WHAT IS THE PROBLEM WITH TTIP?

How public services are affected by TTIP and what can be done about it

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The linkage between international trade deals and public service delivery is a constant branch of political and economic debate. The ongoing negotiations on a proposed Transatlantic Trade and Investment Partnership (TTIP) add just another important chapter to this key narrative of globalized economic relations. Even more, as this fundamental revision of EU – US economic relations came not just as a reaction to persisting economic atony and low growth rates, but also as a major attempt to gain momentum in stuck multilateral trade negotiations.

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1. *TTIP matters*

The linkage between international trade deals and public service delivery is a constant branch of political and economic debate. The ongoing negotiations on a proposed Transatlantic Trade and Investment Partnership (TTIP) add just another important chapter to this key narrative of globalized economic relations. Even more, as this fundamental revision of EU – US economic relations came not just as a reaction to persisting economic atony and low growth rates, but also as a major attempt to gain momentum in stuck multilateral trade negotiations. Therefore, scope and comprehensiveness of the approach are considerable. Bearing in mind the sheer economic significance of the parties involved (counting together for almost 50 percent of the world's GDP), it is hardly possible to overestimate the treaty's potential impact. Whatever exact wording TTIP will bring in the end, we can expect it to be a cornerstone of EU-economic reality for decades to come. After numerous rounds of negotiations, there is still no agreement in sight and the European Commission (EC) estimates "a significant amount of work" to be dealt with (European Commission, 2015, p.2). Even more so, as the run-up for US-presidential elections puts increasing pressure on the initial goal to conclude the deal under the Obama administration.

The whole idea of creating a transatlantic free trade area had been developed by companies doing business on both sides of the Atlantic in the course of the 1990s in order to lower their costs arising from mainly non-tariff barriers to trade such as different regulatory regimes, and to cover new business sectors such as services and investment. Institutions like the Transatlantic Business Dialogue, the Transatlantic Economic Partnership and subsequently the Transatlantic Economic Council were actively engaged in promoting a trade and investment partnership agreement that goes far beyond the scope of earlier trade agreements (Chase & Pelkmans, 2015. Pp. 26-28). Consequently, in 2011 a joint EU-US high-level working group was established, which recommended negotiations for a new, far-reaching agreement, including services and investment (European Commission, 2013, p.6). Only a few months later, in June 2013, the Council of the European Union mandated the European Commission to negotiate such an agreement. However, exact contents of the negotiation mandate remained classified, and were only brought to the focus of public attention because of documents leaked by the German Green Party (Der Spiegel, 2014). After seven rounds of negotiations, the Council finally declassified the negotiation mandate in October 2014 as public discontent over lack of transparency had reached unprecedented levels (Euractiv.com, 2014). Politicians and negotiators clearly underestimated the level of public scrutiny and concern arising out of a far-reaching agreement with the US. Just recently, as if there was any need for a formal proof of discontent, an EU-wide citizens' initiative aiming at stopping negotiations gathered more than three million signatures (Euractiv.com, 2015). One of the key concerns of the initiative was the irreversible privatization of public services - the famous "ratchet clause" in TTIP and CETA. This leads us straight to the focus of this article, the potential threats to public service delivery arising from TTIP, and some suggestions on how these threats could be remedied.

1.1. *Scope and focus*

As TTIP belongs to a new generation of trade agreements that reach an unprecedented level of comprehensiveness (European Parliament, 2015, pp. 5-6), it is only natural that a large number of policy fields are affected: from environmental regulation, to competition rules, from labor standards to technical norms and standards. This article approaches TTIP from a public service delivery perspective and investigates the question:

What key elements of TTIP are potentially detrimental to public service delivery, and what potential remedies are applicable to sustain existing socially and environmentally sound modes of public service delivery throughout Europe?

