Public services in the Draft Canada-European Union Economic and Trade Agreement (CETA)

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Executive Summary

- The European Commission (EC) recently proposed a new approach towards public services in the on-going negotiations with Canada on an Economic and Trade Agreement (CETA) which would significantly deviate from the standard model used in trade agreements so far. The CETA follows a negative list model of scheduling concessions which makes the wording and structure of reservations and exemption clauses particularly important.
- The EC proposal contains a general exemption clause for "non-economic services of general interest carried out in the exercise of governmental authority" and suggests that the scope of this clause should be determined on the basis of the case law of the European Court of Justice (ECJ). This is an ambiguous and potentially confusing clause which is at best useless if it duplicates the exclusion of these services from the scope of the agreement. If this clause replaces such a general exclusion clause, it substantially reduces the level of protection of these services. The reference to the case law of the ECJ could be part of an agenda setting attempt of the EC aimed at introducing internal market concepts into the debate on public services and trade agreements. This would reduce the autonomy of the Member States to determine what they consider non-economic services. In this context, it is also doubtful whether this clause could be reconciled with the objective of Article 2 of Protocol No. 26 to the Lisbon Treaty on Services of General Interest which maintains that the EU has no competence to regulate non-economic services of general interest.
- The EC's proposal also contains a reservation for "public services" which is based on the so-called "public utilities clause" used in trade agreements so far. Compared with the standard model, the new approach uses the term "public services" which reflects a broad scope of the exemption better than the term "public utilities" which has been used previously. However, the scope of application of the exemption clause is reduced from "all sectors" to a hybrid sector called "public services". Furthermore, the new proposal applies a procedural (functional) understanding of the term public services which is limited to services with specific public service obligations whereas the standard model refers to the understanding at the national, regional and local level. Like the standard model the new approach is limited to two types of market access restrictions (monopolies and exclusive service suppliers) and does not cover national treatment or other regulatory disciplines. This significantly reduces its value as a measure aimed at maintaining policy space for the organisation, provision and financing of public services.

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Background

The European Union has recently initialled or is still negotiating bilateral free trade agreements (FTAs) with a number of countries or regional groupings.[1] These agreements are important elements of the new EU trade policy which aims to supplement or even replace the EU's multilateral commitments in the WTO with bilateral obligations which usually go beyond the multilateral level. The treatment of public services under these new agreements is therefore of great concern for policy makers at the national, regional and local level, public service suppliers, trade unions and other civil society organisations.

In this context, the current negotiations with Canada aiming at the conclusion of an economic and trade agreement between Canada and the EU (CETA) are of particular significance because they utilise a so-called negative list approach for commitments in trade in services and because they propose a new approach for the treatment of public services in the specific commitments of the EU. Both aspects were also mentioned in the European Parliament's Resolution on EU-Canada trade relations of 8 June 2011 in which the Parliament noted "that the Commission has chosen a 'negative list approach' for the liberalisation of services, but considers that this should be seen as a mere exception and not serve as a precedent for future negotiations; considers that the GATS public utilities exemption remains the most appropriate tool to guarantee universal access to public services to citizens".[2] Even though it can be disputed whether the GATS public utilities exemption clause is the most appropriate tool to protect public services[3] the statement of the European Parliament raises the question whether and how the EU plans to treat public services in its commitments under a potential Canada – EU free trade agreement. The contentiousness of this issue is also reflected in the EC's "Reflections Paper on Services of General Interest in Bilateral FTAs" published in February 2011.[4] While this paper does not contain an official trade policy statement, it shows that the relationship between public services and free trade agreements is on the agenda of current and future trade negotiations. This raises the importance of the treatment of public services in the EU – Canada negotiations not least because they could become a precedent or template for future negotiations despite the European Parliament's call for the contrary.

This study will assess the impact of the CETA on public services based on the EU's Draft Offer for cross-border services and investment of 29 July 2011 and the draft consolidated versions of the chapter on investment and services of the CETA following the eight round of negotiations.[5] The study does not revisit the arguments of the impact of trade agreements on the provision, organisation and financing of public services[6] but will analyse the main components and structural aspects of the current proposal and discuss how they deviate from the established standard of protecting public services in EU trade agreements.

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[1] For an overview see European Commission, Overview of FTA and other trade negotiations, Updated on 12 August 2011, available at http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf

[2] European Parliament resolution of 8 June 2011 on EU-Canada trade relations, 8 June 2011, P7_TA-PROV(2011)0257, para 5.

