CECILIA MALMSTRÖM
MEMBER OF THE EUROPEAN COMMISSION

Brussels, 20. 05. 2016

Dear Ms Cartmail,

Thank you for your letter of 23 February 2016 about the negotiations for the Transatlantic Trade & Investment Partnership (TTIP) and the National Health Service (NHS) in the UK, enclosing the legal advice you commissioned. I'm also grateful for your follow-up letter of 21 April 2016. My legal and policy teams have reviewed this in detail, and have benefited from the further discussions with UNITE (which you refer to in your later letter) during which we have had the chance to further work through these concerns.

EU trade agreements, and TTIP is no exception, are about creating jobs and growth. They do this by providing better market access to non-EU countries, which is reciprocated by the EU. The market access achieved through the EU's trade agreements ensures that EU goods are more competitive on world markets, and that EU service suppliers can provide services in markets on the same footing as local service suppliers. In TTIP we are also seeking to reduce unnecessary regulatory obstacles to trade, provided this can be done in a manner that enhances or at least maintains the existing level of protection for EU citizens. By doing so the EU spurs growth and creates jobs.

To address the possibility that some of these trade commitments might interact with the activities of public authorities, the EU approach to trade agreements since the World Trade Organisation was established has been carefully designed to ensure that they do not affect the ability of governments to deliver the public services demanded of them by their citizens. They do not affect the mix of public and private activities in the provision of these services. They do not prevent governments to alter that mix as they see fit. To the extent that any of the rules are in fact applicable, they require no more than making sure that there is no discrimination against the goods or service suppliers of the partner country. In that sense they are less far-reaching than the rules contained in the EU treaties and adopted under EU law.

The advice you have commissioned, with respect, does not take into account this careful design of trade agreements. It contains a number of inaccuracies and fails to identify the correct framework for analysis. In particular, it does not examine the interplay between the procurement, services and the investment protection provisions in TTIP. Nor does the advice sufficiently take into account the very significant differences between past cases of investor-state disputes under old-style bilateral investment treaties, and the new Investment Court System the EU has proposed in TTIP. It also contains quite a number of inaccuracies and speculation regarding the EU's position.

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The NHS is not affected by TTIP or other EU trade agreements regardless of how its services are delivered, because all NHS care is procured and funded by public authorities, even if the operator in question works on a for-profit basis. The NHS is not affected because:

a) Procurement of health services (including the activities of Clinical Commissioning Groups in England) will not be covered by the TTIP procurement obligations; indeed the EU has never taken procurement commitments on health services;

b) In turn the procurement of a service is excluded from the services obligations;

c) In any event TTIP will be constructed to allow the UK to maintain full policy space as regards the provision of publicly funded health services even when the public funding is only partial. This is achieved thanks to EU-wide safeguards as well as UK specific limitations related to health services[1]; and,

d) An investor can never hold legitimate expectations that would be protected under the agreement that a public measure could not be reversed by a future government.[2]

This is something which I and my officials have set out in some detail in previous letters.[3] This is furthermore addressed in greater detail in the annex to this letter which responds to the legal advice UNITE has commissioned.

This allows me to confirm the following:

- **TTIP poses no risk whatsoever to public services in the EU, including the NHS;**

- **Nothing in TTIP would affect how the NHS in the UK operates at the moment; and**

- **Nothing in TTIP would prevent a government from reversing policy as regards the involvement of private operators in the NHS.**

For these reasons, the extra reservation proposed in the legal advice UNITE has commissioned is not necessary.

[1] http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230#part-1-services

[2] http://trade.ec.europa.eu/doclib/html/153955.htm

[3] http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152665.pdf

You may wish to note, also, my joint statement with my counterpart Michael Froman last year to confirm that neither the EU nor the US intends to alter in any way the protection both sides offer to public services in trade agreements[4]. Furthermore, the negotiating directives given to the Commission by the Council (the Member States) also clearly state that public services must be protected in TTIP as they always have been in EU trade agreements[5].

I hope that this letter and the annex provide reassurance to you and to UNITE's members. I would ask you to share it widely to inform others interested in this debate. We are, as always, ready to answer any further questions that you may have.

Yours sincerely,

Cecilia MALMSTRÖM

ANNEX: Comments on advice

[4] http://trade.ec.europa.eu/doclib/docs/2015/march/tradoc_153264.pdf

[5] http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf

ANNEX: Comments on advice

1. INTRODUCTION

1. The advice provided to UNITE by Mr. Bowsher QC (the "Advice") is characterised by numerous flaws and misunderstandings of how agreements such as TTIP are constructed and would operate. It does not include a detailed examination of the texts which the European Union will use as a basis for the negotiations. These flaws and misunderstandings lead to incorrect legal findings.

2. In the detailed analysis provided below, the Commission will explain the nature of the obligations applicable to public services under TTIP. It shall examine how health services, and in particular the National Health Service, would be treated, by examining the examples cited in the Advice.

