

CEEP OPINION ON EU TRADE AGREEMENTS

Executive summary

- CEEP wants to support a coherent implementation of the EU's trade strategy and sees free trade agreements as an opportunity to set worldwide well-designed standards to support sustainable development, including by safeguarding subsidiarity and the essential role played by services of general interest (SGIs) and the social economy. Therefore:
 - More legal certainty is needed over the safeguard of the provision of SGIs in international trade agreements. Hence, CEEP calls European institutions, and notably the European Commission, to engage into a constructive debate on the possibility to include standard clauses to fully preserve the discretionary power of national, regional and local authorities in how to provide, organise, finance and commission SGIs, and notably services of general economic interest (SGEIs) subject to trade agreement rules.
 - The EU should pursue effectively the Sustainable Development Goals 2030 in its trade policy. Binding and enforceable provisions to promote high environmental and labour standards need to be included in all future FTAs negotiated by the EU and any attempt of social and environmental dumping should be prevented. Furthermore, EU Trade agreements need to ensure a better coherence between development goals and trade interests.
 - CEEP calls the European Commission and Member states to continue their efforts towards a more evidenced-based, inclusive and transparent trade policy. Furthermore, in a democratic system, competent authorities should not find it difficult to enact any standards because of fearing to be challenged by corporate claims.
 - Trade agreements need to be fit for the digital age. Cross-border data flows, if addressed, shall be in compliance with data protection and security rules in force in the country of residence of the data subject. New services should not be automatically included in EU market access commitments without re-negotiation. In addition, the “digital dimension” of products and services shall be negotiated in the context of their respective original classifications.

INTRODUCTION AND AIM

The EU has been increasingly addressing “behind the border” issues in plurilateral and bilateral trade negotiations. In the context of blocked multilateral WTO-negotiations, the EU negotiated in the past years so-called trade agreements of new generation (starting in 2010 with South Korea). They consist in an ambitious “WTO-plus” agenda addressing non-tariff barriers in services and investment and touch upon regulatory requirements, public procurement, competition rules. Those trade agreements also include normative issues concerning human rights and sustainable development. The last generation of trade agreements, such as the Free Trade Agreement with Canada or Singapore, include next to liberalisation of services and investments, provisions on investment protection.

CEEP supports EU Free Trade agreements aiming at removing trade barriers and promoting a closer economic integration with trade partners in a reciprocal and balanced way. Free trade agreements are a necessary condition for sustainable growth and jobs. However, addressing market barriers in areas such as market access to services, public procurement and competition potentially conflicts with the freedom of choice of public authorities in how they provide, commission and organise SGEIs, today and in the future. Furthermore, the right to regulate of public authorities to guarantee high quality public services might be impacted. Hence, public services providers are concerned that trade agreements might lead to an erosion of the existence and quality of SGEIs, also by impacting the structure of public services undertakings.

Therefore, and further to strong criticism from civil society and the European Parliament notably in the context of the TTIP negotiations, CEEP welcomes the fact that the EU has refocused its trade strategy in relation to European values, in addition to its economic interests. The strategy “Trade for all - Towards a more responsible trade and investment policy” published in October 2015 takes up new elements and tries to address criticism on investment protection provisions, regulatory cooperation and the lack of transparency. The EU commits to promote sustainable, inclusive and transparent trade.

CEEP sees future free trade agreements as an opportunity to set worldwide well-designed and higher levels of standards e.g. for decent labour, core social rights, environment, health and consumer protection, as well as to the safeguard of subsidiarity, SGEIs and the social economy. Hence, this opinion lays down key principles to balance economic and societal interests in trade agreement negotiations and support the implementation of EU's new trade strategy. In particular, this requires to address the current lack of legal certainty around the implications of trade agreements on the provision of SGEIs.

This opinion builds on CEEP's opinions on TTIP¹ and International Trade Agreements and Services of General Interest² published in 2014. The latter formulated clear recommendations mainly based on the available consolidated CETA text, still valid today.

¹ http://www.ceep.eu/wp-content/uploads/2014/06/14opinion05_CEEP-Opinion-on-TTIP.pdf

² <http://www.ceep.eu/wp-content/uploads/2016/04/CEEP-Position-Paper-on-CETA.pdf>

FOCUS I: Safeguard Services of General Economic Interest (SGEIs)

SGIs have a fundamental role in the daily life EU citizens and represent a democratically chosen tool for competent authorities at national, regional and local level to fulfil tasks of general interest. The EU law distinguishes between Non Economic Services of General Interest (NESGIs), which are not subject to specific European legislation, and Services of General Economic Interest (SGEIs), which are subject to the internal market and competitions rules³. The importance of SGEIs is reflected in primary EU law through Article 14 TFEU and Protocol No.26 TFEU as well as in secondary law, as collected in the CEEP Acquis+ for SGEIs (see below). It is also worth keeping in mind the fact that public services contribute to 26.6% of EU GVA (Gross Value Added), equivalent to €2.926 billion, and represents 30% of the total employment within the EU⁴.