[3] The debate on public services and the GATS remains controversial, see most recently A. Arena, The GATS Notion of Public Services as an Instance of Intergovernmental Agnosticism: Comparative Insights from EU Supranational Dialectic, JWT 2011, 489.

[4] European Commission, Reflections Paper on Services of General Interest in Bilateral FTAs (Applicable to both Positive and Negative Lists) Revised 28 February 2011. The Reflection Paper has not been released officially by the EU, but is available on various websites.

[5] The eighth round of the negotiations took place in Brussels in July 2011.

[6] On these arguments see Arena (as note 3); R. Adlung, Public Services and the GATS, JIEL 2006, 455; E. Leroux, What Is a ''Service Supplied in the Exercise of Governmental Authority'' under Article I:3(b) and (c) of the General Agreement on Trade in Services?, JWT 2006, 345; M. Krajewski, Public Services and Trade Liberalization: Mapping the Legal Framework, JIEL 2003, 341.

The new approach towards public services in the EU's CETA Draft Offer

Negative list approach

Unlike the GATS and all other free trade agreements ratified by the EU so far, the CETA would employ a so-called negative list approach. A negative list approach means that the core obligations of the agreement (market access, national treatment and most-favoured nation treatment) apply generally, unless the parties of the agreement explicitly include existing or potential measures which would violate these obligations in specific annexes of the agreement. A positive list approach refers to agreements, according to which these core obligations only apply to sectors, which are positively included in a list, and only subject to the conditions contained in such a list. NAFTA and other free trade agreements signed by the United States follow a negative list approach, while the GATS follows a positive list approach. The difference between the two approaches should not be underestimated.[7] While it is possible to maintain certain measures and exclude liberalisation obligations under both approaches, the negative list approach tends to have a more liberalising effect[8], because all sectors and measures are subject to the core obligations while a positive list approach requires specific liberalisation commitments. The shift from a positive to a negative list approach requires detailed and careful scheduling disciplines as any "omission" of a measure results in a liberalisation commitment ("list it or lose it"). Furthermore, such a shift complicates the comparison between the different levels of liberalisation commitments.

Annex I and Annex II reservations

The current draft text of the CETA allows for two types of reservations: Measures listed in Annex I are existing measures which do not conform to national treatment, market access and most-favoured nation treatment. Countries can maintain these measures, renew and revise them provided the revision does not decrease the conformity of the measure with the respective obligations of the agreement compared to the level of conformity which existed immediately before the amendment. This requirement leads to a so-called "ratchet effect" which locks-in future liberalisation measures and therefore contains an "autonomous built-in dynamic" towards liberalisation.[9] A country which listed a specific measure in its Annex I reservations and revises this measure in a more liberalising manner cannot re-introduce the original measure because that would be an amendment of the measure which decreases the conformity of the (revised) measure with the agreement.[10] This mechanism is of specific importance for public services which have been subject to policy reforms in many EU Member States sometimes including re-nationalisation or re-municipalisation.

Annex II enables countries to adopt and maintain measures inconsistent with the three core obligations and therefore covers existing and future measures. As a consequence, policy space for future regulations and deviations from the status quo will only be possible if there are appropriate reservations in Annex II. If a country only lists measures in Annex I it is essentially bound to maintain the status quo. According to this mechanism liberalization measures adopted by a country cannot be replaced by new measures which are more restrictive unless there are relevant reservations in Annex II.

The approach used in the EU's Draft Offer of 29 July 2011 consists of two reservations listed in the Schedule of the EU of Annex II. There are no relevant reservations in Annex I. This

[7] S. M. Stephenson, Regional versus multilateral liberalisation of services, WTRev 2002, 187 (193).

[8] For a similar assessment see M. Houde et al, The interaction between investment and services chapters in selected Regional Trade Agreements: Key findings, OECD Trade Policy Working Paper No. 55, 2007, p. 9.

[9] Stephenson (as note 7), p. 198.

[10] See also M. Houde et al (as note 8), p. 35.

indicates that the EU intends to create policy space for the regulation of public services through these reservations and does not merely bind the status quo. However, because of the mechanisms of Annex I and II, the scope of the Annex II reservations define the policy space which would still be available for future measures. The exact determination of the scope of the reservations is therefore of crucial importance for the assessment of the impact of the CETA on public services in particular in light of the ratchet mechanism of Annex I.

