.

The danger in this area is very real. A proposal to do away with price controls is already negotiated in another trade deal, the Trans-Pacific Partnership (TPP) between the US, Australia, New Zealand, and Asian countries, and the pharmaceutical lobby has made it clear it would like to see TTIP include similar rules.[37]

31 Ibid.

32 The GPA is a plurilateral treaty signed by 15 parties, including the EU, the US and Canada. See: https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm

33 In the EU, the threshold of 130,000 SDR applies to central government entities. For subcentral government entities the limit has been set at 200,000 SDR and above.

34 Alliance for Healthcare Competitiveness 2013: Transatlantic Trade and Investment Partnership, May 10, 2013

35 See for instance: Lethbridge, Jane 2012: Empty Promises: The impact of outsourcing on the delivery of NHS services, UNISON, February 2012

36 Ibid.

37 The proposal was leaked June 10, 2015: https://wikileaks.org/tpp/healthcare/WikiLeaks-TPP-Transparency-Healthcare-Annex.pdf. The suggestion of the US pharmaceutical industry to include such measures in TTIP can be seen in a PhRMA contribution to a TTIP hearing in the US Congress on July 24, 2013: "Short-sighted cost containment measures – ostensibly proposed in response to the financial crisis, but too often implemented without predictable, transparent and consultative processes – have significantly impacted our member's businesses in Europe, with negative spill over as a result of parallel trade and international reference pricing. These measures raise serious concerns regarding the commitment in a number of EU Member States to adequately reward innovation". http://www.phrma.org/sites/default/files/pdf/HHRG-113-IF17-Wstate-CastellaniJ-20130724.pdf

Box 3

Home Instead: the McDonald's of the care business

US company Home Instead Inc., a leading provider of home care services for seniors, operates an international franchise network including offices in several EU member states such as Austria, Finland, Germany, Ireland, Italy, the Netherlands, and the United Kingdom. The company submitted a comment to the US Trade Representative (USTR) requesting a "focus on two particular home care related issues as we negotiate the TTIP with the EU".[38]

The first issue was the dismantling of tax and labour laws biting into its profits. It considers the value added tax (VAT) imposed on home care in several EU countries "as a brake on the growth of local franchise businesses" as it increases the cost of care beyond the means of its potential customers: "It is our position that the VAT on home care services in the EU substantially inhibits our successful entry into many EU markets."[39]

The second barrier targeted by Home Instead relates to allegedly "inflexible labour laws". European labour regulations written to protect full-time employees would grant no exemptions for enterprises where part-time employment is the rule. As a result, home care businesses are compelled to offer their part-time employees "extensive benefits including paid vacations". Home Instead claims that these regulations "unnecessarily inflate the costs of home care".[40] Addressing these 'trade barriers' through TTIP would be advantageous for both the US home care business and European franchisees.

In the United States, Home Instead fiercely opposes planned new labour regulations requiring they pay the minimum wage and overtime hours, which were due to take effect in January 2015.[41] However, business groups including the International Franchise Association (with Home Instead as one of its members) successfully sued the US-Department of Labour, which appealed the ruling. The final outcome of this battle remains undecided as the legal proceedings are still ongoing.[42]

In Switzerland, the public services trade union VPOD protested against Home Instead's business model which guarantees high profits for the company while shifting the risks to the franchisees, who have responded by aggressively cutting labour costs. Care workers have to be on call without guarantee of being adequately paid for their stand-by periods. To save social security contributions, some workers have even been prevented from registering with the compulsory occupational pension scheme. VPOD called Home Instead Switzerland "the McDonald's of the for-profit care business".[43]

3.4 Financial industry: a major player in services liberalisation

The financial industry is not only one of the most vocal advocates of trade liberalisation but also a major force behind the privatisation of public services. Lobby group AFME (Association for Financial Markets in Europe) and its US counterpart SIFMA (Securities Industry and Financial Markets Association) issued a joint TTIP statement urging that "provisions for financial services must be an integral part of this

38 Home Instead 2013: Written comment to the Proposed Transatlantic Trade and Investment Agreement, submission to a hearing of the United States Trade Representative (USTR), May 9, 2013

39 Ibid.

40 Ibid.

41 Kennedy, Kelly, 2012: Home health industry fights minimum wage rule, USA Today, 16 February 2012: http://usatoday30.usatoday.com/news/washington/story/2012-02-15/home-health-care-minimum-wage/53110228/1

42 Wheeler, Lydia, 2015: Judges weigh minimum wage, overtime rules for home care providers, The Hill, 7 May 2015: http://thehill.com/regulation/court-battles/241331-court-hears-appeal-for-wage-protections-for-home-health-aids

43 Meyer, Marianne 2014: Home Instead – der McDonald's unter den Profitspitex, VPOD Region Basel, No. 2, 2014, p. 10

Partnership".[44] TheCityUK, representing the financial services industry based in the UK, also stresses a need for a "comprehensive agreement". The negotiations "should cover all aspects of the transatlantic economy" and "nothing should be excluded from discussion".[45] The influential London-based lobby group is also a staunch defender of Investor-State Dispute Settlement (ISDS) mechanisms (see chapters 3.11 and 4.11) foreseen in TTIP: "In TheCityUK's view, it is essential for the investment provisions in TTIP to include an ISDS process in order to protect UK investors and to allow them to seek redress."[46]

These lobby groups have many members engaged in privatised public services, including investment banks, asset management firms, insurance companies, public equity groups or real estate investment trusts (REITs). The financial industry is constantly developing specialised investment funds and other instruments targeting particularly the utilities sector (electricity, gas and water services), healthcare (clinics, health insurance), education (college funding), infrastructure (transport and energy networks), and construction and real estate (schools, hospitals, care homes).

For instance, US investment company Invesco, a SIFMA member, owns an important stake in the huge British healthcare provider CareUK (see chapter 4.8).[47] US private equity giant BlackRock, a SIFMA member that also sits on TheCityUK's advisory council and its International Regulatory Strategy Group (IRSG),[48] holds shares in German healthcare company Fresenius.[49] The German conglomerate owns a global network of clinical services companies with affiliates in Europe and the US, along with the largest network of private clinics in Germany (Helios Kliniken Group).[50]

Box 4

Pillaging without care: Blackstone and the collapse of Southern Cross

US private equity company Blackstone, also sitting on the council of TheCityUK's International Regulatory Strategy Group (IRSG),[51] became infamous over the 2011 collapse of Southern Cross, once the largest long-term care provider in the UK. Blackstone bought Southern Cross in 2004 and reorganised the business. Under this model, the care home company sold all its properties to the NHP group, a real estate manager also acquired by Blackstone, only to rent them back under unfavourable lease contracts. While Blackstone made huge profits when it floated Southern Cross on the stock exchange in 2006, the care home company started accumulating ever more debts. As the rents kept rising and revenues were falling, Southern Cross became incapable of paying its rent leading to its bankruptcy in 2011.[52]

44 SIFMA/AFME 2013: SIFMA/AFME Goals for the Transatlantic Trade and Investment Partnership, Letter to Karel De Gucht and Michael Froman, April 30, 2013

45 TheCityUK 2013: The Transatlantic Trade and Investment Partnership (TTIP): A View From TheCityUK, May 2013

46 TheCityUK 2015: Transatlantic Trade and Investment Partnership (TTIP): Brief by TheCityUK; http://www.thecityuk.com/home/transatlantic-trade-and-investment-partnership-ttip-brief-by-thecityuk/

47 SIFMA, SIFMA AMG Member Directory, http://www.sifma.org/amg-member-directory/

48 SIFMA, SIFMA AMG Member Directory, http://www.sifma.org/amg-member-directory/ ; TheCityUK, Advisory Council, http://www.thecityuk.com/about-us/who-we-are/advisory-council/, International Regulatory Strategy Group (IRSG), Council, http://www.irsg.co.uk/about-us/council/

49 Fresenius, Shareholder structure, http://www.fresenius.com/511.htm

50 Fresenius, Participations, http://www.fresenius.com/326.htm

51 International Regulatory Strategy Group (IRSG), Council: http://www.irsg.co.uk/about-us/council/

52 Preston, Alex, 2011: Southern Cross, a haunting example of how privatisation can go wrong, New Statesman, 23 July 2011: http://www.newstatesman.com/society/2011/06/southern-cross-blackstone-care. Wikipedia, Southern Cross Healthcare (United Kingdom): https://en.wikipedia.org/wiki/Southern_Cross_Healthcare_%28United_Kingdom%29

3.5 Procurement: attack on public utilities

In order to prepare its requests to the US Government for the TTIP negotiations, the European Commission in September 2013 circulated a detailed questionnaire to European industry for their particular interests in the US and the obstacles they encountered when trying to participate in public tenders. In its response, BusinessEurope provides a list of sectors where its members have commercial interests in US' procurement, covering energy, health, and transport services (airports, roads, railways, metros, ports) as well as public utilities. The interest in public utilities focuses especially on the water sector such as "water services management of the full water cycle" as well as the design and operation of "water treatment plants".[53]

PUBLIC PROCUREMENT HAS TO BE FULLY OPEN AT ALL LEVELS OF GOVERNMENT (FEDERAL, STATE, LOCAL LEVEL).

BusinessEurope response to EC questionnaire on public procurement by EU businesses in the US, November 2013

BusinessEurope's overall objective is "that public procurement has to be fully open at all levels of government (federal, state, local level)". In addition, any local content requirement "should be eliminated". In this regard BusinessEurope refers particularly to the Buy American legislation enacted in 2009 requiring publicly funded works to only use iron, steel, and manufactured goods produced in the United States.

Meanwhile, US businesses direct essentially the same demands towards the EU. In a submission to the United States Trade Representative, the American Chamber of Commerce to the EU (AmCham EU) attacked a proposed EU regulation[54] on the access of third-country suppliers to public tenders in the European internal market. AmCham EU "is very concerned" by a 2012 Commission proposal where US companies would be "a priori excluded from some public EU tenders in strategic sectors like water, airports, urban transport etc". For AmCham EU, the proposed regulation amounts to "a clear discrimination against countries like the US". The Chamber expresses its hope "that the proposed TTIP addresses and resolves such issues".[55] But bowing to these business demands would further restrict contracting authorities' ability to avoid competitive tenders in order to retain services within the public sector. Limiting the in-house option, ie constraining the ability to keep services within the public sector, could increase the risk of outsourcing ever more public sector jobs to private companies and of impairing equal access to affordable public services.

3.6 Public Private Partnerships: profiting from austerity

Business groups are also advocating for rules on public-private partnerships (PPPs) to be introduced in TTIP. PPPs are contracts between governments and private companies under which companies finance, build, and operate elements of a public service and get repaid over a number of years, either through charges paid by users or by payments from the state. However, they can end up being a far more expensive option than the conventional public spending model.

53 BusinessEurope 2013: Response to "European Commission's Questionnaire to EU Industry on Public Procurement in the U.S. (September 2013)", 5 November 2013

54 European Commission 2012: Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries, COM(2012) 124 final, Brussels, 21 March 2012: http://trade.ec.europa.eu/doclib/docs/2012/march/tradoc_149243.pdf

55 AmCham EU 2013: AmCham EU's reply to USTR's Request for Comments Concerning Proposed Transatlantic Trade and Investment Partnership, Consultation Response

Concessions are classic versions of PPPs, in which private companies agree to construct and operate water, gas, or electricity systems in return for a monopoly awarded by the state, allowing them to cover costs and generate a profit by charging users. In modern PPP versions like the UK's Private Finance Initiative (PFI) it is mainly the state who is paying the private companies (see chapter 4.8).

