AK EUROPA

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AK Position Paper

Current negotiations on the plurilateral Trade in Services Agreement (TiSA)

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About us

The Austrian Federal Chamber of Labour is by law representing the interests of about 3.4 million em-ployees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership.

The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.

Organisation and Tasks of the Austrian Federal Chamber of Labour

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 560.000 - amongst others unemployed, persons on maternity (paternity) leave, communityand military service - of the 3.4 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Rudi Kaske
President

Werner Muhm
Director

The AK position in detail

From 6 to 10 July 2015 the 13th round of negotiations on the **plurilateral Trade in Services Agreement (TiSA)** took place in Geneva. The Austrian Federal Chamber of Labour (AK) would like to take this as an opportunity to underline the basic positions of the AK on the TiSA negotiations once more and to state its position on some areas in the context of current negotiating texts. At the outset we refer to the AK EUROPA position papers of June 2013 on TiSA[1] and of April 2015 on TTIP and CETA[2], which contain our basic positions on the TiSA treaty. In the following, we will first make some general remarks on the TiSA negotiations and then comment on individual areas in several current negotiating texts by way of example.

1. General remarks on the TiSA negotiations

The negotiations of the EU and, currently, 24 other WTO members taking place since March 2013 on the planned plurilateral Trade in Services Agreement, TiSA, are aimed at a further liberalisation of the cross-border trade in services. With the TiSA negotiations, the „coalition of the willing" which originated from the initiative of the so-called „Really Good Friends of Services" is pursuing the goal of pushing through their aggressive liberalisation goals in the context of a new negotiating forum outside the multilateral WTO trade system due to the existing political conflicts within the Doha round of the WTO.

The AK has already repeatedly expressed its **decisive rejection** of an agreement on trade in services going beyond the General Agreement on Trade in Services (GATS), and thus of the TiSA negotiations. Instead of conducting negotiations on a GATS follow-up agreement, the EU would do better to take the reasons for the faltering of the GATS negotiations seriously. One of these, in particular, is also the fact that a reform of the GATS in the sense of better protection provisions for regulatory policy space and social welfare standards at national, regional and local level has so far still not been achieved. The AK has repeatedly stated its position on this and on the status of the Doha round in detail.

From the point of view of employees, a fundamental change of direction in the EU's trade policy is urgently needed. In this context, for negotiations on international trade in services, the **anchoring of mandatory and enforceable labour standards** and **guaranteed adherence to wage and labour regulations** are just as indispensable as the **removal of public services** from the scope of trade agreements (cf inter alia AK EUROPA position paper on the Reflections Paper of the European Commission on „Services of General Interest in Bilateral Free Trade Agreements" of March 2011[3]). These goals must also be realised in particular in the context of a substantial reform of the GATS at multilateral level. The current shift towards a new „GATS 2.0" agreement is in contrast likely to circumvent corresponding reform proposals as well as liberalisation reservations and to subvert necessary further developments of the multilateral trade system.

In the TiSA negotiations an offensive liberalisation agenda is being reflected which is placing the **regulatory policy space** of states, in particular in the area of the regulation of **public services**, increasingly **under pressure**. In the course of the negotiations so far, the European Commission has not revealed any intention of supporting a general carve-out of public services from the scope of the agreement. With the application of a so-called hybrid approach in the context of the schedules of commitments, which contains a negative list approach together with „standstill" and „ratchet" clauses in the area of national treatment, pressure is being exerted on liberalisation commitments being as far-reaching as possible. Furthermore, several negotiating texts on the annexes envisaged to the agreement contain highly problematic regulations, which are likely to undermine states' regulatory policy space in the public interest as well as protection standards for employees and consumers.