The Acquis+ for Services of General Interest

EU's commitments in the area of SGIs and SGEIs have been clearly identified by CEEP in its [Acquis+ analysis](#) and translated into "5 golden rules". These principles also need to be respected and included in trade agreement negotiations to which the EU is a party:

- Member States (national, regional and local authorities) have the general competence and wide discretion to define, provide, commission and organise SGIs, as well as funding them, and European institutions should only control manifest errors thereof.
- For non-economic SGIs, internal market and the competition rules do not apply.
- For Services of General Economic Interest (SGEIs), the rules of competition and the rules of the internal market apply, only if those rules do not hinder the fulfilment of SGEIs' specific mission being achieved (Article 106 TFEU). The effective performance of a task of general interest prevails over Treaty rules in the event of a conflict.
- Furthermore, competent authorities are free to choose the modes of management: 'regie', 'in house', externalised etc. The European institutions are neutral regarding the ownership of undertakings providing SGEIs.
- For all SGEIs, the standards of quality, security, affordability, equal treatment, the promotion of universal access and of users' rights must be implemented, as foreseen by protocol 26.

The need for more legal certainty

CEEP demands legal certainty in trade agreements so that commitments taken by Parties at all levels of government will not affect the provision of existing and future SGEIs. CEEP believes that the existing GATS-Model⁵ - a combination of clauses and reservations - is not fit for purpose for addressing possible legal conflicts which may arise in trade agreements of new generation for reasons such as follows:

- The use of a negative list approach for commitment in liberalisation of services increases legal uncertainty regarding the appropriate coverage of possible market barriers linked to the provision of SGEIs;
- The use of unclear notions, such as "public utilities", confronted with evolving SGEIs at national, local and regional levels;
- The EU is negotiating agreements with trade partners which apply different models for the provision of SGEIs, such as in the case of TTIP, CETA and TiSA;

³ [CEEP, SGI for everyone \(2015\)](#)

⁴ [Mapping Public Services \(2010\)](#)

⁵ <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1115>

- Appropriate safeguards for in-house provision and public-public cooperation in public procurement and concessions are needed. “In-house” provision of SGEIs and cooperation between public authorities are legitimate modes of management, as enshrined by the public procurement package adopted in 2014. This essential *acquis* should not be undermined by market access or investment protection rules in trade agreements, which have to foresee appropriate exemption clauses. For instance, in CETA, an in-house exemption only exists for public procurement in the government procurement chapter and not for concessions. At the same time, concessions are considered as “investment”⁶, which ignores the quality of concessions as a tool for competent authorities to provide SGEIs: in-house solutions for concessions are not foreseen in CETA.

In this context, CEEP believes that a better approach is needed to preserve the right to regulate of competent authorities at national, regional and local level in how to provide, commission, organise and finance provision of SGEIs in international trade agreement. CEEP calls the European institutions, and notably the European Commission, to engage into a constructive debate on the possibility to implement such a new approach.

A ‘gold standard’ for the safeguard of SGEIs

According to CEEP, in order to safeguard SGEIs, trade agreements should respect following principles:

1. Use the concepts of SGEIs which is referenced in EU primary law (article 14 TFEU and protocol 26 TFEU) and because it is all-encompassing;
2. Ensure an effective carve-out of SG(E)Is from market access provisions by referring to the concept of SG(E)I and making the exclusion explicit;
3. Apply a positive-list approach for commitments in market access and national treatment for services in order to fully preserve the right to regulate of competent authorities;
4. Ensure the safeguard of SGEIs when applying competition rules by explicitly mentioning EU primary law (article 106 TFEU) which states that undertakings providing SGEIs are exempted from competition rules if their performance in delivering a SGEI task is obstructed;
5. Ensure the respect of EU Public Procurement rules, notably with regard to local self-government, “in-house”, public-public cooperation and the possibility to include social and environmental award criteria.

In the light of these principles, the inclusion of standard clauses, as proposed by the Social Platform and the European Parliament, could significantly improve the safeguard of SGEIs in trade agreements. Firstly, the standard clause as proposed by the Social Platform⁷ should be included in the preamble of EU trade agreements. It states as follows:

“Nothing in this agreement shall be interpreted as restricting or adversely affecting the provision of services of general interest, whether economic or non-economic, in accordance with the principles as laid down by Protocol 26, especially regarding a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.

