November 2017

AK Position Paper

Commission proposals for a mandate for trade agreements with Australia and New Zealand

COM (2017) 472; COM (2017) 469

www.akeuropa.eu

About us

The Austrian Federal Chamber of Labour is by law representing the interests of about 3.6 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 Austrian Federal Chamber of Labour is registered at the EU Transperency Register under the number 23869471911-54.

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). 816.000 - amongst others unemployed, persons on maternity (paternity) leave, communityand military service - of the 3.6 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Rudi Kaske
President

Christoph Klein
Director

Executive Summary

The BAK is critical of the project for the following reasons: The draft negotiating mandate for the two trade agreements is not based on comprehensive impact assessments, nor on sustainability impact assessments. In addition, essential elements for the employee-oriented realignment of trade policy are not taken into account. In our opinion, the following concerns should at least be included:

Sustainability chapter: For the BAK, the ratification, implementation and application of all eight ILO core labour standards by all parties is a precondition for the provisional or definitive entry into force of trade agreements. Each sustainability chapter must allow for effective sanctions if these standards are breached and the intended measures are exhausted. The fines should be used to remedy grievances.

Regulatory cooperation: The precautionary principle under EU law must be explicitly enshrined. The scope must be precisely defined and limited. It must be ensured that existing protection levels are not lowered. Excluded are all regulations of sensitive protection interests in the areas of health, safety, consumers (in particular data protection), labour standards, and the environment. In addition, explicit exceptions are required from certain sectors such as the chemicals, pharmaceuticals or food sectors, and from certain sensitive regulatory issues, such as genetically modified organisms (GMOs), hormones, antibiotics or veterinary matters. The BAK rejects consultations in transnational bodies with undefined stakeholders about an unrestricted regulatory stock.

Trade in services: The BAK demands a reliable limitation of the negotiation guidelines: It does not guarantee an early exclusion of sensitive service sectors (such as services of general interest), nor does it prevent a deterioration of negotiating standards (such as a comprehensive definition of a positive list approach for any obligations). The BAK also advocates comprehensive coverage of labour, social, income and collective agreements, as well as the destination country and the principle of favourability. The focus is primarily on measures to improve cross-border cooperation in administration and justice, and to refrain from further liberalisation of cross-border provision of services by workers (so-called mode IV). In view of the targeted negotiations on expanded disciplines for national regulation, a so-called "necessity test" is rejected and instead a comprehensive safeguarding of high-quality social, labour, consumer and data protection laws, environmental and democratic-political standards, is demanded.

Public Procurement: Greater liberalisation of international procurement markets is considered problematic. In any case, public services, as well as contracts and concessions in the area of supply, are to be excluded from the agreement. Above all, it is important to refrain at an early stage from the forced inclusion of public-private partnerships

(PPP) in connection with TTIP. Especially in the wake of the economic crisis and international climate protection commitments, it is an essential task of the public sector to strengthen a sustainable orientation of public procurement. It must be based on the highest environmental and social standards, as well as on compliance with international standards for the protection of employees.

The Federal Chamber of Labour (BAK) refers to its comprehensive statement of 27.11.2015 to the Commission's communication "Trade for All", which applies in large part to the topics of the Trade Package.

The AK's position in detail

1. General Ratings:

The negotiating directives (Australia: COM (2017) 472 and Annex, New Zealand: COM (2017) 469 final and Annex) include liberalisation and the mutual opening of markets for goods and services, direct investment (but not investment protection), public procurement and intellectual property rights in the objectives of the two EU trade agreements with Australia and New Zealand. In the following, the focus of the BAK will be on the terms of reference: Regulatory Cooperation, Trade in Services, and Public Procurement. With regard to the Sustainable Development chapter, we refer in particular to our recent statement on the "Non-paper of the Commission services on Trade and Sustainable Development (TDS) chapters in EU Free Trade Agreements".

