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## EU Free Trade and Investment Agreements with a focus on CETA, TTIP and TiSA

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### Position paper

#### I. Executive summary

The European Confederation of Independent Trade Unions (CESI) is a European umbrella organisation bringing together 43 international and national-level trade union organisations from 28 European countries. CESI was founded in 1990 and is a recognised EU social partner. Being politically and ideologically independent, CESI represents the interests of more than five million workers through its member organisations.

On a general basis, CESI welcomes the conclusions of comprehensive trade agreements not only as tools to support growth and wealth, but also, if well-designed, as an opportunity to set worldwide minimum standards e.g. for decent labour, core social rights, environment, health and consumer protection.

As a trade union confederation, CESI particularly advocates the incorporation of clauses into trade and investment agreements which effectively prevent them from having adverse effects on social rights, labour standards and working conditions as guaranteed by the legal orders of the EU and its Member States.

Moreover, as a confederation representing over five million public sector workers, it is a priority for CESI to prevent the dismantling of services of general interest (SGIs) throughout the EU and to maintain adequate levels of working conditions and staffing in the public sector providing SGIs. CESI is convinced that free trade-induced liberalisation pressures have negative effects on the provision of public services and on all the duties of a welfare state, and thereby lead to an erosion of the extent and the quality of SGIs provided to society in the common interest. As a consequence, CESI demands the unequivocal exclusion of SGIs from the scope of free trade agreements.

CESI also points out that in the past, an increase in free trade has frequently led to a drop in customs duties and fees for the state, which has consequently often had an impact on public services. Therefore, CESI calls for the protection of SGIs from the effects – including long-term impacts – incurred by the reduction in revenue from fees and customs duties.

CESI also stresses that national rules and award criteria definitions of authorities in public procurement procedures should in no way be affected by trade agreements. Moreover, according to CESI, special

investor protection instruments for cases of investor-state disputes should not run against labour rights and the governments' right to meet core public policy objectives. Finally, CESI notes that greater transparency in the EU's trade negotiations must be achieved.

## II. CESI's assessment of the EU's free trade agenda

The EU has concluded a number of bilateral free trade agreements since the 1990s, and through its membership of the World Trade Organisation (WTO) the EU has become party to different multilateral agreements too.<sup>1</sup>

In this way, tariffs for trade operations into and out of the EU have been reduced to a great extent since the 1990s.

Recently, the European Commission started to call for going beyond free trade agreements (FTAs) that only reduce tariffs.<sup>2</sup>

Indeed, the European Commission explicitly states that as tariffs have already become "relatively low" in world trade, trade barriers today "lie behind the customs borders".

To address them, the European Commission aims at the conclusion of 'Deep and Comprehensive Free Trade Agreements' (DCFTA) which would not only remove remaining tariffs but would also be designed to ensure market access and non-discriminatory treatment of goods, services and investments, whether they are entering or exiting the EU – this would include the abolition of non-tariff barriers (NTBs) and technical barriers to trade (TBTs), and hence require regulatory cooperation or even the setting of common rules and standards. Arguably, as the EU's first two major (probable) upcoming DCFTAs, the EU-Canadian CETA and the EU-US TTIP agreements will act as a benchmark for future agreements to be concluded.

The European Commission calculates that concluding "all its current free trade talks tomorrow" would bring the EU's economy a total benefit worth 2.2% of its GDP. CESI doubts the validity of this figure, given that it is not sufficiently supported.<sup>3</sup>

Nevertheless, while the merits of free trade and free movement to help economic growth and job creation in the long run cannot be disputed per se, CESI argues that in order to prevent negative societal repercussions of trade agreements, the EU has to respect the following principles when negotiating and concluding FTAs and DCFTAs:

- a. The EU must make sure that trade agreements will in no way negatively affect, erode or even dismantle social and labour standards and rights established by international, EU and EU Member States' legal orders. Importantly, trade agreements must not affect public social security systems.

