Brussels, 10 April 2015

Cecilia Malmström
Commissioner for Trade

RE: Follow-up to our meeting on TTIP and TISA on 5 December 2014

Dear Commissioner Malmström,

We would like to thank you for your letter dated 2 February 2015, following the fruitful meeting we had last December.

With this letter we would like to reiterate our concerns and clarify our requests. We would also like to provide you with some background information that substantiates our arguments in reply to your letter and at the end, some questions for clarification.

I. Exclude all social services, and health and education services of general interest, regardless if they are publicly or privately funded.

We consider that what the Commission and the United States (US) propose (horizontal reservation for a wide range of public services, exclusion of sensitive sectors from EU liberalisation commitments, member states' right to regulate how services have to be supplied) is not enough to protect public services.

Stating that public services / services of general interest are always publicly funded and that privately funded services are not in the general interest is an over-simplification of how those services are currently funded in the EU. The reality is that, at least in some member states, many social, health and education services which are of general interest are privately funded or supported by a hybrid of public and private funding. The financial crisis and the implementation of austerity measures on the one hand, and national cultural traditions that privilege private for-profit provision and private investments on the other, are the main reasons for this situation.

The European Union recognises, in art. 14 TFEU and Protocol 26 of the Lisbon Treaty, the role and the specificity of services of general economic interest (SGEI), the wide discretion of national, regional and local authorities to provide, commission and organise them. In the negotiation of trade agreements, the Commission needs to respect EU Treaty provisions, including those mentioned above.

The main health focus within the Trade in Services chapter relates to public procurement and the exclusion of health services from TTIP. The impact of privatisation on efficiency, quality and employment terms and conditions is well evidenced. Consequently, as the boundaries between 'social' and 'commercial' services continue to blur, the precise wording of any 'hard' or 'soft' exclusion will be of importance. The greatest consequence would be to those Member States that choose not to explicitly exclude their health services from TTIP.[1]

To effectively protect public services in general, and in particular all social services, and health and education services that are of general interest, we would like to propose:

- the inclusion in trade agreements, in particular TTIP and TISA, of a "golden clause" for Services of General Interest. Nothing in these agreements shall be interpreted as implying any right for any party to undermine, put in question or jeopardy the right of national, regional and local public authorities to regulate Services of General Interest complying with EU rules (see ANNEX A for a proposed text).

[1] Khan, U., Pallot, R., Taylor, D. and Kanavos, P. (2015)'The Transatlantic Trade and Investment Partnership: international trade law, health systems and public health' London School of Economics and Political Science and Modus Europe report. http://www.epha.org/6278

- the exclusion from the scope of agreements of public services or services of general interest, in particular in the social, health and education fields, regardless of whether they are publicly or privately funded. The criterion to decide on the inclusion or exclusion of services in the agreements should be the mission of the services, namely if they respond or not to the general interest, and not their source of funding. In ANNEX B we provide further explanation.

Our concrete proposals:

- To provide legal certainty, give a clear definition of the following legal concepts used in trade agreements and clarify how they match with those used in the EU treaties and secondary legislation: "public services" and "services of general interest"; "public utilities"; "publicly funded" and "privately funded" services.

  In particular, concerning social, health and education services, we would like to receive clarification as to whether the situations described in ANNEX C fall in the category of publicly or privately funded services.

- The exclusion of public services should be provided with a positive list in the trade agreements.

- Protect governments' right to regulate (which includes the definition of safety and quality standards, criteria to ensure the accessibility, affordability and universal access to Services of General Interest in the EU, as enshrined in art. 14 TFEU and Protocol 26), by explicitly stating in the investment chapters the governments' right to regulate, alongside the states' obligations to protect foreign investors. In CETA the right to regulate has been included in the preamble and in the chapters on environment and labour, but not in the investment chapter. This does not legally protect governments' right to regulate.

