

Opinion of the German Association for Public and Private Welfare on International Free Trade Agree- ments and Social Services

The opinion (DV 22/14) was adopted on 30 September 2014 by the Executive Committee of the German Association for Public and Private Welfare.

Deutscher Verein für öffentliche und private Fürsorge e.V. – the social forum for more than 130 years.

The German Association for Public and Private Welfare (Deutscher Verein für öffentliche und private Fürsorge e.V.) is the joint forum of local governments and social welfare organisations and their institutions in Germany, the federal states (Länder) and representatives from science and academia for all fields of social work and social policy. Through its expertise and experience, it monitors and shapes developments in child, youth and family policy, social and old people's welfare, basic social security provision, care and rehabilitation.



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The German Association for Public and Private Welfare (The German Association) calls for a full-scale exemption for social services in international free trade agreements. Legal provisions and regulations regarding the quality of social services must not be interpreted as trade restrictions. The organisation of the welfare state within the Member States and the responsibility of the Member States for social and public services must not be undermined by free trade agreements.

1. Background

Since July 2013, the European Union (EU) and the United States of America (USA) have been negotiating a free trade agreement which would include the movement of both goods and services (Transatlantic Trade and Investment Partnership, TTIP).¹ The negotiations are aimed to be concluded by the end of 2015. At the same time, the EU is negotiating a multilateral trade agreement for services (Trade in Services Agreement, TiSA) within a group of states outside of the World Trade Organisation (Really Good Friends of Service, RGFS states).² The bilateral negotiations between the EU and Canada regarding a free trade agreement (Comprehensive Economic and Trade Agreement, CETA) have ended.³ The clearance decision regarding the CETA is still pending. The TTIP, TiSA and CETA differ in scope and detail, but the negotiations have to be seen as an interrelated process.

The TTIP, CETA and TiSA should implement growth impulses through the reduction of customs duties as well as non-tariff trade restrictions. A study carried out on behalf of the German Federal Government predicts an additional per capita GDP increase in the EU of 5% within 20 years through the TTIP alone. In the same time period, this should generate up to 400,000 (100,000 in Germany) new jobs in the EU.⁴ By creating an economic area with around 800 million people as well as 50% of the global economic performance, in particular the TTIP promises a positive influence on the worldwide trade system. The EU Commission and the German Federal Government emphasise the possibility to define high qualitative standards and to motivate other states to do the same.

However, there is no reliable information to what scope the free trade agreements will have. The negotiations up to this point have been characterised by a lack of transparency. Citizens fear that their interests have not been sufficiently considered. It is unclear which – also indirect – effects the free trade agreements will have.

Your contact person at the German Association: Niklas Kramer.

1 See also the EU Commission information page on the TTIP, which can be found at http://ec.europa.eu/trade/policy/in-focus/ttip/index_de.htm.

2 See also the EU Commission information page on the TiSA, which can be found at <http://ec.europa.eu/trade/policy/in-focus/tisa/>.

3 See also the EU Commission information page on the CETA, which can be found at <http://ec.europa.eu/trade/policy/countries-and-regions/countries/canada/>.

4 Felbermay, G. et al.: Dimensionen und Auswirkungen eines Freihandelsabkommens zwischen der EU und den USA, Studie im Auftrag des BMWI, 2013. Criticism: Ohr, R./Beck, N.: Das Transatlantische Freihandelsabkommen – Relativierung von Chancen und Risiken, in: Wirtschaftsdienst 2014, p. 344–351.



2. Create acceptance – Increase transparency

The German Association for Public and Private Welfare welcomes the aim of the EU Commission and the German Federal Government to generate additional growth and employment in Europe. The German Association also recognises the intentions of the stakeholders to carry out the negotiations on the basis of shared values with the aim of ensuring high standards.

In light of the broad mandate, the existing lack of transparency of the negotiations, however, must be criticised. The form and content of the public discussion on the TTIP show what loss of legitimacy such a practice could mean for the trade policy of the EU Commission and the German Federal Government. From the perspective of the German Association, acceptance can only be achieved when citizens, parliaments and civil society can be sufficiently informed of the aims of the negotiations as well as the status of such negotiations. They must be able to see that their interests have been safeguarded. The previous attempts of the EU Commission and the German Federal Government to increase the participation of citizens, parliaments and civil society must be welcomed. The EU Commission must, however, report more broadly and in more depth on the status of negotiations, they must release key negotiation documents and they must eliminate any existing uncertainties.

3. Exclude social services from the scope of free trade agreements with legal certainty

Social services create participation opportunities, they preserve human rights and they must be considered as an investment in the future. The market alone cannot guarantee a qualitative and broad provision as well as cost-effective access. The proximity to people requires the intervention of the state, which ensures there is trust and that the interests of the vulnerable are safeguarded. Legal guidelines and provisions regarding the quality of social services must not be interpreted as restrictions on trade. The German Association has been campaigning for social services in Germany on the European level for years.⁵ Proven models of provision like the so-called triangular relationship between private providers, users and public authorities (as a cost-bearing unit) in German social law, licensing models or personal budgets ensure that users have a free right to choose and that there is a open variety of facilities and services. As part of a partner-like guarantee, the state also facilitates private non-profit organisations as a sign of recognition for charitable action.⁶

In the EU Treaties (primary law) as well as Regulations, Directives and Resolutions (secondary law), attention is paid to the significance and special character of public and social services.