⁶ <http://www.ceep.eu/wp-content/uploads/2016/04/CEEP-Position-Paper-on-CETA.pdf>

⁷ http://www.socialplatform.org/wp-content/uploads/2015/11/20151027_SocialPlatform_positionpaper_TTIP_TiSA_public-services.pdf, Annex 2 page 10.

Nothing in this agreement shall be interpreted as restricting or adversely affecting the essential role and the wide discretion of national, regional and local authorities in:

- *Defining the services which they consider as being delivered in the general interest;*
- *Providing, commissioning and organising services of general economic and social interest as closely as possible to the needs of the users;*
- *Defining whether these services are open to competition;*
- *Deciding whether these services are publicly or privately funded.*

The provisions of this agreement do not in any way affect the competence of Member States to provide commission and organise services of general interest in compliance with EU rules. Nothing in this agreement shall be interpreted as implying any right for any party to undermine, question or jeopardise the right of national, regional and local public authorities to regulate Services of General Interest complying with EU rules. Nothing in this agreement should lead to a lowering of the rules and standards established by the EU or by member states (especially standards to protect the environment, health, consumers, social cohesion, labour standards, and public procurement rules). This agreement should strive towards the promotion of fundamental rights as enshrined in the Charter of Fundamental Rights of the EU and other relevant international human rights conventions.”

This model clause would express the political will to safeguard SGEIs in the core text of trade agreements and provide more legal certainty in the event of possible litigations. However, it would need to be combined with precise drafting of definitions, a careful listing on market access reservations, an exclusion of in-house procedures for concessions and procurement, etc.

Hence, secondly, CEEP strongly supports the demand of the European Parliament of the introduction of a ‘gold standard’ in the EU offer for liberalisation of services clause in TISA and other trade agreements, as expressed in its resolution on TISA: “Xi. to seek to introduce, without prejudice to the GATS, an unequivocal ‘gold standard’ clause, which could be included in all trade agreements and would ensure that the public utilities clause applies to all modes of supply and to any services considered to be public services by European, national or regional authorities, in any sector and irrespective of the service’s monopoly status;”⁸. To achieve this aim, such a ‘gold standard’ clause should use the concept of SGEI and make sure to cover next to monopolies and exclusive rights, also special rights, such as public service obligations.

⁸ <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2016-0041>

FOCUS II – Sustainable Development Goals 2030

The EU should effectively pursue the sustainable development goals 2030 in its trade strategy and trade agreements.

Environmental and social standards

In order to shape a fair and sustainable globalisation, public services providers and employers gathered within CEEP strongly believe that trade policy and all future trade agreements have to follow the logics of sustainability which means an economic action taking into account social and environmental objectives. In order to promote sustainable development, CEEP believes that trade agreements should:

- Acknowledge the existence of market failures in responding to certain societal challenges and safeguard the role of SGIs;
- Include binding and enforceable provisions to promote high environmental and labour standards in all future FTAs negotiated by the EU. Any attempt of social and environmental dumping should be prevented. In particular, core standards of the International Labour Organisation (ILO) should be enshrined in FTAs. Furthermore, they should include a strong commitment on the adoption and effective implementation of core environmental agreements, including the Paris Agreement.
- Consider and avoid any adverse effects on third countries.

A Better Coherence with Development Policy

EU trade agreements also need to ensure coherence between its development goals and trade interests. When pursuing its trade interests, the EU should avoid collateral damages on the economies of developing countries and support the capacity of those countries to respond to their economical, environment and social needs. This concerns notably public procurement, which is systematically included in trade agreements of new generation. Public procurement represents up to 20% of the GDP of developing countries. The use of environment and social criteria is an essential tool for territorial development.

FOCUS III – Guarantee Democratic Legitimacy and the Right to Regulate Transparency

CEEP calls the European Commission and Member states to pursue their efforts towards a more evidenced-based, inclusive and transparent trade policy.

CEEP welcomes the efforts carried out by the European Commission to increase transparency, notably in the context of the TTIP negotiations. It is important to implement transparency commitments in a more systematic way for all trade agreements and types of negotiations. Furthermore, national governments need to make the same substantive efforts on openness. Most importantly also, both the European Parliament and national parliaments need to have access to the information they require in order to exercise effective democratic control on the negotiations and the implementation of the agreement.

