

Verena Madner, Stefan Mayr, Dragana Damjanovic

# THE IMPACT OF THE COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT (CETA) ON THE LEGAL FRAMEWORK FOR THE PROVISION OF PUBLIC SERVICES IN AUSTRIA

Key Findings/Executive Summary



In Kooperation mit  
**younion**  
Die Daseinsgewerkschaft

# The Impact of the Comprehensive Economic and Trade Agreement (CETA) on the Legal Framework for the Provision of Public Services in Austria

Verena Madner, Stefan Mayr, Dragana Damjanovic

## Key Findings/Executive Summary

The European Union is currently negotiating a number of trade agreements, including most notably the infamous TTIP with the US and – a bit less in the centre of public attention – the plurilateral TiSA. While negotiations on TTIP and TiSA are ongoing, the CETA negotiations have been finished in August 2014, leading to the official publication of the draft agreement in September 2014. While the agreement is not yet binding under international law, it offers a solid starting point for evaluating potential effects on the provision of public services.

With regard to services and investment the EU considers CETA the most comprehensive trade agreement it has ever concluded. However, CETA – which is often considered a blueprint for TTIP – is quite obviously not simply a trade agreement and from a public services perspective goes in many respects beyond previous FTAs or the GATS. Above all, CETA includes highly controversial provisions on investment protection and particularly on investor-state dispute settlement.

Public Services are core to the shared values of the Union and take a special role in promoting social and territorial cohesion. A comprehensive agreement like CETA therefore raises questions and considerable concerns regarding the freedom of Member States to provide, to commission and to fund such services and to pursue public policy objectives in the fields of social, environmental and economic policy. The European Commission repeatedly held that CETA like other trade deals comes with solid guarantees which fully protect public services.

Against this background the study explores, whether and to what extent CETA may adversely affect Member States' freedom to organize, finance and provide public services. It scrutinises a broad range of provisions in different chapters of the agreement and analyses the complex structure and interplay of commitments and exceptions and reservations in various EU and country-specific annexes to the agreement. In order to illustrate the impact of CETA on public services, the study analyses problematic sector-specific cases from an Austrian perspective.

The following summary highlights some of the most important findings of the study.

### **The claim that CETA does not cover public services is inaccurate**

First and foremost: The policy space with regard to public services remains by no means untouched by CETA. Despite frequent assertions by the European Commission, the study reveals and illustrates, that it is not ensured that Member States 'remain entirely free to manage public services as they wish'.

### **List it or lose it**

In terms of sectoral coverage CETA is the first EU trade agreement that follows a negative list approach with regard to investment, cross border trade in services and financial services. The following remarks focus on investment. In a nutshell, negative listing means that *everything is bound unless explicitly excluded*. Hence, the liberalising disciplines on market access, performance requirements, national treatment, most favoured nation treatment (MFN) etc, apply *in principle* to all investments in all sectors, unless the EU or a Member State has scheduled a reservation in either Annex I or Annex II (*list it, or lose it*).

### **Lock-in of current and future levels of liberalisation**

Before going into some detail with regard to the complex and above all fragmentary system of exceptions and reservations, it is important to highlight some of the effects of the negative list approach taken in CETA. Firstly, it locks in existing levels of market openness (standstill), preventing a so-called *binding overhang*; secondly, the built-in ratchet mechanism leads to an automatic locking in of any future policy changes.

What is more, any misconceptions in the drafting of the reservations, e.g. as a consequence of government-internal communication and coordination problems, automatically leads to unintended liberalising effects. In our study we have identified a number of such issues with regard to Austria's country-specific reservations (e.g. already outdated reservations in Annex I). Finally, as a consequence of the negative list approach, new services will generally be covered by the relevant CETA obligations, as far as no corresponding exception has been scheduled (cf new Annex 9-B).

### **Fragmentary nature and uncertain scope of exceptions for public services**

As a consequence, the exact scope of a Member State's obligations under CETA depends on the specific reservations scheduled by the EU or the Member State in Annex I or Annex II. While Annex I covers reservations for existing non-conforming measures, Annex II also contains reservations for future measures. That means that only Annex II-reservations enable a Party to adopt new or more restrictive measures not conforming to the obligations concerning market access, national treatment, MFN, performance requirements or senior management and board of directors.

