



October 2015
AK Position Paper

TTIP negotiations:

EU proposal for a „Title on trade in services,
investment and e-commerce“ and the related
revised EU offer

About us

The Austrian Federal Chamber of Labour is by law representing the interests of about 3.4 million employees 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, community and 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

The Austrian Federal Chamber of Labour (AK) would like to set out in this position paper its positions on the draft EU proposal for the Title on trade in services, investment and e-commerce and the related revised EU offer in relation to the trade and investment agreement between the EU and the US (TTIP) as well as the corresponding documents presented by the EU in the negotiations. However, we wish to emphasise that the amount of time granted by the European Commission to Member States to address the relevant drafts before the 10th round of negotiations was extremely short.

It is still the case that there is neither a transparent process of drafting the relevant EU positions based on broad discussions in society nor a comprehensive assessment of the possible legal implications of the negotiating texts. The proposed text and the offer by the EU were published on 31 July 2015. However, this only occurred after the 10th round of negotiations from 13 to 17 July 2015 in which these negotiating texts were presented.

As a matter of principle, it is not possible to make a final position statement regarding the current documents. Firstly, at the time of writing of these analyses several draft texts of the agreements relating to the negotiating areas concerned were not yet available. In particular, the planned parts of the current text on investment protection and investor-state dispute settlement were missing. In addition, no drafts of the

TTIP chapters on public procurement, on subsidies and on competition policy have been disclosed as yet. Secondly, it can be assumed that the proposals and offers by the European Commission will undergo further changes during the negotiations.

Basic positions

Below, we would like to highlight some of our basic positions regarding the TTIP negotiations. In particular, we wish to affirm here our position, which we have put forward repeatedly, that **TTIP must not contain investment protection provisions and related enforcement mechanisms such as ISDS** (see the AK EUROPA position paper on the proposed investment court system¹).

Moreover, we reiterate in particular our demand for a **general mandatory exclusion of public services from the scope of the agreement**. This exclusion should apply regardless of how such services are provided or funded. Also, service concessions should in any event be excluded from the scope of the agreement.

The AK furthermore rejects the application of the so-called **negative list approach** (including the “standstill” and “ratchet” clauses) in the context of the liberalisation of trade in services. We also strongly oppose the application of a so-called **hybrid approach**, in which both the positive and the negative list approach are employed in relation to the liberalisation commitments.

The AK **opposes** negotiations for a **further liberalisation of the cross-border provision of services by workers** (mode 4), unless cross-border administrative and judicial cooperation is ensured as a precondition for guaranteeing compliance with applicable minimum wages, working conditions and other labour standards on the basis of labour and social law and collective agreement provisions.

It is the AK's view that, against the background of the urgently needed (re-) regulation of the financial sector, **financial services** should be **removed** from the scope of the TTIP (see also the AK EUROPA position paper on the current negotiating texts for TISA of September 2015²).

Although a final assessment is not possible, we would nevertheless like at this stage in the negotiations to make the following comments on the documents presented:

"Title on trade in services, investment and e-commerce"

Chapter I: General Provisions

Article 1-1 para. 1: This paragraph is apparently intended, among other things, to stipulate the right to regulate of the parties to the agreement. The AK believes that the proposed provision is **not able to comprehensively ensure regulatory policy space for measures in the public interest**. It has to be pointed out that the establishment of the right to regulate only refers to measures that are "[c]onsistent with the provisions of this Title". However, this provision does not exclude from the relevant TTIP regulations measures in the public interest

which would otherwise contradict the provisions of this part of the agreement. This casts serious doubt over the significance of this provision in our view.

Article 1-1 para. 2: Regarding footnote 2, we propose the inclusion of the following vital addition: "Moreover, the sole fact of requiring on a non-discriminatory basis that a service supplier complies with all laws, regulations and collective agreements concerning wages, working and employment conditions and social security shall not be regarded as nullifying or impairing benefits accruing to any Party under the terms of a specific commitment."

Article 1-1 para. 3(j), (k): The exemption for "services supplied in the exercise of governmental authority" only applies to services that are provided "neither on a commercial basis nor in competition with one or more economic operators" and, according to the prevailing opinion, therefore only exempts individual limited areas of governmental activity, such as the police or the military, from this part of the agreement. In the AK's opinion, it is necessary to anchor a **general mandatory exclusion of public services from the scope of trade agreements**.