Of great concern for the AK is also the fact that the negotiations - despite the potential far-reaching effects of the agreement on a broad range of economic and social areas - do not demonstrate **sufficient transparency** vis-à-vis the public and are being conducted in **the absence of a comprehensive examination** of the possible effects of the agreement. Thus, the AK calls for the European Commission to ensure that all negotiating documents in the TiSA negotiations are made public in order to enable a broad and comprehensive discussion on the agreement. The lack of a comprehensive examination of the potential effects of the planned agreement is also obvious in the fact that a public consultation about TiSA was only conducted after the negotiations had already started and, until now, no impact assessment by the European Commission has been made public.

Irrespective of our decisive rejection of the TiSA negotiations, in the following we would like to make comments on individual areas of the current TiSA negotiations. The comments do not represent complete and conclusive remarks on the respective areas of negotiation.

2. Core text of the TiSA agreement

Re Art I-1:

In Art I-1 para 3(b) of the present negotiating text, "services supplied in the exercise of governmental authority" are, as in the GATS, exempted from the scope of the agreement. These are defined under (c) as "any service which is supplied neither on a commercial basis, nor in competition with one or more service providers". The AK is of the view that with this provision only some restricted areas of state activity such as the police, the military or the judicial system will be removed from the scope of the agreement.

In order to guarantee comprehensive regulatory policy space in the area of public services, from the point of view of the AK, it is however necessary to adopt a **general binding carve-out of public services from the scope of the agreement.** In this context, it is not only a matter of safeguarding existing, but also future policy space.

The exemption clauses proposed by the EU in the schedules of commitments are, from our point of view, not sufficient to ensure adequate policy space for states in order to regulate the provision, financing and organisation of public services. Furthermore, the principal approach of the European Commission is to be questioned, namely, of envisaging specific - in our view, insufficient - exemption clauses for public services only at the level of the schedules of commitments. Thus,

several of the negotiating texts on the annexes envisaged contain provisions which are likely to restrict regulatory policy space in the public interest in the area of public services (see specific comments below). The schedules of commitments do however primarily relate to the commitments or limitations and exemptions of the contractual parties taken on in the respective sectors in connection with the market access and national treatment provisions. Exemption clauses which are entered in the schedules of commitments do in principle not exempt the sectors and measures concerned from the further provisions of the core text as well as from the annexes of TiSA.

Re Art "Most Favoured Nation Treatment and Economic Integration – GATS Article V":

Where things stand at present it is unclear whether the contractual parties intend to insert an article on Most Favoured Nation (MFN). A potential MFN commitment would throw up a whole series of unanswered questions with regard to the extent of the concessions by the TiSA contractual parties with regard to the treatment of services and service providers from other states which would also have to be granted to all other TiSA contractual parties. Thus, there does not exist **any legal certainty** about which provisions from other trade and bilateral investment agreements might be incorporated into TiSA on the basis of the MFN clause. Therefore, in our view, the incorporation of such a clause is to be rejected.

Re Art I-3 to I-5 and Art II-2:

There is a general criticism to be made about the fact that the negotiations currently taking place on the offers regarding the schedules of commitments in connection with the specific obligations as per Art I-3 to I-5 **are not based on a substantiated assessment of the legal consequences.** This is particularly relevant given the background that the scope and configuration of the „GATS plus" contractual elements envisaged (for example in the areas of new and enhanced regulatory disciplines, domestic regulation, public procurement etc) have not yet been clarified. Thus, the relationship between the specific commitments as well as limitations and exemptions of the contractual parties with regard to Art I-3 to I-5 vis-à-vis the rest of the possible provisions of the agreement also remain completely unclear. At any rate, the level of protection and the scope of the **existing horizontal exemptions in the EU schedules of commitments** („public utilities" exemption and „subsidy reservation") must not be restricted in any way.

