ETUC POSITION ON THE PLURILATERAL TRADE IN SERVICES AGREEMENT (TiSA)

Approved by the ETUC Permanent Committee on International Matters, Trade and International Development on 14 January 2016

Introduction

The European Trade Union Confederation (ETUC) and its affiliates call for a reorientation of EU Trade Policy to promote economic, social and environmental justice. For the ETUC, an open trading system is important but should not be an end in itself. It should promote decent work in the EU and abroad.

The ETUC believes that global trade in both goods and services must be conducted under fair conditions in order to guarantee the protection of labour rights and to enable the wider public to benefit from possible welfare gains. In order to guarantee the effective protection of labour rights, the ETUC insists that all EU trade and investment agreements must include enforceable labour protections.

The ETUC has made its position and demands regarding trade and investment agreements very clear in the context of the public debates around the agreements between the EU and the US (TTIP) as well as Canada (CETA).

The EU has been negotiating a plurilateral agreement on trade in services (TiSA) since 2012 together with 22 other states[1]. According to the mandate given to the EU Commission by the Council, this agreement should aim at extensive liberalisation by being "comprehensive and ambitious" and "apply in principle to all sectors and modes of supply".[2]

An examination of the mandate and of leaked chapters of the draft agreement leads the ETUC to call for a redefinition of the mandate and for the negotiations to address the following areas of concern.

I) Negotiations Need More Transparency

The ETUC is seriously concerned that the negotiations have been conducted so far without the required level of transparency while it appears that all negotiation documents will be officially published only five years after negotiations have been concluded.

EU Commissioner for trade Cecilia Malmström says that since she took office, the Commission has put in place a new transparency initiative which has made EU trade policy more transparent than ever before. However, this initiative does not appear to go beyond the TTIP debate and public information about TiSA remains scant.

The Council allowed the negotiation mandate to be made public only two years after the start of the negotiations, demonstrating also the reluctance of EU member states to ensure effective transparency at both national and European level. In any event,

[1] Apart from the EU, TiSA negotiation partners include: Australia, Canada, Chile, Chinese Taipei, Columbia, Costa Rica, Hong Kong, Iceland, Israel, Japan, Liechtenstein, Mexico, New Zealand, Norway, Pakistan, Panama, Paraguay, Peru, South Korea, Switzerland, Turkey and the US. Uruguay withdrew from the negotiations in September 2015.

[2] See negotiation mandate: http://data.consilium.europa.eu/doc/document/ST-6891-2013-ADD-1-DCL-1/en/pdf, p.2.

publication of the mandate is of little use without information about the developments and changes that have taken place during negotiations.

The “transparency chapter” is limited in scope and does not cover the publication of negotiation positions and documents. However, the negotiating partners have to inform all TiSA parties and social partners about planned changes or renewals of laws and have to give everybody the opportunity to check whether these measures would affect them.

TiSA rules on “transparency” appear to bring the right to regulate into question by extending to lobbyists the possibility to influence the law making process – even before democratically elected parliaments can deal with the issues - as well as to institutionalise a legislative chilling process.

The ETUC finds such proposals unacceptable and opposes in particular the US system of “notice and comment” that extends such unfair advantages to industrial lobbies.

Overall, transparency cannot consist of the mere provision of information. The ETUC calls on the Commission to involve in real consultation and at all stages of the negotiations the European parliament, the social partners and civil society organisations. The ETUC also asks that all relevant documents be released in good time.

II) Public services must be protected

Current and future public services must be excluded from all trade and investment agreements that the EU is negotiating through an explicit carve-out in the core text of the agreement. Universal access to Services of General Interest and Services of General Economic Interest must be guaranteed.

The TiSA core text published in July 2015 and other extracts published by the platform WikiLeaks suggest that TiSA poses similar threats to increase liberalisation of public services as those found in TTIP and CETA. With this in mind it is especially important to carefully follow the TiSA negotiations in order to prevent possibly hard-earnt improvements in TTIP and CETA being undermined. Liberalisation must not affect the quality of services or the labour conditions under which they are provided.

III) TiSA Core Text

i) Basic Principles

TiSA is supposed to be modelled on the existing General Agreement on Trade in Services (GATS) of the World Trade Organization (WTO) that came into force in 1995 and aims at the continuous liberalisation of services. So far, there has not been sufficient progress in the context of this agreement as negotiations on services in the WTO are almost completely blocked, leading to TiSA negotiations being instituted to circumvent this.