Nowadays, the main motivation for governments pursuing PPPs is to bypass their own neoliberal austerity measures constraining public borrowing. Although governments remain obliged to pay for the investments made under such partnerships, the accounting rules allow PPPs to be treated as private borrowing, enabling governments to shift their liabilities off public accounts.[56]

In Europe, the majority of PPPs have been used to construct roads, railways, hospitals, schools, and other public buildings. However, PPPs are generally far more expensive than investments financed by public borrowing. Due to the ability of the state to raise taxes, the risk of defaulting on its debts is pretty low. By contrast, lending to private companies is far more risky as any of them may go bankrupt. Therefore, lenders usually charge higher interest rates on private sector loans than on public sector loans. In addition to the higher interest rates, private companies have to pay dividends to the shareholders in a PPP project, increasing the costs even further.[57]

FOR OUR SECTOR, GOVERNMENT POLICIES WHICH FAVOR STATE-OWNED ENTERPRISES (SOEs) AND STATE-SUPPORTED ENTERPRISES (SSEs) ARE EXTREMELY DAMAGING.

UPS submission to a hearing on TTIP, May 2013

A TTIP position paper published by BusinessEurope hails these partnership models: "PPPs are an effective mechanism to deliver infrastructure projects and services to citizens." PPPs would be of particular interest in situations "characterised by a shortage of funds", but "their legal application needs to be clarified" in the context of TTIP.[58] In another position paper on the European Commission's recently announced investment plan, BusinessEurope complains that the PPP market "remains underdeveloped". Governments should therefore "promote PPPs, including for infrastructure projects". The lobby group also wants the EU to pave the way for the financial industry. The EU should encourage "investment in long-term infrastructures by pension funds and insurance companies, now corresponding only to 1% of their institutional assets but with appetite for more."[59]

3.7 Post: eroding universal service

Large courier companies have traditionally lobbied trade negotiators to open world markets particularly for the express delivery of parcels and other mail items, in competition with national post services. Consequently, UPS, the US-based global courier company, welcomes the launch of the EU-US negotiations: "Europe represents UPS' largest market and investment outside North America, giving the TTIP critical value in terms of our ability to continue investing in both economies". An ambitious agreement "could boost our trading volume by 131 million packages" over 10 years. UPS advocates for commitments "to ensure market access and a level playing field for express delivery services (EDS)". However, government-supported national postal operators stand in the way of such a leveling exercise: "For our sector, government policies which favor state-owned enterprises (SOEs) and state-supported enterprises (SSEs) are extremely damaging."[60]

56 Hall, David 2015: Why Public-Private Partnerships don't work: the many advantages of the public alternative, Public Services International, February 2015

57 Ibid.

58 BusinessEurope 2013: Public Procurement in the Transatlantic Trade and Investment Partnership (TTIP), Position Paper, 11 December 2013, p. 6

59 BusinessEurope 2014: BusinessEurope expectations from an EU investment plan, November 2014

60 UPS 2013: RE: Request for Comments on the Proposed Transatlantic Trade and Investment Partnership, May 10, 2013

UPS's rival on the US market, Federal Express (FedEx), is even more outspoken: "Laws, regulations, and policies which offer an advantage to one class of provider such as a national postal authority should be prohibited insofar as competitive services are concerned." In addition, FedEx takes aim at cross-subsidizations where service providers use revenues accrued in one market such as letters to subsidize activities in another market like parcels: "Equally, the TTIP should prohibit the abuse of monopoly positions to cross-subsidize services provided in a competitive environment."[61]

Yet many national postal operators which have been granted a public monopoly do not follow a profit motive. Generally, in return for the monopoly position they are obliged to fulfill certain universal service obligations (USOs) like daily delivery of mail also in remote areas without extra charges. For many public enterprises, also beyond the postal sector, cross-subsidies can be an important tool to guarantee universal access to basic services at affordable prices. This is particularly true for multi-utilities performing several tasks such as the provision of waste, water, energy, or transport services.

It should be noted here that – despite past liberalisations and privatisations in the postal sector (most recently in Portugal and the UK) – many EU member states still own their national public postal operators. In the majority of cases governments retain 100 percent ownership, in some other cases they hold a smaller share.[62] Thus far, only three EU member states have completely sold off their stakes in former public postal companies (the Netherlands, Malta, and Portugal). Therefore, all countries where governments retain ownership rights in their national postal operators or impose specific universal service obligations could be affected by TTIP when negotiators bow to the pressure of transnational courier companies.

3.8 Hollywood: fighting the cultural exception

The Motion Picture Association of America (MPAA) representing the US film industry, also hopes for broader market access in the EU. To achieve this, the business association opposes any "upfront, blanket sectoral exclusions" – naturally their concern is the culture and entertainment sectors – in the TTIP talks. Instead, negotiators should strive for "a comprehensive agreement, devoid of sectoral carve-outs".[63] Excluding cultural services particularly in the audiovisual sector from trade negotiations – a regular demand of successive French governments – runs counter to the export interests of Hollywood's studios already dominating the world's movie markets.

MPAA DOES NOT SUPPORT ANY TYPE OF QUOTA RESTRICTION THAT LIMITS THE ABILITY TO DISTRIBUTE FILM PRODUCTS BASED ON MARKET DEMAND.

Motion Picture Associaton of America (MPAA), contribution to USTR's Trade Barriers Report, October 2014, on quota restrictions in France

Nonetheless, some European companies have also supported MPAA's position. According to a Commission report of an internal BusinessEurope meeting with DG Trade officials in May 2013, "ESF pointed out that the 'cultural exception' will also exclude exports of video games and music, which is an offensive interest of the EU." The Confederation of Swedish Enterprise (Svenskt Näringsliv) shares this view: "The Swedish confederation of industries encouraged the Commission to use the strongest possible language to avoid having any red-lines before starting the negotiations".[64]

MPAA's yearly contribution to the Trade Barriers Report of the United States Trade Representative (USTR) lists the EU regulations of the audiovisual sector it wants to see removed. The lobby group

61 FedEx Express 2013: RE: Request for Comments on the Proposed Transatlantic Trade and Investment Partnership, May 10, 2013

62 WIK-Consult 2013: Main Developments in the Postal Sector (2010-2013), Final Report, Study for the European Commission, Bad Honnef, August 2013

63 Motion Picture Association of America 2013: Comments of the Motion Picture Association of America Concerning the Proposed Transatlantic Trade and Investment Partnerhip. Friday, May 10, 2013

64 DG Trade 2013: Report Meeting FTA working group BusinessEurope 17 May 2013, 14h00 – 16h00

complains that some "EU Member States, such as France, Italy and Spain have taken measures which are far more restrictive than required".[65] The lobby group particularly targets content quotas reserving certain percentages of television and cinema screenings for movies produced in Europe – a means to preserve and encourage linguistic and cultural diversity: "MPAA does not support any type of quota restriction that limits the ability to distribute film products based on market demand." Poland's regulation requiring national broadcasters to dedicate at least 33 percent of their broadcasting time to programmes produced in Poland would go beyond EU law and "impedes market access".[66]

MPAA also seeks to remove European support schemes for the local film industry. Poland's taxes on box office and on DVD sales to finance subsidies for Polish and European films "unfairly burden MPAA member companies with the cost of financing the government's cultural policy." The lobby group also questions France's taxes aimed at supporting local film producers: "MPAA disagrees with the imposition of de-facto discriminatory taxes and levy schemes on the film industry to finance subsidies allocated on a discriminatory basis." MPAA is equally unhappy with Spanish regulations. "Spain maintains discriminatory provisions", they assert, by obliging audiovisual service providers to annually invest five percent of their revenues in the production of European films.[67]

3.9 Future proofing TTIP: digital trade in public services

Industry groups are pushing for a kind of "future-proofed" TTIP agreement, liberalising by default any new services which might emerge due to technological change, no matter what form they might take. The Business Coalition for Transatlantic Trade (BCTT), a lobby group comprising industry associations and major corporations (such as Citi, FedEx, IBM, Lilly, Metlife, and UPS), explains this radical demand: "Technological innovation often leads to the development of new services. Market access commitments should ensure that the supply of any new services be permitted without further negotiation."[68] The European Services Forum supports this far-reaching idea, hoping it will pre-empt governmental regulation affecting trade: "The ability to future proof commitments is important as it prevents barriers from re-emerging with changes in technology, for example."[69] But the consequences of these frivolous demands may be extremely damaging for society. Permitting any newly emerging service without assessing its potential impact on workers and consumers would irresponsibly expose entire societies to unpredictable risks.

MARKET ACCESS COMMITMENTS SHOULD ENSURE THAT THE SUPPLY OF ANY NEW SERVICES BE PERMITTED WITHOUT FURTHER NEGOTIATION.

Business Coalition for Transatlantic Trade (BCTT) on technological innovation

Future-proofing TTIP by approving any new service which emerges, for instance over the internet, poses particular threats for public services such as health and education. The Alliance for Healthcare Competitiveness for example demands the dismantling of burdens on the "cross-border provision via telemedicine"[70] (telemedicine is the remote diagnosis and treatment of patients by means of telecommunications technology). But authorising any novel treatment available via telemedicine without proper risk assessment might put patients' lives in danger and increase healthcare costs. Equally, permitting online courses without proper assessments could endanger the quality of education and academic degrees (see chapter 4.7).

65 Motion Picture Association of America 2014: MPAA Comments Regarding the 2015 National Trade Estimate Report on Foreign Trade Barriers. October 29, 2014

66 Ibid.

67 Ibid.

68 Business Coalition for Transatlantic Trade (BCTT): Issues, Services: http://www.transatlantictrade.org/issues/services/

69 European Services Forum 2012: ESF Contribution to Public Consultation on EU-US High Level Working Group on Jobs and Growth, 23 April 2012

70 Alliance for Healthcare Competitiveness 2013: Transatlantic Trade and Investment Partnership, May 10, 2013

3.10 Locking in privatisation

Beyond prising open services markets, one of the central features of free trade agreements such as TTIP and CETA is their capacity to effectively lock in previous and future liberalisations and privatisations – regardless of any government that gets voted in or what its mandate or policies might be.

Apart from 'standstill' clauses irreversibly binding existing policies, business groups further demand the inclusion of a so-called 'ratchet' provision which would effectively lock in future deregulations. The Business Coalition for Transatlantic Trade (BCTT), for example, wants market access commitments to "be subject to a 'ratchet' to lock in subsequent liberalization".[71] Thus, any deregulatory experiment a government might undertake would automatically be made a permanent obligation under the treaty.

The European Services Forum describes the rationale behind these demands: "The standstill and ratchet clauses are tools that ensure spreading of trade liberalisation… and allow avoiding the necessity to renegotiate outdated agreements."[72] Indeed, the ratchet clause provides an example of what former EU Trade Commissioner, Karel De Gucht, might have had in mind when he described TTIP as "a living agreement".[73] TTIP's coverage of services opened to transatlantic competition could be expanded even after the agreement's entering into force, without renegotiating the entire treaty and asking parliaments for their approval. In essence, the ratchet clause represents a convenient tool for bypassing democratic decision making over the regulation of services. Any civil society initiatives trying to undo neoliberal privatisation policies implemented in the past would be futile in all the sectors covered by the standstill clause.