Unfortunately, there is no adequate **impact assessment.** According to the mandate proposal, it should only be presented at a later date, not specified. The **Sustainability Impact Assessment** is also to be tackled and will be available only at the time the Agreement is initialled. This lacks the essential foundations for a serious assessment, which continues to uphold our criticism in this regard.

The Commission's **Impact Assessment Summary** Communication[1] for both trade agreements shows that only a **long-term GDP effect of 0.02% would be expected**. As we have repeatedly demonstrated, this result is doubtful for several reasons. For the economic impact assessment, general equilibrium models are applied, which inherently only allow for short-term unemployment and do not take into account social adjustment costs for administration, consumers, companies, especially SMEs, which arise as a result of changes in regulations. Similarly, retraining costs such as additional unemployment benefits, changeover costs, etc. are not considered. In addition, the model suffers from a trend of undervaluation of imports and the elimination of customs duties. Also completely open are the costs which the public expects to derive from the regulatory differences. The summary also did not address the negative diversification effects on the hitherto most important single EU market. (Our detailed critique of common equilibrium models can be found in the above statement on "Trade for All".)

Finally, a long-term 0.02% cumulative GDP effect would not be a strong argument for economic benefits. This is much too small an economic effect to ignore the considerable risks involved, for example, in potential deregulation due to regulatory cooperation, or the potential liberalisation of services.

The impact assessment commissioned by the Commission also assumes *"slightly higher **greenhouse gas (CO2) emissions** ... (increase of 0.38% in Australia, 0.64% in New Zealand, and 0.04% in the EU) with a decrease in the rest of the world, which would correspond to a marginal **increase** globally and in the long run"*. This is contrary to the General Principles in the Negotiating Directives, where a commitment to protect the environment should be enshrined.

As was the case with CETA and TTIP, the study authors of the Summary of Impact Assessment in individual sectors expect liberalisation of trade to provide some **"transitional unemployment"**. However, more detailed information is missing.

The negotiating mandate for Australia and New Zealand does not provide **investment protection**. This is obviously due to the new trade architecture pursued by the European Commission. Nonetheless, the BAK points out, with regard to any separate bilateral investment protection agreements, that it has consistently opposed the privileged protection of property for foreign investors. In particular, it vehemently rejects the extension of special arbitration for multinational corporations. There is no need for such a court of law, especially between developed states such as the Member States of the EU and Australia or New Zealand.

In the mandates, the BAK does not include provisions on compulsory compliance with the **precautionary principle under EU law**.

Likewise, as with CETA and TTIP, as well as relevant interest groups, such as the German Association of Small and Medium-Sized Enterprises[2], we doubt the alleged advantages for European SMEs. The majority of SMEs produce primarily for regional markets and the EU internal market. Around 70% of Austria's foreign trade takes place with EU countries, with another 10% taking place with other European countries. Most studies predict a decline in EU internal trade due to trade agreements with third countries. This decline would hit SMEs in particular.[3]

Against this background, and based on the underlying comprehensive approach to trade agreements, we assess the risks that would accompany a trade agreement based on the current negotiating directives as greater than the benefits for workers, the environment and citizens.

2. The demands of the BAK in terms of content for a trade agreement with Australia and New Zealand

On regulatory cooperation

With regard to the regulatory cooperation proposed by the Commission, we refer to our detailed opinion of 09.03.2015 on Regulatory Cooperation in the framework of CETA and TTIP, and to the legal opinion commissioned by the BAK on regulatory cooperation on CETA and TTIP (Stoll et al 2014). These criticisms are also applicable to the planned trade agreements with Australia and New Zealand. In addition, we want to emphasise our attitude towards the following aspects:

The BAK expressly rejects the Commission's proposal for regulatory cooperation based on the model of CETA. In principle, the BAK is critical of any **harmonisation projects** and the **mutual recognition** of regulations because they tend to lower standards.

