Our ref: 161243/MIN

Dear Mr. Jennings,

On behalf of the Minister for Jobs, Enterprise and Innovation, Ms. Mary Mitchell O'Connor T.D., I wish to refer to your recent correspondence forwarded to this Department by the Department of Education in relation the Irish Federation of Union Teachers resolution passed concerning the ongoing EU-US Transatlantic Trade and Investment Partnership negotiations.

The proposed EU-US agreement is one of a number of new style trade agreements the EU is negotiating that not only covers tariffs, improvements in market access such as public procurement and breaking down barriers to trade but also common approaches to protecting the environment, labour standards and other areas of sustainable development. An EU-US agreement would be the world's largest bilateral trade and investment deal, and a successful conclusion is expected to benefit Ireland more than any other EU Member State.

It is right that the agreement go beyond core trade issues, in particular of reducing tariff rates and quotas, which are already low between the EU and US. Instead the new style trade agreements are focusing on regulatory convergence and on limiting the use of subsidies and regulations that are seen to distort or impede trade. Those disciplines and rules will be legally binding with the ICS/ISDS system as a possible route for the foreign investors. In contrast, when it comes to labour rights and other areas included in the sustainable development chapter the follow-up mechanisms are much weaker and essentially those areas are non-enforceable in case of breach of human rights or labour rights.

Owing to our historic economic and cultural ties, Ireland's enterprises are particularly well placed to take up opportunities to trade more easily with the US. This is very important to Ireland as it will build on our already rewarding economic relationship with the US and create new opportunities to stimulate growth, create employment and continue to grow our economy. Particularly at this time following the UK referendum, we are keen to deepen and expand our exports and investment footprint around the globe. EU Free Trade Agreements are essential instruments to help with this national endeavour.

An independent study commissioned by this Department, carried out by Copenhagen Economics, estimates that these benefits in Ireland will be proportionally greater than in the EU as a whole. It suggests a boost to GDP of 1.1%, growth in Irish exports of almost 4%, increases in investment of 1.5%, and an increase in real wages of 1.5%. It estimates somewhere between 5,000 and 10,000 additional export related jobs could be created. The findings are backed up by the recent interim independent report carried out by Ecorys Consultancy, which was contracted by the EU Commission, which estimates that an EU-US free trade agreement would boost Irish GDP by 1.4%.

Even the most optimistic studies, including the ones referred to, the predicted economic benefit would be rather limited on an annual basis. Furthermore, these studies used the so-called computable general equilibrium (CGE) model that is based on the assumption that all economies operate constantly in full employment. However, assuming full employment is not a very appropriate start for estimating job creation and does not take into account relocation of jobs and

the need for training and education when jobs in certain sectors disappear as a result of increased competition. Another model, the United Nations Global Policy Model (GPM) takes into account macroeconomic consequences and the results are strikingly deviant to the studies using the CGE model. Instead of a minor positive outcome, it shows negative impacts on growths. https://ase.tufts.edu/gdae/Pubs/wp/14-03CapaldoTTIP.pdf

The opportunities of an agreement will be especially valuable for SMEs, given that trade barriers tend to disproportionately burden smaller firms, which have fewer resources to overcome them than larger firms. In fact, the study reported that a trans-Atlantic agreement would have a more significant positive impact on SMEs than on other types of business. The final agreement will have an entire chapter exclusively dedicated to SMEs aimed at addressing those specific constraints that might otherwise limit SMEs taking full advantage of the improved EU-US trade agreement market access.

A number of SMEs are either critical or against TTIP as they see more risks than opportunities. See more here https://www.bvmw.de/nc/homeseiten/news/artikel/umfrage-deutsche-unternehmer-fordern-aenderungen-beim-freihandelsabkommen.html

One of the objectives in the EU–US Trade Agreement is greater regulatory coherence to ease red tape for firms. Contrary to much speculation the proposed Agreement will not remove or lower health, safety, environmental or labour standards. Environmental, food safety or labour standards laws will continue as part of EU law. It will not give the EU or US the power to change each other's regulations, including EU restrictions on genetically modified organisms (GMOs) or hormone treated beef. Nor will it prevent either the EU or the US from introducing new environmental legislation. EU Trade Commissioner, Cecilia Malmström has further confirmed that any EU trade deal can only change regulation by making it stronger and that no trade deal will limit our ability to make new rules to protect our citizens or environment in the future.