Reservation for non-economic services of general interest

The first reservation which is of relevance in the present context concerns non-economic services of general interest. It applies to "All Sectors" and covers reservations to market access, national treatment and most-favoured-nation treatment. The text of the reservation is worded as follows: "The EU reserves the right to adopt or maintain any measure with respect to the provision of non-economic services of general interest which are carried out in relation to the exercise of governmental authority, which are services which are supplied neither on a commercial basis nor in competition with one or more service suppliers. These services may include, but are not limited to, the police, justice, statutory social security schemes, border and air space control, and public administration, as well as activities of international organisations and regional bodies, diplomatic and consular missions. The non-economic nature of a specific service of general interest within the EU is determined in the light of the case law of the European Court of Justice."

Reservation for public services

The second reservation does not apply to all sectors, but to a sector called "Public services". This reservation is limited to market access only and consists of the following text: "The EU reserves the right to adopt or maintain any measure with respect to limiting the number of suppliers, through the designation of a monopoly or by conferring exclusive rights to private operators, for services of general interest which are subject to specific public service obligations imposed by public authorities on the provider of the service in order to meet certain public interest objectives. These obligations may be imposed at national, regional and local level. Public services exist in such sectors as related scientific and technical consulting services, R&D services on social sciences and humanities, technical testing and analysis services, environmental services, health services, transport services and services auxiliary to all modes of transport. Exclusive rights on such services are often granted to private operators, for instance operators with concessions from public authorities, subject to specific service obligations. Given that public services often also exist at the sub-central level, detailed and exhaustive sector-specific scheduling is not practical. This reservation does not apply to telecommunications and to computer and related services."

No reservation for subsidies

It should be noted that the Draft Offer contains no reservations for subsidies. This deviates from the GATS Schedule which includes the following limitation: "Eligibility for subsidies from the European Communities or Member States may be limited to juridical persons established within the territory of a Member State or a particular geographical sub division thereof".[11] As the draft chapter on investment and services of the CETA does not apply to subsidies there may not be an immediate need for a reservation for subsidies in the annexes on investment and services. However, the draft CETA chapter on subsidies partly applies also to subsidies relating to trade in services. Based on the current draft, it is unclear whether

[11] Council for Trade in Services, Communication from the European Communities and its Member States, Certification - Draft consolidated Schedule, S/C/W/273, 9 October 2006. The consolidated version is not yet in force as it still awaits ratification by all EU Members.

discriminatory subsidisation of domestic service providers would be possible. A provision suggested by the EU on "Principles applicable to other subsidies" seems to exclude that possibility, but the status of that proposal is unclear.

Analysis of the new approach and comparison with the "public utilities" standard

Non-economic services of general interest

The reservation for non-economic services of general interest is a novel concept compared to existing EU trade agreements. The term "non-economic services of general interest" is not a term of international trade law but is based on concepts used by the EC in its communications on services of general interest in the EU.[12] The proposed reservation follows an approach which the EC suggested in its Reflections Paper of February 2011. This paper proposed that "public services" should be divided into three groups: Non-economic services of general interest, services of general economic interest in network industries and services of general interest other than network industries.[13] The logic of this distinction is based on the level of liberalisation of these services in the internal market. The EC's proposal was an attempt to introduce the internal market agenda and nomenclature into the context of trade negotiations. This attempt is part of a general strategy of the EC to frame the debate on public services based on these concepts which the Commission itself developed to influence this debate at the EU level. This attempt of agenda setting in the context of trade agreements is also highlighted by the fact that the draft proposal refers to case law of the ECJ in order to determine the non-economic nature of an activity.

This reference itself is problematic because the ECJ determined the non-economic nature of an activity based on the question whether the service was provided for remuneration. The Court always approached this question very narrowly. In most cases, the ECJ held that a particular activity was provided for remuneration and therefore constituted a service in the meaning of Art. 56, 57 TFEU.[14]

The reservation for non-economic services of general interest resembles the approach of the Art. I:3 (b) GATS which excludes services supplied on the exercise of public authority. These are defined as services which are supplied neither on a commercial basis nor in competition with one or more service suppliers. In the Reflections Paper the EC specifically notes that the reservation for non-economic services of general interest is intended to "replicate the exclusion in the GATS provided in the exercise of governmental authority while reflecting the specific EU understanding of these services." It is highly doubtful whether such a scheduling technique would provide legal certainty, because the relationship between this reservation with its specific reference to ECJ case law and the GATS clause which does not contain such a reference remains unclear and leads to incoherence.