Furthermore, **the application of the negative list approach** in connection with the national treatment obligation (Art II-2) as well as the associated application of the standstill clause and the ratchet clause on part of the exemption clauses of the national treatment is **to be decisively rejected.** This is because these mechanisms would fundamentally restrict the policy space at national and local level, establish an "autonomous built-in dynamic" towards liberalisation and intensify the pressure on any exemption clause from liberalisation commitments. In this context, reference should be made to the fact that the European Parliament, in its resolution of 8 June 2011 on the trade relations between the EU and Canada, stated that the application of the negative list approach in CETA „ should […] **not serve as a precedent for future negotiations"**[4].

T**rade agreements must leave enough policy space in order to be able to react to negative liberalisation experiences and to meet democratic demands for**

(re-)regulation (such as in the case of remunicipalisations). For this reason, a simplified procedure also needs to be developed to modify once made liberalisation commitments in order to ensure sufficient regulatory flexibility in such agreements.

Re Article on „Domestic Regulation":

The wording envisaged in para 1 on the recognition of the right to regulate and to adopt new regulations concerning the provision of services in order to achieve public interest objectives is insufficient in the AK's view to guarantee regulatory policy space, in particular in the area of public services. This wording does not mean that those provisions of the annex on domestic regulation which are identified as being problematic for regulatory policy space (see section 3 of this position paper) would not be applicable. One should also note critically that the EU rejects the proposal of a specific clarification which would state that the contractual parties are not being hindered from introducing or maintaining regulations in order to ensure the provision of universal services.

Re Art I-9:

Within the context of the proposed Art I-9, based on where things stand currently, the inadequacies in the GATS general exemptions are being continued. Thus, the envisaged article does not contain, for example, any explicit exemptions for measures to ensure employee protection beyond the protection of health mentioned in the text and social security as well as the guaranteeing of environmental protection.

Binding and enforceable minimum labour standards are missing in the negotiating text

The existing negotiating text is also characterised through the omission of including binding and enforceable internationally recognised minimum labour standards. Thus, the EU cannot in any way fulfil the declared goal of EU trade policy to contribute effectively to sustainable development. Furthermore, nor will the r**esolution of the Austrian National Council on the requirements for EU trade agreements of 24 September 2014 be met.**

The AK demands that EU trade agreements must stipulate the binding obligation on all contractual parties to **ratify and fully and effectively implement and adhere to at least the ILO core labour standards.** The international labour representational bodies have for a long time been pushing for ILO minimum labour standards to be included within the context of the WTO and the GATS, respectively. These demands are being further undermined by the plurilateral TiSA negotiations and their complete ignoring of the connection between cross-border trade and labour rights. Furthermore, the fact that no commitments with regard to international environmental agreements are the subject of negotiations on the TiSA core text is also to be criticised.

3. Annex on domestic regulation

From the AK's point of view, it is essential to ensure that **states' regulatory policy space** in relation to the guaranteeing of high quality, labour, environmental and consumer protection standards, the maintenance and expansion of public services and their regulation as well as further political goals in the public interest are in no way restricted by international trade agreements. In particular, states'

policy space for defining universal service obligations must be unequivocally ensured. Several textual proposals currently up for discussion for the annex on domestic regulation, which is aimed at the removal of barriers to cross-border trade in services through services-related regulations, are however likely to restrict this regulatory policy space.

Re Art 4:

The current textual proposal is in the view of the AK to be rejected at any rate. It would oblige the contractual parties to ensure that any licensing requirements and procedures, qualification requirements and procedures as well as, possibly, technical standards meet the criteria set forth in GATS Art VI para 4(a), (b) and (c).

The negotiating agenda in relation to GATS Art VI para 4 has already represented a controversially debated subject area within the context of the GATS negotiations due to the **interference in the regulatory autonomy of states** linked with it. GATS Art VI para 4 tasks the Council for Trade in Services of the WTO with developing disciplines which are to ensure that qualification requirements and procedures, technical standards and licensing requirements are "based on objective and transparent criteria such as competence and the ability to supply the service" (para 4(a)); "not more burdensome than necessary to ensure the quality of the service" (para 4(b)); and, "in the case of licensing procedures, not in themselves a restriction on the supply of the service" (para 4(c)). The extremely vague terminology used here is likely to expose services-related regulations in the public interest to the risk of becoming the object of complaints in the context of dispute settlement procedures.

