Ref. Ares(2015)412272 - 02/02/2015

CECILIA MALMSTRÖM
MEMBER OF THE EUROPEAN COMMISSION

Brussels, 02. 02. 2015

Dear Ms Roy,

Dear Mr. Baussand,

Thank you very much for the constructive meeting we had on 5th December, in which you explained your concerns regarding the treatment of services of general economic interest in the EU's free trade agreements. I share your view that European public services such as healthcare and education are among the best in the world. This is recognised not only by citizens but also by EU law. For this reason, the EU and its Member States are required to protect public services in any new laws or policies they adopt, which includes EU trade agreements with countries outside Europe. Of course I am committed to continuing this practice both in TTIP and in other EU trade agreements.

All our free trade agreements (FTAs) fully preserve the EU's ability to respond to key societal choices at the same time as seeking market access of commercial value for EU companies. For the past two decades since the conclusion of the General Agreement of Trade in Services (GATS), the EU has consistently protected public services. All EU trade deals, including CETA, TTIP and TiSA, will continue to provide important guarantees that ensure EU governments remain free to manage public services as they wish:

Firstly, a broad horizontal so-called "reservation" preserves the right to run monopolies and grant exclusive rights for a wide range of public services sectors at all levels of government, including the local level. In all our FTAs so far, this reservation reads as follows:

"*In all EU Member States, services considered as public utilities at a national or local level may be subject to public monopolies or to exclusive rights granted to private operators.*[...]"

EU governments are therefore free to decide what they consider to be public 'utilities' or services. If they wish, public authorities at local, regional and national level can organise these services so that just one supplier provides the service. They can also choose whether to procure a service from a private or third sector provider ('exclusive rights'), or to provide it themselves in-house ('public monopoly').

Of course, if a public authority chooses to procure a service externally it would need to follow the obligations set by relevant EU procurement law. There may be obligations under the Government Procurement Agreement (GPA) of the World Trade Organisation (WTO), however, this is not the case for health, social or educational services on which the EU has not made any commitment, either in the GPA or any FTA.

Secondly, on top of the right to have a monopoly (and in particular relevant when this right is not exercised) the EU always excludes from its concrete liberalisation commitments particular sectors such as publicly funded healthcare and social services, as well as publicly funded education services. This means in particular that public authorities do not have to provide access to their markets.

For a comparative table setting out the EU's usual reservations for public services, please see the Annex of this letter.

And thirdly, public authorities in Member States remain free to regulate how exactly services have to be supplied – for example, by defining the safety and quality standards which all suppliers have to meet. No EU trade agreement affects such right to fully regulate services, whether they are publicly funded or not.

To sum up, all publicly funded services, no matter how they are delivered, are protected in the EU's trade agreements by these three guarantees. And if an EU government has decided in the past to outsource some public services to a private contractor, it is free at any time in the future to reverse this decision.

Regarding the legal order of provisions in an international agreement such as TTIP or CETA versus provisions in the EU Services or Public Procurement Directives, let me first describe the general legal order between EU Treaties as part of the primary EU law, international agreements concluded by the EU and EU secondary law. Based on settled case law, the highest ranking legal norms are "the value foundations of the EU legal order" (see an enumeration of those values in Article 2 of the Treaty on the European Union - TEU). These norms are followed in the EU legal order by the general principles of Union law, including fundamental rights and written primary law, notably the TEU and the Treaty on the Functioning of the European Union (TFEU), with Protocols. Thereafter would follow international agreements binding on the EU and then secondary law in the form of legislative acts, such as the EU Services Directive or the EU Public Procurement Directive.

Having said that, when negotiating trade agreements such as CETA or TTIP, the Commission as well as the other EU Institutions naturally need to respect the EU Treaty provisions, including the provisions on services of general economic interest as enshrined in the TFEU, in particular Art. 14 and Protocol No. 26, and take care that such services operate on the basis of principles and conditions which enable them to fulfil their mission. In the same vein, the Commission will take care that its trade agreements will be in line with the existing secondary law such as the Services Directive or the Public Procurement Directive as part of the EU acquis and avoid creating conflicts between international agreements and EU secondary law.

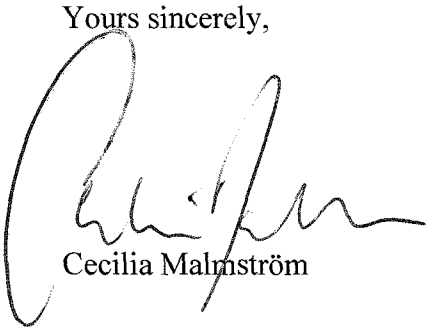
With regard to Investor-to-State Dispute Settlement (ISDS), we are currently in the process of considering our approach for TTIP. The report on the public consultation was published on 13 January and I am now consulting with Member States, MEPs and relevant stakeholders on how to take it forward. However, more generally, I can already say the following: ISDS is only available in very limited situations, when the very specific rules on investment protection have been breached. These rules, in a nutshell, only refer to expropriation without compensation, denial of justice, coercion or harassment and discriminatory treatment. In any case, ISDS cannot change the policy decision, but only allow compensation.

The possibility to go to domestic courts is open to any individual or company for any type of claim under domestic law, including EU law. A service provider or client of services of general economic interest can lodge a claim based on domestic law and/or EU law only in domestic courts. Remedies other than compensation, e.g. repeal or reversal of the measure, are normally available in domestic courts. However, trade agreements concluded at EU level do not have what is termed "direct effect" in the countries concerned, which means that individuals or companies cannot claim any rights resulting from EU trade agreements in domestic courts.

To conclude, it is worth noting that the US takes a similar view on the importance of protecting public services. They too have their safeguards and they are not looking to dismantle ours. My counterpart United States Trade Representative Michael Froman confirmed this during my visit to Washington in December 2014. [1]

I hope this reply provides answers to the issues on the treatment of services of general economic interest in the EU's free trade agreements that were raised during our meeting.

Yours sincerely,



Cecilia Malmström

[1] Transcript of the corresponding 8th December 2014 press point with US Trade Representative Froman can be found here: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1217