5 See Deutscher Verein: Stellungnahme – Sozialpolitische Erwartungen an die EU, which can be found under http://www.deutscher-verein.de/05-empfehlungen/empfehlungen_archiv/2013/DV-28-13-Sozialpolitische-Erwartungen-EU.

6 See Deutscher Verein: Stellungnahme – Überprüfung bestehender MWSt-Rechtsvorschriften zu öffentlichen Einrichtungen und Steuerbefreiungen für dem Gemeinwohl dienende Tätigkeiten, which can be found under http://www.deutscher-verein.de/05-empfehlungen/empfehlungen_archiv/2014/DV-04-14-Konsultation-EU-MWSt-Reform.



Art. 14 TFEU, Protocol No. 26 as well as Art. 106 (2) TFEU are underlining the value of public and social services as part of services of general interest. Art. 36 of the Charter of Fundamental Rights also establishes that the Union observes and recognises access to public services. Public and social services must be considered as a key element of a European social model. They are directly connected with the Union's goals of a social market economy and social and territorial cohesion in Art. 3 (3) TEU. Accordingly, the European Services Directive as well as the latest reforms in EU state aid and public procurement law in 2012 and 2014 consider the particularities of public and social services in secondary law. As international public law, however, free trade agreements have priority over secondary law according to Art. 216 (2) TFEU. Thus they harbour the risk that existing legislation will be questioned.

From the perspective of the German Association, the EU Commission can only do justice to primary law judgements as well as to the democratic process of recent years by establishing a full-scale exclusion of public and social services from the scope of free trade agreements. The German Association therefore calls for a full-scale exemption for social services in the main body of the trade agreements.

4. Ensure close relationship with citizens – Maintain possibilities for shaping policy

Social services must be performed in a people-orientated manner. Art. 14 (2) Sub-clause 2 TFEU as well as Protocol No. 26 emphasise the broad discretion of the Member States in shaping and providing public and social services as well as the necessary variety of these services.⁷ In Germany, the local governments are among those bearing responsibility for social services. With Art. 4 (2) Clause 1 TEU, the Lisbon Treaty contains a guarantee of protection for regional and local self-government and interventions must thus be justified. This is a manifestation of the idea of subsidiarity. As part of its trade policy authority according to Art. 207 TFEU, the EU Commission has a mandate to negotiate over services. The principle of proportionality in Art. 5 (4) TEU in particular requires sufficient recognition of a reservation of authority. This is another reason, why social services must be fully excluded from the scope of free trade agreements.

In addition, safeguarding the policy-making abilities of Member States and local governments requires balanced and comprehensible processes of government liability. An investor state dispute settlement (ISDS), as desired by the EU Commission for the TTIP and the CETA, harbours the risk of indirectly influencing future decisions on social standards and regulations.

The composition and procedures of arbitration courts could lead to uncertainties regarding high compensation claims and thus negatively limit the policy-making of the democratic institutions. Therefore the German Association welcomes the decision of the EU Commission to conduct a public consultation on the issue and to withdraw investment protection from the negotiations on the

⁷ The general reservations of the Member States in social policy must be also observed (e.g. Art.153 (1) und (2) TFEU).



TTIP during the term. The German Association requests the EU Commission, however, to take the raised concerns seriously and to waive an ISDS both in the TTIP and the CETA.

With regard to the TTIP, the establishment of a regulatory council has been suggested.⁸ The regulatory council is intended to assess the probable standards and laws of the contracting parties for compatibility with international trade, and to make suggestions concerning mutual recognition. Overall, the mandate, the questions, the binding nature of decisions as well as the composition of the regulatory council are still unclear. The German Association stresses that key decisions must be reserved for the democratic institutions. Should the contracting parties adhere to the introduction of a regulatory council, it must be ensured that social standards are not up for discussion and are not the object of consultations.

5. Existing exemption clauses are uncertain

The liberalisation obligations in free trade agreements refer to market access as well the equal treatment of foreign and domestic investors. In addition, there will be separate sections on state subsidies and public procurement.

Very complex positive and negative lists are used in the Annexes for the market access offer and the offer of equal treatment. While in the case of positive lists, only the explicitly listed sectors will be liberalised, in the case of negative lists, all sectors which are not explicitly excluded shall be liberalised. The EU Commission has accepted a negative list for the CETA. For the TTIP and TiSA, the EU Commission offers a positive list for the market access and a negative list for the equal treatment. The German Association asserts that the risk of unintended liberalisations is greater for negative lists as the exemptions must be comprehensively defined. The German Association therefore requests the EU Commission to refrain from a negative list. However, due to the complex structure of the documents, the German Association emphasises for both approaches the necessity of carefully checking whether social services are excluded in a full-scale-manner.