Regulations have equally benefits and costs; however the proposed regulatory cooperation in TTIP focuses on reducing unnecessary burdens for business, not for society. Regulations have important public policy objectives that are the result of the national democratic decision-making processes and therefore neither the most nor less burdensome but the compromise achieved through the political process. With the inclusion of regulatory cooperation/disciplines on domestic regulations there is the risk that regulatory cooperation would result in a delay, lowering the level of ambition or even taking future progressive legislation off the table. With regulatory cooperation it would mean that it would take longer time before legislation can be adopted. In addition, the fact that regulators are required to inform and consult each other before the adoption of a Commission proposal in the case of the EU, it is highly likely that regulators on either side could "recommend" and thereby execute considerable pressure on the other side to exclude for example certain parts of a not yet adopted legislative proposal.

Furthermore Commissioner Malmström and US Trade Representative Michael Froman have jointly confirmed that trade negotiations including an EU-US Trade Agreement cannot oblige any country to privatise its public services or prevent governments from expanding the range of services they supply to the public. Publicly funded services such as health, education, social

services and water services are explicitly excluded from the remit of the trade negotiations, by virtue of the mandate and by virtue of the horizontal exclusion provided in the WTO's General Agreement on Trade in Services (GATS). Therefore, all EU Member States' governments remain entirely free to manage and organise these services as they see fit.

The below is from the ETUCE report on the EU-US reassurances regarding the protection of public services. In addition, please see the report on Model clauses for the exclusion of public services from trade and investment agreements http://www.epsu.org/sites/default/files/article/files/Study%20M%20Krajewski_Model%20clauses%20for%20the%20exclusion%20of%20public%20services_2016.pdf

On the GATS's governmental authority :

Since the GATS negotiations, it has been considered unlikely that the education sector would benefit from the exception on governmental authority because it is extremely narrow and open to conflicting interpretations as services are defined as those that are provided on a non-commercial basis and not in competition with one or more services providers. Moreover, WTO Members agreed in a 1998 meeting of the Council for Trade in Services that "the exceptions provided in Article I:3 of the Agreement needed to be interpreted narrowly" (WTO 1998). Therefore services which are supplied for any form of remuneration or by more than one service supplier could potentially be regarded as supplied on a commercial basis or in competition with one or more service suppliers. Consequently, many public services, including education, social,health as well as network-based and universal services are not covered by this exemption clause.

1) Overall public services are properly safeguarded

The EC traditionally refers to GATS article I:3 as one of the main pillars of protection for public services in trade agreements. This article states the exclusion of services in the "exercise of government authority". Such services are defined as *"supplied neither on a commercial basis, nor in competition with one or more service providers"*.

The EC claims that this clause protects public services from liberalisation, but it is in fact too narrow to fulfil that objective. Today, most services are supplied by a variety of both publicly- and privately providers, even if the provision has no commercial component. Likewise there are a lot of services that have commercial aspects even though they are not meant for profit generation. The exemption clause offers no real explanation of how to interpret the specifications. This means that de facto only a very limited amount of services are excluded by the GATS article I:3. These services comprise solely the core sovereign functions of a State, such as administration, judicial or police services. Other services that are essential for the functioning of a society like education are not covered by this exemption and must be protected through other means. Indeed, the regulatory cooperation provisions of TTIP and other agreements expressly cover administration.