Investigating this question makes it necessary to define what is meant by public services. However, finding a precise definition of public services is rather challenging. Public Service delivery is deeply rooted in national or even regional perceptions of state and society. One can intuitively understand that organizing the public service of snow clearance in order to achieve the public good of safe and snow-free roads, carries different importance and is organized differently in Sweden and in Spain. It must thus come as no surprise that both the definition and scope of the concept of public service varies across Europe. 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. The EU clarified many underlying issues in two decades of intense political debate and court cases before the European Court of Justice when internal market rules came into conflict with public services.

In the process of clarifying what public services are, the EU enshrined the concepts of "Services of General Interest (SGI)" and "Services of General Economic Interest (SGEI)" in primary law (Article 14 TFEU and in Protocol 26 TFEU). Subsequently also defined by the European Commission in the Communication "A Quality Framework for Services of General Interest in Europe". In this Communication, SGI are defined in the following way:

> *SGI are services that public authorities of the Member States classify as being of general interest and, therefore, subject to specific public service obligations (PSO). The term covers both economic activities (see the definition of SGEI below) and non-economic services.*
>
> (European Commission, 2011, p.3)

Whereas SGEI are to be seen as a sub-concept of SGI, and defined in the following way:

> *SGEI are economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of quality, safety, affordability, equal treatment or universal access) by the market without public intervention. The PSO is imposed on the provider by way of an entrustment and on the basis of a general interest criterion which ensures that the service is provided under conditions allowing it to fulfil its mission.*
>
> (European Commission, 2011, p.3)

In other words, this notion allows for a comprehensive understanding of public services, as public authorities of member-states are in a position to define general interest. Governments are free to choose from a range of modes of provision, as services can be provided "in-house", via public-public cooperation (e.g. intercommunal cooperation), or by competitive tendering through third parties to name just a few. The EU has thus succeeded in maintaining a delicate balance between diverse member state preferences and internal market requirements. We therefore choose to employ the EU definition of SG(E)I when referring to public services.

1.2. Limitations

TTIP negotiations are far from being completed, so there is no final text available for assessment. What can be done in advance though, is a rough forward-looking assessment of the expected impacts of the *key elements*, proclaimed by one or both negotiating partners. When assessing key elements, the Comprehensive Economic and Trade Agreement (CETA), negotiated between the EU and Canada, can serve as a blueprint, as it contains many of the same or similar elements as are planned for TTIP. Being able to formulate concerns and remedies early on in the process, should ideally allow for a constructive approach. An approach that points out how the benefits of TTIP can be harvested, at the same time as public services are safeguarded.

The main official source on the progress and contents of the negotiations, available to the general public, is the website of the European Commission. This website contains, most importantly, position papers of the EU on some of the topics under negotiation, and negotiation texts of the EU i.e. the legal text proposed by the EU, line by line on some of the chapters under negotiation. How much of that EU position finds its way into the final text is impossible to tell, especially as the US government only publishes very general and unspecific position papers and keeps its negotiation texts secret (Euractiv.com, 2015a).

2. Potential threats to Public Services within TTIP

Rather than evoking all different areas of public service delivery that may be affected by TTIP, we will stick to main critical elements. However before discussing these key elements, a brief outline of what is meant by the term "liberalization" is necessary. Liberalization usually refers to measures concerning market access which entails a ban on quantitative and qualitative restrictions, performance requirements, non-discrimination, subsidies, national treatment and public procurement. In TTIP most of these liberalization requirements will be listed in the chapter on market access (European Commission, 2015a, p. 12) and they will also apply to public services unless these are covered by a reservation. Liberalization almost automatically comes into conflict with public services, as public services often rely on public monopolies, exclusive rights, subsidies and other measures, in order to ensure sufficient quantity and quality (Krajewski, 2013, pp. 8 – 9)