Furthermore, a reservation clause for services supplied under governmental authority would be superfluous should the chapter on services contain a GATS-type exemption clause as suggested in an earlier version of the draft text, because such an exemption clause would exclude services supplied in the exercise of governmental authority from the scope of the agreement altogether. However, it should also be noted that the reservation clause for non-economic services of general interest as suggested in the Draft Offer provides a substantially lower level of protection than a general exemption clause for services supplied in the exercise of governmental authority, because the reservation clause in Annex II only applies to market

[12] See e.g. Communication from the European Commission, Services of general interest, including social services of general interest: a new European commitment, COM(2007) 725 final, p. 4-5.

[13] See Reflections Paper (as note 4), p. 2-3.

[14] ECJ, Case C-534/92, SAT/Eurocontrol [1994] ECR I-43, para. 30; Case C-343/95 Diego Cali [1997] ECR I-1547, para 23 and Case C-309/99 Wouters [2002] ECR I-1577, para 57.

access, national treatment and most-favoured nation treatment while the general exemption clause would exclude these services from all obligations of the agreement. To put it briefly: A GATS-type exemption clause ensures that services supplied in the exercise of governmental authority are excluded from the agreement altogether whereas the reservation clause suggested by the EU only covers three substantial obligations. The reservation clause for non-economic services of general interest is hence not equivalent to a general exemption clause. If the proposed reservation clause for non-economic services of general interest would therefore replace a general exemption clause, the level of protection of non-economic services/services supplied in the exercise of governmental authority would be significantly reduced.
It is also noteworthy that the EC mentions Article 2 of Protocol No. 26 annexed to the Treaty of Lisbon in the Reflections Paper.[15] This provision maintains that "the provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest." Article 2 of the Protocol No. 26 reaffirms that the EU has no competence in this field. It is therefore highly doubtful if the EU has the competence to include a reservation for these services in its Annex II reservations because this suggests that these services would be subject to the liberalisation obligations unless they are mentioned in Annex II. This reverse assumption of a competence is ambiguous and can only be explained in the context of the agenda setting attempts of the EC. Against this background, the draft reservation for non-economic services of general interest in the Annex II reservations of the Draft Offer can be interpreted as an approach which aims at depriving the Member States and their regional and local authorities of their autonomy ("ownership") to determine what they consider as non-economic services of general interest.

Public services
Unlike the approach suggested in the Reflections Paper, the Draft Offer of 29 July does not distinguish between services of general economic interest in the network industries and services of general interest other than network industries, but maintains the comprehensive approach used by the standard "public utilities" clause.
The first and most obvious deviation of the proposed reservation from the current standard is the wording. While the GATS commitments and similar commitments under FTAs refer to "public utilities" the new proposal uses the term "public service". Even though the "public utilities" exemption is generally interpreted as a clause which goes beyond the ordinary meaning of the term public utilities, its wording always gave rise to interpretive question-marks.[16] The new wording is therefore more appropriate to underline the broad scope of this clause. It also coincides with the non-authentic French version of the EU`s GATS schedule of commitments which refers to "service public".[17] It should be noted that the new approach also includes a non-exhaustive list of sectors in which public services exist ("in such sectors as …") which is also employed in the standard approach. A non-exhaustive list of sectors with public services allows for greater regulatory flexibility, because it does not restrict the imposition of public service requirements to specifically mentioned sectors.
Unlike the reservation for non-economic services of general interest and unlike the standard public utilities approach in the GATS and other trade agreements, the reservation for public services does not apply to "all sectors." Instead, the proposal introduces a hybrid category of "public services" which is less than all sectors but cannot be defined on specific industry classification (CPC). Yet, the reservation specifically excludes telecommunications and

[15] Reflections Paper (as note 4), p. 4.
[16] M. Krajewski, Protecting a Shared Value of the Union in a Globalized World: Services of General Economic Interest and External Trade, in: J. van de Gronden (ed), EU and WTO Law on Services: Limits to the Realization of General Interest Policies Within the Services Markets, 2008, 187 (208-210).
[17] Only the English version of the GATS schedule is authentic.

