Services and investment in EU trade deals
Using 'positive' and 'negative' lists

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Trade

Services and investment are a key component of EU trade policy, mirroring the key role of these sectors in the EU economy. The EU is indeed the world's largest exporter of services and investment and the sector generates several million jobs throughout Europe.

EU international trade in services and investment has increased significantly in the last decade. The EU28 surplus stood at almost €163 bn in 2014[1], while the EU held a net investment position of €1,166 bn in relation to the rest of the world at the end of 2014[2].

1. How do EU trade deals cover trade in services and investment?

Trade in services and investment negotiations[3] are, broadly speaking, about two key categories of commitments:

- the Market Access Commitment - the commitment to let each other's services suppliers or investors have access to the domestic services market and

- the National Treatment Commitment - the commitment to treat foreign services suppliers or investors no less favourably than one's own service suppliers or investors.

Market Access

This implies that a Party may not impose on service suppliers or investors of the other Party certain types of quantitative restrictions that would limit access to its market, such as limitations on:

- the number of suppliers or service operations,
- the total value of transactions,
- the participation of foreign capital by quantity,

Other examples include any specific requirements for the legal form to be used and limitations on the participation of foreign capital.

National Treatment (NT)

This implies that a Party may not discriminate against the other Party's service suppliers and investors in favour of its own domestic service suppliers or investors.

[1] See Eurostat: http://ec.europa.eu/eurostat/documents/2995521/7130584/2-12012016-AP-EN.pdf/f79c2805-76e2-435e-9883-69606e0a2bcd.

[2] See Eurostat http://ec.europa.eu/eurostat/documents/2995521/7142952/2-25012016-AP-EN.pdf/76a02447-2a76-4ee3-bb02-07eacf6c855a.

[3] This paper does not cover issues related to the standards of investment protection and the related issue of the resolution of investment disputes related to those standards investment protection, which are a different topic, not related to the access to the market.

A typical type of discrimination would be to impose more restrictive conditions to a foreign supplier for the supply of a given service than to the Party's own providers – for example, by limiting foreigners' voting rights in an enterprise irrespective of their level of investment.

The different agreements on trade in services, including the GATS, take a more cautious approach allowing various kinds of exceptions in the commitments, as explained below in the section on scheduling.

In contrast agreements on trade in goods, including the WTO General Agreement on Tariffs and Trade (GATT), prescribe NT for imported goods without targeted exceptions.

<u>Limitations, reservations and schedules</u>

But these general commitments do not necessarily apply without exception.

Each Party can set conditions or exceptions to its commitments, often referred to as 'limitations' or 'reservations'. Commitments and exceptions are inscribed in so-called schedules, which form an integral part of the trade agreement.

Even if a Party does not include exceptions in its schedule – and takes what is called a "full commitment" - it does not mean that the sector is or will be deregulated.

The Party can continue regulating that sector but it will have to do so without imposing quotas or discriminating, so the rules should apply in the same way to domestic and foreign service suppliers and investors alike.

This means for instance that quality standards for the education or health sector or universal services obligations (for postal services for example) remain applicable (or can be introduced) even where no exception has been scheduled in a given sector.

2. How are the "positive list" and "negative list" techniques used?

The Parties can inscribe their commitments and exceptions in their schedules according to two different techniques – using a positive list or a negative list.

The choice of the technique, however, is not decisive for the range of commitments undertaken in a trade agreement. The same degree of opening/protection can be achieved with a positive as well as a negative list.

<u>Positive lists</u>

When using a positive list, a Party has to explicitly ("positively") list those sectors and subsectors in which it undertakes Market Access and National Treatment commitments.

As a second step, the Party lists <u>all</u> exceptions or conditions to these commitments, stating the Market Access and/or National Treatment limitations it wants to apply.

<u>Negative lists</u>

When using a negative list, the Parties only need to go through the second step.

They do not have to list the sectors for which they take commitments. All sectors or sub-sectors that are not listed are, by default, open to foreign service suppliers under the same conditions as for domestic service suppliers.

The Parties list only those sectors or subsectors which they limit or exclude by inscribing reservations for all measures which they consider would run counter to the Market Access and National Treatment principles. As such a negative list approach fosters transparency for those sectors and measures which are not fully liberalised.

A Party typically uses two different annexes to inscribe its reservations in a negative list:

- In Annex I the Party explicitly lists all existing national legislation which derogates from Market Access and/or National Treatment.