A similar problem occurs with the often used wording that publicly-funded services are not covered by treaty provisions. No clear line is drawn between publicly- and privately funded or provided services and

it remains thus unclear to what extent exemptions based on this wording apply. A proper exemption would cover public services independent of how they are financed and supplied. Indeed, the EU has promoted a model of public services that precisely takes no account of the 'public' or 'private' nature of the service provider, favouring instead the protection of the 'general interest' of the service in question. A carve out of public services based on the GATS article 1:3 exemption is insufficient. Therefore, the statement that public services are properly safeguarded is misleading.

2) "Defining the appropriate balance between public and private services is up to the discretion of each government"

The EU-US Joint Statement claims that "no EU or US trade agreement requires governments to privatise any service, or prevents governments from expanding the range of services they supply to the public". If governments wish, they can organize services so that just one supplier provides the service. This service provider can either be publicly owned, so a "public monopoly", or a private provider with exclusive rights.

Free trade agreements usually have the purpose to prohibit the establishment of monopolies by introducing free market access to both parties in the other party's market. Governments can therefore only continue to establish monopolies if they make explicit exemptions to this rule. Exceptions to market access provisions in TTIP and TiSA are made by means of positive listing. This means that Member States make an exhaustive list of all the services that they open up for liberalization. Whereas this might allow for the protection of all relevant public services, it is important to note that conventional measures of regulating market access, such as for example economic needs tests, are in new trade agreements not part of their actual set of provisions, but belong to the measures applied under national treatment provisions. Public services are thus only then properly protected from liberalisation if they are also exempted from national treatment obligations.

This mix of instruments is not only confusing, but also misleading. And as the requirements for national treatment exemptions differ from the ones for market access rules, it becomes extremely difficult to create a comprehensive carve out of public services. For countries where public services are mainly a local or regional responsibility it is even more complicated to protect the local autonomy.

3) "EU governments can regulate certain services in whatever way they choose"

In its fact sheet on the protection of public services in TTIP and other EU trade agreements, the EC claims that governments can offer subsidies, choose service providers or decide who can operate or invest in their market even if it means that domestic suppliers are treated differently than foreign ones.

What they do not mention though is that in order to have these rights, governments must list the sectors for which national treatment requirements do not apply to. National treatment requirements lay down that foreign providers are no less favourable treated than domestic ones. In TiSA and TTIP, just as in CETA,

exemptions to these requirements are made by negative listing, which normally consists of two Annexes. This listing type is worrisome for a variety of reasons:

- No exhaustive list of exemptions: The "list it or lose it"-approach means that Member States have to make a very deliberate choice of what services to exclude, because services are automatically subject to non-discriminatory treatment if they are not mentioned.
- Ratchet-clause mechanism: measures listed in Annex I are exempted from the provisions and can be changed as long as any alterations do not decrease the conformity with the agreement. It is therefore extremely difficult to de-liberalise a service if it was once made subject to market access, as the changes to the service will be understood as a lowering of the level of conformity with the treaty. This is also known as the ratchet-effect, a built-in dynamic towards ever increasing levels of liberalisation.
- Standstill-clause: measures listed in Annex II are also excluded from national treatment obligations if they are subject to future changes. This means that policy space is only ensured as long as Member States manage to list all relevant services in this Annex. This also means that they must anticipate future services and name them if they want them to be protected. This is especially problematic for services such as education. Here, technological development leads to many changes, as for example the case of e-learning.

If future public services will automatically be subject to the trade provisions, it will be much more difficult for governments to ensure high-quality of public services. Today, many countries chose to 'de-privatize' their public services. For example, France is currently remunicipalising many of its water works and Estonia renationalized its railway. Such steps will be difficult to be taken in the future should the agreement include a ratchet-clause. In a time of new emerging services and changes in the design of service provision, it is impossible to properly safeguard public services by negative listing.