2.1. Negative list – list it or lose it

The so-called "negative-list-approach" comprised in both TTIP and CETA, marks a radical departure from almost all previous EU trade agreements with third countries (Shan & Zhang, 2014, p. 444). In previous agreements, including the GATS (General Agreement on trade in services), economic sectors subjected to the rules of a trade agreement were meticulously listed and defined. These listings were called commitments, as they represented an active political decision to make a trade agreement applicable to certain areas ("positive-list"). The negative-list-approach however, makes a trade agreement applicable to all areas, except for those that are actively exempted. The negative-list approach generally leads to more far-reaching liberalization, as it is liberalization by default, and doesn't require an active political decision to liberalize. On the contrary, it requires an active political decision to protect public services from liberalization. If services in question are perceived as technical and not politically salient, or simply not very well known to a wider public, there is a risk that there will be insufficient political mobilization to achieve an exemption of such public services. An active political decision to liberalize would be all the more important, as trade agreements are hierarchically above national law, and very hard to amend. So whatever goes in a trade agreement, you better be very sure you really want it there, because it will not go away easily.

The US government favors the negative-list-approach in its trade agreements with other countries, as it generally leads to more areas of other countries' economies being opened up to US companies (Fritz, 2015, p. 29). Also some European lobby groups such as the European Services Forum (ESF) and Business Europe have pushed hard for the negative-list-approach to be adopted in TTIP and CETA (ibid, p. 28). In the case of CETA, negative listing was chosen for the entire agreement. Each chapter of the agreement includes annexes, which list the reservations and exemptions from the provisions of the respective chapter. In TTIP it is not yet clear whether all chapters of the agreement will follow the-negative-list approach. There is some speculation about a planned hybrid-list-approach, which would mean, that some chapters follow a positive list where active commitments have to be made, while other chapters include a negative list with exemptions and reservations (ibid, p.29). From a public service point of view there are two main problems with the negative list approach: lack of legal certainty and a barrier to innovation.

Lack of legal certainty arises from an inherent difficulty of formulating "waterproof" exemptions and reservations. Multinational companies attempting to open up as many markets as possible, have a strong economic incentive to challenge reservations. Resulting in a constant menace of litigation for public service providers. Not just to be considered as a financial burden, but also a threat to bare existence as decisions of dispute settlement mechanisms are inherently unpredictable. As it is now a tribunal under CETA would only have to take into account the previously untested legal framework of the trade agreement and no other sources of law such as case law of other courts or other treaties. Its awards may possibly be final, as there is no appellate mechanism. Examples of ambiguously worded reservations and exemptions in both CETA and TTIP abound.

For example, in the draft TTIP investment and services offer of the EU, there is a reservation from the national treatment provision that allows the EU to adopt or maintain any measure with regard to the provision of all educational services which are "…not considered to be privately funded" (European Commission, 2015b, p. 85). What is not specified in this reservation however is a clear definition of "privately funded". Is an education service privately funded only when 100% of the cost is covered by student fees and the institution receives no state support whatsoever? Or can "privately funded" also mean that a publicly funded institution such as a university charges a small fee for a course? How big must the proportion of private funding be, in order for education services to fall under the scope of the agreement? Ambiguously worded reservations like this one need to be interpreted to clarify their meaning, object and purpose. Until a claim is submitted to arbitration in order to determine what "privately funded" is supposed to mean in that context, public service providers of education must be prepared for legal challenges and costly arbitration battles.

Reservations and exemptions are listed at the time the agreement is concluded and they can only be changed or expanded through an amendment of the agreement which is quite unlikely. This lock-in of the status quo prevents the dynamic development and innovation of public services. Technological progress and citizens' preferences are evolving constantly. It is therefore only natural, that public services have to evolve in order to continue to meet the needs of citizens. In most cases it is impossible to foresee future technological development to such a level of detail, that new public services and corresponding reservations can be formulated. Through the use of a negative list public services are artificially locked-in at the level of the previous century, when they should meet the challenges of the 21st century.