Chapter II: Investment, Section 1: Liberalisation of Investments

Article 2-1 para. 4: The AK has a critical stance towards the treatment of subsidies chosen in the current document. It must in any event be ensured that **subsidies for public services are removed completely from the scope of the agreement**. The relevant provisions state that subsidies are dealt with in the chapter on competition and state

aid. As such a chapter is not available, it is not possible to fully assess which provisions should be applied to subsidies. Moreover, it is incomprehensible that the exemptions for subsidies under Chapter II and Chapter III are configured differently. Thus, in Chapter III (Cross-border Supply of Services) Article 3-1 para. 3, subsidies are excluded from the provisions of the entire chapter. However, the exemption for subsidies in Chapter II Section 1 Article 2-1 para. 4 only applies to the provisions of Section 1 (Liberalisation of Investments) and not to the entire chapter, including the proposed Section 2 (Investment Protection).

Article 2-2: This chapter can only be assessed when it is clear whether investment protection and ISDS are included in the TTIP. Even if the parties to the agreement are willing to exclude market access from investment protection and ISDS, it is not possible to differentiate clearly between the “establishment” and “operation” of an investment, since in reality the processes are fluid and merge together. It is therefore necessary that a legal study establishes to what extent the definitions and differentiations could withstand a potential investor lawsuit.

Article 2-4: The “most-favoured-nation” clause should also be examined to ascertain whether undesirable “**treaty shopping**” is firmly ruled out.

Article 2-6: The **obligations on performance requirements** significantly limit the political and economic sovereignty of the parties to the agreement. The AK is fundamentally critical of the obligations to restrict performance requirements because the parties to the agreement thereby remove their abil-

ity to respond to future challenges using economic policy instruments. In the current text, the obligations on performance requirements are further expanded, which we vehemently oppose. As a matter of principle, the Commission should go into the negotiations with comparable treaty texts in order to strive for coherence in trade and investment agreements as far as possible. However, new performance requirements have been added compared to CETA: para. 1 (h) to (l) and para. 2 (e). The Commission should also be asked which rationale it is pursuing with this strategy, and in any event, coherence between the various agreements should be called for.

Article 2-7 and Article 3-5: The proposed **negative list approach** for the provisions mentioned in the respective first paragraphs, including the application of the “**standstill**” and “**ratchet**” mechanisms for the exemptions in Annex I, is resolutely **rejected** by the AK. These mechanisms would result in an increase in momentum of the liberalisation process and regulatory policy space would come under increasing pressure. We also refer to the uniform position statement of the Austrian provinces of 9 May 2014, in which the application of the negative list approach is rejected.

Article 2-7 para. 4(a) and Article 3-5 para. 3(a): In relation to the provisions on market access, it must in any event be ensured that no increased liberalisation mechanisms (“standstill” and “ratchet” mechanisms) are applied. The provisions in the passages cited here have to be assessed as **extremely problematic** as they limit the regulatory policy space. In this context, it has to be

once again pointed to the problem of the treatment of the local level in Annex I (among other things in view of the commitment categories on national treatment and performance requirements) which arises due to the application of the “standstill” and “ratchet” clauses.

In addition, significant exemptions from market access are missing in Article 2-7, including, for example, a stipulation ensuring that urban planning measures are not restricted.

Chapter IV: Entry and Temporary Residence for Natural Persons for Business Purposes

The AK opposes negotiations for a further liberalisation of the **cross-border provision of services by workers** (“mode 4”), unless cross-border administrative and judicial cooperation is ensured as a precondition for guaranteeing compliance with applicable minimum wages, working conditions and other labour standards on the basis of labour and social law and collective agreement provisions.

In any event, any possible chapter on “mode 4” must state that a lack of enforcement by the parties to the agreement may be the subject of the general dispute settlement mechanism, including the imposition of sanctions.

Article 4-2 para. 2, which aims to ban economic needs tests for intracorporate transferees and business visitors must be rejected in any event.

Chapter V, Section 1: Domestic Regulation

Article 5-1: The intended scope of the planned chapter on domestic regulation does not appear to be fully and clearly determined.

Article 5-2: The guidelines specified in para. 2 for criteria for licencing and qualification requirements and procedures are in some cases very vague, making it possible **to put service-related regulations under pressure and limit potential regulatory policy space in the public interest**. Thus, the requirement listed in (a) for criteria to be “proportionate to a legitimate public policy objective” may be interpreted very differently by a dispute settlement panel, both as regards the interpretation of the proportionality of a measure and the legitimacy of a public policy objective. In the AK’s opinion, this wording should therefore be rejected along with the ill-defined requirement for “objective” criteria, which could give rise to problems regarding the definition of measures based on precautionary considerations in the absence of complete scientific information about the risks of a particular method of service provision.