Thus, TiSA is not being negotiated in the context of the WTO, but by a fraction of WTO members that refer to themselves as the “really good friends of services” and together are responsible for approximately 70% of global trade in services. According to official statements, the long-term aim, however, is to integrate the TiSA agreement into the WTO which would make its rules binding for all WTO members.

The leaked core text setting down the overall rules of the agreement shows parallels to the GATS agreement. With regard to some crucial issues, however, it differs from GATS and hence joins a new generation of trade and investment agreement similar to TTIP and CETA.

The ETUC believes that plurilateral trade negotiations must take place through the WTO as it is a more transparent body accountable to all member states. The ETUC has consistently supported equitable trade regulated by multilateral institutions, and called for strong cooperation between the WTO and the International Labour Organisation (ILO). TiSA, by contrast, is being negotiated by a small number of advanced economies and we are concerned that the outcome of the TiSA negotiations will be imposed subsequently on all WTO members. That would pose a substantial threat to public services, regulations and sovereignty in all countries.

On the basis of GATS, the EU negotiation mandate seeks to apply the principles of market access and national treatment horizontally to the entire TiSA agreement. Market access for foreign suppliers shall – as in GATS – be regulated through a positive list.

We fiercely reject the use of a negative list approach ("list it or lose it") and the incorporation of so-called stand still and ratchet clauses (which automatically lock-in future liberalisation measures and therefore contain an "autonomous built-in dynamic" towards liberalisation) in the agreement. Thereby, the ratchet and standstill mechanisms result in a one-way street to ever-increasing levels of liberalisation. We are concerned that universal access, equal treatment, public administration, affordability and sustainability of public services cannot be maintained through further liberalisation. Trade and investment agreements must leave enough policy space to react to negative liberalisation results and to meet democratic demands for (re)regulation. Therefore, negotiators should also develop a simplified modification procedure for liberalisation commitments and must ensure sufficient regulatory flexibility.

It remains unclear whether TiSA will include a most-favoured-nation (MFN) clause. According to this clause, trade advantages that have been granted to one trading partner automatically have to be granted to every other partner as well. Therefore, every favourable rule in the service sector that a TiSA negotiating partner has agreed on in another agreement automatically would have to be granted to all other TiSA partners. The ETUC would oppose the inclusion of a MFN clause that would allow an inclusion of ISDS from other parties of the agreement on all TiSA partners.

ii) TiSA's Scope of Application

Apart from the basic principles of market access, national treatment and – if so – MFN clause, the core text also defines its scope of application. Based on the GATS agreement there are four kinds of services (modes):

- Mode 1: Cross-border supply – covers services that are transferred from the home country of the provider to consumers abroad (e.g. e-banking, e-learning)

- Mode 2: Consumption abroad – covers services that foreign consumers make use of in the home country of the service supplier (e.g. students abroad, tourists)

- Mode 3: Commercial presence – the service is being provided by a foreign supplier in the home country of the consumer (e.g. foreign hotel chains, branches of foreign banks, foreign direct investments)

- Mode 4: Presence of natural persons – covers services that are provided by foreign employees in the home country of the consumer (e.g. seasonal farm workers, foreign consultants, services by industrial companies, e.g. construction works).

TiSA will apply to numerous measures that are supposed to regulate these four service modes. That includes laws, regulations, decrees, proceedings and any other kind of legal norm. Moreover, TiSA rules will apply to all aspects of the supply chain – from production and marketing to sale and delivery of the service.

The very broad definition of TiSA's scope is problematic as this limits governments' leeway to regulate the service sectors, subordinating them to unregulated market mechanisms that may endanger the quality of services.

The only horizontal exception (applying to the entire agreement) referred-to in the core text is the exception for services supplied in the exercise of governmental authority. These are defined as being provided neither on a commercial basis nor in competition with other service suppliers. This definition raises difficulties, that we have also raised in the TTIP and CETA contexts, as these conditions do not apply to most of the services of general public interest (e.g. water supply, electricity supply, education and health services). Hence, foreign suppliers might, dependent on the market opening offer of the member state in question, access the market of services for the public leading to increased competitive and pricing pressure and quality problems, endangering universal access to essential services. Even if extensive exceptions for services of public interest can be achieved in TTIP and CETA, there is a potential danger that liberalisation commitments are introduced through the TiSA back-door.

In the light of this insufficient exception, the hybrid approach of combining positive and negative lists for market access and national treatment is even more problematic, as the negative list approach only makes the definition of exceptions more complex. Service sectors and subsectors have to be listed in detail.