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<sup>1</sup>A list of agreements can be accessed here: [http://trade.ec.europa.eu/doclib/docs/2012/november/tradoc\\_150129.pdf](http://trade.ec.europa.eu/doclib/docs/2012/november/tradoc_150129.pdf)

<sup>2</sup>See [http://ec.europa.eu/trade/policy/countries-and-regions/agreements/#\\_other-countries](http://ec.europa.eu/trade/policy/countries-and-regions/agreements/#_other-countries)

<sup>3</sup>There is evidence that even TTIP – the largest free trade and investment zone to be created – will only bring GDP growth in Europe of 0.05% per year during the next ten years. See <http://library.fes.de/pdf-files/wiso/10969.pdf>

- b. As proposed by CESI and the Social Platform, services of general interest (SGIs) must be fully exempted from trade agreements.<sup>4</sup> Only if all SGIs are exempted from agreement-induced liberalisation forces and privatisation pressures can the providers and their employees continue to deliver high quality, safe and affordable SGIs.

The loss of fees and customs duties as a result of the increase in free trade should not have any impact on the provision of SGIs, even in the long term.

- c. National rules and award criteria in public procurement mechanisms should be excluded from trade agreements as their definition must remain unchanged in relation to the currently existing EU public procurement rules. Trade agreements should not contribute to hindering contracting authorities from determining award criteria in the interest of e.g. decent labour, core social rights, environment, health and consumer protection.
- d. Special investor protection instruments for cases of investor-state disputes should not run against the governments' right to meet core public policy objectives. This right includes the safeguarding of labour and social standards. Mechanisms to settle disputes between investors and states should be subject to this principle.
- e. Secrecy in negotiations must end. All interested parties and stakeholders must be allowed to be aware of what is being discussed and must be given credible opportunities to make their voices heard and considered.

### III. CESI's demands

In light of the above, CESI calls on EU trade agreement negotiators, signatories and ratification parties to consider the following:

#### a. Regulatory cooperation and its impact on social and labour standards

Agreements that aim to reduce barriers to trade and investment must in no way undermine **social standards, labour rights** and **working conditions**. This includes - but is not limited to - the areas of freedom of association and the right to organise and collective bargaining, discrimination related to pay and other forms of discrimination at work as well as occupational safety and health.

Social and labour provisions in place in the EU in these areas must not fall victim to agendas of regulatory cooperation and harmonisation under agreements with countries which do not grant the same level of minimum rights and standards as the EU. They should not be regarded as costs or trade barriers but as safeguards of important societal priorities. A race to the bottom as a result of 'councils for regulatory cooperation' and similar undemocratic mechanisms should not lead to competing (mutually recognised)

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<sup>4</sup>See annex for the CESI and Social Platform joint proposal for a 'Golden clause for services of general interest in EU trade agreements'.

rules and standards. Upholding European provisions is especially important for potential cross-border postings of workers.

Therefore, the EU should make it a precondition of any trade agreement that the signatory partner has fully ratified at least **the eight fundamental conventions of the International Labour Organisation (ILO)**<sup>5</sup> and is credibly implementing and enforcing them. CESI is particularly concerned that some of the EU's (likely) forthcoming DCFTA partners such as the USA (TTIP) and Canada (CETA) have not ratified all major agreements concluded in the ILO framework. References to documents setting out decent labour commitments such as the 1998 ILO Declaration on Principles and Rights at Work<sup>6</sup>, which countries such as the USA have signed, are insufficient.

Beyond the ILO's eight fundamental conventions, DCFTAs should also cover ILO Conventions 81 on labour inspection, 102 on social security, 122 on employment policy, 135 on workers' representation, 144 on tripartite consultation and 155 on occupational health and safety.<sup>7</sup>

Moreover, provisions to ensure social standards, working conditions and labour rights guaranteed by the EU itself should be enshrined in all trade agreements. These provisions must be *binding and enforceable* at all levels and be exempted from regulatory cooperation or harmonisation. Moreover, trade agreements should not touch on public social security systems.

To this end, a transparent **monitoring and complaint mechanism** should be established with independent expert assessments. This mechanism should allow workers and trade unions to raise violations of rights by employers and see them effectively sanctioned with substantial fines, criminal penalties and/or trading restrictions. Effective international cooperation between different judicial systems is of great importance in order to achieve successful sanctioning. The bargaining power of workers in trade agreements must be maintained, especially against the backdrop of the ILO's findings of widespread negative effects of trade liberalisation on unionisation.<sup>8</sup>

## **b. Services of general interest (SGIs)**

### **i. Exemption of SGIs**

All **SGIs** must, in principle, be fully excluded from trade agreements.