But locking in current and future policies is particularly harmful when deregulations turn out to be a failure, as, for instance, the liberalisation of capital markets which deepened the recent financial crisis. Efforts to reverse course and re-regulate previously liberalised sectors under these kinds of circumstances may then be rejected as potential treaty violations. Similarly many welfare-enhancing measures could also be thwarted: containing the expansion of private health insurance (as the previous Slovak government tried),[74] renationalising privatised railways (as Estonia did[75] and 70 percent of the British electorate want[76]), including all wealthy contributors in a universal "citizens' insurance scheme" (as German social democrats proposed),[77] as well as the numerous remunicipalisations currently taking place across Europe. In the water sector, France is spearheading this trend with 63 remunicipalisations of water works completed in the past five years alone.[78]

3.11 Protecting investment – endangering welfare

Business lobbyists are united in their call to have a broad investment protection chapter in TTIP, including the highly controversial Investor-State Dispute Settlement mechanism (ISDS), granting foreign investors the exclusive right to bypass

71 Business Coalition for Transatlantic Trade (BCTT): Issues, Services: http://www.transatlantictrade.org/issues/services/

72 European Services Forum 2015: ESF Comments on INTA Draft Report Containing the EP's recommendations to the Commission on the negotiations for TTIP, 16 March 2015

73 De Gucht, Karel, 2013: Transatlantic Trade and Investment Partnership – Solving the Regulatory Puzzle, European Commission, Speech/13/801, 10 October 2013: http://europa.eu/rapid/press-release_SPEECH-13-801_en.htm

74 Liptakova, Jana 2012: Fico demands a single health insurer, The Slovak Spectator, 23 July 2012: http://spectator.sme.sk/c/20044098/fico-demands-a-single-health-insurer.html

75 Wright, Robert, 2007: Estonia completes rail nationalisation, ft.com, 16 January 2007: http://www.ft.com/intl/cms/s/0/70de8424-a59e-11db-a4e0-0000779e2340.html#axzz3alCUTeQh

76 Global Rail News 2012: 70% want end to rail privatisation, 13 September 2012: http://www.globalrailnews.com/2012/09/13/70-want-end-to-rail-privatisation/

77 Petring, Alexander et al., 2012: Welfare State and Social Democracy, Friedrich-Ebert-Stiftung, Social Democracy Reader 3, Berlin, November 2012: http://library.fes.de/pdf-files/iez/09581.pdf

78 Satoko Kishimoto, Emanuele Lobina and Olivier Petitjean (editors) 2015: Our public water future: The global experience with remunicipalisation, TNI/PSIRU/Multinationals Observatory/MSP/EPSU, Amsterdam, London, Paris, Cape Town and Brussels, April 2015

national courts and sue governments before private international tribunals. One of the overarching corporate aims is to prevent governments from any regulatory changes limiting private profits. The price states have to pay for backtracking from liberalisation and privatisation (see box 5) will be as high as possible.

The US Chamber of Commerce, for instance, calls for the "right to establish and operate investments on a non-discriminatory basis, across the full range of economic sectors, including… services". The business group advocates for a "broad definition of investment" and fiercely defends ISDS: "While some argue that ISDS need not be part of the TTIP given the demonstrated US and EU commitment to the rule of law, the Chamber insists that the United States and the EU must include these provisions as a signal to the world of our willingness to commit to the same set of rules that we urge other commercial partners to uphold."[79] On the other side of the Atlantic, the European Services Forum concurs that it is "strongly in favour of having a state of the art ISDS mechanism in TTIP", claiming that for investors "ISDS is like an insurance policy".[80]

Box 5

Selection of recent nationalisations and remunicipalisations in the EU[81]

Similar measures taken in the future could potentially violate CETA and TTIP rules and trigger disputes with investors.

Sector	Process
Banking and insurance	Nationalisations: Taking over part or all assets of private banks or insurers by the state in the wake of the financial crisis
Railways	Nationalisation: Repurchase of shares in previously privatised national railway company by the state
Water	Remunicipalisations of water and sanitation services in numerous municipalities and local territories
Local transport	Remunicipalisations: Termination of several PPP contracts for the rehabilitation and management of the underground and tramways (London); return to direct provision of local transport (Nice, Cannes, Saumur, etc.)
Energy	Nationalisation: Repurchase of shares in national power transmission company by the state (Finland) Remuncipalisations: Setting up of new energy utilities, repurchase of energy generation companies and distribution networks by many municipalities (Germany)
Waste management	Contracts brought inhouse (insourcing) which had previously been outsourced
Catering, cleaning, property services	Insourcing of previously outsourced contracts, including cleaning services, facility management of public buildings, catering in schools and hospitals
Pension system	Mandatory retransfer of assets held in private pensions schemes to the statutory social security system in several Eastern European states (Hungary, Poland, Bulgaria, with Czech Republic considering similar steps)

79 U.S. Chamber of Commerce 2013: Statement of the U.S. Chamber of Commerce on the Transatlantic Trade and Investment Partnership to the Office of the U.S. Trade Representative, May 10, 2013

80 European Services Forum 2015: ESF Comments on INTA Draft Report Containing the EP's recommendations to the Commission on the negotiations for TTIP, 16 March 2015

81 Adapted from: Hall, David, 2012: Re-municipalising municipal services in Europe, PSIRU, Revised, November 2012, London

4. ROLLING OUT THE RED CARPET:

HOW THE EU BOWS TO CORPORATE DEMANDS

Over the course of the TTIP negotiations, the European Commission has provided many assurances to concerned citizens that public services would remain unaffected by TTIP and CETA. In March 2015, EU Trade commissioner Cecilia Malmström and US Trade Representative Michael Froman even issued a joint statement on public services, claiming that US and EU trade agreements would neither require governments to privatise services nor prevent them from expanding the services they supply to the public: "Defining the appropriate balance between public and private services is up to the discretion of each government," they said.[82] But an analysis of the treaty texts known so far, ie the consolidated CETA agreement published September 2014 as well as drafts of TTIP chapters and internal negotiation documents, proves exactly the opposite. By mirroring most of the corporate demands, the transatlantic agreements act as legal straitjackets, leaving governments with far less room to make democratic decisions over how they organise public services.

4.1 An ESF win: privatising everything but the kitchen sink?

Heeding the demands of the business lobby, CETA and TTIP apply to virtually all public services. A very limited exemption only exists for services "supplied in the exercise of governmental authority". But to qualify for this exemption a service has to be carried out "neither on a commercial basis nor in competition with one or more economic operators".[83] Yet nowadays, in virtually all traditional public sectors private companies exist alongside public suppliers – often resulting in fierce competition between the two. Against this backdrop "governmental authority" appears as a pretty narrow concept, at best excluding some core sovereign functions such as law enforcement, the judiciary, or the services of a central bank.[84]

The business lobby achieved another huge success as CETA is set to become the first EU trade agreement where the EU uses the 'negative list' approach for its services and investment commitments (see box 7 on page 28). By default, all measures not listed in the EU's schedule of commitments may be subject to the liberalisation provisions of the agreement, unless specific reservations are taken out.

Box 6

Public services in trade agreements: the debate on exemptions and carve-outs

Given the importance of the public sector for overall welfare, there has been a long debate on exempting public services from trade agreements which dates back to the Uruguay-Round GATS negotiations (see chapter 2.1). In order to counter demands for an outright carve-out of public services, proponents of trade liberalisation referred to a provision in GATS as being adequate to safeguard the public good. This is GATS Articles I.3 (b) and (c) exempting "services supplied in the exercise of governmental authority" from the agreement, provided these are not delivered in competition with other service suppliers.

The EU itself, however, actually acknowledged the limited scope of this provision and introduced a so-called public utilities exemption in its GATS schedule of commitments which it used in many other bilateral trade agreements as well.[85] But this public utilities exemption, reserving EU member states' right to subject certain services to public monopolies or to exclusive rights, contains so many loopholes that it cannot award adequate protection for public services either (see chapter 4.4).

In 2011, the European Commission tabled a highly contested proposal to abandon the present public utilities exemption and replace it with even weaker provisions, effectively opening up ever more public services to international competition.[86] Due to the inadequate approach taken so far and the Commission's attempts to limit it even further, the only suitable measure guaranteeing effective protection would be a full and unequivocal exclusion of all public services from any EU trade agreements and the ongoing trade negotiations.

82 European Commission 2015: Joint Statement on Public Services, Brussels, 20 March 2015: http://europa.eu/rapid/press-release_STATEMENT-15-4646_en.htm

83 CETA, Investment Chapter, Art. X.3. See: Consolidated CETA Text, published on 26 September 2014. TTIP, Title on Trade in Services, Investment and E-Commerce, Article 1-1.3(k). See: European Union 2015: Transatlantic Trade and Investment Partnership, Trade in Services, Investment and E-commerce, Brussels, 31 July 2015, p. 3

84 Krajewski, Markus 2013: Public Services in EU Trade and Investment Agreements, Public Services & the EU, EPSU, 14 November 2013

85 Krajewski, Markus 2013: Public Services in EU Trade and Investment Agreements, Public Services & the EU, EPSU, 14 November 2013

86 European Commission 2011: Reflections Paper on Services of General Interest in Bilateral FTAs (Applicable to Both Positive and Negative Lists), Directorate-General for Trade, 28 February 2011. For a critical analysis see: Arbeiterkammer 2011: Services of General Interest in Bilateral Free Trade Agreements – Reflection Paper of the European Commission, AK Position Paper, March 2011, Vienna.

The European Services Forum (ESF) was highly delighted when it learned that the EU's Trade Policy Committee (TPC) gave the green light for a negative list approach in CETA: "This is an important decision that the services industry must be proud of, after years of advocacy in that direction".[87] At the same time, ESF was well aware of the particular risks for public services due to the enormous difficulties EU member states encountered when they tried to apply this approach. In an e-mail circulated to ESF's policy committee on the outcomes of the eighth round of CETA negotiations Pascal Kerneis, ESF Managing Director, writes that "the Polish Presidency is signaling that Member States are still struggling to understand all possible case scenarios in the framework of the negative list approach, and have difficulties in identifying all restrictions at various EU local levels for services related to utilities (water, waste, etc.)."[88]

The same could also happen in TTIP due to the Commission's pressure pushing member states to accept the same, risky, negative list approach. So far, the EU's TTIP offers used so-called hybrid lists, combining a negative and positive list (see box 7). Yet, according to an internal document prepared by Germany's economics ministry reporting on an October 2014 TPC meeting, the Commission emphasised that the services negotiations needed "a new impetus" and recommended the submission "of a new offer based on the CAN-model", that is to say a negative list used in CETA.[89] So, it cannot be ruled out that the Commission switches to a full negative list at a later stage of the negotiations.

Box 7

Rules and schedules: important elements of the trade agreements

To understand the liberalisation commitments covering services a government has made under trade agreements such as TTIP and CETA it is necessary to look at several chapters and annexes. The main text of modern trade agreements usually contains the rules that apply to goods, services, and investment. Here, five rules are of particular importance:

Market access: These rules prohibit certain government measures restricting foreign suppliers' market access, eg numerical quotas of suppliers, economic needs tests, limits on foreign capital participation in local companies, or requirements to choose a particular legal form of association for a company.

National treatment: This rule is one of the two so-called non-discrimination principles. Governments must ensure that suppliers or investors from the other party to the agreement are treated no less favourably than local ones in like situations. This applies in principle also to subsidies and other kind of public support.

Most-favoured nation treatment: This rule is the second non-discrimination principle. It stipulates that suppliers from the other party must be afforded no less favourable treatment than suppliers of all other third countries in like situations.

Fair and equitable treatment: This is the most invoked investment protection standard and has been interpreted by some arbitration panels as a state obligation not to breach investors' "legitimate expectation" of a stable business environment. This means that governments shall avoid regulatory changes diminishing private profits.

Expropriation: This is another important investment protection standard prohibiting direct and indirect expropriations without compensation. While direct expropriation relates to seizures of private property such as nationalisations, indirect expropriation refers to public regulations limiting investors' ability to profit from their property.

87 European Services Forum, News Flash No. 2011/01

88 European Services Forum 2011, EU-Canada Comprehensive Economic Trade Agreement, Electronic Mail, No. PC 53, Brussels 8 September 2011

89 BMWI 2014: Betr.: Sitzung des Handelspolitischen Ausschusses (Stellvertreter) am 10.10.2014, Email, 13 October 2014

90 See the leak of the EU's first TTIP offer submitted to the Trade Policy Council in May 2014: http://www.bilaterals.org/IMG/pdf/reconstructed-draft_eu_ttip_offer_for_trade_in_services.pdf. And the latest EU services and investment offer published in July 2015: European Union 2015: Transatlantic Trade and Investment Partnership, Trade in Services, Investment and E-commerce, Brussels, 31 July 2015: http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153670.pdf

91 See eg the latest draft TTIP text on services, investment and e-commerce: European Union 2015: Transatlantic Trade and Investment Partnership, Trade in Services, Investment and E-commerce, Brussels, 31 July 2015,

Yet these rules do not necessarily apply to all services sectors of the economy. In **schedules of commitments** annexed to the trade agreements each party determines the extent to which the rules apply to specific service sectors or sub-sectors. The EU's schedules contain both commitments taken by the EU and specific ones taken by the member states. There are different approaches for setting up these schedules: a positive list, a negative list, and a hybrid list.

