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INTERNATIONAL TRADE AGREEMENTS AND SERVICES OF GENERAL INTEREST (TTIP, CETA, ETC.)

Executive summary

The aim of free trade agreements is to remove trade barriers in a wide range of economic sectors, including services. One of the legal provisions for achieving this goal is the agreement to grant market access to foreign companies. The effect on Services of General Interest (SGIs) is very much dependent on how these provisions are laid down in the respective agreement.

In this context, CETA opens new market access possibilities, but also contains a detailed chapter about government procurement. Therefore, the effects on SGIs in the EU have to be looked at carefully. A first analysis shows that the following provisions in CETA have an effect on the acquis communautaire of Services of General (Economic) Interest SG(E)Is:

- The scope of application of CETA is very broad since the definition of "investment" in the investment chapter is very broad too, including the award of concessions. Furthermore, the exclusions listed in CETA do not contain an exclusion for SG(E)Is, but only for some sectors and situations in the field of SG(E)Is.

- The CETA government procurement chapter largely embraces the EU procurement rules laid down in the 2014 procurement package. However, the EU market access offer for government procurement only contains a very limited version of the "in-house" rules in EU law and does not specify that award criteria may contain social, environmental or innovative award criteria.

- As a consequence, investors from Canada would then be able to bring a claim against violations of the two chapters, e.g. the one on the "in-house" award or on an award to a higher price because of ecological standards. This could be interpreted as a discriminatory measure since it is not covered under EU competition law and EU procurement rules.

SERVICES OF GENERAL INTEREST IN CETA

The aim: Liberalise trade, including services

The aim of free trade agreements is to liberalise trade, also in the field of services, which include SG(E)Is. This aim is achieved by granting market access. The legal provisions granting market access are laid down in clauses like “market access”, “national treatment”, “most-favoured-nation treatment”, “non-discrimination”, “non-expropriation”, “fair and equitable treatment” (amongst others). The effect on SGIs is very much dependent on how these provisions are laid down. In CETA, these provisions have been laid down in the investment chapter.

The Investment Chapter (Chapter 10)

CETA provides for a detailed investment chapter with several provisions granting market access, but also exclusions, which are laid down in annexes. However, the scope of application of this chapter is very broad, since the definition of “investment” in this chapter is also very broad. According to this definition of investment, concessions awarded within the European Union would be subject to the rules laid down in the investment chapter. This quality of concessions has never been discussed in the legislative process on the concessions directive.

The reservations on the other hand do not contain an exclusion for SG(E)Is in general, but only grant exclusions to a limited number of sectors and situations (for a more detailed overview see annex below). The scope of application is much wider than in previous EU free trade agreements since this is the first time the EU has agreed to the so called “negative listing”: All areas fall under the scope of this agreement if they are not explicitly listed in one of the annexes. The principle of negative listing is very critical for SG(E)Is since these are subject to constant change due to societal and technological change. A full listing is practically impossible.

The Chapter on Government Procurement (Chapter 21)

Non-discriminatory public procurement is a way of providing public services in accordance with EU competition policy. In the EU there has been a wide political and legal debate which has led to a well-balanced public procurement regime which will however most likely have to be improved even further in the future.

The CETA government procurement chapter largely embraces the EU procurement rules laid down in the 2014 procurement package. However, it only contains a very limited version of the “in-house” rules in EU law. The in-house clause taken in the EU government procurement market access offer is only valid for the award to affiliated undertakings and only in the field of the water, energy and transport networks. For local public authorities and local public services enterprises this would imply the loss of the use of direct awards e.g. in the waste sector or under Reg. 1370/2007. Furthermore, CETA does not specify that award criteria for the most advantageous tender may contain social, environmental or innovative award criteria as valid under the EU procurement rules.

Conclusion

As a consequence of the abovementioned provisions, investors from Canada would be able to bring a claim against violations of the two chapters, e.g. the one on the “in-house” award or on an award to a higher price because of ecological standards. This could be interpreted as a discriminatory measure since it is not covered under EU competition law and EU procurement rules.