The BAK is of the opinion that the assessment of which laws and **regulations are unnecessary and burdensome** must not be based on purely commercial considerations or on cost grounds. Above all, the assessment must be made within the framework of established democratic decision-making processes at European and Member State level.

The BAK therefore demands that the relevant **parliaments**, in particular, be fully involved in regulatory cooperation. Legal development must not be impeded by the agreement. In any case, it is important to avoid modifying democratically agreed regulations after the entry into force of the trade agreements with Australia or New Zealand, and restricting the future development of regulations.

The **scope** of the regulatory cooperation must be precisely defined and limited, in the view of the BAK. It must also be ensured that existing protection levels are not lowered. Excluded are all regulations of sensitive protection interests in the areas of health, safety, consumers (in particular data protection), labour standards, and the environment. In addition, explicit exceptions are required from certain sectors such as the chemicals, pharmaceuticals or food sectors, and from certain sensitive regulatory issues, such as genetically modified organisms (GMOs), hormones, antibiotics or veterinary matters.

The **precautionary principle applied in the EU** and contained in EU law must continue to be applied and must be explicitly enshrined, both in the negotiation mandate and in the text of the agreement. For example, in the North American approach to the precautionary principle, scientific uncertainty about the risks of certain processes or products is not sufficient to justify protective measures. Rather, these require that damage has already occurred, and that scientific proof of causation is provided. In this context, CETA and TTIP provide that protective measures can only be taken if they are "cost-effective". However, the assessment of cost-effectiveness would itself require more science-based knowledge about risks. Moreover, under **WTO** rules, safeguarding measures must **not be more restrictive than necessary** and only apply on a **temporary** basis. In this respect, an infiltration of European standards is to be feared (cost / benefit analyses, if appropriate and feasible, review in the case of new scientific findings, proportionality of protection level and measure).

The BAK rejects **early consultation** on regulations. In combination with the inclusion of unspecified **interest groups** in the preparation of regulatory proposals, regulatory regulation could be curtailed (Regulatory Chill). Therefore, the concept of advocacy needs to be defined. Social partners and civil society organisations must be recognised according to their social relevance and involved in the regulatory processes.

On trade in services

The present Negotiating Directives fail to reliably limit the scope of the negotiation mandate for trade in services and related national regulations. **Instead of overburdening, precise negotiating guidelines are needed** to guarantee the early exclusion of sensitive areas of negotiation (e.g. in the area of services of general interest) and to prevent deterioration of **negotiating standards** (such as a comprehensive definition of a positive list approach for any obligations in the area of services).

No liberalisation through the back door

However, the mandate lacks a commitment to the WTO-based GATS standard approach "positive list" for service-sector negotiations. This commitment to the multilateral standard negotiating approach must be explicitly stated. On the other hand, the legal risks and restrictions for regulatory leeway,

which are based on a negative list approach, including its ratchet and standstill clauses, must be completely ruled out. This means, among other things: The lists of commitments for liberalisation may only apply where, at most, an obligation is expressly stated. Moreover, in no area should any clauses be used that provide for automatism in the direction of increasing liberalisation. The missing provisions in the mandate are all the more problematic because the EC has recently repeatedly exerted pressure in individual negotiations to change the negotiating approach, and to proceed far more proactively than in the GATS. In this context - not least against the background of the expressly incorporated reference to the controversial TiSA negotiations in the negotiating mandate - the partial application of a negative list approach, along the TiSA guidelines, is rejected by the BAK (i.e. a so-called hybrid approach: It should also be recalled that standstill and ratchet clauses in the GATS are also not included in the national treatment list). **Public scope of action** must **not** be **limited** in advance by automatically recording so-called "new services" as a result of liberalisation obligations.