2. OVERVIEW

3. Public services, and in particular health services, are potentially subject to three groups of obligations under trade and investment agreements. These are 1) public procurement obligations, 2) obligations on the provision of services and 3) investment protection obligations, to which investor-to-state dispute settlement is applicable (replaced in TTIP by the EU's Investment Court System).

4. The interplay between the three groups of obligations is important.

5. Procurement is carved out of services and investment obligations. That is, if an action is considered as procurement it is only subject to the procurement disciplines of the agreement, not to the services obligations. In order for foreign service suppliers to be able to take part in a public procurement procedure, it needs to be separately agreed that foreign service suppliers should have access to such procedures in the form of procurement commitments. Only if a service is not procured would it be subject to the services obligations of the agreement.

6. The investment court system is not applicable to an alleged breach of either the provisions on services nor the provisions on public procurement. Any alleged breach of those provisions is exclusively subject to the state-to-state dispute settlement provisions of the agreement, meaning the EU could sue the US or vice versa in the light of an alleged breach. TTIP will not be enforceable in the domestic court systems of either the United States or the European Union.

7. This analysis examines these different elements and how they operate together.

3. PROVISIONS ON PUBLIC PROCUREMENT

3.1. Scope of procurement obligations

8. If a particular action is considered "procurement" then it will not be subject to the services disciplines. For agreements such as TTIP, the same definition of "procurement" as used in the revised Government Procurement Agreement (GPA) is utilised. The revised GPA uses the following definition:

"For the purposes of this Agreement, covered procurement means procurement for governmental purposes:

(a) of goods, services, or any combination thereof:

(i) as specified in each Party's annexes to Appendix I; and

(ii) not procured with a view to commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale;"[6]

9. To be potentially subject to the agreement a number of requirements must be met. First, the act must fall under the definition of procurement set out above. This means that the acquisition of the service must be for government purposes and the services are not procured with a view to commercial sale or resale. Second, the entity undertaking the procurement must be a "covered entity" i.e. one subject to the disciplines of the agreement. Third, the value of the procurement must be above a certain value, fixed in the agreement (essentially low value tenders are not subject to the agreement). The current threshold is £ 106,047 so only tenders above that value are subject to the disciplines. Fourth, the specific goods or services subject to the tender itself must not be excluded from the agreement.

3.2. Application to activities by Clinical Commissioning Groups

10. The National Health Service is already subject to the EU's commitments under the GPA when it procures certain goods (but not for the procurement of health services). US goods or services suppliers already have access, for example, with respect to the procurement of goods above a threshold value.

11. This reflects the fact that the organisation and provision of health services by a government for its population is indubitably procurement for governmental purposes. Evidently for the NHS there is no question of the health services being "intended for commercial resale". Hence there is no doubt that purchasing of goods or services by the NHS will be considered "procurement".

12. The fact that the procurement may be carried out by Clinical Commissioning Groups does not affect this conclusion. It is still the case that the procurement is taking place for governmental purposes and not with a view to commercial resale. The fact that the functions of the Clinical Commissioning Groups are considered to be procurement within the meaning of the EU public procurement directives is further evidence supporting this conclusion. Indeed, the Advice takes the view in paragraphs 61-74 that the activities of the Clinical Commissioning Groups should be considered as procurement in the sense of the EU directives.

13. Having established that the activities of the NHS in general, and the Clinical Commissioning Groups in particular, would be considered as "procurement" it is necessary to turn to how commitments are taken for procurement. The obligations in TTIP will only apply to the purchases of certain goods and certain services (the fourth element mentioned above). The EU has never taken procurement commitments on health services. They are not among the services listed in Annex V of the GPA, nor in the

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[6] Article II.2(a) of the revised GPA.

comparable Annex V of CETA. These will not be covered by the EU's commitments for procurement in TTIP either.

14. This means that the UK NHS would remain free to discriminate against non-EU services suppliers if it wished to and that it would not be required to give such suppliers access to procurement opportunities. Furthermore the procurement obligations do not prevent the authorities to decide to re-organise the system of procurement. There is nothing that prevents an authority to decide to stop procuring and to bring all activities in-house.

3.3. In-house arrangements

15. As for the EU internal market rules, Art. 12 of Directive 2014/24/EU on public procurement codifies the approach to "in-house" arrangements developed by the European Court of Justice in a number of cases in the past years such as *Teckal, Lecce and Stadtreinigung Hamburg*.

16. The Advice refers to a specific example of a note in CETA which clarifies that the chapter is not applicable to *"goods and services that are procured by a covered entity internally or that are supplied by one covered entity to another"*. This note is indeed a clarification which has been introduced in response to Canada's approach. With regard to TTIP, it goes without saying that the flexibilities for contracting entities provided for in the EU Directive will be maintained. Such flexibilities exist also under US procurement legislation. However, as flows from the analysis above, these flexibilities will not be necessary as regards procurement of health services by the NHS.