In a **positive list**, the approach pursued in GATS, a party lists all sectors which it committed to subject to the agreement's rules. Sectors not mentioned remain unaffected. In addition, governments set out specific limitations on the extent to which the rules apply. For instance, a country may commit to subject postal services to the market access rules while excluding the application of the national treatment obligation.

In a **negative list** a party states all sectors or regulations which are excluded from specific treaty rules. Any sector or regulation not listed is automatically covered by the rules. This approach is also called "list it or lose it" because by default any sectors or measures will be subject to liberalisation, unless specific reservations are taken out. Usually negative lists are far more complex and have broader coverage than positive lists because governments are unable to predict the emergence of new sectors or the measures they might want to use in the future. Negative lists are also extremely opaque because it is impossible to detect regulations or services which have been completely liberalised as these do not appear in the schedule. CETA is the first trade agreement where the EU applied a negative list, the approach usually pursued by Canada and the USA.

A **hybrid list** is even more complex as it combines both approaches by applying, for instance, a positive list to market access rules and a negative list to the national treatment obligation. This model is being used in the TiSA negotiations and in the EU's TTIP offers that have come to light thus far.[90]

The schedules of commitments comprise several **annexes**. Under CETA and the latest TTIP draft, the Annex I reservations are subject to the highly problematic standstill and ratchet mechanisms business groups are fighting for (see chapter 3.10). Amending a measure listed under Annex I is only permitted "to the extent that the amendment does not decrease the conformity of the measure" with core treaty obligations.[91] This provision actually functions like a one-way street allowing only amendments that are more 'liberal' and prohibiting those perceived as a restriction of trade. In this way, the **standstill** and **ratchet mechanisms** effectively lock-in current and future liberalisations.

THIS IS AN IMPORTANT DECISION THAT THE SERVICES INDUSTRY MUST BE PROUD OF, AFTER YEARS OF ADVOCACY IN THAT DIRECTION.

European Services Forum (ESF) on EU Trade Policy Council's decision to agree on negative list approach in CETA, 2011

Arguably, the most glaring deficit of the schedules of commitments contained in CETA and the latest TTIP draft relates to **investment protection**. While the schedules allow the application of some articles of the investment chapter to be restricted, the most important ones relating to **investor-state dispute settlement (ISDS)**, fair and equitable treatment and the prohibition of expropriation would continue to apply.[92] These articles are de facto untouchable. As a consequence, it is impossible for EU member states to exclude the risk of ISDS arbitrations targeting services regulations as long as investors base their claims on alleged breaches of the fair and equitable treatment standard or the prohibition of direct and indirect expropriation. This extremely dangerous loophole undermines all the reservations introduced in the schedule of commitments intended to limit the scope of the agreement. Investors have been granted the right to challenge any of them through ISDS.

Chapter II Investment, Article 2-7.1(c) : http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153669.pdf

92 See, Consolidated CETA Text, published on 26 September 2014, p. 1200 and p. 1497. And: draft TTIP services and investment offer: European Union 2015: Transatlantic Trade and Investment Partnership, Trade in Services, Investment and E-commerce, Brussels, 31 July 2015, p. 4, 55 and 117. Please note that the EU's draft services and investment *text* does not yet contain the section on investment protection due to the on-going reflection process on this issue. Nonetheless, the draft services and investment *offer* already refers to selected articles of the investment chapter to be included at a later stage of the negotiations.

4.2 Pleasing BusinessEurope: negotiating PPPs

A leaked document outlining the European Union's TTIP requests to the United States under the procurement chapter reveals that the Commission is also fulfilling industry demands to include public private partnerships (PPP) in the negotiations. The document reads: "The EU takes the view that public-private partnerships of a contractual nature should in principle fall within the scope of the public procurement chapter". The Commission closely follows BusinessEurope's request to clarify the application of PPPs by proposing an additional TTIP annex dedicated to "clarifications on the notion of public private partnership contracts".[93]

THE EU TAKES THE VIEW THAT PUBLIC-PRIVATE PARTNERSHIPS OF A CONTRACTUAL NATURE SHOULD IN PRINCIPLE FALL WITHIN THE SCOPE OF THE PUBLIC PROCUREMENT CHAPTER.

European Commission, leaked document on government procurement in TTIP, 2014

The Commission document explains that in the EU the notion of public-private partnerships also applies to the very sensitive issue of services concessions. European civil society strongly contested the inclusion of services concessions in the recently approved package of EU procurement directives.[94] The European Citizens' Initiative (ECI) "Right2Water" succeeded in achieving at least the exclusion of water from the concessions directive.[95] But now it appears that services concessions as a whole have become a topic of the TTIP negotiations. According to a report of Germany's Economics Ministry to the German Parliament on the ninth round of TTIP negotiations held April 2015 in New York, "the EU envisages specific commitments on services concessions in its market access lists".[96]

TTIP could therefore lead to a dangerous expansion of EU liberalisation commitments to the United States going far beyond those already made in the framework of the WTO's Government Procurement Agreement (GPA) – a plurilateral treaty signed by 15 parties, including the EU, the US, and Canada. While the EU already committed, amongst others, construction services under the GPA, it still upholds several important restrictions to US companies. For instance, US suppliers do not enjoy a right to participate in services procured by subcentral government entities and utilities or in tenders offering public works concessions.[97] Yet, all these barriers might now fall.

The US requests could even lead to changes in current EU law, as an internal Commission report to the European Council's Trade Policy Committee (TPC) on the fourth TTIP round held March 2014 reveals. The report labeled as "sensitive" summarizes the "key asks" of the US in public procurement, which include, "publication of all EU contract notices in English", and the "application of thresholds lower than in the EU Directives".[98] In the fifth TTIP round in May 2014 the US reiterated its request. According to the internal Commission report summarizing the negotiations, the "US firmly pointed to its request for lower thresholds" for central government purchases, "without recognising the EU point that this would require a change of the EU directives".[99] Giving in to this US demand could further restrict contracting authorities' leeway to avoid competitive transatlantic

93 Michael Reimon, EU-US FTA / TTIP Public Procurement Chapter – Coverage of public private partnerships ("PPP"), https://www.reimon.net/2015/02/16/eu-us-fta-ttip-public-procurement-chapter-coverage-of-public-private-partnerships-ppp/

94 European Commission 2014: Revision of public procurement directives – Frequently Asked Questions, Memo, Brussels, 15 January 2014: http://europa.eu/rapid/press-release_MEMO-14-20_en.htm?locale=en, European Commission 2014, Directive of the European Parliament and the of the Councl on the award of concession contracts, Memo, Brussels, 15 January 2014: http://europa.eu/rapid/press-release_MEMO-14-19_en.htm

95 Water and sanitation are a human right, http://www.right2water.eu/

96 BMWI 2014: Bericht des Bundesministeriums für Wirtschaft und Energie über die neunte TTIP Verhandlungsrunde, Deutscher Bundestag, Ausschuss für Wirtschaft und Energie, Ausschussdrucksache: 18(9)447, 4 June 2015.

97 Woolcock, Steve/Grier, Jean Heilman 2015: Public Procurement in the Transatlantic Trade and Investment Partnership Negotiations, CEPS Special Report No. 100, February 2015

98 European Commission 2014: Note for the Attention of the Trade Policy Committee, Subject: TTIP: Written report of 4th round, Brussels, 20 March 2014, p. 17-18

tenders and to keep services within the public sector. Limiting the in-house option would accelerate the outsourcing of public sector jobs to private companies and the deterioration of working conditions.

4.3 Standstill: no backtracking from postal services liberalisation

The EU Commission also follows industry demands concerning the dangerous standstill and ratchet mechanisms locking in present and future liberalisations and privatisations (see box 7 on page 28). The EU, for instance, included a very narrow market access reservation for postal services in its Annex I under CETA: "In the EU, the organisation of the siting of letter boxes on the public highway, the issuing of postage stamps, and the provision of the registered mail service used in the course of judicial or administrative procedures may be restricted in accordance with national legislation."[100] Due to the standstill mechanism, any legislation extending the activities of public postal operators beyond the activities mentioned here (ie siting of letter boxes, issuing of postage stamps, and the handling of judicial or administrative mail) may constitute a violation of CETA rules.

US FIRMLY POINTED TO ITS REQUEST FOR LOWER THRESHOLDS FOR ANNEX I ENTITIES WITHOUT RECOGNISING THE EU POINT THAT THIS WOULD REQUIRE A CHANGE OF THE EU DIRECTIVES.

DG Trade report to the EU's Trade Policy Committee on fifth TTIP round, June 2014

The EU's July 2015 draft TTIP schedule is even worse as it does not contain the extremely modest reservation used in CETA. In addition, the TTIP draft has a section on postal and courier services closely mirroring the wishes of the big courier companies keen to curb competition by public postal operators. Under this section, the treaty's parties commit to prevent "anti-competitive practices" such as "cross-subsidization" or "unjustified preferential treatment" of service providers, especially where those services are in competition with express delivery services.[101]

This chapter also severely restricts the use of universal service obligations (USOs) imposed on postal companies in order to guarantee universal service delivery at affordable rates across the whole country. The extremely strict wording used says that USOs "will not be regarded as anti-competitive *per se*, provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary". In addition, USOs have to be "proportional" and "the universal service obligation shall not include express delivery services".[102] Based on this wording USOs could be subjected to a very demanding review assessing their necessity against less "burdensome" alternatives in the event of a dispute.

Given that a majority of EU member states continues to retain controlling stakes in their national post operators, it appears pretty risky to commit to such drastic limitations of policy space.[103] It cannot be ruled out that a country changes its preferences, as might be the case after a change of government, and again wishes to extend the state's activities in the postal sector, for instance by allowing the national operator to expand its parcel services. But such policies would run counter to the TTIP commitments.

Fearing for their profitable parcel business, large express delivery companies could push the US government to initiate proceedings against the EU under TTIP's state-state dispute settlement mechanism. What is worse, UPS and FedEx could also sue the EU or a member state individually before private investment tribunals because both ISDS and the investment protection standards continue to apply to any of the reservations introduced in the schedule of commitments.

99 European Commission 2014: Note for the Attention of the Trade Policy Committee, Subject: TTIP: Written report of 5th round, Brussels, 3 June 2014, p. 20

100 Consolidated CETA Text, published on 26 September 2014, p. 1209

101 See the draft EU services and investment text: European Union 2015: Transatlantic Trade and Investment Partnership, Trade in Services, Investment and E-commerce, Brussels, 31 July 2015, Section IV Postal and Courier Services, p. 29: http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153669.pdf

102 Ibid.

103 WIK-Consult 2013: Main Developments in the Postal Sector (2010-2013), Final Report, Study for the European Commission, Bad Honnef, August 2013

4.4 Water utilities unprotected

The EU's schedules of commitments under CETA and the latest TTIP offer both contain the so-called 'public utilities clause' intended to provide some protection to public services. In the July 2015 TTIP offer this reads: "EU: Activities considered as public utilities at a national or local level may be subject to public monopolies or to exclusive rights granted to private operators".[104] But this reservation contains numerous loopholes. First, it refers only to some of TTIP's market access commitments, not to the equally important obligations to ensure non-discrimination and investment protection (see box 7 on page 28). Second, the bulk of public services are provided neither as a "public monopoly" nor as the "exclusive right" of private suppliers. In fact, many services delegated to private operators are often delivered in competition, for example home care or waste disposal, and are therefore not provided as an "exclusive" right.

Regarding the water sector, the EU's services schedules contain a particular reservation. In the CETA and the draft TTIP schedule the EU reserves the right to adopt or maintain any measure "with respect to the provision of services relating to the collection, purification and distribution of water".[105] But as this reservation is limited to drinking water it does not cover waste water treatment. By separating drinking water from sewerage, this clause effectively undermines interconnected multi-utilities providing both water and sewerage services. Multi-utilities are very widespread in the EU's water sector, but in CETA and the TTIP draft their sewerage services do not enjoy the same protection as their drinking water services.