II. Base TTIP and TISA negotiations on the *acquis* of the new public procurement directive, the services directive and the recently revised state aid rules.

We welcome your statement that the Commission will take care to ensure that its trade agreements will be in line with the existing secondary law, to avoid creating conflicts between international agreements and EU secondary law. You mentioned in particular the Services Directive and the Public Procurement directive. In order to secure this commitment,

Our concrete proposals:

- EU secondary law that recognises the specific characteristics of Services of General Interest and Social Services of General Interest and on which member states have agreed upon should not be jeopardised by trade agreements. Those laws should be the red line which negotiations cannot cross.

- The exceptions foreseen in the Services Directive for healthcare and social services[2], and by extension for education services, should be integrated in the same way in trade agreements.

- The negotiations should not affect the provisions of the Public Procurement Directive that allow contracting authorities to choose goods, services and works that promote

[2] *The Directive shall not apply to the following activities:*
a) non-economic services of general interest
f) healthcare services whether or not they are provided via healthcare facilities, and regardless of the ways in which they are organised and financed at national level or whether they are public or private
j) social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised as such by the state.
(Art. 2 of the Services Directive)

environmental protection, social progress, labour law enforcement, and the specific provisions concerning social, health and other services directly provided to the person.

- On *state aid*: the social sector - including social housing - benefits from an exemption in the state aids regulation. Those exemptions are justified by the competence of the member states to regulate the enterprises entrusted with the operation of SGEI, and the mission of SGEI itself, but also because social services and social housing provision do not affect trade within the EU given the local nature of their provision.

  TTIP proposals contain a specific chapter on subsidies granted to operators of services of general interest, based on WTO definitions. However, the TISA and CETA agreements did not contain such provisions. Therefore, there is a need for some clarification in TTIP on proceedings relating to subsidies granted to operators of services of general interest.

  In addition, we believe that adding an international level of examination of state aid is not appropriate, given the diverse nature of services of general interest based on local preferences. It would also create the risk of impacting the definition of the service of general interest itself regarding the existing case law within the EU. TTIP should include a specification on the competence of member states in this regard.

III. Do not use Investor-State Dispute Settlement (ISDS) in order to preserve the general interest

Social Platform calls on the Commission not to include ISDS in TTIP. Protection against misuse or abuse of governmental powers is a standard feature of domestic law – or certainly in advanced legal systems, the standard would generally not fall below what is offered in international investment law. Both the EU and the US must be considered to have advanced legal systems and there are sufficiently strong legal mechanisms both in the US and EU to reassure foreign investors. The ISDS mechanism is both unnecessary and potentially destabilising.

Moreover, whilst economic research gives support to the argument that investment-protection agreements help to promote Foreign and Domestic Investment (FDI), the effect is unlikely to be strong because there are far more important determinants of FDI. The agreement between Australia and the US does not include ISDS and this has not harmed foreign investment in Australia. As there is a lack of empirical evidence that Free Trade Agremments containing ISDS increase foreign investment, it is unlikely that a TTIP without an ISDS mechanism will have a major negative impact on foreign investment from the US into the EU.

There has been some improvement in CETA, but the solutions proposed by the negotiators still present a lot of flaws as they do not satisfy basic standards of judicial independence and fair process. See ANNEX D for further explanation.

As it is outlined in the European Commission public consultation document, there are alternatives for Investment protection such as investment insurance and political risks that deter countries from arbitrary expropriation.

We hope that you can consider our proposals and respond positively to our concerns.

Yours sincerely,

Heather Roy
President

Pierre Baussand
Director

ANNEX A

Proposal of "golden clause" for Services of General Interest in the Trade in Services Agreement (TISA) and in the Transatlantic Trade and Investment Partnership (TTIP)

"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 interest as closely as possible to the needs of the users*
- *defining whether these services are open to competition*
- *decide whether these services are publicly or privately funded.*

The provisions of this agreement do not affect in any way 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, put in question or jeopardy 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 the decrease 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 aim at the promotion of fundamental rights as enshrined in the Charter of fundamental rights of the EU and other relevant international human rights conventions."