4. PROVISIONS ON SERVICES

4.1. Introduction

17. Trade and investment agreements, since the World Trade Organisation (WTO) which entered into force in 1995, treat trade in services in the same manner. TTIP is not, in terms of the applicability of services commitments to public services, any different from the WTO General Agreement in Trade in Services (GATS). The UK has been subject to those disciplines since 1995 and this has not led to any disputes, nor has the GATS been relevant in any of the discussions in reform of the National Health Service. The EU-KOREA Free Trade Agreement, in application since 1 July 2011 also follows this approach, as do all FTAs negotiated by the EU and indeed the US.

4.2. Scope of services provisions

18. Although measures relating to health services in principle fall under the obligations contained in the services chapter of any trade agreement, numerous limitations to the scope of application of such obligations come into play.

4.2.1. Services in the exercise of government authority are excluded

19. In order to fall within the scope of application of the services chapter of EU trade agreements, including TTIP, a measure must relate to a service which is not "a service supplied in the exercise of governmental authority" (see the definition of "services" in Article 1-1(3)(j)). This is defined as "any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers". Consequently any health services provided by the National Health Service in so far as they are neither

supplied on a commercial basis nor in competition with other service suppliers are not subject to TTIP.

4.2.2. Procurement of services are excluded from services and investment obligations

20. Services obligations are also not applicable where what is at issue is not the provision of a service but the procurement of a service. The National Treatment obligation (together with the other obligations) does not apply when the measure in question is the procurement of a service by the government (Articles 2-1 on Investment and 3-1 on the Cross-border supply of services). Procurement of a particular health service (e.g. procurement of a certain type of treatment) is therefore not covered by the services or investment disciplines, even if the chosen supplier operates on a commercial basis. Foreign service suppliers only get access to these procurement opportunities if the government has accepted commitments for procurement (otherwise the limits to the procurement exceptions could be circumvented).

21. As regards procurement for services, the same definition derived from the GPA as referred to above would apply. The treaty interpreters would treat the reference to "procurement" in the services provisions as a reference to the term "procurement" as used in the procurement chapter.

22. Therefore, should the UK government decide to halt the procurement of services from private service suppliers (often referred to as the potential "renationalisation" of the NHS) such measures would fall outside the scope of both the services/investment and the procurement obligations contained in an EU free trade agreement such as TTIP.

4.3. Obligation not to discriminate not applicable to publicly funded health services

23. If a measure relating to health services does fall within the general scope of the services and investment chapters, because, for example, it is not considered procurement, it will be potentially subject to certain obligations under the services and investment chapters. Services commitments are structured around National Treatment obligations and Market Access obligations.

24. The National Treatment obligation requires that a service supplier from a third country (the US for example) can provide a service on the same basis as a national service supplier. For example, if UK firms are allowed to provide ambulance services on a private basis, then US firms will be allowed to provide such services, unless a reservation is included. Reservations can cover a whole sector, or parts of it, or particular activities. If a reservation is scheduled, discrimination can continue (i.e. national service providers can be given favourable treatment such as being allowed to provide a service that foreign service providers cannot). Reservations under Annex I are to maintain existing measures which currently discriminate against foreign service suppliers and permit the continuation of such discrimination. Reservations under Annex II have a similar effect with respect to existing measures but additionally they allow space for the adoption of new measures which could discriminate against foreign service suppliers in the future, and even the adoption of measures which are more discriminatory than existing measures.

25. Whilst it is not strictly necessary for the UK, given that the National Health Service is engaged in procurement, which falls outside the scope of the services/investment chapter, the EU nevertheless schedules reservations for publicly funded health services and also, in part, for privately-funded health services. This is because other EU Member States organise their publicly funded health services differently, and hence some may be in a situation where public health service suppliers may not be regarded as procuring or have chosen not to open private health care to foreign competition. In the UK, publicly-funded health services fall entirely under the relevant reservation and therefore UK does not need to include the same reservations as other EU Member States in relation to services provided by the NHS. Nevertheless, the EU services offer includes several UK-specific reservations related to health services: a specific reservation reserving full policy space for ambulance services and residential health facilities (and also, for market access, for NHS medical manpower planning - see below). The reservations are scheduled in Annex II, so apply to any future discriminatory measure that a government may wish to adopt.

26. It is important to bear in mind that the reservation for state-supported health services applies even when the service in question is only partially publicly funded. The text of the reservation does not require that the service in question be wholly publicly funded.

27. The relevant national treatment reservation in Annex II is reproduced below. This can also be consulted via the services offer online[7].

