

Trade in services

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KEY POINTS

When most people think of free trade, they think of trade in goods such as coffee, cars and chemicals. Reducing barriers to trade in goods is one of the purposes of CETA, but the deal is also designed to liberalise trade in services such as transportation, insurance and communication. Since the principal barriers to international trade in services are government regulations, CETA's chapter on cross-border trade in services (Chapter 9) has significant public policy as well as commercial implications.¹

The chapter includes provisions on national treatment (Article 9.3), most-favoured-nation (MFN) (Article 9.5) and market access (Article 9.6) that are intended to liberalise services trade between Canada and the EU. The national treatment and MFN provisions require governments to treat foreign service suppliers at least as well as domestic service suppliers or the service suppliers of other trading partners. The market access provisions prevent governments from imposing economic needs

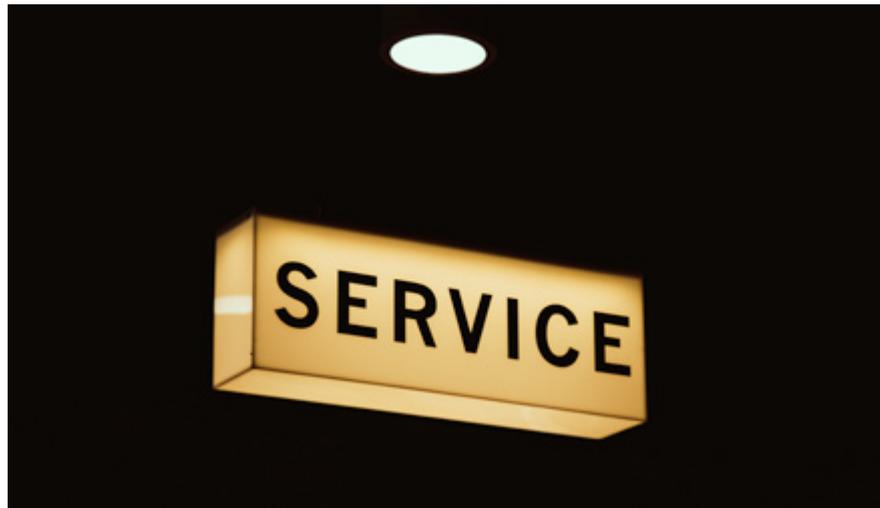


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tests or other limits on the total number of service suppliers, the value of their services, or the outputs of those services. In sum, CETA opens the door to foreign service suppliers by restricting governments' capacity to regulate their entry and activity in the domestic market, even when such regulations do not discriminate between foreign and domestic service suppliers.

There are various exceptions and caveats to the services provisions, but the scope of the chapter is still extremely broad. Unlike the General Agreement on Trade in Services (GATS), CETA employs a negative list approach to liberalisation, which means all services are covered by default unless specifically excluded by negotiators. Furthermore, CETA contains a standstill and ratchet mechanism that locks in the current level of services liberalisation in each country and prevents governments from

* We'd like to thank Thomas Fritz (PowerShift e.V.) for his help with this chapter. This chapter is based on his previous work on CETA. See Thomas Fritz (2015), Analysis and Evaluation of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, Hans-Böckler-Foundation (http://www.boeckler.de/pdf_fof/S-2014-779-1-3.pdf).

¹ The total value of commercial services trade between Canada and the EU was approximately €15.6 billion (\$22.7 billion in August 2016) in 2013, while the total value of merchandise goods trade was approximately €56.7 billion (\$82.7 billion). See Statistics Canada, 'Table 376-0036: International transactions in services, by selected countries', and 'Table 228-0069: Merchandise imports, exports and trade balance, customs and balance of payments basis for all countries, by seasonal adjustment and principal trading partners' (<http://www5.statcan.gc.ca/cansim>).

backtracking on any further liberalisation that may be undertaken voluntarily.

As a result, CETA will make it more difficult for countries to protect and expand public services. It will also become more difficult to regulate private service suppliers over time.

ANALYSIS OF KEY PROVISIONS

Scope

CETA's chapter on cross-border trade in services encompasses two modes of providing services: (i) 'from the territory of a party into the territory of the other party', which corresponds to GATS Mode 1 (cross-border supply); and (ii) 'in the territory of a party to the service consumer of the other party', which corresponds to GATS Mode 2 (consumption abroad) (Article 9.1). GATS Mode 3 (commercial presence) is covered by the investment provisions in Chapter 8 while GATS Mode 4 (presence of natural persons) is covered by the temporary entry provisions in Chapter 10.