In particular, in the view of the AK, the provision whereby respective regulations should be **„not more burdensome than necessary"**, is to be **decisively rejected**. For one thing, the relevant wording is extremely vague and, in the event of a dispute, would mean that public bodies are subject to a massive pressure of justification when drawing up regulations. Furthermore, the wording only targets the quality of the service as the objective of regulation and does not explicitly take into consideration further aspects such as the protection of employees, health and the environment. The introduction of potential **„necessity tests"** in connection with services-related regulations would place domestic regulation massively under pressure due to the explicit objective of the greatest possible dismantling of trade barriers pursued in trade agreements. Against this background, it is of particular importance that states' policy space in relation to **universal service obligations** and other conditions aimed at the public good is in no way restricted.

Furthermore, in connection with the proposed Art 4 as well as in relation to Art 5(a) of the TiSA annex on domestic regulation, it should be noted that the term „objective and transparent criteria" could be interpreted in wildly different versions in the context of services-related regulations in the event of a dispute. It is necessary to ensure regulatory policy space to implement regulations for the protection of employees, consumers and the environment also on the basis of societal preferences as well as in the absence of conclusive scientific certainty about existing risks, for example in connection with certain processes. Previous trade disputes do, however, demonstrate that the US criticises EU regulations based on the precautionary principle as unscientific and not based on objective standards. It can therefore not be ex-

cluded that regulations based on the precautionary principle or societal preferences will also in the services sector become the object of trade disputes via such provisions.

4. Annex on transparency

In the AK's view, the envisaged provisions on the information obligations of the contractual parties, for example in connection with planned regulations which affect the scope of the agreement, as well as rules which require the contracting parties to enable and, possibly, comment on queries and statements of position by „interested persons" are to be assessed extremely critically. The envisaged provisions far exceed GATS Art III. In particular, it is to be feared that obligations on the inclusion of „interested persons" from the areas of all TiSA contractual partiesin the review processes for numerous regulatory plans which may be of relevance for services sectors would require an **excessive administrative effort** which may delay regulatory processes in the public interest and would, in practice, grant companies, business associations and lobbying firms massive **possibilities of exerting influence.**

5. Annex on the movement of natural persons

As already expressed more than once, the AK represents the position that negotiations on a f**urther liberalisation in the area of the cross-border provision of services by employees** („mode 4") are **to be rejected**, as long as an effective cross-border collaboration ofad-ministrative and legal authorities is not secured. This is a precondition for ensuring that minimum wages, working conditions and other labour standards in force are adhered to on the basis of labour and social law as well as collective agreements. In the area of the short-term migration of labour, a warning should be given about the undermining of domestic regulations such as wage provisions and labour and social legislation. This applies in particular given the background as the TiSA contractual parties represent countries with very diverse wage levels. Furthermore, also given the background of the straitened employment market in Austria and the EU, there should be no further commitments in the area of mode 4.

Without prejudice to this fundamental position, it must be ensured at any case that the non-guaranteeing of adherence to labour and social law and collective agreements, for instance in relation to wage provisions, as well as the lack of enforcement of the penalties for infringements of these conditions can become the **object of the general dispute settlement mechanism**. In this context, it must be possible to apply sanctions. Furthermore, with regard to the applicable labour and social law and collective agreements, for instance in relation to wage provisions, the destination country principle must be adhered to at any case and the so-called **„labour clause"** must be maintained.

The attempts by individual contractual partners reflected in the negotiating text to prohibit the application of economic needs tests in the area of cross-border

provision of services by natural persons must be decisively rejected in the view of the AK.

The textual proposal contained in para 6 whereby the contractual parties are to desist from the application of „overly burdensome procedures" is to be rejected.