ANNEX B

Examples of social, health and education services of general interest provided by non profit organisations which are privately funded or by a mix of public and private sources

SOCIAL SERVICES

Based on the 2011 ASISP[3] country reports that assess the socio-economic impact of social reforms, we can identify two main groups of countries:

1. Member states with limited expenditure reductions in social services (Denmark, Germany, Sweden, Finland, Austria, Belgium and France)
2. Member states severely impacted by the budget cuts in social services (Baltic States, Bulgaria, Greece, Hungary, Ireland, Italy, Portugal, Romania, Spain and the UK).

Social housing (from our member Housing Europe[4])

In most EU countries public funding does not fully cover the costs involved in social housing provision, except where the share of social housing is extremely small and only provided directly by municipalities, as is the case in some Eastern European countries such as Estonia, Lithuania, Romania, Slovakia. On the contrary, access to private funding – either through borrowing from banks or in some cases directly from the capital markets - is gaining importance in the financing of social housing. For instance:

- In England, under the current Affordable Homes Programme, housing associations must finance 86% of the new construction cost for social housing, as only 14% of the cost is covered by government grant. Private borrowing used to be mainly from banks, but increasingly housing associations are issuing bonds as a way to raise funding.

- In the Netherlands, financing of new social housing projects by housing corporations mainly consists of bank loans (about 70-80% of the project cost on average), and housing associations' own equity. Social housing organisations have access to a three-layer security scheme to guarantee the loans they contract with banks to finance their social housing activities. While the first two security mechanisms of this system are set up and financed collectively by housing corporations, the Dutch state and municipalities come only as a last resort guarantor.

- In Finland, the social housing fund (ARA) grants public guarantees and interest subsidies on loans provided by the private sector for social housing construction.

- In Ireland, where previously grants up to 100% of a project cost were available to approved housing bodies, direct public funding has been replaced almost entirely by a model based on private borrowing since 2011.

Support services for people or groups who are marginalised or excluded or hit the most by the economic crisis (from our member Caritas Europa[5])

- Italy: Microcredit/Economic and financial advice to families hit by the economic crisis and in financial difficulties (service provided by several Italian Caritas Member Organisations, supported by Diocesan funds and sometimes by banks, foundations and municipal social service funds); counselling and financial advice, through volunteer experts, aimed to empower families to make economic and financial decisions adequate to their means, by rationalising access to credit, including access to mini-social loans through a special Caritas solidarity fund.

[3] ASISP stands for Analytical Support on the Socio-Economic Impact of Social Protection Reforms.
[4] For further information see 'Housing Europe Review 2012: the nuts and bolts of social housing' and 'Study on financing social housing in 6 countries', published by Housing Europe Observatory.
[5] Most of examples are taken from Caritas Europa's Crisis Monitoring report.