2.2. Ratchet and standstill clauses - making liberalization a one-way street

The negative list approach is supplemented by so-called "ratchet" and "standstill-clauses", which make sure that liberalization of public services is a one-way street (cf. Krajewski, 2013, p. 10). While it is impossible for governments to expand the scope of public services beyond the reservations that were made when the agreement was negotiated, the opposite is very much possible. Governments can always choose to open up more sectors of their economies to liberalization without having to renegotiate the entire agreement (cf. "living agreement"; European Commission, 2013a). Once new commitments for more liberalization have been made, the so-called ratchet clause makes sure that there is no turning back from it. The ratchet clause stipulates that the actual level of liberalization cannot be decreased, even if the level of liberalization in a country is higher than its initial reservations required it to be. In a similar vein, the standstill clause makes sure that the actual level of liberalization at the time of entry into force of the agreement cannot be decreased.

There are two main problems with the ratchet and standstill clauses. Firstly, a basic democratic deficit that ensues when the government of a country can no longer decide the extent of public services it wants to provide to its citizens. Secondly, societies are no longer free to find out about favorable modes of public service provision through trial and error, if they risk being "locked in" inadequate policies. For instance, re-municipalization of water supply after unsuccessful privatizations in 63 cities in France 2010 – 2015 (Kishimoto et al., 2015, p.10) would be equally impossible as the re-nationalization of Estonia's railways after a failed privatization (Financial Times, 2007).

Not all privatizations are bad. The point is that some privatizations may be beneficial to the public good because of increased efficiency or a host of other reasons, but some privatizations turn out as failures. By locking in privatization, TTIP forces a perpetuation of such failures and prevents governments from learning from their mistakes, and forces citizens to keep paying for them.

2.3. Investment protection

Much has been written about investment protection in TTIP and its shortcomings. Van Harten (2015) provides a detailed walkthrough of the main flaws in the latest proposal of the European Commission on investor protection. For the purpose of this article the focus is restricted to the aspects of investment protection most directly relevant to public service provision. The European Commission's latest proposal on investment protection contains some procedural improvements compared to a pure ISDS system, but the material provisions relevant to public services remain the same.

The main threat to public services emanates from the clauses on fair and equitable treatment (FET) and on expropriation. Both provisions are very common and most of the time only briefly worded in bilateral investment treaties of member states (Giegerich, 2015). Therefore the standard on FET has mostly been defined through legal practice i.e. arbitration cases. Most important elements of FET are transparency, stability and the investor's legitimate expectations, compliance with contractual obligations, procedural propriety and due process, action in good faith and freedom from coercion and harassment (cf. Schreuer, 2005, p. 358). CETA however tries a new approach towards a more defined clause on FET, which includes all of the previous mentioned elements, but lacks to specify them. In the same vein, the rules for what constitutes indirect expropriation are very broad and unspecific. For example, the provision in the CETA agreement regarding expropriation reads that a public measure does not constitute expropriation if it is introduced: (a) for a public purpose; (b) under due process of law; (c) in a non-discriminatory manner; and (d) against payment of prompt, adequate and effective compensation. Indirect expropriation is defined in CETA as:

> "*indirect expropriation occurs where a measure or series of measures by a Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.*"
>
> (CETA, Chapter 10, Art. X.11)

Both of these concepts share as a distinct feature, that judgment over whether investor rights have been violated or not will be up to the ISDS/investment court on a case-by-case basis. Experiences from other investment tribunals show that the FET and indirect expropriation provision grants enormous leeway to the investment court. In essence, it will be an international tribunal that decides whether a measure serves a legitimate public purpose or whether it constitutes indirect expropriation.

What makes the threat from these two provisions so acute is the fact that there are almost no exceptions or reservations from their application. While public service reservations restrict the application of other parts of the agreement such as national treatment or market access provisions to public services, FET and the prohibition of indirect expropriation continue to apply to almost all measures regarding public services (Fritz, 2015, p. 29). Because of their "untouchable" status inside the agreement, FET and the prohibition of indirect expropriation represent a launching pad for legal challenges by foreign investors against public service measures. The unpredictable nature of rulings in turn makes it difficult for states or sub-national entities to anticipate, what measure would be seen as their legitimate right to regulate and what would be seen as an infringement on investor rights. In such an environment of uncertainty, the threat of a powerful international investor to sue against a planned measure of e.g. a region may suffice for the region to reconsider their measure even before the case goes to court/tribunal. This effect is commonly referred to as regulatory chill (Tienhaara, 2011, p.2), and it becomes particularly biting in times of constrained budgets. Confronted with the looming threat of a potentially ruinous compensation payment, law-makers may ask themselves whether they can afford to implement even balanced proposals.