6. Annex on financial services

Based on experiences of the severe financial market crisis, which escalated in 2008 and whose destabilising effects are still causing severe economic problems in the Eurozone today, the AK is in favour of not taking on **any further commitments to liberalise financial services and provisions for their regulation in trade agreements.** The AK therefore also rejects the annex envisaged in TiSA on financial services.

The efficient market hypothesis, which represents the basic justification for the liberalisation of the financial sector amongst others in GATS, has been proving to be absurd. After decades of liberalisation have taken place, the fulfilment of the central functions of the financial sector is not at all guaranteed. **Excessive liberalisation** is also associated with intensified competition on the financial markets which fuels herd mentality and a high readiness to take risks. Pressure also arises to expand financial institutes and for massive market concentration, especially as this is associated with increased competitiveness in international competition.

The steps taken so far to re-regulate the financial markets are still not sufficient by far to ensure a sustainable stabilisation of the financial sector. Further liberalisation and disciplines on the regulation of financial services in trade agreements could **prevent necessary regulatory measures or make them more difficult.** The AK requests the Austrian federal government not to join the demands for a further opening up of the financial markets and instead to support their comprehensive regulation at European and international level. Accordingly, we are also advocating for existing EU trade agreements to be critically examined with the view of amending excessive liberalisation commitments where necessary.[5] At the same time we are pleading the case for the further development of international forums in the area of financial market regulation into democratically legitimised, transparent organisations. The supreme goal must be to shape the financial sector such that it contributes in the best possible way to a stable and continuous development of the entire economy.

In what follows, we will discuss some proposed provisions of the annex on financial services in TiSA in order to reinforce our general dismissive position with examples.

Re Art X.2:

The term „financial services" is very comprehensively interpreted in the present negotiating text and is to encompass all insurance and insurance-related services as well as all banking and other financial services, inter alia also trading for own account with all financial products, whether on the stock exchange

or over-the-counter, or the provision of financial market data and its processing (Art X.2). The definitions on financial services are based on the GATS definitions. Furthermore, **„new financial services"** are also included. These are also found in the WTO Understanding on Commitments on Financial Services. According to Art X.2(d) of the negotiating text, these are financial services which are not provided in the area of a contractual party but are offered in the area of another contractual party. Pursuant to Art X.9, foreign providers may offer these new services if this is also permitted to domestic providers. The legal form may also be prescribed and an authorisation may be required which however may only be refused for „prudential reasons". The latter are however defined in a relatively fuzzy and at the same time narrow way. In this regard, **public or social interests do not play any role** (see notes on Art X.16).

Re Art X.3:

The concrete scope of the market access rules (Art X.3) depends on the concrete commitments as well as limitations and exemptions in the schedules of commitments. Depending on the content of the commitments, a series of **critical questions can arise in connection with regulatory approaches,** for example concerning rules on establishing a system which separates commercial and investment banking, position limits or for restricting short selling. It should be noted that the article concerned itself does not contain any exemptions. In the preliminary CETA text an exemption was included in the market access article which is to enable the implementation of a system which separates commercial and investment banking. This was however not adopted in the present TiSA text. The proposal to include a „standstill" mechanism, whereby restrictions to market access commitments for financial services may only refer to existing nonconforming measures (Art X.3 para 2), must at any rate be rejected.

Re Art X.5:

In the context of Art X.5, proposed provisions are up for discussion which state that the contractual parties shall list existing **monopoly rights** as well as make further efforts beyond that to **reduce these or dissolve them**. This goes beyond the original GATS provisions. Considerations of public interest are not taken into consideration here too.

Re Art X.10:

A further subject is the **transfer of data and its processing** (Art X.10). In this context, the provision is to be rejected whereby no contractual party may take measures that prevent the transfer of data or the processing of finance-specific data into and out of its territory or the transfer of equipment if this is necessary for carrying out the usual business activity of the financial service provider (Art X.10 para 1). Although it is pointed out that the article is not to hinder states from protecting personal data and personal privacy, this, however, only applies as long as such measures do not serve to circumvent the provisions of the agreement, which can be interpreted in widely differing ways. The similar provision in Art X.10 para 2 is also to be rejected.