The reservation applying to drinking water contains another important loophole: it does not extend to the generalised obligation to guarantee investment protection (see box 7 on page 28). Thus, a company domiciled in Canada or the US could claim breaches of the 'fair and equitable treatment' standard or the prohibition of 'indirect expropriation' when local councils take measures potentially limiting its profits. This option can also be exercised by European multinationals established in the North American markets. For example, French companies Suez and Veolia, active in the municipal waste and water sector, have establishments in Canada and the US.[106] Veolia is a member of the Corporate Advisory and Support Group of BusinessEurope, the umbrella organisation of European industry fiercely advocating for TTIP and against the exclusion of public services.[107]

Veolia could actually sue its own government via a foreign subsidiary before an ICSID tribunal, if it considers one of the many remunicipalisations happening in France as a violation of its "legitimate expectations" protected in the trade agreements' investment chapters. Equally, Suez Environnement, which holds a significant stake in Italy's major private water company Acea, could try to fight off Italian regulations by threatening recourse to ISDS.[108] Acea has already been embroiled in many legal disputes over anti-competitive behaviour, illegal water tariffs, and evasion of tax payments and social security contributions.[109]

104 See the EU's draft TTIP services and investment offer: European Union 2015: Transatlantic Trade and Investment Partnership, Trade in Services, Investment and E-commerce, Brussels, 31 July 2015, p. 119: http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153670.pdf

105 Consolidated CETA Text, published on 26 September 2014, pp. 1502-1503. And: EU's draft TTIP services and investment offer: European Union 2015: Transatlantic Trade and Investment Partnership, Trade in Services, Investment and E-commerce, Brussels, 31 July 2015, p. 87

106 See Veolia webpage, About us, Locations in North America: http://www.veoliawaterstna.com/about/locations-north-america/; See Suez Environnement webpage: Group/ An international presence: http://www.suez-environnement.com/group/international-presence/

107 See BusinessEurope website, About us, ASGroup – our partner companies: http://www.businesseurope.be/content/default.asp?PageID=604

108 Regan, James, 2014: Suez Environnement buys GDF stake in Italy's Acea, reuters.com, 17 February 2014, http://www.reuters.com/article/2014/02/19/suez-acea-idUSWEB00IP720140219

109 Hall, David/Lobina Emanuele 2012: Water Companies and Trends in Europe 2012, EPSU, Public Utilities, August 2012. Hall, David/Lobina Emanuele 2010: Water Companies in Europe 2010, Public Services International Research Unit - PSIRU, September 2010

4.5 Energy services: blocking policy space

The freedom of public utilities in the energy sector to produce and distribute energy according to public preferences by supporting renewables or remunicipalising services might also be affected by TTIP and CETA. An analysis of the latest draft TTIP offer shows that the freedom to shape local energy systems on the municipal level could be restricted. In order to defend their policy space, the EU or the member states would need to make specific reservations protecting energy production and distribution in the schedules' Annex II, providing some limited policy space for current and future state measures. However, these kinds of reservations are largely missing. Among the member states, only Belgium, Portugal, and Slovakia, for instance, explicitly reserve their rights to adopt measures with respect to the "production of electricity".[110]

Equally scarce are reservations concerning the local energy distribution networks, many of which are currently being remunicipalised, particularly in Germany. Only very few of the 28 EU member states (which include Belgium, Bulgaria, Hungary and Slovakia) reserved their right to adopt measures with respect to "energy distribution" or "services incidental to energy distribution" in Annex II of the latest EU TTIP schedule.[111] In all other member states lacking such clauses, measures affecting investor interests, such as promotion of renewables or remunicipalising the electricity grids, could be viewed as potential treaty violations.

Moreover, all member states, including those having made some reservations, face the risk of investment disputes given the loophole in the EU's schedule of commitments allowing ISDS claims against any of the measures addressed under the reservations (see box 7 on page 28). These instruments could equally be used by US energy companies such as General Electric or ExxonMobil. Both US conglomerates are active on the North American and the European energy markets. European companies with subsidiaries in North America could also benefit. French companies EDF, GDF Suez, and Veolia, for instance, are established on both the European and the US energy services markets.[112] Under TTIP they might be able to launch claims not only directed against the US but also against EU governments if they structure their investment accordingly through a foreign subsidiary. General Electric, ExxonMobil, EDF, and Veolia are all members of the Corporate Advisory and Support Group of BusinessEurope, the powerful industry alliance actively promoting TTIP.[113]

4.6 On the rise: privately funded services

In its schedule of commitments contained in CETA and the latest TTIP draft, the EU has included specific reservations for education and health services limiting the treaties' liberalisations to "privately funded" services. The reservation stipulates that the EU "reserves the right to adopt or maintain any measure" with regard to education, health and social services "which receive public funding

110 See the EU's draft TTIP services and investment offer: European Union 2015: Transatlantic Trade and Investment Partnership, Trade in Services, Investment and E-commerce, Brussels, 31 July 2015, p. 105-111: http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153670.pdf. The EU also inserted a reservation regarding production of energy. However, in brackets it says: "To be deleted if US undertakes mutually acceptable commitments on energy".

111 Ibid.

112 See webpages: EDF Trading, North American Power and Gas: http://www.edftrading.com/commodities/north-american-power, GDF Suez Energy North America: http://www.gdfsuezna.com/, Veolia North America: http://www.veolianorthamerica.com/en

113 See BusinessEurope webpage, About us, ASGroup – our partner companies: http://www.businesseurope.be/content/default.asp?PageID=604

TTIP, CETA, and the secretive collusion between business lobbyists and trade negotiators

or State support in any form, and are therefore not considered to be privately funded."[114] At first consideration, the clause might appear to save publicly funded services from specific treaty rules. Nevertheless, there are some problems with this reservation that potentially limits its scope. These problems are mainly related to the fact that many public institutions receive mixed funding from public and private sources or generate some revenue from commercial activities.

1. The reservation does not determine the actual proportion of public financing which might be required to qualify as a public service outside the scope of the trade agreement. Thus, services receiving only small amounts of state support might still be regarded as privately funded.

2. The clause suggests that the support relates to specific services, not the institutions providing these services. As a consequence, fee-based services offered by public institutions (eg language courses at adult education centres, master's programmes at public universities, or contributions to statutory health insurance schemes) might be considered as privately funded, regardless of the providers' legal status as public sector institutions.

3. The particular wording of the provision excluding only services "not considered to be privately funded" could be interpreted as treating private funding as the ultimate criterion for the classification of a service. A legal assessment of the reservation commissioned by British trade union UNITE suggests that "even a small proportion of private funding may suffice for the purposes of subjecting said services to the material scope of the Treaty".[115]

4. The fourth problem is probably the most severe, because it relates to democratic decision making. Once the privately funded parts of the public sector have been committed in a trade agreement, central governments and local authorities effectively lose the ability to change the particular mix of public and private elements in their services sectors. As a consequence, regaining equal and affordable access to basic services by increasing the proportion of publicly funded services would become impossible.

Thus the scope of publicly funded services protected by this reservation appears to be rather limited. In addition, it has to be kept in mind that privately funded services may still continue their expansion. According to another EU reservation, privately funded education or health providers may be required to obtain a "concession" or to pass an "economic needs test" subjecting an approval to criteria such as market saturation.[116] However, once admitted to the EU market, private education and health providers enjoy the far-reaching protections of the trade agreements, including the investment standards.

4.7 TNCs and the commodification of education

As the weak EU reservations do not exclude public services, the corporate sector is increasingly eyeing the opening up of the education market via TTIP. The internal Commission report on the fifth TTIP round of negotiations says: "The US confirmed its interest in a segment of education services, i.e. adult and other education services as per its previous paper." But the EU member states were not made aware of this important US paper, as the

114 Consolidated CETA Text, published on 26 September 2014, pp. 1508-15012. And: draft TTIP services and investment offer: European Union 2015: Transatlantic Trade and Investment Partnership, Trade in Services, Investment and E-commerce, Brussels, 31 July 2015, p. 85 and pp. 88-90: http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153670.pdf.

115 Raptapoulou, Kyriaki-Korina 2015: The legal implications for the NHS of Transatlantic Trade and Investment Partnership, commissioned by UNITE, pp. 19-20.

116 Consolidated CETA Text, published on 26 September 2014, pp. 1508-15012

report goes on to explain: "The EU regretted that the paper could not be shared with MS [member states] so far."[117] It is disturbing to learn that the Commission is negotiating about US requests relating to the education sector whose details remain unknown to member states, and consequently also to their parliaments.

A report prepared by Germany's economics ministry about a meeting of the Council's Trade Policy Committee held in July 2014 mentions a few of the education sectors the US included in its request such as management trainings, language courses, and high school admission tests. The report says it would be "urgently necessary that the Commission gets to know the potential flexibilities of the Member States".[118] It also describes the different views of member states towards the US requests. The Netherlands and Sweden, for instance, consider US education services such as "online college courses" as "beneficial". However, others like Austria, Poland, the UK, and Germany wanted to know what "other education services" actually mean, while Romania expressed a rather negative view on the US requests.

COMMISSION EXPLAINED THAT THE OFFER HAD ALREADY BEEN SENT TO THE US, PROVOKING HUGE ANNOYANCE AMONG SEVERAL MEMBER STATES CLAIMING THAT THE PARTICIPATION RIGHTS OF THE TRADE POLICY COMMITTEE HAD BEEN RESTRICTED.

Germany's Economics Ministry reporting on a meeting of the European Council's Trade Policy Committee (TPC), July 2014

According to the German ministry report, some member states (France, Austria, Poland, and Portugal) were pretty upset with the Commission's decision to submit the EU services offer to the US and criticized an inadequate consultation of the Trade Policy Committee (TPC): "COM explained that the offer had already been sent to the US, provoking huge annoyance among several MS claiming that the participation rights of the TPC had been restricted."[119]

While the concrete commitments are still under negotiation, there are already several US education companies on the European market that would potentially profit from TTIP rules covering market access, national treatment, and investment protection. Laureate Education, for instance, maintains a broad network of vocational and higher education institutions across Europe covering Cyprus, France, Germany, Italy, Portugal, and Spain.[120] The US-based Apollo Group, which acquired the British private education provider BPP Holdings, could equally profit from TTIP[121], as well as the Kaplan Group with vocational education establishments in the UK and Ireland.[122]

Allowing further US expansion into the European education system is particularly risky as US private education firms are known for aggressively fighting against regulations potentially limiting their profits. For example in 2014 a lobby group of 1,400 for-profit colleges filed a lawsuit against the US Government over planned regulations cracking down on institutions charging excessive tuition fees and exploiting federal student loans.[123] US for-profit colleges have come under government scrutiny for deceptive practices such as false advertisement and misrepresentation of their job placement success, thereby luring low-income

117 European Commission 2014: Note for the Attention of the Trade Policy Committee, Subject: TTIP: Written report of 5th round, Brussels, 3 June 2014, p. 17

118 BMWI 2014: Betr.: Sitzung des Handelspolitischen Ausschusses (Dienstleistungen und Investitionen) am 9.7. 2014 – Teil 1 -, Email, 17 July 2014

119 Ibid.

120 See Laureate International Universities webpage, Our Network: http://www.laureate.net/OurNetwork

121 See Apollo Education Group webpage: http://www.apollo.edu/

122 See Kaplan webpage, About Kaplan, Global Operations: http://www.kaplan.com/about-kaplan/global-operations/

123 Kamenetz, Anya 2014: For-profit colleges sue the federal government over student loan rules, npr.org, 7 November 2014: http://www.npr.org/sections/ed/2014/11/07/362069843/for-profit-colleges-sue-the-federal-government

students to take out student loans enabling them to attend the fee-based courses.[124] These companies could also use investment protections granted by TTIP and CETA to counter unfavourable regulations they might face in Europe.

