

# AIM RECOMMENDATIONS ON CETA

8 July 2016

While in certain areas, the European Union and its Member States would certainly benefit from the “Comprehensive and Economic Free Trade Agreement (CETA)” through the reduction of tariffs and the mutual recognition of standards and certification processes, health insurance funds and health mutuels still have some concerns about the impact that CETA may have on their work. Statements from the European Commission that health insurance funds and health mutuels will be protected as a “public service”, “a public utility” and as a “service of general (economic) interest” still leaves health insurance funds and health mutuels included in the material scope of the CETA and subject to all obligations except for some features on the market access principle.

*Current exemptions  
on public services  
and health services  
are not sufficient*

## AIM recommendations on CETA

Therefore, AIM and its members urge European Institutions and the Member States to take into account the following recommendations:

1. Services forming part of statutory systems of social security and services of general (economic) interest should be excluded from the investment chapter (including market access, national treatment, and investment protection standards such as the fair and equitable treatment and expropriation). The exemption should also apply to cross border services and investment.
2. If there is no way around to include an Investor-to-State Dispute Settlement (ISDS) or Investment Court System (ICS) in the CETA treaty, Member States and their social organisations such as trade unions, health insurance funds and health mutuals should have access to this tribunal. Tribunals have to be established through precise and unambiguous terms so that no room for interpretation arises and regulation by the government in the sense of the common good is still possible.
3. The ambiguities of the term "public utilities" must be eliminated and replaced by public services/ services of general (economic) interest that may be subject to a specific regulatory regime or are characterised by specific obligations and operate in the public interest.
4. Subsidies need to be exempted not only from the chapter on cross border trade in services but also from the investment chapter, including the principle of fair and equitable treatment, compensation for losses and expropriation.
5. In Annex II, social security systems and services of general (economic) interest including health and social services must be completely excluded from the scope of trade agreements (including market access, national treatment and investment protection) regardless of how they are provided or financed as proposed in the European Parliament resolution on TTIP<sup>1</sup>.

### Explanatory note

#### I. Investment Protection

##### 1. Investment Protection Standard - Fair and equitable treatment

CETA contains protection standards such as the principle on "fair and equitable treatment" and "expropriation". The fair and equitable treatment standard (art. 8.10) is the most widely used standard in ISDS (Investor-State-Dispute-Settlement) procedures. Some tribunals have interpreted the standard that the investor is entitled to a "stable regulatory environment" which meets their "legitimate expectations". Legislative changes or the introduction of new regulatory requirements are thus potentially vulnerable. However, the Commission explains that the definition of fair and equitable treatment in CETA narrows the broad interpretation of investment tribunals. It is doubtful,

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<sup>1</sup> As recommended by the European Parliament in its resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228(INI)).

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whether the listed elements in the mentioned article will lead to more clarification. The past has shown that tribunals still interpreted the standards in a broad way. The attempts to reach more specification remained fruitless.<sup>2</sup>

**CHAPTER Investment: Article 8.10 Treatment of investors and of covered investments**

*“Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments **fair and equitable treatment** and full protection and security in accordance with paragraphs 2 through 6.”*

### 2. Right to regulate

CETA explicitly ensures that governments retain the right to regulate in the public interest on health (among other topics). AIM health insurers/health mutuals welcome the clear confirmation of the parties’ “right to regulate”. However, the “right to regulate” does not exist without limits. Even when a measure passes the test, and cannot be declared wrongful or illegal, it does not automatically mean that it can be done without compensation. Thus legitimate regulation can go hand in hand with compensation.

**CHAPTER Investment: Article 8.9 Investment and regulatory measures**

*“For the purpose of this Chapter, the Parties reaffirm their **right to regulate** within their territories to achieve legitimate policy objectives, such as the protection of **public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.**”*

### 3. Expropriation

Another significant substantive protection standard in CETA is the direct and indirect expropriation (article 8.12), whereas the latter is now more relevant. But again, the attempt to narrow the scope by including some elements, describing what expropriation is (annex 8-A), does not lead to any clarification and is not suitable to protect the right to regulate effectively.

**RECOMMENDATION:** Services forming part of statutory systems of social security **and** services of general (economic) interest should be excluded from the investment chapter (including market access, national treatment, and investment protection standards such as the fair and equitable treatment and expropriation). The exemption should also apply to cross border services and investment.

### 4. Investment Court System (ICS)

To protect foreign investors against arbitrary actions of governments, the CETA treaty contains the Investment Court System (ICS). It replaces the Investor-to-State-Dispute Settlement (ISDS). Member

<sup>2</sup> Porterfield, Matthew C. 2013: A Distinction Without a Difference? The Interpretation of Fair and Equitable Treatment Under Customary International Law by Investment Tribunals. IISD, 22. März.