All this complexity makes it hard for interested citizens, civil society and unions to check whether all important sectors have been excluded from liberalisation. Furthermore, a negative list where only selected services are excluded means additional public services cannot be added in the future.

That is why the ETUC and its member unions demand also for TiSA the retention of the positive list approach not only for market access, but also for the national treatment principle. In addition, current and future public services must be excluded through an explicit carve-out in the core text. In doing so treaty partners must be able to define themselves which services are part of this exception. In the case of the EU every member state must have the right to define individually the covered public services.

IV) TiSA Chapters in Detail

The following section looks at those sector-specific chapters to which we have had access to date. The analysis of these chapters does not imply that the ETUC and its member unions will not formulate demands regarding the contents of other chapters. Due to the lack of transparency however it is not currently possible to assess whether the negotiations are heading into the wrong direction in other areas as much as in the areas covered in the following sections.

i) Domestic Regulation

The ETUC insists that TiSA must not endanger the right to regulate. We therefore call for its clear inclusion in the preamble as well as in the core text, to become horizontally applicable. In particular, the right of the state to regulate the supply of services in line with social and environmental criteria and in the public interest must not be subject to necessity tests.
This aspect is especially important at the European level. In numerous areas where TiSA aims at liberalising standards, the EU is currently working on and implementing new

directives and regulations such as the directives on public procurement and the EU reform agenda on financial market regulations. The parallelism of these processes poses the question how far the EU laws will be affected or chilled – and in the worst case undermined - by TiSA regulations.

ii) Mode 4

The mobility of workers increases with ongoing globalisation. It is thus important for this area not to be subject to the rules of the free market. Increasing mobility has to be accompanied by high and binding social and labour standards so that workers are protected against exploitation and social dumping. The cross-border deployment of workers is too sensitive an issue to be left to trade and investment agreements for its regulation.

TiSA includes a chapter on the deployment of natural persons. It explicitly does not cover measures regarding permanent employment, but only temporary work periods. Every negotiating partner defines in an annex which rules apply to which group of natural persons. These include rules on market access and national treatment, e.g. maximal length of deployment, quantitative restrictions, and economic needs tests.

In principle these rules should "at least" apply to the following groups of natural persons (Art. V, Par.1):

- intra-corporate transfers -> employees of a company that has an office in another country where the employee is to work temporarily to supply a certain service
- business visitors
- contractual service suppliers -> employees that work for a company that does not have an office in the country where the employee is to provide the service
- independent professionals - > freelancer and independent workers that do not have an office in the country where they are supplying the service.

The ETUC insists that the place-of-work principle must apply from the first day on. All workers, irrespective of their home country, must at least have the same rights and salaries as nationals at the same place of work. Wages and working conditions of mode-4 workers at least have to comply with sector-specific collective labour agreements. A strike-breaker clause must prevent the use of foreign workers during bargaining processes and labour disputes to weaken the unions' bargaining positions.

Due to the short duration of mode-4-workers it is often difficult to check the conditions under which they work and to implement the labour standards of the country of destination. Furthermore, those workers often accept worse working conditions as their employment only extends over a short period of time. Thus the pressure on wages and labour conditions in the country of destination rises and threatens to replace ordinary work contracts by foreign workers. In its current form the TiSA chapter does not include protection clauses for deployed workers, which is especially problematic due to the very different understandings of social and labour standards in the TiSA negotiating countries. That is why in TiSA all negotiating partners should have to commit to ratifying and effectively implementing the core labour standards of the ILO. Mode-4 workers must have the right to join a union and labour disputes also during their stay abroad.

iii) Public Procurement

TiSA will cover the supply of services for public authorities. Public procurement is often one of the main sources of income for small and medium enterprises (SME). In industrialised, but especially in emerging and developing countries, public procurement can represent a substantial part of the national gross domestic product (GDP) and

promote social and economic development as well as local supply chains. Consequently, from a development perspective, it wouldn't be beneficial for developing countries to be forced to open up completely their public procurement markets. The EU should take this into account bearing in mind that that EU wishes to extend TiSA to all WTO members in the long term.

In principle every government has the right – irrespective of its participation in international agreements – to open public tenders to foreign suppliers. This unilateral opening does not result in any commitment for the future and can be withdrawn at any time. With agreements like TiSA such a withdrawal would be prohibited.