European corporations could also benefit. The planned rules on the liberalisation of e-commerce and digital trade in order to "future proof" TTIP would support business models aimed at profiting from online education. For instance, German media conglomerate Bertelsmann, fiercely advocating for TTIP via its Bertelsmann Foundation, recently bought a stake in Udacity, a controversial US online education provider (see box 8).[125]

Bertelsmann Foundation, which holds 77.6 percent of the shares of the Bertelsmann group,[126] is actively promoting TTIP by conducting surveys, commissioning reports and organising numerous events, including a "TTIP Roadshow" demonstrating the alleged benefits of the agreement.[127] According to the Foundation's Executive Director, Annette Heuser, one of the key areas "that should be included in TTIP negotiations is the digital economy and e-commerce." The foundation's executive advocates for the inclusion of precisely those areas where the Bertelsmann group is invested. Unsurprisingly, Heuser asserts that "TTIP is of limited value if it fails to address the 'new economy'".[128]

Box 8

Udacity: how profit destroys quality

In 2014, Bertelsmann announced it had acquired a stake in Udacity, the US-based commercial online education provider specialising in vocational training courses. The US company, founded in Silicon Valley in 2011, provides an example of how profit can impair quality in the education sector. In 2013, San Jose State University in the United States put its collaboration with Udacity on hold because of "disappointing student performance". According to findings presented by the University, students participating in Udacity's fee-based courses, designed to replace classroom teaching, "fared significantly worse than their in-class mates".[129]

Udacity's business model represents a commercialisation of so-called MOOCs (Massive Open Online Courses), originally intended to provide free and unlimited access to online courses for everyone. Yet for Bertelsmann investing in online education is ordinary business. "The investment in Udacity is an important step for Bertelsmann", said Thomas Rabe, the group's chairman and CEO. "We will continue to invest in education businesses, with the aim of turning education into a third mainstay of revenues for Bertelsmann, alongside media and services."[130]

124 Elias, Paul, 2013: Major for-profit college chain systematically deceived students, huffingtonpost.com, 10 October 2013: http://www.huffingtonpost.com/2013/10/10/corinthian-colleges-for-profit-lawsuit_n_4081000.html

125 Shaffi, Sarah, 2014: Bertelsmann buys stake in Udacity, thebookseller.com, 24 September 2014: http://www.thebookseller.com/news/bertelsmann-buys-stake-udacity

126 Institut für Medien und Kommunikationspolitik (IfM), Mediendatenbank, Deutsche Medienkonzerne, Bertelsmann: http://www.mediadb.eu/datenbanken/deutsche-medienkonzerne/bertelsmann.html

127 Bertelsmann Foundation 2014: Bertelsmann Foundation Receives EU Grant for "TTIP Roadshow", Washington/DC, 13 January 2014: http://www.bfna.org/article/bertelsmann-foundation-receives-eu-grant-for-ttip-roadshow

128 Heuser, Annette 2015: Making TTIP a 21st-Century Agreement, Bertelsmann Foundation, Brief, April 21, 2015, Washington/DC

129 Rivard, Ry, 2013: Udacity Project on 'Pause', Inside Higher Ed, 18 July 2013: https://www.insidehighered.com/news/2013/07/18/citing-disappointing-student-outcomes-san-jose-state-pauses-work-udacity

130 Shaffi, Sarah, 2014: Bertelsmann buys stake in Udacity, thebookseller.com, 24 September 2014: http://www.thebookseller.com/news/bertelsmann-buys-stake-udacity

4.8 NHS: the sell-off of public health

TTIP and CETA will allow investors domiciled in North America to exploit liberalisations already undertaken in Europe's public health sectors to force through further market openings and to lock in past privatisations. The UK's National Health Service (NHS) is an important case in point having suffered from market-based reforms beginning in the 1980s, such as the outsourcing of support services (catering, cleaning, facilities management) and the creation of an internal market where local NHS agencies purchase clinical services not only from NHS hospitals but increasingly from private providers as well. Through the UK's Private Finance Initiative (PFI) – a particular form of public-private partnerships – consortia of private companies raised money on the financial markets to construct and operate hospitals, subsequently rented back to the NHS under often over-priced lease contracts.[131]

The latest and most radical move has been the Health and Social Care Act (HSCA) passed in 2012 stipulating that all NHS services have to be commissioned by competitive tenders, while any "qualified providers", including private companies, are entitled to bid. Since the act came into effect in April 2013 the amount of NHS care awarded through the market has skyrocketed. In the two-year period April 2013-April 2015, £9.6 billion worth of NHS contracts were awarded by competitive tenders, compared to £1.2 billion in the year before the HSCA came into effect. The big winner is the private sector: of the 252 NHS contracts awarded, about 66 percent (165) went to non-NHS providers.[132]

Many of the private companies profiting from NHS contracts maintain investment links with the US. The world's largest health care provider, Hospital Corporation of America (HCA), for instance, is expanding in the UK.[133] Care UK, running many treatment centres and residential care homes, is largely owned by private equity firm Bridgepoint, the majority of whose investors are from the US.[134] International private equity firm Apax Partners with offices in London and New York is a shareholder in the largest private hospital chain in the UK, General Healthcare Group (GHG).[135]

PRIVATE FINANCE HAS ALWAYS BEEN MORE EXPENSIVE THAN PUBLIC BORROWING.

UK's House of Commons Treasury Committee, report on the Private Finance Initiative, 2011

So far, the market-based reforms introduced in the NHS have proved to be either negative or ineffective for the quality of care. Outsourcing of clinical services produced poor value for money as private treatment centers cherry-picked those patients with better health while referring the more complicated and expensive cases back to the NHS. Financing hospital construction through the Private Finance Initiative (PFI) left many local NHS organisations burdened with debt whereas investors generated huge returns. In a 2011 report, the UK's House of Commons Treasury Committee analysed the reasons: "Private finance has always been more expensive than public borrowing.... The difference in finance costs means that PFI projects are significantly more expensive to fund over the life of a project."[136]

131 Coote, Anna/Penny, Joe 2014: The wrong medicine. A review of the impacts of NHS reforms in England, New Economics Foundation, November 2014

132 NHS Support Federation 2015: Contract Alert, Report, April 2015

133 See HCA Hospitals webpage: http://www.hcahospitals.co.uk/

134 Unite 2015: Tax Avoiders bying up the NHS and how TTIP could "lock in" tax avoidance, March 2015. And: Bridgepoint webpage, Investor profile: http://www.bridgepoint.eu/en/investors/investor-profile/

135 See Apax Partners webpage, Investments, Healthcare: http://www.apax.com/investments/healthcare/

136 House of Commons Treasury Committee 2011: Private Finance Initiative, Seventeeth Report of Session 2010-2012, Volume I, August 2011

Finally, the market-based reforms themselves produced huge costs: subsidising private providers to create competition where it did not exist; creation of new institutions governing the NHS market; negotiating and monitoring contracts; managing invoicing and billing; and resolving disputes when for-profit contractors failed. The NHS's additional costs for servicing the market have been estimated at more than £4.5 billion per year – "enough to pay for 10 specialist hospitals"[137] or for covering the annual costs for some 175,000 extra nurses.[138]

With TTIP and CETA, learning from past failures (see box 9) and reversing even a few of the NHS privatisations might become impossible. Backtracking from the now generalised tendering requirements could run counter to the commitments under the respective government procurement chapters of the trade agreements. Under CETA, for example, the UK added purchases of the Department of Health to its procurement commitments, including all NHS trusts, the public corporations running NHS hospitals, mental health facilities, community care, and ambulance services.[139] In addition, regional and local authorities as well as public hospitals must issue transatlantic tenders for purchases of supplies and services above 200,000 SDR (special drawing rights) and for all works above 5 million SDR (at the time of writing, 15 July 2015, 1 SDR corresponds to 1.27 Euros).[140] With TTIP these thresholds could even be lower given the pressure of powerful US industry groups such as the Alliance for Healthcare Competitiveness (AHC) demanding a drastic lowering of these thresholds to 1,000 SDR as well as the US request to lower the thresholds for purchases of central government entities (see chapter 3.3).

Furthermore, the construction of about three quarters of NHS hospitals has been funded through the Private Finance Initiative (PFI) and not by the government which funds the daily operations of these hospitals.[141] Given the EU's very limited reservation only excluding some publicly funded services from TTIP and CETA (see chapter 4.6), existing private

Box 9

Circle and the failure of hospital privatisation

American financial investors have also been involved in some of the costly failures of the market-based reforms in the UK's National Health Service (NHS). US investment company Invesco, for instance, holds a stake in Circle Holdings which in 2010 acquired a franchise contract to manage Hinchingbrooke Hospital in the East of England. Hinchingbrooke was the first NHS hospital to have its management contracted out to a private company. However, Circle dramatically failed and withdrew from the contract in early 2015 admitting huge losses and inability to cope with increasing demand for emergency services.[142] Circle's chairman, Michael J Kirkwood, serves as Advisory Director of BritishAmerican Business, a powerful transatlantic business group advocating for TTIP.[143]

137 Patom, Calum 2014: At what cost? Paying the price for the market in the English NHS, Centre for Health and the Public Interest, February 2014

138 Coote, Anna/Penny, Joe 2014: The wrong medicine. A review of the impacts of NHS reforms in England, New Economics Foundation, November 2014

139 Consolidated CETA Text, published on 26 September 2014, p. 708f. http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf

140 Ibid, p. 714

141 Coote, Anna/Penny, Joe 2014: The wrong medicine. A review of the impacts of NHS reforms in England, New Economics Foundation, November 2014

142 Lethbridge, Jane 2015: Circle and Hinchingbrooke Hospital, PSIRU, January 2015

143 BritishAmerican Business webpage, About us, Board of Directors: http://www.babinc.org/aboutus/boardofdirectors, BritishAmerican Business webpage, Policy, Policy Initiatives: http://www.babinc.org/policy/policyinitiatives

involvement means the full range of the trade agreements' liberalisation provisions would probably apply to these hospitals. The poorly structured reservations taken out by the UK do not protect NHS hospitals either. Quite the contrary: the respective UK reservation taken out in the latest TTIP draft only applies to privately funded ambulance services and residential health facilities while hospital services remain fully committed. The reservation explicitly says that the UK only reserves the right to adopt measures "with regard to the establishment of privately funded ambulance and residential health services other than hospital services".[144]

The worst deficit, however, relates to the loophole in the schedule of commitments potentially enabling ISDS claims based on the fair and equitable treatment standard and the prohibition of expropriation. Therefore, all private NHS providers with US investment links may challenge any future attempts to roll back past privations and strengthen public and non-profit healthcare providers in the NHS.

4.9 Audiovisual services: nixing an exemption

Much to the annoyance of the US film industry and the European Commission, the TTIP negotiating mandate that the European Council gave to the Commission in June 2013 excluded audiovisual services. Referring to the planned chapter on trade in services and establishment the mandate says: "Audiovisual services will not be covered by this chapter".[145] However, at a hearing in the US congress in July 2013, the United States Trade Representative, Michael Froman, stressed that the US would not back down: "We will advocate aggressively in these negotiations for all of our service providers, including those in the film and television industry.... We raised audiovisual services with the EU in our first negotiating round in July, and will continue to raise it in future rounds."[146]

WE WILL ADVOCATE AGGRESSIVELY IN THESE NEGOTIATIONS FOR ALL OF OUR SERVICE PROVIDERS, INCLUDING THOSE IN THE FILM AND TELEVISION INDUSTRY.

Michael Froman, United States Trade Representative, at a hearing in the US congress, July 2013

The European Commission, too, made unmistakably clear that it would not give up the fight. In a memo on the endorsement of the mandate it declared: "There is no carve-out on audiovisual services.... As the EU legislation in this area still has to be developed, it has been agreed that audiovisual services are presently not part of the mandate, but that the Commission has the possibility to come back to the Council with additional negotiating directives at a later stage."[147] Apparently, the Commission hopes at some point public attention could wane allowing an opportunity for them to reintroduce audiovisual services to the TTIP table.