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States as well as health insurance funds and health mutuals fear that ISDS and ICS can lead to a parallel legal system that undermines the democratic process. They propose that Member States should have access to ICS.<sup>3</sup>

**RECOMMENDATION:** If there is no way around to include an Investor-to-State Dispute Settlement (ISDS) or Investment Court System (ICS) in the CETA treaty, Member States and their social organisations such as trade unions, health insurance funds and health mutuals should have access to this tribunal. Tribunals have to be established through precise and unambiguous terms so that no room for interpretation arises and regulation by the government in the sense of the common good is still possible.

### II. Public services and the exception for public utilities

In general, public services are included in CETA. Explicit exemptions for public services can only be found for services carried out in the exercise of a governmental authority and audio-visual services.

In many areas of public services private companies exist in addition to public authorities (e.g. in the education sector and health sector). Competition situations may occur, so that these areas apply to the CETA rules. For this reason, the EU has added an exception for public services in Annex II, the so-called "Public Utilities Clause". Similar clauses can be found in other Free Trade Agreements in the EU.

The clause does not fully cover health insurers/health mutuals. It only refers to investments and market access, not to cross-border trade in services via internet. It does also not apply to national treatment, most-favoured nation principle and the investment protection standards. Furthermore, the majority of public services are provided neither as "public monopoly; nor as "exclusive" rights granted to private providers. The services provided by private parties by order of a public contract are often in competition, such as care/nursing services and therefore do not have "exclusive" rights.

**Type of Reservation:** Market Access

**Description:** Investment

*"In all EU Member States, services considered as public utilities at a national or local level may be subject to public monopolies or to exclusive rights granted to private operators. (...) 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 utilities 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."*

<sup>3</sup> See the parliamentary debate in the Netherlands on 6 June 2016: <https://www.tweedekamer.nl/nieuws/kamernieuws/debat-over-vrijhandelsverdrag-ceta>, [https://www.tweedekamer.nl/kamerstukken/plenaire\\_verslagen/detail?vj=2015-2016&nr=92&version=2#idd1e724178](https://www.tweedekamer.nl/kamerstukken/plenaire_verslagen/detail?vj=2015-2016&nr=92&version=2#idd1e724178).

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**RECOMMENDATION:** The ambiguities of the term "public utilities" must be eliminated and replaced by public services/ services of general (economic) interest that may be subject to a specific regulatory regime or are characterised by specific obligations and operate in the public interest.

### III. Subsidies

The CETA text contains a chapter on subsidies, which puts notification obligations on the parties. Subsidies as such are excluded from Chapter 9 on Cross border trade in services (p. 74ff; Article 9.2 (2g)). This is different from the Investment Chapter (8): Subsidies are only excluded from market access and national treatment (Article 8.15 (5b)). But they are covered by the principle of fair and equitable treatment (article 8.10), compensation for losses (8.11) and expropriation (8.12).

With subsidies still being covered by the principle of fair and equitable treatment, compensation for losses and expropriation, this gives investors the opportunity to claim that certain tenders or subsidies violate CETA rules in front of tribunals such as ICS (Investment Court System).

**RECOMMENDATION:** Subsidies need to be exempted not only from the chapter on cross border trade in services but also from the investment chapter, including the principle of fair and equitable treatment, compensation for losses and expropriation.

### IV. Health Services

The EU has made reservations in Annex II in a list of commitments in the field of education, health and social services reservations that limit the CETA liberalization to "privately funded". This exception applies to the CETA rules on market access, and national treatment but not for the most-favoured nation principles and the investment protection standards.

Furthermore, it is not entirely clear to which extent a service with mixed financing from public and private sources is still considered to be publicly financed and would thus be excluded from the respective CETA rules. The wording "public funding or State support in any form" leaves open, how high the proportion of public funding should at least be, so that the services will not be considered as a privately funded service. It is also not clear what exactly is meant by public funding (e.g. social contributions, even when regulated by law, could be seen as private funding).

**RECOMMENDATION:** In Annex II, social security systems and services of general (economic) interest including health and social services must be completely excluded from the scope of trade agreements (including market access, national treatment and investment protection) regardless of how they are provided or financed as proposed in the European Parliament resolution on TTIP.

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### About AIM

The Association Internationale de la Mutualité (AIM) is an international umbrella organisation of not-for-profit healthcare mutuals and health insurance funds in Europe and in the world which operate on the basis of solidarity. Currently, AIM's membership consists of 63 member organisation in 30 countries. In Europe alone they provide coverage of healthcare to around 200 million people. AIM strives via its network to make an active contribution to the preservation and improvement of access to health care for everyone.

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