computer services in the same way as the standard public utilities clause which, however, applies to "all sectors". This increases the hybrid nature of this new category.
Apart from the ambiguity this raises, it should also be noted that the scope of the sector "public services" is smaller than the scope of "all sectors". In this respect, the new proposal is therefore narrower than the standard approach even though the exact sectoral scope of the proposed reservation is difficult to assess. The limitation of the public service reservation to a sector "public services" is also problematic because it suggests that the term "public services" is determined on a sectoral basis while the main text of the reservation defines public services in a procedural manner as services "which are subject to specific public service obligations imposed by public authorities on the provider of the service in order to meet certain public interest objectives". This procedural definition indicates that every service could be subject to such public service obligations (PSO). Hence, it would be more appropriate and consistent if the reservation for public services would also apply to "all sectors".
Furthermore, the understanding of the notion of public services in the proposed reservation is based on EU concepts. Both the reference to services of general interest and to the imposition of public service obligations link the notion to the respective EU debate and support the agenda setting attempts mentioned above. This definition of public services in the proposed reservation also significantly deviates from the public utilities standard because this exemption referred to "services considered as public utilities at a national or local level". The competence to determine public utilities was therefore clearly allocated at the national or local level and not subject to EU definitions. The new approach refers to competent authorities at the national, regional and local level which impose public service obligations on service suppliers and therefore determine which services are considered as public services. However, the reservation requires a specific, formal act consisting of the imposition of public service obligations. This would exclude a determination on the basis of legal traditions or other regulatory approaches. The new approach therefore formally maintains the right of the Member States and their regional and local authorities to determine what they consider as public services. However, this determination is only recognised if it is done in a specific form which is derived from EU law (Article 106 para. 2 TFEU).
In addition to these deviations from the standard public utility exemption clause, the new proposal also maintains a number of short-comings of the old approach. This concerns the fact that it is limited to market access and does not cover national treatment. If a domestic authority intends to rely on local service suppliers in order to provide public services "as closely as possible to the needs of the users" (Art. 1 Protocol No. 26) it may encounter difficulties if it treats local providers more favourable than foreign providers. Furthermore, the standard and the new approach only cover monopolies and exclusive service suppliers. Other elements of market access, especially economic needs tests (ENT) which are a typical instrument of limiting competition in sensitive sectors are not covered by the reservation. This significantly reduces its value as a measure aimed at maintaining policy space at the national, regional and local level for the organisation, provision and financing of public services. Also, the indicative list of sectors in which public services exist does not mention social services which is a surprising omission.
Lastly, the relationship between the general public service reservation proposed in the Draft Offer and reservations taken by the Member States need to be assessed. The EC seems to be of the opinion that a general public service reservation clause could replace any reservations taken by the Member States. This reflects the agenda setting objectives of the EC intended at mainstreaming public services into the EU logic. It should, however, also be noted that the current Draft Offer still contains a number of sector-specific reservations which do not seem to be based on a uniform EU approach.

Conclusion and recommendations

1. The reservation for non-economic services of general interest does not contain additional value vis-à-vis a general GATS-type exemption clause for services supplied in the exercise of governmental authority. Instead, it provides legal uncertainty and creates an ambiguous second layer for these services which serves no purpose if used in combination with such a general exemption clause. If the reservation clause for non-economic services of general interest is intended to replace a general exemption clause for services supplied in the exercise of governmental authority, the level of protection of these services would be substantially reduced. In fact, the CETA would deviate from the standard of most trade agreements which contain a general exemption clause.

2. The use of the term "public services" in lieu of "public utilities" in the reservation clause for public services is a helpful clarification as it indicates that the scope of this reservation is not limited to those sectors which are often associated with the term public utilities.

3. The public service reservation is limited to a hybrid sector called "public services" whose exact scope is difficult to assess. Compared to the standard clause and compared to other reservations in the Draft Offer which apply to "all sectors", the public service reservation has a more limited area of application. The objective of this limitation is unclear. It would be more appropriate and consistent with the Draft Offer in general if the public service reservation would apply to "all sectors".

4. The definition of public services based on public service obligations follows the EU concept of services of general interest and shifts the definitional authority partly away from the national, regional and local level. Even though the competent authorities at these levels have the right to impose public service obligations and therefore determine what are public services, the new approach limits this determination to one regulatory instrument (public service obligations) and does not take into account traditional and well-established concepts of public services. The latter were, however, reflected in the standard provision referring to services considered as public utilities at the national, regional and local level. This definition of public services should be preserved.

5. The use of a non-exhaustive indicative list of public services is an appropriate approach. However, the list should also mention social services, because the omission of these services seems a significant gap.

6. The scope of regulatory autonomy and policy space to organise, finance and provide public services depends on the breadth (or narrowness) of the public service reservation in Annex II. Due to the new approach of a negative list with a ratchet mechanism it would be useful if the reservation would not be limited to two types of market access restrictions, but would apply to all market access restrictions as well as to national treatment.

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