SGIs are at the core of the European social model, which is the basis of social cohesion in Europe. Only if all SGIs are exempted on a general basis from agreement-induced liberalisation forces and privatisation pressures can the providers continue to deliver high quality, safe and affordable SGIs.

Failing to protect the provision and quality of SGIs would jeopardise the European social model. Public providers of SGIs guarantee that (common) goods are shared and that they are not simply

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<sup>5</sup>The full list of the ILO's fundamental conventions can be accessed here: <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>

<sup>6</sup>See <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>

<sup>7</sup>See <http://www.ilo.org/dyn/normlex/en/f?p=1000:12000:0::NO::>

<sup>8</sup>See [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms\\_228965.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_228965.pdf)

made of the sum of individual (economic) interests. The provision of such services is a public obligation, requiring intervention by the public hand free from the logic of 'economic benefit by all means'.

**Education** is a prime example of a public good that must not be treated as an economic good, and must therefore be wholly excluded from trade agreements. This includes formal and non-formal learning as well as youth work, and covers all areas of primary, secondary, tertiary and adult education services. Trade-agreement-led privatisation of such services would likely accelerate their commercialisation and thus ultimately compromise the affordability and quality of education. It would probably also threaten equal access for disadvantaged groups and counteract the preservation of cultural differences in education that exist in Europe.

In view of this, trade agreements must not infringe on the competence of the EU Member States when it comes to drawing up their own education policies and quality standards independently, regardless of whether they are publicly or (partially) privately funded. The agreements must not compromise their right to adopt or maintain any measure relating to the provision of non-profit and/or publicly funded educational services. While the principle of non-discrimination applies, privately funded foreign education providers must meet the same quality and accreditation requirements as domestic providers.

Likewise, public utilities and rules in the fields of **water supply and waste collection, social services and healthcare systems** have to be clearly excluded from trade agreements. **Environmental and consumer protection** must not be compromised. In sum, trade agreements must not in any way affect the competences of national and sub-national authorities to determine how the services above are to be provided, organised and regulated in the public interest.

## ii. **Gold standard clause for the protection of public services**

The aforementioned exclusion of SGIs could be implemented through a '**Gold standard clause for the protection of public services**' in all trade agreements, as brought forward jointly by CESI and the Social Platform (see annex).

This clause should firstly exempt 'public' services as widely as possible from the scope of an agreement and would have to be inserted into the core text. In addition, it should clarify that nothing restricts the provision of SGIs, whether economic or non-economic, and stress the wide discretion of national, regional and local authorities in delivering these.

The clause should, furthermore, underline the significance of public services for the functioning of society and affirm the absolute and unquestioned competence and discretion of national, regional and local authorities in the definition, provision and organisation of these services, including decisions on whether services are to be publicly or (in part) privately funded.

This will ensure that a trade agreement will not in any way serve to justify liberalisation and privatisation that would have a serious negative impact on the public sector.

Finally, the clause should rule out the possibility of lowering any social and labour standards (see above).

In light of the above, CESI welcomes the statement on public services in TTIP and TiSA of 20 March 2015 by European Commissioner Cecilia Malmström<sup>9</sup>, and the related clause 2(b)(vii) on public services in the European Parliament TTIP resolution of July 8, 2015, which reflects much of what the proposed Gold standard clause encompasses.<sup>10</sup>

### iii. Positive lists, standstill and ratchet clauses

While SGIs are to be fully excluded from trade agreements, the scope of the latter should basically only cover those goods and services that are included in so-called **positive lists, i.e. only those explicitly mentioned**.

Using negative lists would give rise to the dangerous threat that services overlooked in the list or developing after a trade agreement has been concluded are automatically included in the scope of the text ('list it or lose it'-principle).

As a matter of principle, bringing back SGIs **to the public hand** must be possible at any time. Ratchet and standstill clauses in agreements must therefore be avoided in order to avoid definitively locking in present and/or future levels of liberalisation/privatisation.

Situations in which profit-oriented undertakings offering SGIs can sue the state that was previously offering the service for subsidies must be ruled out.