The offered lists from the EU Commission are only accessible to the public in a limited fashion which varies according to the free trade agreement.⁹

8 EU Commission: Papier über die Eingangsposition zur TTIP – Handelsübergreifende und Institutionelle Bestimmungen zu Fragen der Regulierung, available at http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151622.pdf.

9 For TiSA see EU Commission, TiSA offer lists, which are available at http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152689.pdf. While the EU Commission has published the preliminary offer lists for the TiSA, for the TTIP and CETA only certain documents have been made accessible on the Internet by third parties during the negotiations. Afterwards, the TTIP essentially refers to the offer lists in the TiSA lists. The opinion will hereinafter refer to the TiSA lists. The translations are free. The system essentially follows the General Agreement on Trade Services (GATS) from the World Trade Organisation (WTO) from 15 April 1994, whereby there are also differences. For the GATS lists see the WTO document, S/DCS/W/EEC consolidated version from 22 April 2003, available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=14703,98576&CurrentCatalogueIdIndex=1&FullTextSearch=.

From the insights that have hitherto been obtained, it is clear that the EU Commission is aiming for a differentiation between private and publicly funded social services, whereas publicly funded social services shall be excluded.¹⁰ Additionally, a public utility clause would be used for the market access. This provides the possibility in the case of so-called public utilities to award public monopolies or exclusive rights.¹¹ In a footnote which is not exhaustive in terms of examples, health services are named but social services are not.

In the field of health social services, privately funded hospitals, rescue services and other sanitary facilities are listed for the market access. In the field of classic social services, privately financed rehabilitation facilities, care homes and retirement homes are listed.¹² For commercial presences abroad (mode of supply 3)¹³ the possibility of concessions or other access regulations and requirement plans shall be reserved for health social services.¹⁴ For rescue and certified ambulance services, there shall be a reservation for non-profit operators in mode of supply 3 for Germany.¹⁵ Professional/freelance services such as midwives, nurses, physiotherapists as well as medical and dentistry services must be considered separately; they are indeed classified as social services but are noted as commercial services in the lists. There is no differentiation between services which are financed publicly and privately.¹⁶

For domestic equal treatment, the EU Commission calls for a regulation reservation for all public and privately financed social services, whereby the social services which have already been listed for market access are excluded from this reservation.¹⁷

The German Association stresses that the system of exemptions up to this point and the definitions in the free trade agreements are not clear in terms of their applicability, and are laden with significant legal uncertainties. It is not clear how the exemption of publicly funded services would be applied, nor if the term “public utility” has been sufficiently clarified in European or German law. In addition, sections on subsidies and public procurement, the effect of which are still unknown, are not covered by the clauses.

10 The social services can be found under the international UN CPC classification (provisional version) under number 93. Under this can be found the sub-classification 931 (health services), 932 (veterinary services) and 933 (classic social services).

11 EU Commission: TiSA offer lists, p.38.

12 Hospital services, ambulance services, residential health facilities other than hospital services as health social services as well as convalescent and host Houses, old people's homes as classic social services, EU Commission, TiSA offer lists, p.104–105.

13 There is an essential differentiation between four modes of supply: 1. Mode: Cross-border supply, 2. Mode: External consumption within the domestic territory, 3. Mode: Commercial presences abroad, 4. Mode: Natural persons abroad. Normally the 2nd mode is used. The 1st and 4th modes are regulated in principle. The 3rd mode is key above all.

14 EU Commission: TiSA offer lists, p.104–105.

15 It has not yet been sufficiently established through this formulation that the facilitation of non-profit services is not included by the agreement. Special reservations must not lead to the conclusion that non-profit services should not count as publicly funded services within the meaning of the agreement.

16 Midwives services, services provided by nurses, physiotherapists and paramedical personnel, medical and dental Services. These are classified under CPC 93191, 93191 and CPC 9312. Requirement reservations in the market access are codified in mode 3 for the medical and dentistry services. Furthermore, only the public utility clause shall be applicable. It is unclear whether services financed by social security are already excluded as part of the CPC classification. EU Commission: TiSA offer lists, p. 6–7 and p. 54–59.

17 EU Commission: TiSA offer lists p.24–25.

In light of this, the German Association for Public and Private Welfare therefore calls for a full-scale exemption for social services in the main body of the agreements. In the event that the European Commission maintains the approach taken thus far, the German Association calls for more detailed and unambiguous clarifications as to which services are excluded, and that the agreement do comply to the special nature of social services. In particular the exclusion of publicly funded social services must be defined in broad terms and applied to the social services which have thus far not been included by this differentiation. It must be ensured that the social security systems and provision models like the so-called triangular relationship between private providers, user and public authority (as a cost-bearing unit), licensing models or personal budgets are included within the meaning of publicly funded services in the agreements. The German Association also calls for the exemption definitions to clearly include financial support and other support for non-profit organisations and charitable action.



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Michael Löher, Vorstand

Michaelkirchstr. 17/18

10179 Berlin

www.deutscher-verein.de

E-Mail info@deutscher-verein.de