- Italy: Caritas Social Markets (“Empori della Solidarietà”), supported by Diocesan funds, food companies, supermarket chains (and sometimes by bank foundations and social service funds). “Emporio della Solidarieta’ is a real medium-sized supermarket. It is aimed at people and families in difficult and uncomfortable situations for a defined period of time (from one to six months), to make them more autonomous and integrated. The beneficiaries, then, are those who are in temporary difficulties and who cannot meet all their needs. The main objective of the project is to give families a real chance to overcome crisis situations and to increase their level of empowerment. The products distributed are those collected in the territory, offered by companies in solidarity and retrieved through food collection in supermarkets.
- Italy: Caritas medical clinics, supported by Diocesan funds, are services aimed not only to give an immediate medical response to people or groups who are marginalised and excluded, but also to raise awareness of public authorities and the health care system to address the specific medical and health needs of this target group.
- Portugal: “Fundo Social Solidário” is a solidarity fund set at the initiative of the Portuguese Bishops’ Conference; its objective is to contribute to resolving severe social problems caused by the crisis. It is managed by Caritas along with church institutions. Last year it supported 3,957 persons facing difficulties with issues like housing costs, health, education or jobs.
- Greece: the “Elpis Project” is funded by Caritas Italy, several Italian diocesan Caritates, Caritas Spain, Caritas France, and is carried out by Caritas Greece in collaboration with Caritas Europa. The project provides support to 500 disadvantaged families in different geographical regions in Greece through a monthly distribution of food and non-food items. The main goals of the project are to contribute to the reduction of the consequences of the crisis among disadvantaged and socially excluded people and to strengthen the network of Caritas in Greece in order to be able to help more people.
- Romania: the Caritas Romania Confederation created the National Home Care Programme to offer basic services, in the form of food, transportation and housekeeping, to improve the lives and meet the basic needs of people who are confined to bed. This programme comprises a team of doctors, nurses, social workers and volunteers to provide medical services and psychosocial support. Since July 2013, the Caritas Romania Confederation, along with its partners, have been developing a nationwide homecare network, entitled “Seniorinet”. The Caritas Romania Confederation addresses the nation’s aging population with social campaigns for seniors who wish to remain active despite problems that are encountered in older age. In 2013, Caritas organisations offered support and dedicated programmes to 4,000 seniors. The number of people requesting support from Caritas organisations continues to increase each year. Unfortunately, due to difficult funding situations facing some organisations, their capacity could not be increased and in some cases has even decreased. In 2013, Caritas Romania provided support and services to 16,000 persons.

Social services financed by the means of Social Impact Bonds - an example provided by our member Volonteurope

In the UK, Essex County Council is delivering the first local authority social impact bond targeted at vulnerable children and young people on the edge of care, in cooperation with with Social Finance.

The Essex Social Impact Bond is a means of financing interventions with the simple aim of keeping young people out of the care system. The bond will fund intensive work with families experiencing difficult times and with complex needs, working with around 380 young people with the aim of keeping families together, not apart.

The SIB has raised over £3.1million of external investment to fund intensive support over five years with the aim of preventing children entering the care system and thus releasing (cashable) savings for the council.

Action for Children’s programme will help 380 vulnerable 11-16 year olds on the edge of care or custody to stay safely at home with their families. The programme uses Multi-Systemic

Therapy, an intervention that focuses on improving parenting and rebuilding positive relationships. By focusing on early intervention rather than treatment, it will help families build the skills they need to manage crisis situations now and in the future.

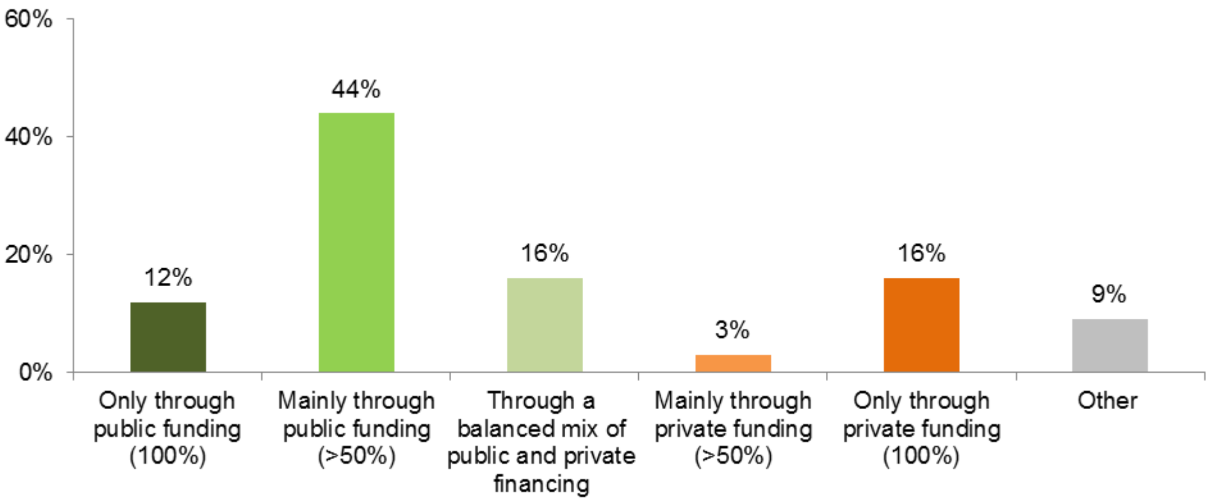
Children's Support Services (CSS) has entered into a payment-by-results (PbR) contract with Essex County Council. CSS will work with Social Finance who will help manage the delivery of the contract by Action for Children, one of the UK's largest children's charities.