Meanwhile, negotiators are debating the actual scope of the exemption as there is no consensus on what constitutes audiovisual services. Defining and classifying this sector in order to enable proper regulation is extremely difficult because due to technological progress the audiovisual market is constantly changing and new services keep emerging. Here, two trends are particularly important: 1) the convergence of telecommunication and audiovisual services; 2) the convergence of audiovisual content production and its transmission, for instance, Smart TV integrating television and internet features enabling customers to assemble their own programmes.

144 See draft TTIP services and investment offer: European Union 2015: Transatlantic Trade and Investment Partnership, Trade in Services, Investment and E-commerce, Brussels, 31 July 2015, p. 89: http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153670.pdf.

145 Council of the European Union 2013: Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America, Brussels, 17 June 2013, 11103/13

146 Questions for the Record for Committee on Ways and Means Full Committee Hearing on President's Trade Policy Agenda with Ambassador Michael Froman, 18 July 2013: http://big.assets.huffingtonpost.com/FromanWaysandMeansResponse.pdf

147 European Commission 2013: Member States endorse EU-US trade and investment negotiations, Memo, Brussels, 14 June 2013: http://europa.eu/rapid/press-release_MEMO-13-564_en.htm

In an internal report to the Council's Trade Policy Committee on the fourth TTIP negotiation round, the Commission admits that the scope of the audiovisual exemption is largely unclear: "EU explained that it could not provide an abstract definition of what is covered by the concept of 'audiovisual service' and that a case-by-case assessment is required."[148] But such a case-by-case approach could enable the Commission to grant concessions to the US in specific audiovisual sectors despite the exemption. This approach may also please the US negotiators whose main interest is "to delineate the borders of the EU exclusions", according to the report.[149]

Internal Commission documents summarizing meetings with industry prove that DG Trade has indeed tried to limit the audiovisual exemption as far as possible. The tendency is to only exempt a limited set of services engaged in audiovisual content production, leaving any aspects relating to the transmission, distribution, or broadcast of these contents to be liberalised.[150] In a Commission report of a meeting with the European Services Forum (ESF) in May 2012, a DG Trade official refers to ESF's questions on broadcasting: "Interested by the inclusion of broadcasting. I made it clear that this would remain outside the scope of AV [audiovisual services]". The official added that broadcasting "should stay outside of any future debate on AV".[151]

However, the Commission approach poses a severe risk to cultural diversity in Europe. Liberalising transmission of audiovisual content to the public might lead to questioning the quotas in EU member states reserving specific percentages of TV and cinema screenings to movies produced in Europe. Opening transmission and broadcasting would undoubtedly be an important concession to the US. According to the Commission report on the fourth TTIP round, the US Government insists on the "coverage of broadcasting material and contracts for broadcasting time" under the public procurement chapter of the agreement.[152]

4.10 Cashing in: the financialisation of social services

Financial investors engaged in public services may benefit from particular TTIP and CETA provisions fostering market access for new financial services and protecting investments. The CETA text and the TTIP draft have many provisions also affecting financial investments in public services. The latest TTIP draft, for instance, explicitly mentions "capital participation in a juridical person" as an activity covered by the treaty, alongside many financial services including "lending of all types" and "financial leasing".[153] Furthermore, the TTIP draft requires a party to approve any new financial service: "Each Party shall permit a financial service supplier of the other Party to provide any new financial service."[154]

EACH PARTY SHALL PERMIT A FINANCIAL SERVICE SUPPLIER OF THE OTHER PARTY TO PROVIDE ANY NEW FINANCIAL SERVICE.

TTIP, draft services and investment text, 31 July 2015

148 European Commission 2014: Note for the Attention of the Trade Policy Committee, Subject: TTIP: Written report of 4th round, Brussels, 20 March 2014, p. 17-18

149 Ibid.

150 DG Trade 2013: Report Meeting FTA working group BusinessEurope 17 May 2013, 14h00 – 16h00

151 DG Trade 2012: Subject: Short discussion with ESF, 31 May 2012

152 European Commission 2014: Note for the Attention of the Trade Policy Committee, Subject: TTIP: Written report of 4th round, Brussels, 20 March 2014, p. 17

153 See the draft EU services and investment text: European Union 2015: Transatlantic Trade and Investment Partnership, Trade in Services, Investment and E-commerce, Brussels, 31 July 2015, p. 3 footnote 7, and p. 38: http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153669.pdf. Examples for "capital participation in a juridical person" would be: US financial investors acquiring equity stakes in public "juridical persons" (i.e. legal entities) such as utilities, hospitals, national railway enterprises or postal operators, thereby partly or wholly privatising the said public services.

154 Ibid, p. 39

These provisions could be used by many US financial investors to defend their interests against burdensome regulations threatening their profits, for instance, in the health and social services sector. With their home market saturated, US real estate investment trusts (REITs) are increasingly turning to Europe, particularly France, Germany, and the UK.[155] In the UK, US investors such as the Griffin-American Healthcare REIT are buying care homes for the elderly.[156] Medical Properties Trust, another US-based healthcare REIT, recently announced the take over of the properties of MEDIAN Kliniken, a private company in Germany operating a network of clinics specialised in rehabilitation and care.[157]

Similar to Blackstone's Southern Cross engagement (see box 4 page 19), these REITs are also using sale and leaseback deals to maximize their profits in the shortest possible time. This raised fears of a repeat of failures like the Southern Cross collapse. However, regulating REITs more effectively could violate the trade agreements' investment protection standards requiring the maintenance of a stable business environment in order not to breach investors' "legitimate expectations".

Should TTIP and CETA come into force, adopting new regulations protecting the long-term care sector against asset-stripping strategies of financial investors (see box 4 on page 19) could prove particularly difficult when governments continue their lax scheduling approach. Under CETA and the recent TTIP draft 11 EU Member States (Belgium, Cyprus, Denmark, France, Germany, Greece, Ireland, Italy, Portugal, Spain, the UK) introduced a reservation in their schedule of commitments *de facto* liberalising long-term care such as residential homes for the elderly. According to this clause, these countries reserve their right to adopt or maintain any measure regarding "privately funded social services other than services relating to Convalescent and Rest Houses and Old People's Homes."[158]

Box 10

Working conditions in long-term care: pitting pensioners against pensioners

Exposing old people's homes to unfettered competition, as it is planned with CETA and probably also TTIP, could impair efforts to improve working conditions by increasing the mandatory minimum number of staff per resident. European trade unions such as Ver.di in Germany are currently campaigning for regulations defining rules for minimum rates of staff in the care sector.

The Canadian pension fund CPPIB, for instance, holds a sizeable share of French Orpea Group, a large provider of residential care throughout Europe operating facilities in France, Belgium, Germany, the Czech Republic, Italy, and Austria.[159] The Canadians could launch claims under CETA should governments try to enact legislation improving the working conditions or increasing the number of staff in Orpea's care homes. The pension fund could justify international arbitration with the imminent risk of decreasing dividends expected by its clients. In this way, the financial interests of Canadian pensioners could clash with the interests of European pensioners expecting decent treatment by a well paid and caring staff.

155 CBRE 2014: Presentation, Jefferies Healthcare REIT Conference, 8 April 2014

156 Plimmer, Gill 2014: UK care homes lure reits across Atlantic, ft.com, June 16, 2014: http://www.ft.com/cms/s/0/dbf4b976-f538-11e3-91a8-00144feabdc0.html#axzz3dJmpzrVx

157 Kingston, Charles, 2014: US REIT in $900 million takeover of leading German healthcare provider, German Real Estate Finance, REFIRE, 10 November 2014: http://www.refire-online.com/features/investment/us-reit-in-usd900m-takeover-of-leading-german-healthcare-provider/

158 See the draft TTIP services and investment offer: European Union 2015: Transatlantic Trade and Investment Partnership, Trade in Services, Investment and E-commerce, Brussels, 31 July 2015, p. 90: http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153670.pdf. And: Consolidated CETA Text, published on 26 September 2014, Annex II, pp. 1524-1624.

159 See Orpea Group's webpage: http://www.orpea-corp.com/index.php/en/

However, completely liberalising old people's homes is at odds with the recently published joint report of the European Commission and the Social Protection Committee recommending the integration of long-term care in national social protection systems.[160]

4.11 ISDS: defending a corporate privilege

The European Commission is set to fulfill probably one of the most important demands of the corporate sector by including far-reaching investment protections in its transatlantic trade agreements. With the entry into force of the Lisbon Treaty in December 2009, foreign direct investment became an EU competency allowing the Commission to integrate investment protection including Investor-State Dispute Settlement (ISDS) mechanisms in its FTAs. Already a common feature of bilateral investment treaties (BITs), ISDS is increasingly being integrated into trade agreements as well. However, to date, neither the EU nor any of the Western European Member States has a BIT with Canada or the United States. Only several Eastern European countries signed BITs with Canada (7 EU Member States) and the United States (9 EU Member States).[161]

Despite growing public opposition to the private investment arbitration system, CETA already contains a comprehensive investment protection chapter including ISDS. To safeguard a similar chapter foreseen in TTIP, the Commission recently tabled some limited reform proposals unsuitable to address the fundamental shortcomings of these procedures, above all the unjustifiable privilege granted exclusively to foreign investors to bypass national courts by taking recourse to international investment tribunals.[162]

Should TTIP come into force, thousands of US corporations' European subsidiaries could provide the basis for ISDS claims against EU member states. According to research conducted by Public Citizen, a consumer rights advocacy group, US corporations own some 51,400 subsidiaries in the EU. Yet, the nine BITs between the US and Eastern European member states cover only eight percent of the US-owned firms operating in the EU. Thus, 92 percent of US subsidiaries in the EU would gain new rights to attack public policies through ISDS. Moreover, as 81 percent of US corporations operating in the EU also have subsidiaries in Canada, they could already use the ISDS mechanism foreseen in CETA, if they structure their investments accordingly.[163]

ISDS has evolved into a lucrative business dominated by a handful of international law firms and a small club of elite lawyers presiding over a large part of the cases. An investment tribunal typically consists of three arbitrators, two of whom are appointed by each disputing party, and the third by mutual consent. But unlike an ordinary court composed of independent judges, the majority of arbitrators are private lawyers with a commercial interest in attracting as many cases as possible.[164]

160 European Union 2014: Adequate social protection for long-term care needs in an aging society – Report jointly prepared by the Social Protection Committee and the European Commission, Luxembourg 2014

161 EU Member States having BITs with Canada: Croatia, Czech Republic, Hungary, Latvia, Poland, Romania and Slovakia, see: http://investmentpolicyhub.unctad.org/IIA/CountryBits/35. EU Member States having BITs with the United States: Bulgaria, Croatia, Czech Republic, Estonia, Latvia, Lithuania, Poland, Romania and Slovakia, see: http://investmentpolicyhub.unctad.org/IIA/CountryBits/223

162 Seattle to Brussels Network 2015: ISDS: Spreading the disease instead of looking for a cure – Why the Commission's alleged 'reforms' fail to address the key problems, Analysis by the Seattle to Brussels Network (S2B), 6 May 2015: http://www.s2bnetwork.org/isds-statement/

163 Public Citizen 2014: Tens of Thousands of U.S. Firms Would Obtain New Powers to Launch Investor-State Attacks Against European Policies via CETA and TTIP, 9 December 2014: http://www.citizen.org/documents/EU-ISDS-liability.pdf

164 Eberhardt, Pia/Olivet, Cecilia 2012: Profiting from injustice – How law firms, arbitrators and financiers are fuelling an investment arbitration boom, Corporate Europe Observatory/Transnational Institute, Brussels/Amsterdam, November 2012

4.12 Private tribunals adjudicating on public services

The vague investment rules contained in the treaties allow arbitrators expansive interpretations of individual clauses. The main clauses regularly invoked by claimants are the standard of "fair and equitable treatment" and the duty to compensate "indirect expropriations", both of which feature in CETA and are also very likely to appear in TTIP. Investor attacks on states thus far have relied most often upon the fair and equitable treatment (FET) clause.[165] Regulatory changes, such as new laws or taxes diminishing private profits, may be seen as breaches of an investor's "legitimate expectations" justifying multi-billion euro payouts in compensation. Moreover, some arbitration tribunals have interpreted the FET standard as a state obligation to maintain a "stable and predictable business environment".[166]

The second important standard, "protection against indirect expropriation", refers to state measures depriving investors of the economic value of their assets by limiting the ability to profit from their property. Unlike direct expropriations, this standard does not involve an outright seizure of property as, for example, in the case of nationalizations of land or a factory. Thus, "indirect expropriation" lends itself to an extremely broad range of interpretation. For example, tribunals have already denounced many public interest regulations as measures "tantamount" or "equivalent" to expropriation – and ordered states to pay multimillions of euros in compensation (see box 11).[167]

Due to the risk of paying hefty compensations even the threat of investment arbitration may deter governments from taking necessary measures, a phenomenon called "regulatory chill".[168] In some cases governments succeeded in avoiding a costly payout by entering into a settlement agreement with the investors. However, the terms of a settlement may also oblige them to modify or abandon planned regulations.