Para. 6: In the list of public policy objectives, the use of the word “legitimate” should be omitted and worker protection should be explicitly included.

Article 5-3 para. 2: The requirement stating that licencing and qualification procedures and formalities should be “as simple as possible” and “not unduly complicate or delay the provision of the service or the pursuit of the economic activity” are much too widening and imprecise. With regard to licencing

and qualification procedures, theoretically, simpler methods can always be conceived. The important question is whether or not such methods would be detrimental to the quality of the process.

Section IV: Postal and Courier Services

Article 5-16: We would like to point out that the vaguely worded provisions on **universal service obligations** in the postal services sector, such as the requirement that they must be “not more burdensome than necessary”, can be interpreted very differently and therefore may possibly create legal uncertainty.

Article 5-29: This article prohibits the parties to the agreement from **limiting the participation of foreign capital** in the field of electronic communication services and networks. In the AK’s view, it is necessary to examine how the applicability of certain laws, such as in particular §25a of the Austrian Foreign Trade Act (AußWG) and the Austrian State Holding (ÖBIB) Act (in particular §7(2)), can be ensured (see also the AK EUROPA position paper on the current TISA negotiating texts of September 2015).

Specific comments on the offer for the EU schedules of commitments

“Public utilities” clause: It has already been noted that the “public utilities” clause is not able to exclude public services from the entire scope of the agreement. This reservation only removes the corresponding activities from certain aspects of the market access commitments. We reiterate our demand for a general mandatory exclusion of public services from the scope of the agree-

ment. With regard to the “public utilities” clause, further areas should in any case be included in the illustrative list of examples of relevant sectors, such as energy, social services and education services. It is also necessary in this context above all to incorporate the expanded wording “health and social services”. It is important firstly to emphasise the horizontal nature of the “public utilities” clause as an interdisciplinary matter (cross-sectoral, non-exhaustive list of relevant sectors, emphasising its indicative scope). Secondly, in view of the commitment categories, a fundamental increase in the level of protection is necessary since - as has been repeatedly emphasised as a problem - a restriction to certain aspects of market access commitments is insufficient to achieve an exclusion from the entire scope of the agreement.

Water supply and waste-water disposal: The **inclusion of the water supply** in the classification of services sectors to be negotiated within the framework of Annex III **must in any case be rejected**. This is a break with previous negotiating practice - already in the course of the GATS negotiations, a move by the European Commission in this regard was categorically rejected. Also, there is no inclusion of water supply in the classification of the positive list in the EU-South Korea trade agreement. In the draft offer provided, the scope of the agreement has been expanded by the classification of water supply as subsector 5./D. “Collection, purification and distribution of water (ISIC rev 3.1: 410)”, enabling related demands to be placed on the United States. A precedent for the inclusion of water supply in international negotiations on services must be rejected. An important aspect

of this approach is that it is also likely to lead to counter-demands with regard to public services and to put existing European exemptions under pressure. Furthermore, in order to implement the demands of the European citizens' initiative "right2water", the EU should not make any market opening commitments on waste-water disposal (or CPC 9401).

Culture: The exemption for audiovisual services is not sufficient. The AK calls for the exemption of the entire cultural sector from the scope of the agreement.

Omission of the "Rail Transport" section: The "Rail Transport Services" section is apparently entirely missing from Annex III (however, this category is mentioned with regard to exemptions from national treatment). In this context, the "unbound" status of Austria should also be entered.

Limiting foreign capital investments: In order to ensure the legal applicability of the protective provisions of §25a of the Austrian Foreign Trade Act (AußWG) concerning the limitation of investments in companies in the interest of public safety and order, including public services and crisis prevention, as well as with respect to the Austrian State Holding (ÖBIB) Act and its requirement of ensuring the influence of ÖBIB on relevant investments (in particular §7(2)), Austria would have to enter a corresponding horizontal exemption clause, for example in Annex III.

Legal uncertainty regarding the definition of "publicly funded" and "privately funded" education, health and social services: The restriction of the Annex III commitments to privately funded education, health and social services as well as the exemptions in Annex II for publicly funded services in these sectors are not based on a clear definition of the terms "publicly funded" and "privately funded". For this reason, there is legal uncertainty regarding the scope of the corresponding commitments.

Footnotes

¹ http://www.akeuropa.eu/_includes/mods/akeu/docs/main_report_en_382.pdf

² http://www.akeuropa.eu/_includes/mods/akeu/docs/main_report_en_377.pdf

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