

OPEN LETTER

Commissioner
Cecilia Malmström
European Commission
Rue de la Loi 170

1049 Brussels

Brussels, 1 July 2016

Free trade agreements

Dear Commissioner Malmström,

Firstly, we would like to thank you and your colleagues, in particular those from the services unit, for the friendly and open discussions we had in the past regarding EU trade agreements (CETA, TTIP, TiSA). We appreciate the progress that has been made regarding the wording of social security reservations in these agreements. Nevertheless we still have some concerns we would like you to clarify. Of course, we will just pick up some major issues, in fact the most burning in our point of view, as a comprehensive presentation would go beyond the scope of the letter.

1. General remarks: GATS – need for updating of some rules

As you already mentioned several times, the rules in GATS were set up twenty years ago. Thus, they do not reflect anymore the political and economic developments of the last years. In particular the notion of services provided by social security institutions such as medical and rehabilitation benefits have evolved. New topics have emerged such as patient mobility and e-health which have not been reflected in the process of drafting the GATS.

The same applies to the legal concepts. Many consequences of the application of economic freedoms, the concept of non-discrimination between service providers and the prevalence of competition law were not foreseen when the regulators adopted the GATS rules. These concepts also impact on the organisation of social security systems, including the services delivered and financed by social insurers. It was often – and will certainly be in the future – jurisdiction that drives the evolution of the legal environment, including surprises and unforeseen and even unwanted outcomes that are difficult to correct in a democratic process.

We would therefore like to ask you to take the negotiations for “trade agreements” such as CETA, TTIP and TiSA not only as an opportunity to create economic growth but also to update those rules and to review certain legal concepts, where feasible, in order to avoid ambiguities and legal uncertainty in future trade agreements.

2. The use of undefined legal terms

Free trade agreements such as CETA, TTIP and TiSA contain provisions and reservations that reference statutory social insurance using “undefined legal terms”. This results in grey areas that lead to legal uncertainty.

For example, the EU has specified a reservation for health services which are “publicly funded or receive state support in any form”. However, exactly what is meant by “publicly funded or state support in any form” is unclear. The question for the social insurers in Europe is whether social insurance such as for example the statutory accident insurance system in Germany, which is funded by member contributions only, is publicly funded or not.

Furthermore, it is not necessarily the case that trade partners have the same understanding of the terms being used. For example, different countries have a different understanding of the term “statutory system of social security” which is used in CETA, TTIP and TiSA in terms of exempting the regulation of financial services:

As understood in many European countries, statutory social insurance falls under the term “social security”. However, according to the British, the “National Health Service” is part of the “welfare state” and not “social security”.

The reservations in the free trade agreements for the EU in the area of social insurance should be clearly and comprehensively formulated to ensure that the statutory social insurance systems are protected, even when the trade partners have a different understanding of the term “social security”.

The use of undefined legal terms is also problematic with regards to the investment protection provisions contained in the CETA and TTIP as well as the measures provided for investors to take legal action. If there is already the danger that the contracting parties have a different understanding of certain terms, it cannot be ruled out that arbitration resulting from this could lead to unwanted results.

3. Right to regulate and investment protection

a) Right to regulate

We welcome the clear confirmation of the parties’ “right to regulate”. However, the “right to regulate” does not exist without limits. Even when a measure passes the test, and cannot be declared wrongful or illegal, it does not automatically mean that it can be done without compensation. Thus legitimate regulation can go hand in hand with compensation.

b) Investment protection and dispute settlement

Provisions on investment protection apply irrespective of the remaining provisions in the free trade agreement. For example, even if there are clear and unambiguous formulations to

exempt health and social security from both market access and national treatment, regulatory measures which affect these sectors could well constitute a violation of the protection of property and possibly oblige the state to pay compensation.

Therefore, it is not sufficient to formulate relevant single reservations (EU or national) on market access or national treatment obligations. There needs to be at least one additional exemption for the area of social security in the investment protection chapter, namely regarding all acts that can result in an obligation to pay an indemnity.

It would be significantly easier and far more legally certain if the approach of the EU Parliament in its resolution on TiSA was to be followed. MEPs have rightly called for social security systems and services of general (economic) interest, including health and social services, to be completely excluded from the scope of trade agreements, regardless of how they are provided or financed.

4. Financial Services – a clear and unambiguous exclusion for social security systems

Social security systems in Europe have different structures. Future regulation in TTIP or other trade agreements should therefore assure that social insurance systems (and their diversity) in Europe remain and that TTIP will not lead to changes in the systems or to interference with national sovereignty of the Member States in this field.

Therefore we have asked the chief negotiators to use the GATS wording when it comes to financial services since it provides for a clearer exclusion of the statutory systems of social security in Europe. Unfortunately this was not taken into consideration in the revised EU TTIP offer which was published at the end of July 2015. The revised offer still uses the wording of the prior TTIP offer that binds the restriction to the condition that statutory social security has to be operated by a “public entity” - a condition that probably would not be fulfilled by all social security institutions in Europe, in particular self-governing institutions in Germany or Austria. Thus, it has to be feared that the current wording of the EU TTIP draft offer provides greater latitude for liberalization.