From a public services perspective, the piecemeal approach and fragmentary nature of the reservations are problematic. The so-called public utilities clause, which is often presented as a general exception for public services, serves as a good example: Whereas it covers all sectors (except telecommunications and computer and related services), it only allows for very specific deviations from market access disciplines, i.e. public monopolies and exclusive rights. Hence, any other market access restrictions or restrictions with regard to other disciplines are not covered by this reservation. However, they may be covered by other reservations scheduled by the EU or complementary national reservations. Apart from their scope, the reservations' ambiguity can be a serious problem, causing considerable legal uncertainty (e.g. 'services which receive public funding or State support in any form'). Thus, it will often be difficult to say, whether a particular measure is covered by any of the reservations. Moreover, CETA contains a number of symbolic proclamations with little – if any – practical relevance, which may be misleading or concealing the real scope of the agreement (e.g. regarding water only in its natural state).

### **Sneaking treaty amendments bypassing parliamentary processes**

A democratically sensitive issue can be exemplified with regard to services concessions: Services concessions play an important role in the provision of public services and were hotly debated in the context of the new EU procurement directives. On the CETA level, services concessions – so far – do not qualify as ‘covered procurement’. However, in Annex 5 to the Chapter on Government Procurement, the EU explicitly states, that it ‘stands ready ... to take up negotiations with Canada in view of extending the mutual coverage of services and services concessions of this Chapter’. Technically this requires an amendment of Annex 5. In this regard it is crucial to keep in mind, that Annexes can be amended by a certain committee, established in the agreement. The Parties then may approve the decision of the committee *subject to their respective applicable internal requirements and procedures*. From a parliamentary perspective, this could prove to be a ‘Trojan Horse’: According to Art 218 (7) TFEU the Council, when concluding an agreement, may ‘authorise the negotiator to approve on the Union's behalf modifications to the agreement where it provides for them to be adopted by a simplified procedure or by a body set up by the agreement [...]’. In such a case the European Parliament would not decide on whether services concessions should be within the scope of CETA procurement provisions; instead, the EP would only have to be informed of the changes according to Art 218 (10) TFEU. Hence, it will be crucial whether the Council will issue such an authorisation when concluding CETA.

### **Undermining democratic law- and policy-making**

A particularly controversial issue concerns the inclusion of investment protection standards (e.g. fair and equitable treatment, direct and indirect expropriation, etc.) and the establishment of an Investor-to-State Dispute Settlement mechanism. In this context, the study deals with a number of problematic aspects.

Generally, due to the asset-based definition of ‘investment’, the investment chapter has an extremely wide scope (including e.g. service concessions). Also, the sector-specific exceptions in the Annexes, e.g. with regard to health services, social services or education services have no bearing on the Parties’ obligations in the field of investment protection. Hence, repercussions in the field of public services can especially result from claims to compensation for alleged violations of investment protection standards. Under the impression of such financial threats, regulators may refrain from taking action (so-called ‘regulatory chill’). Moreover, the special rights granted to foreign investors create a particularly problematic imbalance vis-à-vis domestic investors and civil society, as CETA may not be directly invoked in the domestic legal systems of the Parties.

The study doubts that the attempt to define the standard of fair and equitable treatment more precisely works out effectively. Similarly, the requirement of substantial business activities, aiming at excluding ‘letter-box’ companies from investment protection, does not set the bar too high.

What is more, the unclear MFN-provision does not unequivocally exclude the import of substantive obligations from other international investment treaties or trade agreements. Again, this puts the efforts to increase the precision of investment protection standards in CETA into perspective.

All in all, the potential impact of the investment protection chapter, including Investor-to-State arbitration, on the policy space with regard to public services cannot be overestimated.

*Addendum: Only after the study had been completed, the new Investment Court System (ICS) has been implemented in the CETA context. However, the issues raised remain by and large untouched by the ICS.*

*In an attempt to soothe the harsh criticism provoked by the inclusion of an ISDS mechanism in CETA and TTIP, the EU developed this new approach towards investment and investor-state dispute settlement. At an institutional level, the ICS establishes a permanent tribunal and an appellate tribunal which is competent to review the decisions of the tribunal. Moreover, the investment chapter now contains a provision on 'Investment and regulatory measures', 'reaffirming' the Parties' right to regulate. So far the right to regulate has basically been the flip side of what is considered in conformity with investment protection standards by international investment tribunals. While States have technically remained free to regulate as they wish, the mere threat of ISDS claims may often have exerted a considerable chilling effect with the potential of seriously distorting democratic processes. It is highly doubtful, whether the new provision in Art 8.9 CETA will really tip the balance in favour of States' regulatory freedom; it may just as well turn out as yet another symbolic proclamation.*