ANNEX II – National Treatment Reservations *(see page 88 of services offer)*

Reservation No. 20 – Health and Social Services

Sector: **Health and Social Services**

Obligations Concerned:

National Treatment
Most-Favoured-Nation Treatment
Performance Requirements
Senior Management and Boards of Directors

Description: Cross-Border Trade in Services and Investment

The **EU** reserves the right to adopt or maintain any measure with respect to the following:

(i) *Health services*	*Affected obligations and scope (CPC code)*	
The **EU** with regard to the provision of all health services which receive public funding or State support in any form, and are therefore not considered to be privately funded (CPC 931, except for CPC 9312 Medical and Dental Services, and part of	National Treatment, Most-Favoured-	CPC 931 933

[7] This can be found at http://trade.ec.europa.eu/doclib/html/153670.htm.

93191 relating to Midwife Services and Services provided by Nurses, Physiotherapeutic and Para-medical Services). The **EU** reserves the right to adopt or maintain any measures with regard to all privately funded health services, other than privately funded hospital, ambulance, and residential health services other than hospital services (covered by CPC 9311, 93192 and 93193). The **EU**, except in **HU**, with respect to requiring the establishment of suppliers and restricting the cross-border provision of privately funded hospital, ambulance, and residential health services other than hospital services (covered by CPC 9311, 93192 and 93193). In **HU** with respect to requiring establishment of suppliers and restricting the cross-border provision of health services, with the exception of privately funded hospital, ambulance and residential health services other than hospital services (CPC 9311, 93192, 93193). In **FR**, with regard to the cross-border provision of privately funded laboratory analysis and testing services (part of 9311). In **AT, BG, BE, UK, CY, CZ, MT, SE, SK, PL, FI**, with respect to the cross-border provision of privately-funded ambulance services (CPC 93192). In **AT**, **SI** and **PL** with respect to the establishment of privately funded ambulance services (CPC 93192). In **BG**, with respect to the establishment of hospital services, for ambulance services and for residential health facilities other than hospital services (CPC 9311, 93192, 93193). In **CY, CZ, FI, MT, SE and SK**, with respect to the establishment of privately-funded hospital, ambulance, and residential health services other than hospital services (CPC 9311, 93192, 93193). In **BE** and **UK**, with regard to the establishment of privately funded ambulance and residential health services other than hospital services (CPC 93192, 93193). In **DE**, the right is reserved to maintain national ownership of hospitals run by the German Forces. Germany reserves the right to nationalise other key hospitals.	Nation Treatment, Performance Requirements, Senior Management and Boards of Directors

28. As noted above, these reservations would not appear necessary for the National Health Service, but have the effect of providing blanket coverage. They mean that even if were to be the case that some health services managed by the National Health Service were to be supplied on a commercial basis, and were not considered to be procurement, the UK would be free to continue to treat national service suppliers more favourably than foreign

service suppliers. There would be no requirement to open the market for the supply of health services which receive state support in any form. There would be no requirement to privatise the National Health Service flowing from TTIP in the same way that there is no such requirement in the World Trade Organisation commitments applicable to the UK or in those of the EU-Korea FTA, or the EU-Columbia/Peru FTA, or the Association Agreements with Central America, Ukraine or the EU-Canada FTA (the Comprehensive Economic and Trade Agreement).

29. Even in the highly unlikely scenario that the UK government should decide to fully nationalise the provision of health care services in the UK, the only sectors that would potentially be covered by any of the EU services commitments would be privately-funded hospital services and health-related professional services. Even so, the possibility that these commitments would form an obstacle to the full nationalisation of healthcare in the UK can only be described as remote. The supply of privately-funded hospital services or professional health services may be subject to the National Treatment obligation, but in order for US health services providers to claim a breach of this provision they would have to prove that any renationalisation measure was targeting US providers and was thus *de facto* discriminatory. Given that currently medical professionals and private providers of NHS clinical services in England are both domestic and from a number of third countries, it seems there would be very little evidence to substantiate such a claim.

4.4. Market access obligations not applicable to publicly funded health services

30. The Market Access obligations in trade agreements prohibit measures such as numerical quotas, or the requirement to establish a local company, or limits to foreign ownership. For example, a country may place no numerical quotas on the number of suppliers of parcel delivery services, or it may be that only 300 US architects could provide architectural services. In the case of TTIP, for any such obligation to be binding in a given services sector it must be explicitly listed in Annex III. If no commitment is listed, the UK remains free to act of its own accord, to impose such quotas, for example.

31. For health services, the EU only takes Market Access obligations for privately-funded health services. This is set out in Annex III below. The EU's market access commitments in the TTIP offer are set out in a so-called positive list: unless a sector is explicitly mentioned in the schedule of commitments, it is not included in the Market Access obligations taken by the EU. Therefore, as the scope of the health services sector in the EU list of commitments is explicitly restricted to privately-funded health services, the EU is not subjecting itself to the Market Access obligation in relation to publicly-funded health services.

32. The EU does take market access commitments for medical professional services, i.e., medical services supplied by healthcare professionals established in the UK outside a hospital setting. However, the EU offer includes a UK specific limitation against this

Market Access obligation according to which "establishment for doctors under the National Health Service is subject to medical manpower planning[8]".

