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CECILIA MALMSTRÖM
MEMBER OF THE EUROPEAN COMMISSION

Brussels, 26. 01. 2015
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Dear Lord Livingston,

I am writing to follow up our meeting in November 2014, when you suggested that it would be helpful for me to write to correct some of the misconceptions circulating about the Transatlantic Trade & Investment Partnership (TTIP) and the National Health Service (NHS) in the UK.

As you know, the EU's chief negotiator for TTIP, Ignacio Garcia Bercero, wrote to the Chair of the UK All-Party Parliamentary Group on this subject in July last year. The situation has not changed but I would like to underline some of the points made.

To be clear, the effects of the EU's approach to public health services in trade agreements such as TTIP are that:

- Member States do not have to open public health services to competition from private providers, nor do they have to outsource services to private providers;
- Member States are free to change their policies and bring back outsourced services back into the public sector whenever they choose to do so, in a manner respecting property rights (which in any event are protected under UK law);
- It makes no difference whether a Member State already allows some services to be outsourced to private providers, or not.

We use a series of reservations in EU trade agreements to make sure that EU Member State governments (at all levels, from central government to local authorities) can continue to manage their public services however they see fit. For example, we reserve the right for governments to operate monopolies and grant exclusive rights for selected providers, whether these are public or private operators. We make sure that governments do not have to open up any of their public services markets (such as publicly-funded health services) to private operators if they do not want to, and that should they choose to do so, there is nothing to prevent them reversing this decision in future. Member States have the possibility to modulate reservations according to their needs as part of EU trade negotiations. The UK is covered by these reservations, has always followed this approach, and is free to decide to continue to do so in TTIP.

You may wish to invite your stakeholders to examine the text of the recently agreed EU-Canada Comprehensive Economic & Trade Agreement (CETA), available online[1], to see how these protective reservations look in practice. My officials would be happy to provide further guidance.

Lord Ian Livingston
Minister of State for Trade and Investment
Department for Business, Innovation & Skills
1 Victoria Street
London SW1H 0ET, United Kingdom

[1] http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf

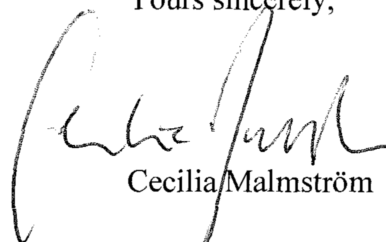
A second key point to explain is that outsourcing public services to private providers, as has been carried out in parts of the English NHS, does not mean that the services become irreversibly part of the commercial sector. It is still the public purse that funds the service, and therefore the service is still protected from liberalisation in EU trade agreements through our protective reservations. Certainly, once a public authority has decided to procure a service from an external service provider and conclude a public contract, it must respect EU public procurement rules requiring, for example, transparency and non-discrimination in this procedure. EU bilateral trade agreements such as TTIP, as well as the World Trade Organisation's Government Procurement Agreement, may also set rules for public procurement – but the EU has never committed public health services in this area. What matters is that these rules do not affect authorities' right to open or close a particular public service to competition should they choose to in the future.

Thirdly, some people question whether including investment protection and Investor-State Dispute Settlement (ISDS) in TTIP would mean that in practice it would be difficult to bring a service back into the public sector, owing to the potentially high costs of losing an ISDS case. Whilst I understand that these questions are posed, I can categorically state that nothing in either the 3,000 existing investment agreements, or in the future TTIP, could prevent a service being brought back into the public sector or force the payment of compensation for such an action. Compensation would only be available if bringing a service back into the public sector involved nationalising property owned by foreign investors. As under UK law, in such cases, compensation would be required. Equally, the question may be whether a contract to provide services previously awarded to a private operator must be continued or risk an ISDS claim. There again, I can be categorical that deciding not to renew a contract would not give grounds for an ISDS claim. An investor has no property at stake in the potential continuation of a contract. In general terms, ISDS can only be used in limited circumstances to address unfair or discriminatory treatment towards foreign investors: for example, if a foreign investor is subject to a denial of justice, or manifestly arbitrary treatment, or, as noted, if their property is expropriated without compensation in a host nation. It is only then that investors could use treaty rights to address the unfair action by the state. These are the sorts of protections we want EU investors to have overseas, and therefore we offer ourselves.

As you yourself noted earlier this year, it is critical to remember that there is a thriving private market for health services in the EU. This sector is a key European strength and it is important that EU trade policy helps to enable our health services companies to access international markets such as the US, as well as to encourage competition on the EU side. This is why Mr Garcia Bercero explained in his letter that health services are within the scope of EU trade policy to ensure that sectors are not ruled out unnecessarily.
In light of all of the above, I am happy to confirm the statement of Mr Garcia Bercero that there is no reason to fear either for the NHS as it stands today or for changes to the NHS in future, as a result of TTIP or indeed EU trade policy more broadly.

I look forward to continuing our work together on this and other files.

Yours sincerely,



Cecilia Malmström