TiSA rules on public procurement in some parts go far beyond existing WTO rules. From a unions' perspective it is absolutely crucial that the agreement should not oblige the opening or liberalisation of public procurement at the subnational level, including at the municipal level. Local governments should be able to use social and environmental criteria to ensure the use of public money in support of sustainable, local, economic development. Furthermore, the scope of this TiSA chapter should be defined using the positive list.

In addition, the lack of threshold values above which tenders have to be opened up to foreign suppliers is problematic. TiSA rules thus apparently apply to all tenders, irrespective of value. This is especially critical for national SMEs who so far at least had an advantage and were protected from foreign competition in bids of lower value. That is why the ETUC and its member unions want high threshold values to be defined so that not all tenders have to be opened up internationally.

In the area of public procurement, it is furthermore important from a unions' perspective to award the contracts in consideration of fair social and environmental conditions.

The forthcoming implementation of the EU directives on public procurement into national law has to be complied with. It obliges member states to comply with national environmental, social and labour standards in the process of awarding a contract. These EU directives have helped to enhance the status of social criteria in the public procurement processes. In this regard, TiSA should also take into account ILO Convention 94 regarding public procurement and collective agreements. This paradigm change on the European level must not be undone by TiSA.

Collective agreements, compliance with the core labour standards of the ILO and social and environmental standards as binding criteria for the awarding of a contract must also apply to all other TiSA negotiating partners. This is especially important in the light of the very different stages social and environmental standards in the different countries.

Thus compliance with social (e.g. payment of living wages, the right to join a union etc.) and environmental standards (e.g. compliance with emission limits, use of sustainable materials) as criteria for the awarding must be binding. Decisions must not be made on the basis of price criteria alone. Quality and fair working conditions must be the basis of the competition instead of a dumping price battle carried out at the expense of workers. In the light of the massive importance of public procurement for the national economy and thus for the development of the labour market, its overall liberalisation is not acceptable.

iv) Financial Services

Financial services play an important role in cross-border trade of services. While many states still struggle with the consequences of the financial crisis, paradoxically negotiations about deregulating the financial service sector even more are under way behind closed doors.

The finance chapter in TiSA is based on the GATS agreement that goes back to the deregulatory era of the 1990s and whose rules contributed heavily to the most recent financial crisis. TiSA would further expand the problematic GATS model of deregulation and would block preventative re-regulation of the financial sector.

TiSA's finance chapter has a broad scope – it covers derivatives, stocks and bonds as well as (life) insurances, the processing of financial data and other services. The principles of the core text alone (market access and national treatment) in combination with financial services can already have far-reaching consequences.

State measures such as the prohibition of risky financial products (e.g. those that sparked the crisis at the beginning of the 2000s) could be challenged as being discriminatory. Due to the commitment to allow market access it would be impossible, for example, to limit the size of banks to prevent them from becoming "too big to fail". The horizontal application of the standstill clause would prevent the state from regulating new, potentially risky financial products in order to hamper future risks.

While slowly but steadily lessons from the most recent financial crisis are being learnt and the financial sectors become increasingly re-regulated (e.g. via the EU reform agenda on financial market regulation) to prevent a new crisis, there is the danger that TiSA will negate these achievements.

Re-regulation of the financial service sector by the state however must be possible and must not be limited by any trade and investment agreements. The dangers that an unrestricted financial system can pose to states, entire economies and their citizens can still be observed in some south European countries. TiSA must not spark such a development again.

Conclusion

The texts and information about the TiSA available so far show that it does not meet the demands of the ETUC. These include:

- Negotiations have to be transparent. Any negotiating documents and information on negotiation rounds must be made accessible to the parliaments of the EU member states, the EU Parliament and the general public in order to enable their serious and intensive participation, including the social partners and civil society.

- Public services must not be put under pressure for further privatisation or deregulation and thus should not be part of TiSA. In addition, ratchet and standstill clauses that stipulate the status quo and prevent a future return of service sectors to public ownership should not be applied.

- In any event TiSA must not result in an opening of service sectors to foreign suppliers at the cost of high European labour, environmental and consumer standards. Wages and conditions for any posted workers must at least comply with those applying to nationals at the same workplace. They must not be treated differently under the guise of being described as "service providers".

- There must be no further deregulation of the financial markets through TiSA. Reforms of financial markets whose necessity became apparent in the aftermath of the international financial crisis must not be treated as trade barriers.

If TiSA does not meet our key demands, the ETUC calls for its rejection. Fair globalisation needs a just trade policy.