CETA's provisions for non-discrimination (national treatment and most-favoured-nation) in its services chapter are not new for a free trade agreement. Where CETA diverges from existing deals like NAFTA is by ensuring market access for foreign suppliers in both its services and investment chapters. That means under CETA governments cannot limit a foreign supplier's presence in the domestic services market even if the treatment is non-discriminatory. Monopolies and exclusive suppliers are prohibited by default under these provisions.

The services chapter does contain some general exceptions. Excluded are 'services supplied in the exercise of governmental authority' (Article 9.2(2)(a)), although in practice this reservation is very narrow

(see section on public services below). The chapter also excludes audiovisual services for the EU, cultural industries for Canada, and financial services for both. Air transport services are exempted in general, but some specific air transport services, such as ground-handling services, are explicitly included. Public procurement, as long as it is not for the purpose of commercial resale, is excluded, as are subsidies and other forms of state support (Article 9.2(2)(f) and (g)). By contrast, Chapter 9 does not include any specific protection for labour or social standards.

Negative listing

In addition to the general exceptions described above, both Canada and the EU have established party-specific exceptions to the liberalisation provisions of the investment and services chapters. However, in contrast to the GATS, which takes a so-called positive list approach to liberalisation, CETA takes a 'negative list' approach.

A positive list means the liberalising provisions of the deal only apply to the areas and measures that the parties have specifically included in their schedule of commitments. In CETA's negative list, by contrast, all areas that are not listed in the parties' schedules may be subject in principle to liberalisation. This approach is also referred to as 'list it or lose it', because what is not explicitly included in the negative list cannot be protected from future liberalisation. That applies not only to existing services, but also to newly emerging services—for example, in the area of e-commerce. Due to this unrestricted reach, the negative list is not transparent. It is scarcely discernible which areas are to be completely liberalised now or in the future.

CETA's negative list of reservations contains restrictions on the fundamental liberalisation principles of establishment (market access, performance

requirements) and non-discrimination (national treatment, most-favoured-nation). These restrictions are divided into Annex I (Reservations for Existing Measures and Liberalisation Commitments) and Annex II (Reservations for Future Measures). In the case of the EU, the annexes contain both EU-wide exceptions and member state-specific exceptions. For Canada, the list of reservations is separated into federal and provincial exceptions.

Annex I contains reservations for 'existing non-conforming measures', be they laws, regulations or other government activities. Annex I is the weaker list because it only protects actions a party is already taking and not necessarily any future actions. These reservations are also subject to the 'standstill' and 'ratchet' mechanisms (see below).

Annex II, by contrast, contains exceptions for current and future actions and measures taken by the party. Annex II reservations are intended to allow the implementation of more discriminatory regulations or the revision of former deregulations. For this reason it is sometimes referred to as the 'policy space' appendix; however, the extent to which the reservations contained in Annex II actually protect such policy space depends largely on their specific wording. An analysis of Annex II reservations shows there are definitely loopholes in some areas (see public services section below).

CETA's negative listing approach has also led to large inconsistencies in national reservations (i.e. country-specific exceptions) for public and essential services. Germany, for example, has supplemented EU-wide reservations with a broad national reservation insulating health care from the treaty, but other EU member states such as the United Kingdom and Hungary have left key parts of their health care systems exposed. This inconsistency is also evident in many other sectors, such as waste management or waste-water treatment. The

result is a patchwork quilt of protections that weakens the social fabric of Europe. It also illustrates how treaties such as CETA and TTIP enable a single conservative government, either deliberately or through carelessness, to lock in services deregulation for all future governments.

Standstill and ratchet

All services in the EU and Canada, including those listed in Annex I but not those listed in Annex II, are subject to CETA's standstill and ratchet mechanisms. The standstill mechanism locks in the current level of services liberalisation, while the ratchet mechanism requires that future liberalisation automatically becomes a CETA commitment. The mechanisms are found in the investment chapter (Articles 8.15(1)(a) and (c)) and in the services chapter (Articles 9.7(1)(a) and (c)), although not explicitly. Instead, the standstill and ratchet mechanisms arise from specific wording in the reservations provisions.

Firstly, the exceptions to the services chapter refer only to 'existing non-conforming measures' (Article 9.7(1)(a)), but not to any future actions. Therefore, governments cannot enact new measures that violate the terms of the deal. The current level of liberalisation is locked in, which is the standstill effect.