[8] http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153670.pdf (page 134)

ANNEX III – Market Access *(see page 155 of services offer)*

13. HEALTH SERVICES AND SOCIAL SERVICES (only privately-funded services)	
A. Hospital Services (CPC 9311) **B. Ambulance Services** (CPC 93192) **C. Residential health facilities other than hospital services** (CPC 93193)	**1) EU** except in **HU**: Unbound In **HU**: None **2) EU**: None, except for ambulance services (CPC 93192) **3) EU:** None except: **EU**: Participation of private operators in the health and social network is subject to concession. An economic needs test may apply. Main criteria: number of and impact on existing establishments, transport infrastructure, population density, geographic spread, and creation of new employment. In **AT, SI**: Unbound for ambulance services. In **BG**: Unbound for hospital services, for ambulance services and for residential health facilities other than hospital services. In **CY, CZ, FI, MT, SE, SK**: Unbound. In **HR**: All persons providing services directly to patients/treating patients need a licence from the professional chamber. In **PL**: Unbound for ambulance services, for residential health facilities other than hospital services, and for social services. In **BE, UK**: Unbound for ambulance services, for residential health facilities other than hospital services. In **FR**: Provisions of services through "société d'exercise liberal" and "société civile professionelle". In **DE**: Rescue services and "qualified ambulance services" might be reserved for non-profit operators. The number of ICT-services providers may be limited to guarantee interoperability, compatibility and necessary safety standards. **4) BVEP; ICT; SeSe**: Unbound except as indicated in the horizontal section, and subject to the following limitations: In **FR:** Authorisation is necessary for the access to management functions. The availability of local managers is taken into consideration for the authorisation. In **HR**: All persons providing services directly to patients/treating patients need a licence from the professional chamber. In **LV:** Economic needs tests for doctors, dentists, midwives, nurses, physiotherapists and para-medical personnel. In **PL:** Practice of medical profession by foreigners requires permission. Foreign medical doctors have limited election rights within the professional chambers.

33. Further, again, though not strictly necessary, to the extent that the National Health Service is considered to have a monopoly or exclusive rights, a further reservation from the market access commitments would come into play. This reservation ensures that EU Member States may maintain monopolies and grant exclusive rights, irrespective of how the service is funded, i.e. whether it includes competitive elements or not. This includes reversing a decision with respect to monopolies or exclusive rights. It applies irrespective of the nature of funding, i.e. whether the relevant service includes competitive elements or not, and would cover services such as those provided by the NHS.

ANNEX III – Market Access ***(see page 119 of services offer)***

"3) EU: Activities considered as public utilities at a national or local level may be subject to public monopolies or to exclusive rights granted to private operators.[12]

[1] Public utilities exist in sectors such as related scientific and technical consulting services, R&D services on social sciences and humanities, technical testing and analysis services, environmental services, **health services**, transport services and services auxiliary to all modes of transport. 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 listing is not practical.

[2] This limitation does not apply to telecommunications services and to computer and related services.

34. Therefore, even in the highly unlikely scenario that the UK government decided to fully nationalise the whole provision of health services in the UK and create a monopoly, the reservation above would shield such a decision from the Market Access obligation.

4.5. No services obligations stand in the way of the ability of governments to regulate

35. None of these disciplines impact the right to regulate. For example, these agreements do not impose an obligation to remove or reduce legislation which is not discriminatory (known as "domestic regulation" in these agreements). Governments can, for example, regulate the expertise which service providers may need to have, such as medical qualifications, or the manner in which the service is provided. Even legislation which is discriminatory, which is not subject to a reservation, can be considered as consistent with the agreement provided the measure is necessary for the attainment, for example, of public health goals, or to protect public morals (for example one case where discriminatory measures were in principle maintained concerned gambling).

5. PROVISIONS ON INVESTMENT

36. As regards investment, international investment agreements contain a number of substantive rules to which investor-to-state dispute settlement applies (replaced in TTIP and other EU agreements with the Investment Court System). Only an alleged breach of these substantive rules can give rise to a claim brought by an investor. These standards are most-favoured nation treatment and national treatment (i.e. where one set of foreign investors treated worse than either another set of foreign investors or domestic investors), protection against uncompensated expropriation and protection against unfair and inequitable treatment. Legally, an investor cannot found a claim on the basis that it has suffered a loss of profits, or a loss of expected profits. It can only claim that one of those standards has been breached, and that it has suffered damage as a result.

37. It is difficult to imagine that any action contemplated by a current or future UK Government as regards the NHS would run afoul of any of these standards.

38. The first two standards, most-favoured nation and national treatment, require that there be no discrimination on the basis of nationality. If the debate in the UK is on the extent to which it is appropriate to have private involvement in the NHS, and if this were to be adjusted, or indeed reversed, unless this is only done as regards foreign service suppliers (which would defeat the purpose of a measure seeking to reverse private participation in the National Health Service) there would be no question of discrimination and hence no potential case under the agreement.