Secure public margins for regulation
We also point out that the guidelines fail to collect urgently needed **"safeguards" for securing public interests** in newly negotiated areas such as **"enhanced regulatory disciplines"** and **"domestic regulation".** In any case, the room for manoeuvre for establishing **high-quality social, labour, consumer and data protection laws, environmental and democratic policy standards,** must be ensured at an early stage (up to more complex testing and approval procedures). Regulatory autonomy for setting such standards must be protected against an excessive interpretation of criteria that are already extremely contentious in the GATS or TiSA context, such as "not more burdensome than necessary" and any **"necessity tests"** or similar **"regulatory tests"**. It is also strongly recommended to fully protect the room for manoeuvre to establish economic needs assessments, procedures for impact assessments (e.g. environmental and social impact assessments), and licensing requirements in the public interest against exacerbated deregulation pressures. In this context too, the Commission's negotiations management should be strengthened.

To guarantee comprehensive protection for workers.
Obligations for **further liberalisation in the area of temporary cross-border provision of services by workers** (so-called mode IV) are to be **exempted** from the mandate. Rather, the focus should be on measures to improve cross-border cooperation in administration and justice in order to ensure compliance with applicable minimum wages, working conditions, and other labour standards, on the basis of labour and social legislation, as well as collective agreements. A lack of enforcement by the contracting parties must be the subject of dispute resolution including sanctions (and, if necessary, also a suspension of liberalisation obligations). In any case, with regard to the applicable labour, social, income or collectively agreed provisions, the **destination country and the favourability principle**, as well as the applicability of the so-called **"Labour Clause"**, must be comprehensively guaranteed.

The wording "nothing in the Agreement should prevent the parties from applying their national laws, regulations and requirements regarding entry and stay" requires a better, more

effective entrenchment. For this purpose, the Negotiating Directives delete the subsequent relativisation "provided that, in doing so, they do not nullify or impair the benefits accruing from the agreement".

In addition, alternatively, for example, this supplement is recommended: "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."

In addition, it should be made clear that there is no reduction in qualification requirements and categories of persons compared to GATS definitions. Protection against wage and social dumping, especially in the case of potential evasion constructions, such as bogus self-employment, must be effective. In the face of continuing difficulties in law enforcement, it is desirable to establish a commitment to the negotiation of "effective provisions on administrative enforcement".

Comprehensive exclusion of public services

It also **lacks** a **comprehensive and clear exception for public services** under the Negotiating Directives. Apart from the exclusion of audiovisual services and services rendered "in the exercise of official authority" (within the meaning of Article I:3 GATS), no area should be exempted from the scope of application in advance. On the other hand, it would be necessary to establish a **comprehensive a priori exemption for public services in the field of application**. It should also be demanded, in view of the positive precedent for the negotiating standards, for other so-called "new generation" agreements.

Therefore, the exemption clause should be added to the already too narrow exclusion of services in the "exercise of official authority": "The agreement will not apply to public services and to measures regulating, providing or financing public services. Public services are activities which are subject to special regulatory regimes or special obligations imposed on services or service suppliers by the competent national, regional or local authority in the general interest. Special regulatory regimes or special obligations include, but are not limited to, universal service or universal access obligations, mandatory contracting schemes, fixed prices or price caps, the limitation of the number of services or service suppliers through monopolies, exclusive service suppliers including concessions, quotas, economic needs tests or other quantitative or qualitative restrictions and regulations aiming at high level of quality, safety and affordability as well as equal treatment of users".

In addition, the current Negotiating Guidelines also point to the so far too weak reference to Protocol 26 TFEU. In particular, the effective exception of public services must take account of the EC's repeated attempts to keep the understanding of "public services worthy of protection" as close as possible and the negotiating power for commercial interests (for example, by providing services of general interest in areas such as energy, postal services, transport, or rubbish and wastewater disposal excluded) as broad as possible. However, such a reduction would also be in contradiction with the scope

for action of cities, regional authorities and national legislators to set the sectoral scope of public services on demand.