4) "Governments can continue to protect important public interest objectives"

In the EC-US Joint Statement, it is claimed that there are no limits to governments' ability to act in favour of the public interest. Even if Member States were to succeed in surmounting the challenges of positive/negative/hybrid-listing of commitments and comprehensively list public service exemptions, a proper safeguard would still not be entirely ensured. Whereas the schedules allow restricting the application of some disciplines, such as market access and national treatment, there are no exemptions to the dispute settlement mechanism. New trade agreements such as CETA include investor-state dispute settlement mechanisms (ISDS). This is also envisaged for TTIP. Under ISDS investors can challenge regulations, which they feel violate their rights to access a market or affect their future profits. As a result of the cost of defending an ISDS case, as well as potential punitive awards imposed by ISDS tribunals, governments will in practice face real regulatory constraints and a narrowing of policy space. This means that governments, when de-liberalising a service for the sake of the public interest, may be sued for taking actions that restrict companies anticipated profit to the disadvantage of the citizens or the environment.

Past cases show that the risks are not merely theoretical, but real. One such case is the company Achmea suing the Slovakian government in the case of health services. Furthermore, the number of ISDS cases is rising dramatically. And even if a government is not actually taken to court, the inclusion of ISDS in trade

agreements can lead to a so-called regulatory chill. This means that the sheer possibility of being sued and dragged into a long lasting legal dispute process keeps governments away from adopting legislation in favour of the public interest. It is therefore not true that governments can continue to act for public interest objectives without constraints.

5) "Trade agreements do not impede governments' ability to adopt or maintain regulations to ensure the quality of services"

The Commission claims on its website that governments' right to regulate public or private service providers will not be impeded in any way.

But the TTIP, in line with CETA, has a chapter on so-called Regulatory Cooperation. Similarly, TiSA includes a chapter on domestic regulation. Regulatory cooperation has the objective of "reducing unnecessary differences in regulation", which means that any differences, such as different standards in labour rights or in services covered by the agreement might be seen as an obstacle to trade and thus be challenged. Regulations in public services are particularly important and therefore public services are especially vulnerable. Regulatory Cooperation also requires the parties to share information on envisaged legislation, even before national parliaments get to see it. In order to coordinate and agree upon future legislation and the alignment of existing rules, a regulatory cooperation body will be established in the case of CETA and TTIP that does not consist of democratically elected government officials, but of representatives from the EC. Not to mention the fact that the consultation with private entities is required, this whole chapter appears to heavily undermine governments' abilities in adopting their own legislation and threatens democracy altogether.

The EU Commission publishes EU negotiating texts and textual proposals in relation to the EU-US free trade negotiation. The EU Commission has also published summaries and clear explanations about its objectives in the negotiations and publishes detailed and extensive reports of the negotiations on its website in all EU official languages. This information is available on the EU Commission's website at http://ec.europa.eu/trade/policy/in-focus/ttip/. This Department also publishes an update following each round of the negotiations, available at www.djei.ie/en/Publications/Update-on-the-EU-US-Trade-Negotiations.html.

Transparency is very welcomed as a first step, however the EC and the Irish Government should also undertake ongoing consultations with the social partners and civil society when developing the proposals in TTIP and other trade agreements. It should be a two-ways form of communications where stakeholders are consulted in a meaning full way and there proposals and suggestions are given due consideration.

Finally, the text of the EU-US free trade agreement is still under negotiation and this is likely to continue for some time, but it will be a matter for the EU Council and the European Parliament to decide on the signature of any final agreement and its provisional application. Following firstly, agreement in Council and secondly the consent of the European Parliament, each Member

State will be asked to ratify the Agreement. This means that Ireland will be part of the final decision to ratify the agreement.

As with the CETA agreement the EC is likely to propose the provisional application of the agreement prior to the national ratification meaning that the majority of the agreement will be applied prior the national ratification process have taken place. In order to allow the national process to take place it would be reasonable that the application of the agreement would only take place after the national ratification have been completed.

The Minister has asked me to say that Ireland will continue to work towards a comprehensive and balanced agreement that delivers real trade and economic potential for our country and the EU without lessening of our high standards particularly regarding health, consumer rights and the environment.

I hope this information is helpful and we would like to thank you for your interest in trade issues.

Yours sincerely,

Therese Walsh
Private Secretary