Therefore, in the light of on-going and trade negotiations, we call for:

- **A stricter definition of investment in the agreements (excluding concessions, waiving of a definition of SGEIs deviant from the definitions in the EU law).**
- **Guaranteeing direct award of SGEIs as set out in EU secondary law.**
- **Allowing for social, ecological and innovative criteria when awarding public contracts and concessions in line with EU public procurement rules.**

ANNEX

Overview of the provisions with a possible effect on SG(E)I in CETA	
Definitions	Some core definitions in CETA are laid down very broadly which wideness the scope of application of CETA also into the field of SG(E)I: • **Investment (p. 149 f.)** Investments are defined very broadly as „any kind of asset that an investor owns or controls, directly or indirectly that has the characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk." In particular this definition also comprises concessions. • **Government Activity (p. 147)** Contrary to the definition of investment, the definition of „activities carried out in the exercise of governmental authority" in the investment chapter is defined very narrowly as „an activity carried out neither on a commercial basis nor in competition with one or more economic operators". • **Services of General Economic Interest (p. 298)** The definition of a service of general economic interest in CETA is not in line with the definitions that the EU Commission has used so far, e.g. in its White Paper on SGI (in particular: "The operation of an SGEI must be entrusted to one or more undertakings by the State by way of a public service assignment that defines the obligations of the undertakings in question and of the State."). Furthermore, the EU has not the legal competence to define SGEI since this is a prerogative of Member States (see article 4 TEU and 14 TFEU) and must therefore be kept open at EU level.
Exclusions	CETA allows for a few horizontal exclusions with regard to SG(E)I: water as a natural resource (p. 14), services supplied in the exercise of governmental authority and audio-visual services as exclusions from the provisions on cross-border trade in services (p. 188).

Investments (Chapter 10)	**Reservations (p. 162 ff.)** CETA contains a number of exclusions for different measures, sectors and situations that are summarized in very complex annexes. The major change lies in the fact that CETA is the first EU trade agreement with a negative listing: • **A) Negative Listing** The scope of application in CETA is much wider than in previous EU free trade agreements since this is the first time the EU has agreed to the so called "negative listing": All areas fall under the scope of this agreement if they are not explicitly listed in one of the annexes. The principle of negative listing is very critical for Services of General (Economic) Interest since these are subject to constant change due to societal and technological change. A full listing is practically impossible. All reservations are summarized in two different types of annexes: Annex I (p. 1200 ff.) contains all reservations to <u>existing</u> discriminatory measures (the EU has for example listed reservations in Health, Social and Education Services here). Annex II (p. 1497 ff.) contains all reservations for <u>future</u> discriminatory measures (the EU has listed here reservations to the collection, purification and distribution of water as well as reservation with regard to "public utilities" -see below-). • **B) The „public utilities"-clause (p. 1500)** Under Annex II the EU has listed a reservation for „public utilities", but only for public monopolies and the award of exclusive rights. However, the term "public utilities" does not exist under EU law and is therefore very contingent. The following areas are mentioned as examples for "public utilities": „related scientific and technical consulting services, R&D services on social sciences and humanities, technical testing and analysis services, environmental services, health services, transport services and services auxiliary to all modes of transport. Exclusive rights on such services are often granted to private operators, for instance operators with concessions from public authorities, subject to specific service obligations. Given that public utilities often also exist at the sub-central level, detailed and exhaustive sector-specific scheduling is not practical" This reservation is only very vague and therefore does not represent a full exclusion for Services of General (Economic) Interest.

	INVESTMENT PROTECTION
	• **Fair and equitable treatment (p. 158)** Foreign investors have the right under CETA to be treated „fairly and equitably“ and can bring this claim in cases of infringements before an international tribunal (see investor-state dispute settlement below). There has been some legal uncertainty about what is meant by “fair and equitable treatment” in the past which has been clarified in CETA by defining these provisions more precisely and reducing their scope to measures like “denial of justice” or “targeted discrimination” on grounds such as gender or race. • **Prohibition of expropriation (p. 158 f.)** The investment chapter comprises the prohibition of direct or indirect expropriation. Indirect expropriation often contains regulatory measures from the state and there is some legal uncertainty about the question which situations are meant by this. CETA clarifies it somewhat by stating in annex X.11 (p. 183) that discriminatory measures that are designed to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations. • **Investor-State Dispute Settlement (p. 164 ff.)** Investors may submit to an international arbitration tribunal a claim with regard to the breach of an obligation, e.g. “non-discrimination”, “fair and equitable treatment” or direct/indirect expropriation and may claim compensation for a loss or damage. The hearings are mainly held in public. The arbitrators are chosen from a list of international lawyers.
Government Procurement (Chapter 21)	• **Award Criteria (p. 325)** According to CETA the procuring entity shall award a contract to the supplier that has submitted the most advantageous tender or the lowest price. It is essential for providers of SG(E)I that the most advantageous tender is specified with regard to the inclusion of social, environmental or innovative award criteria. • **Direct Award / In-House** The EU offer for market access in government procurement contains only a limited version of the very detailed direct award and in-house rules in EU law. The only in-house possibility under CETA is the direct award of contracts to affiliated undertakings with regard to the water, energy and public transport networks. Every contract in any other field would lose its direct award possibilities currently applicable under EU law, e.g. in the waste sector or under Reg. 1370/2007.