Previous experience clearly shows, that Investors make use of this wide range of options provided to bring up a case against regulatory. For instance, 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 (bilateral investment treaty) between Poland and the Netherlands and demanding a hefty compensation 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. (Hall, 2010, p. 4).

Experience from other agreements with investment arbitration clauses point into the same direction. International investors' ability to aggressively and extensively use investment tribunals drives states into lengthy litigation suits. Costly in terms of compensation payments and expenses for legal representation (Barlow, 2015, p. 9).

2.4. Inadequate reservations and exemptions

Are potential risks to public services, really adequately addressed via far-reaching carve-outs? Although senior politicians and negotiators constantly embrace this perspective (cf. BMWI, 2015), the available negotiating texts do not contain a general exemption for public services. Existing provision resemble a piecemeal of vertical and horizontal measures, heavily varying in scope and profoundness.

Firstly, there is a well-known provision referring to measures "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" (Madner et al., 2015, p. 50). The wording of the exemption stems from the GATS agreement, which follows a positive-list approach, and has never been tested before court (ibid). It is therefore not clear whether environmental services, education services or health services can be counted as exercise of government authority. However, for various reasons the bulk of relevant literature on the subject follows a rather narrow interpretation, limiting "exercise of governmental authority" to core state functions like the judiciary, law enforcement and taxation. (Krajewski & Kynast, 2014, p. 20)

Another horizontal clause foreseen in TTIP is called "public utilities clause". It is constantly referred to as one of the building blocks of a public service carve-out. However, it's significance is very limited, as there is no universally agreed definition of public utilities. Both the public utilities clause in the EU negotiation text for the services and investment chapter of TTIP as well as the CETA public utilities clause state that public utilities can be public monopolies or exclusive rights given to a private operator in order to provide a public service. What both clauses fail to provide is an exhaustive list of which sectors are actually regarded as public utilities (Krajewski & Kynast, 2014, p. 30). Furthermore the term public utilities is not commonly used in EU-law or in other international trade agreements for services (Krajewski, 2013: 25). Finally, any eventual coverage of certain sectors does not imply exemption from all the provisions of the agreement. It merely refers to provisions relating to market access: public monopolies and exclusive rights (Krajewski & Kynast, 2014, p. 30). Remaining measures which restrict market access such as legal form requirements, performance requirements, national treatment, non-discrimination as well as the FET-standard and the prohibition of indirect expropriation continue to apply (cf. Madner et al., 2015, p. 68).

Even though, there is one sectoral carve-out within TTIP: when France insisted to exclude audio-visual services from TTIP this was a strong message right at the beginning of the negotiations (cf. Web, 2015, p. 8). It is doubtful, however, how much of the film industry has really been excluded from the scope of the treaty as no generally-accepted definition for audio-visual services exists, and is difficult to agree upon because of rapid technological change transforming the industry (Fritz, 2015, p. 39). Taking as an example the distribution of films through internet streaming and cloud computing, the boundaries between the audiovisual industry and telecommunication industry (which is inside the scope of TTIP) become increasingly blurred, making it hard to determine what is covered by the sectoral carve-out and what isn't. This example clearly indicates the problematic impacts of negative-listing in dynamic industries. Technological progress is a game-changer, leading to rapid convergence of audiovisual content production and transmission. For instance, the German government just recently acknowledged a risk of losing media-diversity due to TTIP, as predominance of US-companies in online services could lead to difficulties in maintaining current regulation such as mandatory minimum prices for books (cf BMWIa, 2015).