Re Art X.11:

Furthermore, the contractual parties shall in principle allow financial service providers of any other contractual party **access to the payment and clearing systems** which are run by a public body as well as to official financing possibilities (Art X.11). Although financial service providers of another contractual party are not to receive access to credit which the contractual party grants as „lender of last resort", this provision nevertheless appears not sufficiently clear and also for this reason not unproblematic from the perspective of financial market stability.

Re Art X.14:

The provisions on non-discriminatory measures (Art X.14), which can also be found in the WTO Understanding on Commitments in Financial Services, are intended for the contractual parties to endeavour to reduce or remove also those negative effects on financial service providers of any other contractual party which arise as the result of **„non-discriminatory measures"**. These include, for example, measures which hinder the further expansion of the activities of a financial service provider into the whole territory of a contractual party, or measures which actually comply with the provisions of the agreement but for example hinder the market entry of a provider of the other party . Furthermore, according to the textual proposal the contractual parties are to make efforts not to restrict the current extent of market opportunities for service providers from other contractual parties. These provisions have been **drafted very vaguely** and give the impression of being a door opener for more extensive steps towards liberalisation the form of which is difficult to assess.

Re Art X.15:

In the context of the provisions on transparency (Art X.15), central textual proposals, which demonstrate parallels to proposals for regulatory cooperation in TTIP, are to be assessed most critically in the AK's view. Para 4 has the aim of obliging the contractual parties to make planned regulations in the scope of the annex publicly accessible before their adoption so that „interested persons" will have an opportunity of stating an opinion on the intended regulation. According to the current textual proposals, this consultation possibility is even to go so far that the contractual parties will have to answer or comment on such queries or suggestions in the course of the consultation process (para 5 or 8). These provisions would in practice drastically increase the **possibilities for financial and lobby firms for having influence on proposed regulations**. Should these provisions also apply at subcentral level, the usual review procedure for drafting laws and other regulations in Austria might have to be opened up to the effect that, in future, service providers from all TiSA contractual parties could also take part.

Re Art X.16:

The provisions concerning the **„prudential measures"** (Art X.16) are not detailed enough and are to a great extent identical with the conditions in GATS, which

were however drawn up before the financial crisis. The corresponding GATS provisions have already been criticised as they create an **extensive grey area.** According to the provisions on prudential measures, a state is to be able to take measures, irrespective of other provisions of the agreement, if the protection of, inter alia, investors or policyholders is at stake, or if the integrity and stability of the financial system (or of financial institutions) is endangered. Even here there is, however, the restriction that these measures may not be used to circumvent obligations under the agreement. **This passage does, however, place a question mark next to the provision itself** since, if no infringement of the obligations arises through corresponding measures, then there is no special rule needed for this. On the whole, a clearly more comprehensive provision about regulatory exceptions would be needed where, inter alia, the functioning of the financial sector in the sense of the public good is taken into account. Even the provisions in the provisional CETA text are more comprehensive in his regard. According to these a contractual party may prohibit certain financial services or activity as a precautionary measure.

7. Annex on electronic commerce

In what follows, we will deal with some provisions of the current negotiating text on electronic trade which entails several problems from a data protection perspective.

Re Art 1:

Para 1: Here it should also be stated that the EU and the national legal frameworks for the protection of consumers and their data or their personal privacy are to remain unaffected by TiSA.

Para 2: The approach of the second paragraph is to be supported whereby apparently the annex on electronic trade on the basis of the current textual proposals is without prejudice to „the policy objectives and legislation" in the areas of the protection of intellectual property, the protection of personal privacy, confidentiality of personal and company data, consumer protection and the protection and promotion of cultural diversity. The proposal to explicitly include health data in this listing is also welcomed.