Secondly, any measures taken by a party may not 'decrease conformity' with the CETA provisions on non-discrimination and market access. Modifications are permissible, according to Article 9.7(1)(c) only:

→ *to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 9.3 [national treatment], 9.5 [most-favoured-nation], and 9.6 [market access].*

In other words, any changes made to a party's investment and services regime are only allowed to the extent that they

increase liberalisation within the meaning of the CETA rules. This applies even if the party wants to reverse a voluntary decision made after the implementation of CETA, hence ‘as it existed immediately before the amendment came into effect’ and not ‘at the time of entry into force of this agreement’. Although not named in the text, this is a de facto ratchet mechanism.

Examples of Annex I reservations

In Annex I of its schedule the EU has included a very narrow market access reservation for postal services:

→ *In the EU, the organisation of the siting of letter boxes on the public highway, the issuing of postage stamps, and the provision of the registered mail service used in the course of judicial or administrative procedures may be restricted in accordance with national legislation.*

In addition, the EU reserves the right to bind the issuing of licences for the provision of postal services to universal service obligations. Due to the standstill and ratchet mechanisms, any extension of the activities of public postal companies or postal companies acting on behalf of the public sector that go beyond the areas cited here (i.e. siting of letter boxes, the issuing of postage stamps, and the handling of judicial or administrative mail) may, under certain circumstances, constitute an infringement of CETA rules.

It should be noted here that, despite past liberalisations and privatisations in the postal sector, it cannot be ruled out in principle that the state will change its preferences. It is important to understand that in the EU, contrary to popular belief, only Malta and the Netherlands have fully privatised their formerly public postal services. In the majority of member states, although these services have been transformed into private-law entities, most remain 100 per cent state owned.

In some other cases governments retain lower shareholdings. The German government, for example, has a 21 per cent share in Deutsche Post AG through its development bank KfW.² The public interest in this sector thus still exists and a potential extension of state activities should not be ruled out categorically.

Another Annex I reservation on the part of the EU concerns railway transport:

→ *The provision of rail transport services requires a licence, which can only be granted to railway undertakings established in a Member State of the EU.*

Licences for cross-border rail transport are thus given only to rail companies established in the EU. Because of the standstill clauses an extension of the requirements that goes beyond the prerequisite of establishment—for example, the imposition of certain public service obligations—may be considered an infringement of CETA.

Germany’s Annex I list also includes various restrictions on the licensing of doctors, emergency services or telemedicine services. If these restrictions were relaxed after CETA came into force—for example, by making the licencing process easier—these liberalisations would become a binding treaty obligation on the basis of the ratchet mechanism. Revising them at a later date would possibly be a violation of CETA.

Public services and the public utilities exception

Public services are effectively covered by CETA. Although ‘services supplied in the exercise of governmental authority’ are excluded from the chapters on investment and cross-border trade in services, the exception is narrowly defined in Article 9.1 as:

² Deutsche Post DHL Group (2016), Shareholder Structure (http://www.dpdhl.com/en/investors/shares/shareholder_structure.html).

→ *any service that is not supplied on a commercial basis, or in competition with one or more service suppliers.*

There is a wide array of services where public providers exist alongside private companies or private operators providing services on behalf of the state (e.g. utilities, transport, education, health care, culture). In all of these areas, situations of competition can arise, meaning that these areas fall outside the narrow scope of ‘governmental authority’ as defined in CETA.

The EU has included a limited exception for public services in Annex II—the so-called public utilities reservation—which has also been used in other EU free trade agreements. It looks like this:

→ **Type of Reservation:** *Market Access*

→ **Description:** *Investment*

→ *In all Member States of the EU, 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.*

This reservation also contains an indicative list of service sectors subjected to monopolies or exclusive rights. Unfortunately, though vital, the reservation is far from adequate. The term ‘public utilities’ is not even defined, leaving it open to dispute. The public utilities reservation is also exposed to several loopholes.

First, the reservation is far from comprehensive, protecting against challenges under only one part of CETA’s market access obligations, not under national treatment,

most-favoured-nation treatment or investment protection standards. So, for example, European governments that seek to restore, expand or create public services are fully exposed to challenges under CETA’s controversial fair and equitable treatment and expropriation obligations.

Second, most public services are not provided as a ‘public monopoly’ or as the ‘exclusive right’ of private providers. Services delegated to private operators are often in competition—for example, in care services or waste disposal—and are therefore not provided as an ‘exclusive’ right.

Third, the exclusion of telecommunications from this reservation contradicts the EU universal service directive (Directive 2002/22/EC), which explicitly permits the imposition of universal service obligations on the providers of electronic communication networks. These obligations can be considered ‘specific service obligations’ as referred to in this reservation. Universal service obligations include, among others, an obligation to provide the service to all end-users, regardless of their geographical location, and at affordable prices.