- In Annex II the Party lists the sectors and subsectors for which it reserves the right to derogate in the future from Market Access and/or National Treatment, including in cases where no measures currently exist.

In negative lists, Parties would usually attach legal citations - references to relevant legislation - which provide additional transparency and clarity to services suppliers and investors. The preparation of negative lists requires particular care. In the EU, the Commission carries out that work in cooperation with Member States.

Parties may also opt for additional mechanisms in order to further nuance their respective commitments and reservations: they can introduce so-called “standstill” and/or “ratchet” clauses**.**

These clauses frame the parties' future leeway to introduce Market Access restrictions and discriminatory measures.

Standstill clause

A “standstill clause” is a provision through which the Parties commit to keep the market at least as open as it was as at the time of the agreement. In other words, the Parties agree not to take reservations for future measures.

In practice, it means that, after the conclusion of a trade agreement, if a Party decides to further open up its market and subsequently decides to fall back to a more restrictive framework, that framework may never fall below the level of openness committed to in the agreement.

Example: if a Party commits in a trade agreement to allow 30 % foreign ownership in domestic companies and later on decides unilaterally to allow 40%, the Party can re-introduce the original level of 30% whenever it wishes (but cannot restrict further below 30%).

Ratchet clause

A “ratchet clause” is a provision through which the Parties commit that, if they unilaterally decide in the future to further open up their respective markets in one specific sector, such opening would be "locked in" – i.e. there can be no step backwards.

In the example mentioned above, the Party cannot roll-back vis-à-vis its negotiating partner the unilateral decision to allow 40% foreign ownership.

Since commitments normally reflect existing levels of market openness, a ratchet clause ensures that a free trade agreement is forward-looking and remains up-to-date by capturing the unilateral liberalisation that the other Party may undertake in the future.

In all the cases where Parties to a trade agreement open a sector, be it through a positive or negative list (and with or without standstill and ratchet), **the Parties retain their right to maintain or introduce non-discriminatory legislation**, for instance standards of treatment for patients, capital requirements for banks, qualification requirements for certain professions or universal services obligations (e.g. for the postal sector).

3. How has the EU used the "positive list" and "negative list" techniques in its trade agreements?

The choice of the approach tends to be influenced by "negotiating traditions". While some countries traditionally adopt a negative list approach in their FTAs, others usually follow a positive list approach.

This said, there is actually no such thing as a "pure positive list" approach - not even in GATS which is often cited as the most prominent example for a positive list agreement. In GATS, once a WTO Member has chosen to include a given sector in its schedule of commitments, it has to list all restrictions that apply (just like in a negative list).

Similarly, the horizontal part of a positive listing schedule (i.e. restrictions that apply across all committed sectors) needs to be exhaustive. In some services agreements both approaches have been used (so-called "hybrid approach").

For example, in the TISA negotiations (Trade in Services Agreement), National Treatment commitments are scheduled using a negative list approach while a positive list approach is applied for Market Access commitments. It is thus difficult to draw a clear line between the two approaches.

The EU has used both negative (e.g. agreement with Canada) and positive lists (e.g. agreements with Korea or Singapore) and is actually simultaneously engaged in (or has just concluded) negotiations using negative (Japan) and positive lists (Vietnam).

The EU has also accepted the use of the so-called "hybrid approach" in TISA.

Other countries in the world also take a flexible stance as to the technique used in services negotiations. For instance:

- South Korea signed a trade agreement with the United States based on a negative list in 2007; the country subsequently signed a trade agreement with the EU in 2010 using a positive list approach.

- China opted for using a negative list in its bilateral investment negotiations with the EU and the US. In the Australia-China FTA signed in 2015, Australia uses negative listing and China positive, which is evidence that the two approaches can co-exist.

Scheduling one and the same reservation under the different approaches

The following figure illustrates how one and the same reservation for a sensitive activity like water distribution is reflected in:

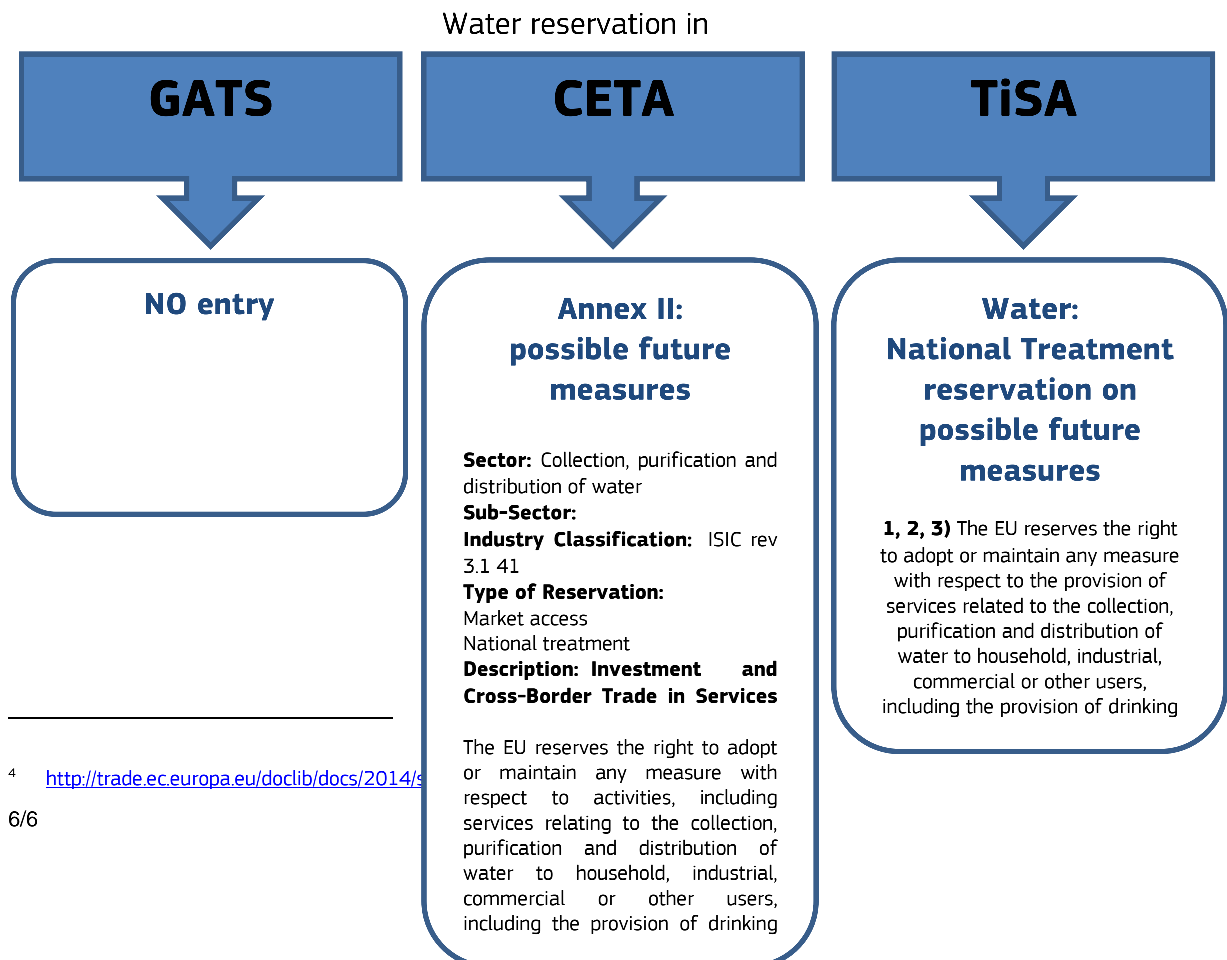
- a positive list (the multilateral General Agreement on Trade in Services (GATS)),
- a negative list (the EU-Canada Comprehensive Economic and Trade Agreement (CETA)[4]) and
- a hybrid schedule (the plurilateral Trade in Services Agreement (TiSA)).

The example shows how governments retain future leeway to introduce Market Access and National Treatment reservations under the different listing approaches.

Under **GATS**, a positive list agreement, the EU did not undertake any commitment in the sector "collection, purification and distribution of water". Therefore this sector does not appear in the schedule and no reservation has to be scheduled to reserve future leeway for National Treatment and Market Access.

Under **CETA**, a negative list FTA, the EU reaches the same future leeway by entering a reservation in Annex II.

Under **TISA**, a so called hybrid FTA using a positive list for Market Access and a negative list for National Treatment, it suffices to make an entry for National Treatment to reach the same leeway as under GATS and CETA. For Market Access no explicit entry has to be made as the sector is "unbound" (as under GATS).



[4] http://trade.ec.europa.eu/doclib/docs/2014/s