Protect critical infrastructure from takeovers
It should also be noted that the **establishment of standstill clauses relating to obligations to free movement of capital must be rejected**. In addition, in view of its current draft regulation on investment screening, the EC is called upon to ensure the **necessary room for manoeuvre and the possibility of designating restrictions and exceptions for foreign direct investment in the public interest**.

This goes hand in hand with the audit and control mechanisms developed in the Member States, which are designed to limit takeovers of critical infrastructure, strategic enterprises, and services of general interest and crisis prevention. In the Austrian context, care must be taken here above all to ensure sufficient protection of present and future public scope for action within the meaning of **Section 25a of the Foreign Trade Act**.

In general, determination of the Negotiating Directives should be **firmly rejected** for liberalisation commitments that go beyond the TiSA plurilateral service agreement (**"TiSAplus"**). The conclusion of TiSA is more than contentious and there is no need to anticipate the open follow-up to the current freeze on negotiations.

On Public Procurement and Awarding
Greater **liberalisation of international procurement** markets is problematic. Especially in the wake of the economic crisis and international climate protection commitments, it is an essential task of the public sector to strengthen a sustainable orientation of public procurement. It must be based on the highest environmental and social standards, as well as having the precondition of compliance with international standards for the protection of workers (as described, inter alia, in the ILO core labour standards, the ILO governance conventions such as the Labour Inspection Convention, 1947 / No 81, and in the up-to-date conventions such as the Labour Clauses (Public Contracts) Convention 1949 / No 94 are included). The prevailing fixation on the criterion of price proves to be unsuitable for raising the international level of labour, social and environmental standards in procurement. Under no circumstances should the **Austrian provisions on in-house procurement, possibilities for inter-municipal cooperation, and the consideration of social and ecological criteria** in procurement procedures, be circumvented. It is therefore all the more important to ensure that there is room for manoeuvre to take account of industrial and regional policy objectives.

In any case, **public services**, as well as **contracts and concessions in the area of supply**, are **to be excluded** from the agreement. Above all, it is important to refrain at an early stage from the forced inclusion of **public-private partnerships (PPP)** in connection with TTIP. Against this background, it is essential to delete in the mandate references to enhanced negotiating objectives in the areas of "state-owned enterprises and undertakings with special or exclusive rights operating in the public utilities sector", as well as references to "covering commitments for public private partnerships / concessions".

On the sustainability chapter

The precondition for the provisional or final entry into force of trade agreements is the ratification, implementation and application of all eight ILO core labour standards by all contracting parties. Each sustainability chapter shall impose effective sanctions if these standards are breached after all measures have been exhausted. The penalties must be used to remedy grievances in those branches / sectors where they occurred. Please refer to the above statement on "Trade for all" and to the "Non-paper of the Commission services on Trade and Sustainable Development (TDS) chapters in EU Free Trade Agreements", dated 16.10.2017.

Footnotes

[1] Accompanying document SWD (2017) 292 final

[2] See German Association of Small and Medium-Sized Enterprises under https://www.bvmw.de/fileadmin/NewsLetter/Mittelstand-aktuell/ttip-special.html

[3] Grumiller, Theurl (June 2015). What does TTIP mean for medium and small businesses? Under https://www.ttip-stoppen.at/wp-content/uploads/2015/06/KMU_TTIP_Studie_Attac1.pdf

Should you have any further questions
please do not hesitate to contact

Eva Dessewffy
T: +43 (0) 1 501 651 2711
eva.dessewffy@akwien.at

and

Petra Völkerer
(in our Brussels Office)
T +32 (0) 2 230 62 54
petra.voelkerer@akeuropa.eu

Bundesarbeitskammer Österreich
Prinz-Eugen-Straße 20-22
1040 Vienna, Austria
T +43 (0) 1 501 65-0

AK EUROPA
Permanent Representation of Austria to the EU
Avenue de Cortenbergh 30
1040 Brussels, Belgium
T +32 (0) 2 230 62 54
F +32 (0) 2 230 29 73