Re Art 2:

It should be ensured that **every data flow must be based on information having been given in th regard and the consent of those concerned.** Furthermore, it should be guaranteed that agreements on data flows do not affect the national legal frameworks.

Para 1: An agreement whereby no contractual party may prevent service providers of another contractual party from obtaining access to personal data in and outside its own territory, store it and transfer it, is **much too far-reaching**, would not at all correspond **with the EU's legal framework** and is decisively rejected by the AK.

Para 3: The proposal whereby consumers are to be protected from fraudulent and deceitful commercial practices by service providers on the internet is supported.

Para 4: The approach whereby the contractual parties want to improve their law enforcement endeavours with regard to data protection is supported.

Para 5: Para 5 significantly equates to para 1 (see above) and is rejected by us.

Re Art 3:

Paras 1 and 2: Here too once again the significance of measures against fraudulent and deceptive conduct is focused on. The approach is to be supported.

Para 3: According to this, consumers are to continue to have access to those consumer protection mechanisms already in place which are provided by national consumer protection authorities. The requirement „[u]nder non-discriminatory terms and conditions" is unclear and should be formulated more precisely.

Paras 4 and 5: According to the text proposed, the contractual parties are to recognise the significance of the cooperation of national consumer protection institutions in order to bolster the confidence of consumers in electronic trade. A clearer formulation would be desirable (e.g.: "The contractual parties submit themselves to existing national dispute settlement mechanisms available to consumers.").

Re Art 4:

Para 1: Instead of the **soft wording** it should rather be stated: "The contractual parties recognise the national or EU-wide applicable regulations for the protection of personal information of online users."

Para 2: The agreement whereby every contractual partner may adopt or maintain a legal framework which serves the protection of personal data is rejected in this respect as **not strict enough**, as it is stated that the legal framework is to contain internationally recognised principles. However, the data protection principles which the Council of Europe, for example, has laid down, do however fall far short of the EU's legal framework. Therefore, reference should only be made to **national and EU-wide data protection provisions.** The restriction whereby the national legal framework is only to be applied to the extent that it is non-discriminatory must absolutely be rejected.

Re Art 5:

Paras 1-3: The current EU legislation with regard to protecting consumers against unwanted commercial notifications (spam etc) may not be undermined. The sending of advertising must continue to have as a prerequisite the prior express consent of those concerned subject to the threat of punishment.

Re Art 8:

This provision is to be welcomed in principle. It should however also at any case refer to the securing of net neutrality in the internet.

Re Art 9:

An agreement whereby no contractual party may require of a service provider that he only stores data within its own territory is **much too far-reaching** and is rejected by the AK. Public officials responsible for data should, for example, at any case have the right reserved, in the context of tenders, to list the requirement that the data processing intended is to be undertaken within the EU.

Re Art 10:

The current EU legislation on security and reliability criteria with secure electronic signatures may not be undermined in any way by this planned agreement. With data flows within and over the borders of the EU there must continue to be **room to manoeuvre for European legislation** to lay down security requirements for authentification systems for data transactions.

8. Annex on telecommunications

Irrespective of our general positions and further aspects of the negotiating text on the annex on telecommunications, we would like in particular to deal with Art 2 of the annex on telecommunications. In Art 2 para 1, according to the current proposals for the text, the aim is to oblige the contractual parties **not to limit foreign (capital) participation** in telecommunication sectors or in electronic trade. This is rejected by the AK. This provision could also be in conflict with several existing legal provisions and therefore create **legal uncertainty.**

In the EU the ownership of former monopolists in the area of telecommunications is treated extremely differently, as the telecommunications infrastructure – due to its significance for public order and security, public services as well as crisis management – can indeed be regarded as sensitive sector. In Austria – according to **§25a International Trade Act (Außenwirtschaftsgesetz)** – the acquisition of shares to the extent of more than 25% in telecommunications companies is in principle subject to an **obligation to obtain authorisation** from the Federal Minister for Science, Research and Economy. The provision envisaged in the annex on telecommunications could therefore make the application of §25a International Trade Act impossible in this area.