39. The third standard is protection against uncompensated expropriation. The logic behind this is very simple. If a local authority wants to build a road through private land, it can do so, but would need to pay compensation at market value to the owners of the private land, compensating them for the value that their property loses as a result of the construction of the road. As regards the NHS, the activity which is referred to as "privatisation" is in fact the decision to allow private operators to supply services. Such operators have no property right in such activities, and no property right in the award of any future contract. Hence, should a future government decide to reverse such policies an investor would not be able to bring a claim for expropriation. Were the government to seize property which the service supplier had purchased (for example a clinic) without adequate compensation, this would amount to a breach of the expropriation obligation. But such an action would also be illegal under UK law and the European Convention on Human Rights.

40. The fourth standard is fair and equitable treatment. Under the new EU approach, this standard has been clarified and modernised to eliminate uncertainty for States and provide clarity to investors. A State could be held responsible for a breach of the fair and equitable treatment obligation only for breaches of a limited set of basic rights, namely: the denial of justice, the disregard of the fundamental principles of due process; manifest arbitrariness; targeted discrimination based on gender, race or religious belief; and abusive treatment, such as coercion, duress or harassment. These precisely defined elements are fundamental rights recognised by the European Convention of Human Rights and the constitutions of most developed legal systems. "Legitimate expectations" as such is not a factor that can determine the breach of the FET fair and equitable treatment standard in the EU proposal. Legitimate expectations however may only help to determine if one of the listed elements of fair and equitable treatment was breached.

41. Legitimate expectations are an integral element of the concept of legal certainty, and one of the general principles of European law and of international law. It is linked to the principle of good faith, a recognised general principle of law, and a source of international law under Article 38 of the Statute of the International Court of Justice. The principle of good faith is specifically recognised for the purpose of interpreting a treaty in the context of investment law under Article 31 of the Vienna Convention on the Law of the Treaties.

42. Over time the key question has been to what degree should legitimate expectations be protected and what kind of expectations can be considered legitimate. To answer that question, a trend of arbitral decisions (*Tecmed v Mexico*, *CMS v Argentina, Occidental v Ecuador)* has linked legitimate expectations to the concept of fair and equitable treatment and has put the focus on the maintenance of a stable legal and business framework by the

host State. This has sometimes led to an overbroad reading of the FET standard with some tribunals going as far as equating legitimate expectations with the requirement for a stable and predictable regulatory environment. The current trend in arbitral decisions has since then notably moved away from this overbroad interpretation of legitimate expectations, and has set limits to the notion: taking into account all the circumstances to determine whether the expectations of the investor were reasonable at the time the investment was made (*Duke Energy v Ecuador*); requiring specific representations addressed personally to the investor (*Methanex v United States*) or rules specifically put in place to induce foreign investments (*Enron v Argentina*). Arbitral tribunals have also ruled that investors carry an obligation to perform their due diligence and not to rely solely on specific representations and assurances of the host government.

43. The EU approach has drawn the lessons from past interpretations of FET and legitimate expectations in investment agreements. It has ensured that broad interpretations are no longer possible. Firstly, legitimate expectations may – and it is not a requirement – only serve as a factor to determine whether one of the elements of the fair and equitable treatment standard has been breached. Secondly, legitimate expectations cannot be interpreted as a guarantee that the legal and regulatory framework of a host State will not change, including in a manner that may negatively affect investments or investors' expectations of profits. This is explicitly stated in paragraph 2 of the new article on the right to regulate. Thirdly, the expectation of an investor will only be found to be legitimate if it was induced by a specific representation from the host State to the investor at the time the investment was made and relied upon by the investor. The protection of such reliance on a specific representation by a State is well-established under international law. It directly flows from international customary law which recognizes that unilateral statements by States are binding if they are clear and unequivocal.

44. In light of the above it is therefore incorrect to say that a State's legal framework or implicit representations given by that State could give rise to legitimate expectations under the new EU approach. The considerations held in *Azurix v Argentina* and *Tecmed v Mexico* mentioned in the Advice would not be possible under the new EU approach nor do they reflect the current trend in arbitral decisions.

5.1. Right to regulate

45. The advice questions whether "the new right to regulate will afford UKG any greater protection", suggesting that the right to regulate is not new, it is vague and it is subject to the uncertainty of the Tribunal's interpretation.

46. However, the new right to regulate article should not be read in isolation but rather in conjunction with the standards of treatment. The purpose of the right to regulate article is to make it even clearer to the Tribunal how the standards of protection such as the fair and equitable treatment standard and the protection against expropriation should be interpreted. In the EU proposal these protection standards are defined in such a way that the right to regulate is already built in. For example non-discriminatory regulatory action will not normally be considered to be indirect expropriation. The new right to regulate article further reduces any doubt that the standards of treatment could be interpreted in a way to restrict Governments pursuing their own public policy objectives. The standards of treatment define clearly the limited situations in which an investor should be compensated.