Services for persons with disabilities (from our member the European Association of Service Providers for persons with disabilities – EASPD)

The funding of the sector is severely impacted by the economic crisis and austerity measures. Budget cuts are not only affecting the public sector but also non-public service providers that depend heavily on public funding.

The table below illustrates the repartition of sources of funding between public and private sources according to 2012 data.

Figure 5: Sources of funding of service providers to people with disabilities (EASPD, 2012)



Services provided by Work Integration Social Enterprises – WISE (from our member ENSIE)

Services funded by a mix of public and private funds:

- In Italy, the social cooperative Paolo Babini provides work integration services for persons in vulnerable situations. They receive public funding for this service, they sell products and services on the market and raise funds from foundations and other private sources.
- In Italy, Cooperativa Nazareno receives both public and private funding; they also have a commercial activity as they sell the goods produced by disadvantaged workers who work there, then they mainly reinvest in the activities of the cooperative.
- In Italy, The Cooperative OPIMM provides services for migrants, training services and work integration services for which they receive public support. They also get financial support from foundations and donations.
- In the Netherlands, the enterprise Brewery De Prael receives public funding for 30% of their turnover.
- In Poland, there are approximately 1,300 social cooperative funded by a mix of public and private sources.

Examples of WISEs financed just by private funding:

- In the Netherlands, the enterprise webservice Swink funds itself from the products or services it sells on the market.
- In Poland, the Foundation for Development of Social Economy "Be together" in Cieszyn and the Foundation Giesche in Katowice are completely privately funded.

EDUCATION SERVICES OF GENERAL INTEREST

Compulsory school (from our member the European Parents' Association)

All EU member states have ratified the UN Convention on the Rights of the Child, while the US has not. On the basis of article 28 of the Convention, state parties have the obligation to make primary education compulsory and freely available to all.

This is not the situation in many EU countries. In many countries if a parent/family opts for church schools or not the traditional curriculum (eg. a Waldorf school or homeschooling), there is no public funding at all, although it is considered a form of compulsory schooling. It is accepted as a form of attending school within the framework of compulsory schooling, as pupils do the same exams and they can go from such a school to a state one or the other way round.

In Hungary, many schools, providing the only acceptable option for talented or special needs children, are only partially funded by the state and parents must pay a fee. Arts education (music, drawing, etc) and most sports courses are also not financed or only partially financed. Early childhood services (kintergardens) are also only partially financed.

Even in Norway all schools recognised as places for compulory education are state financed, but some of them, like Waldorf schools or church schools are only 85% financed (parents pay 15%) while others are 100% financed. For some Special Educational Needs (SEN) children fully free schools are not available.

In Austria, public school teachers are paid by the government and the government (local for primary, national for secondary) is responsible for the building & equipment (furniture, screens, beamers, computers, electricity, heating, toilet paper etc.) and all supporting staff (cleaning, housekeepers, secretaries, school doctors, school psychologists, social workers, teachers for extra-curricular activities, extra staff for outdoor activities like sports and language weeks).