We therefore underlined last year in a letter to the services chief negotiator (see letter from 9 July to Marko Dürkop and a short summary in English attached), that a general exemption clause which excludes the statutory social insurance – starting with its financial function - from the scope of trade agreements would be the best solution. We are glad that the European Parliament also asked for an exclusion of Social Insurance in its resolution of 3 February on the negotiations for a Trade in Services Agreement (see 1.(b) ix).

5. Financing or provision of health and social services by social insurance institutions

a) Market access

We welcome the fact that the EU Commission intends to exclude ‘services forming part of a statutory system of social security’ from market access in TTIP. Nevertheless, the exclusion of “social security” alone from ‘market access’ would not completely preserve the exclusive competence of all Member States to organize and manage their compulsory and complementary health and social insurance in the future, and to define their own policy.

The term “social security” does not necessarily include compulsory health insurance funds/mutuals as variously offered in all Member States, or complementary health insurance as provided for example by the Belgian or French mutuals. It only covers administrative functions, not the delivery of ‘benefits in kind’, such as health care services offered directly without charge.

Therefore, we would like you to explicitly mention “social security” in the EU reservation and to add “current and future Services of General Interest (social and economic)”. The mentioning of these services would include health, social services and social security systems and therefore guarantee Member States’ exclusive competence in organizing their own compulsory and complementary health insurance and social services.

Furthermore, it is essential to acknowledge the same exemption explicitly in other parts of the treaty, and any Schedules applicable, such as in the part concerning “National Treatment”. This is necessary to cover all health and social services including future services and technologies, to avoid unwanted commitments in the health and social sector and to avoid investors claiming rights in these protected areas.

The same must apply for other treaties negotiated by the EU Commission.

b) National Treatment

Progress has also been made with a view to the national treatment obligation of “social services”. A reservation clause with regard to activities or services forming part of a public retirement plan or statutory system of social security has been integrated. The reservation clause shall apply to active and passive freedom of services as well as of the freedom of establishment.

Nevertheless, with regards to health services, a specific reservation clause for the activities and services of the statutory system of social security has not been integrated. The reservation clause still distinguishes between privately funded and publicly funded health services. The Commission does not intend to provide a definition of what constitutes privately and publicly funded in order to allow room for interpretation. In particular, publicly financed professional health services are still bound by the national treatment obligation.

In order to assure legal uncertainty we would like to propose a new EU reservation that excludes all services delivered and paid for by statutory and complementary systems of social security, including social insurance, from the scope of trade agreements. This solution would be perfectly in line with the European Parliament’s resolution on TiSA, which calls for an exhaustive exclusion not only of social insurance systems themselves, but also of “Services of General Interest”, including health and social services.

6. Change in the technical approach

The EU has begun to change its technical approach in free trade agreements, starting with CETA. In CETA, basically all market areas and sectors are to be opened up. Whoever wants to make an exemption, must explicitly, clearly and as unambiguously as possible mention this (the negative list approach). However, using a negative list needs to be done far more carefully than a positive list (which positively lists all areas that should be covered by an agreement). In

concrete terms for the European social insurers, this means that: It is not sufficient to use an exemption, similar to that used in the GATS, for only the insurance function of social insurance in the financial services chapter. Rather, a reservation must be applied to the administration function in the chapter on administration (CPC Division 91). Specifically, this is about exempting services as part of CPC 913 (compulsory social security services) from all types of obligations – national treatment and market access. Otherwise, unlike in the GATS, the negative list approach would include social insurance as part of trade liberalisation.

Regarding these issues which are still open, we would be happy to meet you again and discuss them with you.

We are looking forward to hearing from you.

Best regards



Dr. Franz Terwey

President ESIP



Christian Zahn

President AIM

About the *European Social Insurance Platform (ESIP)*

The European Social Insurance Platform (ESIP) represents over 40 national statutory social insurance organisations (covering approximately 240 million citizens) in 15 EU Member States and Switzerland, active in the field of health insurance, pensions, occupational disease and accident insurance, disability and rehabilitation, family benefits and unemployment insurance. The aims of ESIP and its members are to preserve high profile social security for Europe, to reinforce solidarity-based social insurance systems and to maintain European social protection quality. ESIP builds strategic alliances for developing common positions to influence the European debate and is a consultation forum for the European institutions and other multinational bodies active in the field of social security.

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About AIM

The Association Internationale de la Mutualité (AIM) is an international umbrella organisation of not-for-profit healthcare mutuals and health insurance funds in Europe and in the world which operate on the basis of solidarity. Currently, AIM's membership consists of 63 member organisation in 30 countries. In Europe alone they provide coverage of healthcare to around 200 million people. AIM strives via its network to make an active contribution to the preservation and improvement of access to health care for everyone.

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