47. The example provided in paragraphs 27-30 relates to a situation in which a foreign investor, following a change of legislation in the UK that damaged its business, would claim a breach of the indirect expropriation or fair and equitable treatment standards under TTIP. Under the EU proposal, the new right to regulate article explicitly states that the investment protection provisions cannot be interpreted as a commitment from the Parties that they "will not change the legal and regulatory framework, including in a manner that may negatively affect the operation of covered investments or the investor's expectation of profits". Moreover, the way the FET article and the annex on indirect expropriation are drafted would leave very little doubt that a mere change of legislation "to protect legitimate policy objectives such as the protection of public health…", even if it negatively affected the business of an investor, could not give rise to a credible claim. There is no reason, therefore, to consider that these provisions would have a chilling effect on policy.

5.2. Intentions versus interpretation

48. The advice argues that "the history of negotiated trade arrangements, including of course the EU and before them the EC treaties, is that whatever assurances are given by negotiators as to their intentions, the text once in force is often given a substantially different interpretation." In the field of investment, it may be true that some ad hoc arbitral tribunals constituted on the basis of old-style and broadly formulated investment treaties may have reached conclusions which did not fully reflect the joint intentions of the original negotiators. Mindful of these risks, the EU's approach to investment negotiations has been to replace the traditional and vaguely drafted investment protection standards by precisely and narrowly circumscribed provisions, hence minimizing the interpretative margins of adjudicators. The EU text proposal for TTIP also provides that both Contracting Parties have a right to intervene in all investment dispute proceedings in order to guide the Tribunal on matters of treaty interpretation (see Article 22(3)). Unlike the vast majority of existing investment agreements, the EU text proposal also provides the possibility for the Parties to issue binding interpretations of the treaty provisions in the event that the adjudicators would not reflect the intentions of the negotiators (see Article 13(5)).

5.3. Role of precedent and right to appeal in new ICS

49. The advice refers to the "vagueness of these standards of judicial review such as fair and equitable treatment, full protection and security and indirect expropriation" that would grant "virtually unfettered discretion" to arbitrators "who are neither bound by any precedent nor have to fear any meaningful review of their awards". This point may arguably be made with regard to the protection standards and ad hoc investment arbitration system included in existing Bilateral Investment Treaties (BITs). However, it ignores the fact that it is exactly these shortcomings of the existing system that the EU's new approach on investment protection and the proposal for an *Investment Court System* addresses and remedies. Under the new EU proposal, the standards of treatment are defined precisely without leaving unwelcome discretion to arbitrators. All decisions of the Tribunal of First Instance will be subject to the possibility of review before a standing Appeal Tribunal. The Appeal Tribunal will ensure the legal correctness of the decisions and, over time, contribute to the creation of a body of coherent case-law, hence increasing legal certainty and the predictability of the dispute settlement process. As

referred to further above, in the event that the jurisprudence of the *Investment Court System* were to depart from the intention of the negotiators, the Contracting Parties can correct such developments through joint interpretations which are binding upon the Tribunal of First Instance and the Appeal Tribunal.

5.4. As enforced by the new Investment Court System (ICS)

50. It is unclear why the advice, in paragraph 31, refers to the "remaining problem" that "the new Tribunal would be one of many in the international setting" (referring to ICSID, the ICC, the LCIA, arbitration under the UNCITRAL rules and to the PCA) and that "whilst not binding on any future reformed ICSID (*sic*), the case decisions of the other tribunals may be influential". Here there seems to be a fundamental misunderstanding about the functioning of the *Investment Court System* as proposed by the EU.

51. The *Investment Court System* is composed of a standing Tribunal of First Instance and an Appeal Tribunal, each of them comprising a number of judges appointed in advance by the Contracting Parties and operating according to the mandatory rules laid down in Articles 1 through 30 of the EU's text proposal. These rules – which apply to all cases brought under TTIP – address *inter alia* the relationship with domestic and other international court proceedings, transparency and public access to hearings, disclosure obligations, ethical requirements, the applicable law and rules of interpretation, dismissals of unfounded and abusive claims, interventions by third persons, the costs of the proceedings, as well as the role of the Contracting Parties to the agreement. For the merely procedural aspects (e.g. timelines for submitting documents, etc.) the *Court System* relies on existing dispute settlement rules (such as the ICSID rules or the UNCITRAL rules) which will be supplemented by Working Procedures adopted by the Tribunal of First Instance and the Appeal Tribunal (see Articles 9(10) and 10(10), or rules adopted by the Contracting Parties (see Article 6(3)).

52. However, the *Investment Court System* would be the only Court with competence to hear investment disputes under TTIP. In particular, it is not possible to submit a claim about the breach of any of the TTIP investment protection provisions to any other ad hoc arbitral tribunal constituted under the ICSID, the UNCITRAL, the ICC, the LCIA or the PCA arbitration rules. Hence, any decision of such other ad hoc arbitral tribunals will always be about the respect or the non-respect of another and fundamentally different investment agreement to TTIP. As a result, it is difficult to understand why decisions of such other tribunals "may be influential" on the functioning of the TTIP *Investment Court System* and the interpretation of the TTIP investment protection provisions.