Furthermore, potential legal conflicts can be envisaged in connection with the Austrian **ÖBIB (Austrian Federal and Industry Involvement) Act** (in particular §7(2)), which envisages that the ÖBIB has as far as possible to ensure and maintain its **influence in its involvements**; either by keeping 25% plus one share or through rights or contracts with third parties, which enable the right to vote on annual general meeting resolutions which, according to the Austrian Stock Corporation Act (Aktiengesetz), require a three-quarters majority. Moreover, the relationship of individual textual proposals in this article to **antitrust law** and, in particular, the conditions for a refusal of an involvement due to antitrust law or regulatory conditions (market dominance) should be examined.

It should also be noted that the abovementioned concerns also exist in principle in connection with the market access obligation which prohibits the restriction of foreign capital participation as per Art I-3 para 2(f) of the TiSA core text insofar as no exceptions are entered in the schedules of commitments in this regard.

9. Annex to delivery services

Art 9 („freedom to contract") would make the introduction of a **ban on subcontract chains**, which represent a frequent and problematic phenomenon from the employees' point of view in the area of parcel deliveries, **impossible.**

Furthermore, Art 6 would only enable the financing of a universal service via tax revenue and, for example, no longer via charges or contributions of the other postal service providers.

10. Annex to public procurement

The AK is critical vis-à-vis the annex on **public procurement**. We refer to our positions on public procurement in trade agreements in the AK EUROPA position paper on TTIP and CETA of April 2015. The present textual proposal omits a clear demarcation of the envisaged scope of the annex. At any rate, **public services** have to be generally exempted in an unequivocal way from the scope of the agreement and thus also from any annex on public procurement. Furthermore, in the context of the textual proposal significant requirements on **reform of the regulations on public procurement** such as moving away from the criterion of the lowest price and the promotion of social and ecological criteria in the awarding of public contracts are not considered.

11. Concluding remarks

As already stated in the introduction, the AK decisively rejects the **negotiations on the GATS follow-up agreement TiSA**. The shift to the plurilateral negotiating forum is likely to undermine central demands of the representative bodies of employees in view of the reform of the multilateral trade system. The remarks in this position paper also make clear that with much of the content of the TiSA negotiations **there exist severe concerns** with regard to possible risks for regulatory policy space, in particular in the area of public services, standards of protection for employees and consumers as well as other public interests.

In particular, the present strong public criticism of the TTIP negotiations as well as the rejection of the ACTA agreement by the European Parliament in 2012 make clear that **previous errors should not be repeated** and the direction of the **EU trade policy** must undergo a **fundamental change of course.**

Against this background, in our view it is imperative that discussion of the TiSA agreement is conducted on the basis of a **comprehensive and broad public debate.** Likewise, in our view, given the far-reaching areas of negotiation and lack of legal certainty with regard to numerous parts of the negotiations, there is an urgent need to examine the possible effects of the planned agreement and its manifold possible contractual contents in the context of **independent and comprehensive studies**, in particular legal opinions.

Footnotes and Literature

[1] http://www.akeuropa.eu/_includes/mods/akeu/docs/main_report_en_298.pdf

[2] http://www.akeuropa.eu/_includes/mods/akeu/docs/main_report_en_368.pdf

[3] http://www.akeuropa.eu/_includes/mods/akeu/docs/main_report_en_170.pdf

[4] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2011-0257+0+DOC+PDF+V0//EN

[5] In this context, we once again refer to the recommendations of the UN Commission of Experts on Reforms of the International Monetary and Financial system, Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System (2009), http://www.un.org/ga/president/63/commission/financial_commission.shtm, esp p 104.

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