In public schools pupils have school books for free and free fares to go to school (in Vienna there is an affordable ticket for after-school activities for all students).
There is a great difference between catholic and protestant schools on one hand and so called "free schools" (mainly Waldorf-Steiner, Montessori) and other religious ones (e.g. Islamic) on the other.

Catholic and protestant schools are privileged in contrast to other private schools, because there the government is responsible for all teachers' salaries. The costs for all other staff, the buildings and equipment have to be met by the parents. Pupils also get free schoolbooks. In all other private schools parents have to pay for all things in general.

HEALTH SERVICES OF GENERAL INTEREST

In the EU, according to our member the European Public Health Alliance (EPHA) in many countries health services such as for persons with disabilities, cancer-patient taxi services, nurses funded by charities, old people homes, hospices and community rehabilitation schemes are privately funded.

ANNEX C

We would appreciate if the Commission services could clarify if the following situations fall in the category of publicly funded or privately funded services.

- What would be the treatment for services that are funded by a mix of public and private sources?
- What proportion of public finance is needed for a service to be considered publicly financed? (e.g. 50%, more than 50%, or even 1% of public financing?)
- Are payments of health insurance to health service providers considered public funding, even if the health insurance is privately organised (but where possession of insurance is compulsory by law)?
- In some countries such as Germany, Austria, Luxembourg and Lithuania, social services are mainly financed by the social insurance system and contribution schemes. Can they be considered publicly funded?
- Can the definition "Services carried out exclusively in the exercise of governmental authority" provided in CETA be interpreted to include services provided by private operators?
- In the EU, cooperatives are funded by their members and by profits earned out of their economic activity and reinvested in the cooperative. Cooperatives providing social services are generally also receiving state support which can be in different forms (subsidies, grants, mandate etc). For example, in older people's homes managed by a cooperative, some residents pay out-of-pocket for the service, while the state (or regional/local authority) bears the costs for residents in vulnerable situations. Would this service be considered publicly or privately funded?
- Are providers receiving public support in the form of tax exemptions or reductions because they provide a service in the general interest (e.g. it is foreseen in the mission of Work Integration Social Enterprises – WISE – to employ disadvantaged persons) considered a publicly funded service?
- Not all WISEs in the EU receive financial support from public authorities, as the legislation differs from country to country. When there is no public support in any form, would this be considered a privately funded service?
- Are compulsory private schools (primary or secondary) where parents pay a fee considered a public service or not?

ANNEX D

MAIN FLAWS OF ISDS

- ISDS is a one-sided system that privileges foreign investors over anyone else (domestic companies, governments, citizens, other parties whose rights or interests are affected in a lawsuit). A balance between the protection of investors' rights, other human rights enshrined in international agreements and governments' right to regulate should be ensured.

- ISDS does not ensure the independence of arbitrators and protection against widespread conflicts of interests. Even CETA provisions do not prohibit arbitrators working as lawyers in other investor-state lawsuits and do not establish mechanisms to effectively check the independence of arbitrators.

- ISDS does not allow judicial review of arbitrator decisions.

- ISDS does not protect taxpayers' money, and in some cases it has contributed towards states going bankrupt. CETA contains no provision to put a cap on arbitrators' fees to comply with the practice in use in the World Trade Organisation (WTO). In the WTO, arbitrators get paid 500-600 USD per day, while ISDS arbitrators are paid 1,000 USD per hour. In addition, CETA does not establish a cap on monetary awards to compensate investors' rights. Furthermore, „the loser pays" principle should apply.

- ISDS has a "chilling effect" on state regulatory powers. Although arbitration tribunals have no authority to force a government to change the law called into question by the investor, some governments have stepped down from the process to avoid having to pay compensation. CETA includes a provision allowing awards to be reduced by the arbitrators if the state has removed or amended the measure that is opposed by the foreign investor (article X.36.3 in CETA). We do not consider this acceptable.