53. The advice also states, in its paragraph 32, that "it is unclear whether the new proposed Tribunal will sit in public". While it is true that "most hearings under the existing ICSID system are closed to the public," the European Commission has firmly called for a change of this situation since the EU obtained competence on investment through the entry into force of the Lisbon Treaty.[9] Since then, the EU has successfully implemented its commitment to full transparency of investment dispute settlement proceedings in all

[9] See Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions "Towards a comprehensive European international investment policy" of 7 July 2010, p. 10, available at http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf.

bilateral EU investment negotiation,[10] as well as in the multilateral setting of the United Nations Commission on International Trade Law (UNCITRAL), where the EU has constantly pushed for the adoption of new and high standards of transparency for international investment dispute settlement proceedings.[11]

54. The EU text proposal for TTIP builds on the achievements realized within the UN setting by making the application of the UNCITRAL transparency rules mandatory to all proceedings before the Investment Court System (see Article 18). Article 3 of the UNCITRAL rules provides for the publication of all main procedural documents, Article 4 allows interested third parties (e.g. trade unions, non-governmental organizations or individuals) to make submissions to the Tribunals, and Article 6 provide that the hearings shall be public. Article 18 of the EU TTIP text proposal goes even beyond the already high standards of transparency provided for in the UNCITRAL rules by adding further obligations of transparency in its paragraphs 2 to 5.

5.5. Level of compensation

55. As regards the standards of compensation, the advice argues that TTIP would offer greater protection (fair market value) compared to ECHR case-law. However, the concept of "fair market value" is the internationally accepted standard in investment protection and is part of customary international law. This is fully in line with the principle of protection of property under EU law, ECHR and constitutional traditions of EU Member States.

56. The advice also refers to several investment disputes (rendered on the basis of existing treaties or of customary international law, i.e. not on the basis of the EU approach), where "compensation was contemplated for harm suffered by a range of entities other than those directly affected by the compensation", where a "tribunal found that it had the power to order specific performance", where "tribunals have awarded compensation which would probably be regarded as 'double recovery' in a contract claim in an English court", or where "tribunals have awarded 'supplemental compensation'" (see paragraph 35). It also argues that there is no "limitation on standing in bilateral and multilateral treaties such as TTIP, and it would be possible, therefore, for an investor, standing behind a company which had suffered economic loss due to UKG action, to bring a suit against the government" (see paragraph 49).

57. The Commission does not contest the existence of similar risks when investment disputes are conducted under application of existing investment treaties. It is precisely because of such risks that the EU approach contains a number of new provisions which address and prevent such risks from materialising:

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10 See, respectively, Annex 9-G of the EU-Singapore Free Trade Agreement (available at http://trade.ec.europa.eu/doclib/docs/2015/june/tradoc_153581.pdf), Article 20 of Section 3 of the Investment Chapter of the EU-Vietnam Free Trade Agreement (available at http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf), as well as Article 8.30 of Section F, Chapter 8 of the EU-Canada Free Trade Agreement (available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf).

11 See press releases available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=868 and http://europa.eu/rapid/press-release_IP-14-824_en.htm

58. First, Article 28(2) of the EU text proposal for TTIP explicitly provides that "monetary damages shall not be greater than the loss suffered by the claimant or, as applicable, the locally established company, as a result of the breach of the relevant provisions of the agreement, reduced by any prior damages or compensation already provided by the Party concerned." This provision prohibits supplemental compensation that would go beyond the actual loss suffered by the investor. It also makes clear that where a respondent government has already provided any compensation to the investor, to its investment, or to any related company or person, this amount must be deduced from the compensation awarded. Double recovery is therefore excluded. In addition, Article 28(3) prohibits the Tribunals to award punitive damages.

59. Second, the possibility to order specific performance in lieu of monetary compensation is explicitly excluded through Article 28(1) which allows the Tribunal to *only* award monetary compensation or restitution of property (the latter only if the respondent agrees). The same provision also clearly states that "the Tribunal may not order the repeal, cessation or modification of the treatment concerned."

60. Third, as regards the alleged lack of limitations on standing, it is true that the vast majority of existing investment treaties does not contain any provisions preventing an investor to bring a claim in addition to, or subsequently to, other claims initiated by its company for the same loss or damage. On the contrary, the EU TTIP text proposal only allows an investor to initiate dispute settlement proceedings if the investor withdraws any other such proceedings and waives its rights to initiate any other proceedings in the future (see Article 14(2)). Article 14(3) of the EU text proposal extends these requirements to "all persons who, directly or indirectly, have an ownership interest in or are controlled by the investor" (or by the investment – see Article 14(3)(b)), which effectively prohibits multiple cases that could be brought by related entities throughout the up- and downstream ownership chain.

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