Citizens and stakeholders need to be better informed about the negotiating process of international trade agreements and to be adequately involved. In this regard, CEEP regrets that the EU Advisory Council for TTIP did not involve any cross-sectoral representative of SGEI providers, considering the crucial importance of the question of trade agreements' implications on public services. Both the European Commission and national governments need to organise debates and extensive consultation at all levels of governance. It is important to provide stakeholders with institutionalised opportunities to influence negotiations and scrutinise the implementation of the agreement. Scrutiny should be possible not only during the negotiations, but also once the agreement is adopted.

Parliaments, social partners and relevant stakeholders should not only be adequately involved in the negotiating and planning process, but also in the monitoring process of the implementation of the trade agreement notably with regard to social and environmental aspects. In particular, as cross-sectoral social partner for public service employers, CEEP can bring significant expertise and support to the implementation of sustainable development chapter of trade agreements⁹.

Finally, trade agreements need to be based on a comprehensive and solid impact assessment and be monitored through ex-post evaluations. Such processes should ensure that the overall objectives of those trade agreements are reached and hence increase accountability.

Standards of public services should not be lowered

We share the view that cooperation on regulatory issues brings new trade opportunities. However, there is a risk that regulatory standards which implement the precautionary principle in EU consumer and environment law are recognised per definition as trade barriers, whereas they are the expression of a societal consensus. It is therefore fundamental that investment protection dispute mechanisms cannot challenge those legitimate standards. Furthermore, regulatory cooperation should not lead to harmonise standards which are not compatible because they take as a basis a fundamental different approach. There can be legitimate doubts to what extent this can be possible in areas identified in the context of TTIP, such as chemicals, medical devices and pharmaceuticals. For instance, the technical requirements and test procedures in the water and sewage water industry must be maintained as they guarantee the quality of supply of public services.

Right to Regulate and investment protection

⁹ See CEEP's statement on TTIP Sustainable Development Chapter: http://www.ceep.eu/wp-content/uploads/2016/02/16statement01en-TTIP_Sustainable-chapter.pdf

In a democratic system, competent authorities (European, national, regional or local level) should not find it difficult to enact any standards because of fearing to be challenged by corporate claims (so-called “regulatory chill”). Therefore, CEEP expressed critical views over the investment-state dispute settlement proposal as included in CETA and initially proposed in TTIP¹⁰. In particular, CEEP is concerned about vague and broad definitions (such as the notions of “investment” and “fair and equal treatment” in CETA), a too narrow approach to the right to regulate, lack of transparency, parallel proceedings, conflicts of interest in the nomination of arbitrators and the absence of any appellate mechanism.

CEEP welcomes the Investment Court System proposed by the European Commission in the context of TTIP. It goes in the right direction to guarantee fairer and more transparent procedures and a better protection of the right to regulate. Economic interests should not prevent competent authorities at national, regional and local levels to take regulatory actions in the general interest. In this regard, concerns remain over possible “regulatory chill” effects, notably with regard to the presence of notions such as “indirect expropriation”, “legitimate expectations”, umbrella clauses, upper compensations and without proportionality test, as well as the use of broad definitions, such as for “investment”.

¹⁰ See CEEP’s reply to the public consultation on ISDS (July 2011): <http://www.ceep.eu/wp-content/uploads/2014/07/CEEP-Response-to-the-EC-Consultation-on-ISDS-in-TTIP-July-2014.pdf>

FOCUS IV – Fit for the Digital Age

Data flows

Increasing transparency, trust and security in the digital economy is a core concern to public services providers which are daily dealing with sensitive data¹¹. Therefore, CEEP is concerned that the inclusion of data flows in trade agreements notably in TTIP may challenge privacy or data protection. It must be ensured that international trade agreements do not allow for any circumvention or weakening of European data protection regulation. Furthermore, it should be guaranteed that cross-border data flows are compliant with data protection and security rules in force in the country of residence of the data subject.

Digital, telecommunication and audiovisual services

The digital transformation will lead to the emergence of a new generation of public services and SGIs. Trade agreement should always foresee an exclusion and re-negotiation procedure for the inclusion of “new services”, as included in CETA Annex 9-B. In addition, the “digital dimension” of products and services shall be negotiated in the context of their respective original classifications.

Furthermore, trade agreements should address possible regulatory asymmetries resulting from the digital transformation. This is particularly true for telecommunication services, which have experienced a radical transformation with the convergence of mobile networks and Internet transmission services.

Finally, trade agreements have to ensure a clear and broad exclusion of audiovisual services taking into account current and future technological developments in the media. EU’s and Member States’ cultural policy sovereignty needs to be enshrined in a horizontal binding clause, thereby covering all chapters of the future agreement.

¹¹ See also CEEP opinion “Harnessing the digital transformation of public services”: http://www.ceep.eu/wp-content/uploads/2016/05/16opinion04_Digitalisation_FINAL.pdf