### iv. Loss of revenue from customs duties and fees

CESI points out that in the past, an increase in free trade has frequently led to a drop in customs duties and fees for the state, which has consequently often had an impact on public services. Therefore, CESI calls for the protection of SGIs from the effects – including long-term impacts – incurred by the reduction in revenue from fees and customs duties.

## c. Public procurement

Existing rules and award criteria regarding the EU **public procurement** rules and mechanisms should not be affected by trade agreements. In particular, trade agreements should not hinder authorities from determining award criteria for the delivery of goods and services which are in line with core public health, labour, social, consumer protection and environmental sustainability objectives.

## d. Investor protection and investor-state dispute settlement (ISDS)

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<sup>9</sup>See [http://europa.eu/rapid/press-release\\_STATEMENT-15-4646\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-15-4646_en.htm)

<sup>10</sup>See <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0252+0+DOC+PDF+V0//EN>

Special investor protection instruments for cases of investor-state disputes should not run against the governments' right to meet core public policy objectives. This right includes, most notably, the safeguarding of labour and social standards. However, it also relates to environmental protection and the provision of high-quality health, education and social public services.

Under these conditions only can a dispute resolution mechanism aiming at settling disputes between investors and states as proposed by the EU Commission in September 2015 concerning a public "Investment Court System for TTIP and other EU trade and investment negotiations" be considered.<sup>11</sup>

#### **e. Transparency and consultations**

Greater **transparency** in trade negotiations than in the past is essential.

Greater transparency helps the public and stakeholders understand what is at stake and avoid uninformed hearsay, misunderstandings and escalating controversies in public debates surrounding trade negotiations, as has been witnessed especially in the context of the TiSA negotiations.

It is vital for all interested parties to be systematically involved in credible **consultations** and to be given regular opportunities to have their voices heard and considered during negotiations.

The implications that trade agreements have or may have on citizens and government, social and economic players are significant and highly complex. The negotiating delegations should recognise the value that innovative stakeholder input and informed feedback – be it supportive or critical – can add.

Certainly, though, such consultation processes are only useful if trade negotiations are carried out in a more transparent fashion than in the past.

Upon completion of negotiations on a trade agreement, the European Commission should ask the Court of Justice of the EU (CJEU) for an opinion on whether the negotiated text represents a mixed competence agreement that also requires ratification by the national parliaments of the EU Member States, alongside approval by the European Parliament.

The European Commission should follow the advice of the CJEU when submitting negotiated trade agreement proposals for signature.

After a trade agreement has entered into force, social partners should be involved in an ongoing, **formalised monitoring process** that tracks the enforcement of provisions and can detect any evolving social impacts. The EU Domestic Advisory Group established under the EU-Korea FTA of 2011 can serve as a blueprint for further DCFTAs.

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<sup>11</sup>For more information concerning the Commission's proposal: [http://europa.eu/rapid/press-release\\_IP-15-5651\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5651_en.htm)

## **Annex: CESI and Social Platform joint proposal for a ‘Gold standard clause for services of general interest in EU trade agreements**

*“Nothing in this agreement shall be interpreted as restricting or adversely affecting the provision of services of general interest, whether economic or non-economic, in accordance with the principles as laid down by Protocol 26, especially regarding a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.*

*Nothing in this agreement shall be interpreted as restricting or adversely affecting the essential role and the wide discretion of national, regional and local authorities in:*

- *defining the services which they consider as being delivered in the general interest*
- *providing, commissioning and organising services of general economic and social interest as closely as possible to the needs of the users*
- *defining whether these services are open to competition*
- *deciding whether these services are publicly or privately funded.*

*The provisions of this agreement do not in any way affect the competence of Member States to provide, commission and organise services of general interest in compliance with EU rules.*

*Nothing in this agreement shall be interpreted as implying any right for any party to undermine, question or jeopardise the right of national, regional and local public authorities to regulate Services of General Interest complying with EU rules. Nothing in this agreement should lead to a lowering of the rules and standards established by the EU or by member states (especially standards to protect the environment, health, consumers, social cohesion, labour standards, and public procurement rules). This agreement should strive towards the promotion of fundamental rights as enshrined in the Charter of Fundamental Rights of the EU and other relevant international human rights conventions.”*