Summing up the above-mentioned exemptions, it becomes clear that none of them protects the full range of public services, and not from all provisions of the agreement. Ambiguous terms and unclear definitions make it difficult to predict exactly which public services will be covered and which ones will not. Because of this lack of clarity, the existing exemptions cannot be considered as reliable protections of the public services on which millions of Europeans depend.

3. How to fix it

The core intention of TTIP i.e. creating a level playing field for transatlantic trade and investment by adopting common technical standards and market regulations, is not per se in conflict with high-quality, reliable and dynamically developing public services in Europe. The crunch question is how to go about reaching the goals of TTIP without endangering public services. Having identified and explained the key elements that are potential threats to public services in TTIP, this section explains how each of these threats can be defused. The threats identified are: the negative list approach, ratchet and standstill clauses, investment protection and inadequate reservations and exemptions for public services. If each one of the listed problems is remedied, TTIP could be made safe for public services.

3.1. Positive list approach for legal certainty

As discussed above, the two main problems affecting public services that arise from a negative list approach are the lack of legal certainty and a barrier to innovation. Rather than having a general liberalization requirement from which exceptions can be made, there should be an intentional political decision for a sector to be liberalized. This is done through a precisely defined commitment. Public services should not be part of any liberalization commitment that cannot be taken back. So even in a positive list approach a credible carve-out for public services is absolutely crucial.

3.2. No need for Investor-State-Dispute-Settlement

Investment protection standards in TTIP pose a serious threat to public services. The unprecedented wording of the standards in combination with carve-outs spread all over the chapter on investment and its annexes creates a high degree of legal uncertainty. Even worse, impending claims of investors could have influence on the regulatory behavior of local, regional and national governments and therefore cause a regulatory chill. To fix the lack of legal certainty and the danger of a regulatory chill two points are essential: clear and broad carve-outs and enforcement of investment provisions through national courts. There is simply no necessity to lift investment disputes between investors and states on an international level and let tribunals decide on the legitimacy of national measures. The European as well as the US legal system are highly developed and therefore are able to ensure the enforcement of investment standards. The EC's recent proposals to reform dispute resolution may be a step forward in the long-run. However, they cannot resolve acute pressures arising out of TTIP.

3.3. Truly protect public services through a "gold standard clause"

The existing EU safeguards for public services, enshrined in Art. 14 TFEU and Protocol 26 of the Treaties are non-negotiable issues. Piecemeal 'reservations' in an annex applying to different public services, and different TTIP measures, in different countries are incomplete and cannot effectively safeguard public services. For public services to be effectively protected we need a "gold standard clause" i.e. a horizontal exemption (meaning all sectors) of public services from all commitments

(blanket) made in TTIP, not just market access. Only a ***horizontal blanket exemption*** (i.e. gold standard) can ensure that public services are outside the scope of TTIP and thus protected from liberalization requirements. In a joint statement made on March 20th 2015, Commissioner Malmström and Ambassador Froman highlighted that "EU and US trade agreements do not impede governments' ability to adopt or maintain regulations to ensure the high quality of services and to protect important public interest objectives" (European Commission, 2015c). Words should be followed by deeds. The best way to implement the above statement is to insert a gold standard clause, a horizontal blanket exemption for all public services, into the actual TTIP text.

For the gold standard clause to really cover all public services, it is essential that the ambiguous and undefined term "public utility" is dropped, and that public services are defined in a comprehensive and all-encompassing way, in line with the SG(E)I's that are well-established in EU-law. Recent political signals towards a more balanced approach to trade-agreements are encouraging, although hesitant and not fully persuasive. As a matter of fact, important political and institutional players increasingly pay attention to ongoing widespread criticism. This huge level of public awareness could pose a realistic chance to incorporate legitimate strands of reform within pillars of European Trade policies. However, there is also a wider dimension to this challenge. Taken into account far-flung skepticism towards EU decision-making, credible efforts to provide for demands of many citizens and institutions in such a complex political field, would make a case for the EU's ability to cope in a democratic and pluralistic way with the challenges of globalization.

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