Policies regulating public services have been a frequent target of ISDS claims launched by foreign investors using either existing BITs or the ISDS mechanism of the Energy Charter Treaty, a plurilateral agreement on energy cooperation signed by the EU and all its member states. The experiences so far highlight the imminent threats for public services emanating from investment protection and ISDS (see box 11).

Box 11

ISDS claims targeting public services

United Utilities vs Estonia: Investors against rate caps

In October 2014, water company AS Tallinna Vesi together with its shareholder United Utilities B.V., a holding company registered in the Netherlands belonging to the UK's United Utilities group, brought a claim against Estonia before ICSID (International Centre for Settlement of Investment Disputes), an entity of the World Bank Group. Tallinna Vesi is the water utility of the Estonian capital Tallin, which was privatised in 2001 when United Utilities B.V. became its largest shareholder. The claimants allege that Estonia violated the 'fair and equitable treatment' standard by refusing Tallinna Vesi's application to increase the water rates. They are seeking "compensation for potential damages over 90 million euros for total losses over the lifetime of the contract to 2020".[169] The Dutch holding company enabled the claimants to use the ISDS mechanism included in the BIT between the Netherlands and Estonia.

165 UNCTAD 2012: Fair and Equitable Treatment: A sequel, UNCTAD Series on Issues in International Investment Agreements II, New York and Geneva, 2012

166 Ibid, p. 66

167 UNCTAD 2012: Expropiation: A sequel, UNCTAD Series on Issues in International Investment Agreements II, New York and Geneva, 2012

168 Tienhaara, Kyla 2010: Regulatory Chill and the Threat of Arbitration: A View from Political Science

169 Tallinna Vesi 2014: AS Tallinna Vesi has commenced international arbitration proceedings against the Republic of Estonia: http://www.tallinnavesi.ee/en/Investor/695-AS-Tallinna-Vesi-alustas-rahvusvahelist-arbitraa%C5%BEimenetlust-Eesti-Vabariigi-vastu

Veolia vs Egypt: Investors against minimum wage

In 2012, French company Veolia Propreté filed an ICSID claim against Egypt over an alleged violation of a concession contract to provide waste management services in the port city of Alexandria. The city refused to agree to contract changes Veolia had requested to compensate for increasing costs. One of the causes driving Veolia's costs was the government's decision to introduce new labour legislation increasing the minimum wage. The case has been filed under the BIT between France and Egypt.[170]

Achmea vs Slovakia: Investors against public health insurance

In December 2012, the Permanent Court of Arbitration (PCA) in The Hague ruled that Slovakia had to pay €22 million plus interest and legal fees to Dutch health insurer Achmea for a violation of the BIT between the Netherlands and the Slovak Republic. Achmea filed its claim in reaction to a law passed by the Slovak government in 2006 banning private health insurers from retaining profits or distributing them to their shareholders.[171] While Slovakia continues to fight the PCA ruling, Achmea achieved another verdict by a Luxembourg court in 2013 ordering the seizure of €29.5 million of Slovakian government assets invested in Luxembourg.[172]

Eureko vs Poland: Investors fighting for privatisation

In 1999, Poland allowed Dutch health insurer Eureko to acquire 30 percent of the shares of PZU, the Polish insurance company operating large parts of the mandatory health insurance and pension system, which until then had been 100 percent state-owned. In 2001, the government committed itself to floating further PZU shares which would have allowed Eureko to acquire a controlling stake. But as the planned floatation was later cancelled, Eureko initiated arbitration proceedings claiming breaches of the BIT between Poland and the Netherlands and demanding hefty compensations of about €2 billion. After winning two awards, Eureko reached a settlement with Poland in 2009 requiring PZU to pay a special dividend of €1.8 billion to Eureko.[173]

170 Rey, Fanny, 2012: Veolia assigne l'Égypte en justice, Jeune Afrique, 11 July 2012: http://www.jeuneafrique.com/27151/economie/veolia-assigne-l-gypte-en-justice/

171 Balogová, Beata 2012: Slovakia owes Achmea millions, court rules, The Slovak Spectator, 17 December 2012: http://spectator.sme.sk/c/20045559/slovakia-owes-achmea-millions-court-rules.html

172 Liptáková, Jana, 2013: Slovak assets seized in disupte between state and Achmea, 24 May 2013: http://spectator.sme.sk/c/20047077/slovak-assets-seized-in-dispute-between-state-and-achmea.html

173 Hall, David, 2010: Challenges to Slovakia and Poland health policy decisions: use of investment treaties to claim compensation for reversal of privatisation/liberalisation policies, PSIRU, January 2010. Borowski, Chris: Factbox – Poland, Eureko meet to settle PZU dispute, Reuters, 17 January 2008: http://www.reuters.com/article/2008/01/17/pzu-idUSL174991720080117. Henderson, Julie, 2009: Eureko secures exit from Polish PZU row, Investment & Pensions Europe (I&PE), 2 October 2009: http://www.ipe.com/eureko-secures-exit-from-polish-pzu-row/32881.fullarticle

5. CONCLUSION: DEMOCRACY AND SOCIAL JUSTICE, NOT TRADE DEALS THREATENING PUBLIC SERVICES

TTIP and CETA pose an enormous threat to public services in the EU, as evidenced by the far reaching requests made by corporate lobby groups and the fact that large numbers of their demands have found their way into trade negotiations. If they are successful ever more public sectors will be exposed to private competition, transnational tenders of state purchases will be mandatory, past privatisations will be locked in, and future deregulations made permanent commitments.

The losers will be all those who depend on quality public services such as healthcare, education, water, energy as well as social, cultural and communication services. While private profits will grow, workers face the risk of deteriorating labour standards and the public of impaired access to essential services. People already marginalised may end up unserved if ever more public services will be converted to for-profit enterprises.

The analysis also shows that the many official assurances public services will remain unaffected by the transatlantic trade agreements are simply wrong. The different reservations introduced into the agreements, both in the rules part and the schedules of commitments, are inadequate to effectively protect the public sector and democratic decision making over how to organise it. By committing any privately funded services to be covered by these trade treaties, governments effectively also include those welfare and public sectors currently run with a public-private mix.

By restricting our policy space, TTIP and CETA undermine many efforts aimed at fostering social cohesion, job creation, the redistribution of wealth, the protection of health, and the preservation of a sound natural environment.

The only measure to effectively protect public services from the great trade attack would be a full and unequivocal exclusion of all public services from any EU trade agreements and the ongoing trade negotiations. Decisions on the adequate organisation, funding and provision of public services can only be taken at the national and local levels. They require transparent and democratic deliberations involving all groups potentially affected. As trade negotiations do not guarantee any of these requirements they are completely inappropriate fora to deal with these essential elements of any social and democratic society.

A carve-out of public services is completely in line with the EU's Lisbon treaty, whose Protocol on Services of General Interest emphasizes the "essential role and the wide discretion of national, regional and local authorities" in organising and providing public services.[174] In this respect, it is encouraging to see that the European Parliament's TTIP resolution voted in July 2015 asks for the exclusion of public services from the agreement's scope of application.[175]

Today we can see that governments and local authorities who have learned their lessons from failed experiments are starting to reverse liberalisations and privatisations decided in the past. Re-municipalisations are taking place in the water, energy and transport sectors, insourcing happens in catering, cleaning, and waste services. Some governments are even trying to reverse fatal privatisations of pensions systems. Trade agreements should not get in the way of these democratic processes. A full and unequivocal exclusion of all public services would preserve our ability to change course if needed and reorganise our essential services according to the needs of society.

Nonetheless, a potential carve-out of public services alone would certainly not be sufficient to undo the manifold threats posed by CETA and TTIP. These agreements are ushering in many more provisions endangering democracy and the well-being of citizens. An ISDS mechanism, including a reformed one, granting foreign investors the exclusive privilege to bypass national courts remains unacceptable as it undermines core principles of the rule of law such as equal access to justice for all. Equally undemocratic would be the implementation of regulatory cooperation bodies enabling bureaucrats together with business stakeholders to devise regulations and laws, even before parliaments could have a say. As long as these trade agreements do not unambiguously protect the ability to regulate in the public interest, they have to be rejected. TTIP and CETA, as they are shaped now, do not satisfy the real needs of our societies still struggling with the ongoing financial crisis. Not unfettered liberalisation, but bold measures fostering democracy, social justice, and wellbeing for all should be on the agenda now.

174 See Lisbon Treaty, Protocol on Services of General Interest, Article 1: http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/protocols-annexed-to-the-treaties/679-protocol-on-services-of-general-interest.html

175 European Parliament 2015: European Parliament resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228(INI)).

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Association Internationale de Techniciens, Experts et Chercheurs (AITEC) is a French research and campaign group which fights, through various initiatives (campaigns, events, street mobilizations and actions, networking, trainings...), for economic, social and environmental justice. Among other issues, Aitec has been working since 2006 together with its international and French allies to radically transform the EU trade and investment agenda into a genuinely democratic, just and sustainable policy.

http://aitec.reseau-ipam.org/

Corporate Europe Observatory (CEO) is a research and campaign group working to expose and challenge the privileged access and influence enjoyed by corporations and their lobby groups in EU policy making. CEO works in close alliance with public interest groups and social movements in and outside Europe to develop alternatives to the dominance of corporate power.

www.corporateeurope.org

The **European Federation of Public Service Unions** (EPSU) is a federation of the European Trade Union Confederation (ETUC) and comprises 8 million public service workers from over 265 trade unions. EPSU organises workers in the energy, water and waste sectors, health and social services and local and national administration, in all European countries including in the EU's Eastern Neighborhood. EPSU is the recognised regional organisation of Public Services International (PSI).

www.epsu.org

Institute of Global Responsibility (IGO) is an independent non-governmental organisation (NGO) based in Warsaw, Poland. It was established in 2007 and since that time has been focusing on development policy issues, development education and cooperation with partners in the South.

www.igo.org.pl

The **Transnational Institute** (TNI) is an international research and advocacy institute committed to building a just, democratic and sustainable planet. For more than 40 years, TNI has served as a unique nexus between social movements, engaged scholars and policy makers.

www.tni.org

The **Austrian Federal Chamber of Labour** is by law representing the interests of about 3.4 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. In accordance with Austria's federal structure, there is a separate Chamber of Labour in each of the nine Federal Provinces. The Vienna Chamber of Labour also functions as the administrative body of the Federal Chamber of Labour, which is the umbrella organisation of the nine regional Chambers.

www.akwien.at, www.akeuropa.eu

War on Want is a membership organisation of people who are committed to social justice. Our vision is a world free from poverty and oppression, based on social justice, equality and human rights for all. Our mission is to fight against the root causes of poverty and human rights violation, as part of the worldwide movement for global justice.

www.waronwant.org