DGUV SVLFG
Deutsche Gesetzliche Unfallversicherung
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Comments by the statutory accident insurance institutions in Germany on a Transatlantic Trade and Investment Partnership (TTIP) between the European Union and the USA

The German Social Accident Insurance (DGUV) is the umbrella association of the German statutory accident insurance institutions for trade and industry and for the public sector. It is responsible for the common interests of its member institutions and promotes their functions in the interests both of their member companies and of the insured individuals. The DGUV represents the statutory accident insurance institutions in their dealings with policymakers at national and European level, with German and international institutions, and with the social partners. The statutory accident insurance institutions have the statutory mandate of preventing occupational accidents and diseases, work-related health hazards and accidents involving schoolchildren and students. Should an insured event occur, their duties also include paying compensation to the injured parties and their dependants. In performing these tasks, they are responsible for over 76 million insured individuals and around 3.8 million companies and institutions. An important aspect of the statutory accident insurance scheme is the indemnification against liability: employers need not fear claims for compensation should employees suffer an occupational or commuting accident or contract an occupational disease. This assures social peace and provides financial security for companies.

In the Federal Republic of Germany, the SVLFG (Social insurance for agriculture, forestry and landscaping) is responsible for providing accident insurance for over 1.6 million member companies in the agricultural sector with approximately 1 million insured employees, retirement pensions insurance for almost 250,000 insured farmers and over 600,000 pensioners, and health and nursing care insurance for almost 800,000 insured individuals in the sector. It is responsible for multiple branches of social insurance and provides its insured individuals and member companies with comprehensive social insurance from a single source. The SVLFG is tailored to the needs of the individuals working in the agriculture, forestry and landscaping sectors, and the needs of their families.

General remarks

In June 2013, the ministers of trade in the EU Member States mandated the European Commission to begin negotiations with the USA on a free trade and investment partnership agreement primarily concerning free access to the market, the abolition of non-tariff barriers to trade, and arrangements for investment protection.

The statutory accident insurance institutions in Germany welcome the intention of the European Union to facilitate trade arrangements for European companies through a transatlantic trade and investment partnership with the USA and thereby to promote employment growth in Europe. Such efforts are in the interests both of companies and of their employees. The latter are insured in Germany against occupational accidents and diseases by the statutory accident insurance institutions.

Furthermore, a free-trade agreement could result in the USA becoming more closely involved in the future in international standardization of products and certification procedures. This also applies to recognition of the ILO agreements governing the core labour standards and the ILO Declaration on Fundamental Principles and Rights at Work. In the view of the statutory accident insurance institutions, both aspects should be welcomed.

The statutory accident insurance institutions further welcome comments that the mandate does not intend to facilitate trade or direct investment by relaxing occupational safety and health standards.

At the same time, the statutory accident insurance institutions expressly wish to point out that the system of statutory accident insurance, which forms one of the pillars of the German social insurance system, must not be affected by the provisions of the agreement. The EU must not invoke its exclusive competence within common commercial policy (Articles 3 (1) e and 207 of the TFEU) in order to bypass the Member States in creating arrangements with a considerable impact upon areas of policy – such as those of social and health issues – in which the EU does not possess exclusive competence. The sovereignty of the Member States in these areas must not be circumvented in this way. In particular, interjurisdictional competition with the German social insurance system and its benefits, particularly those of a medical or rehabilitative nature, must be avoided.

The statutory accident insurance institutions are also concerned with the safety of products. With the experience they have gained in their member companies and their efforts to make products safer and healthier, they are conscious of the importance and the challenge of creating global standards for products and thereby of fostering international trade whilst at the same time assuring a high level of worker safety. In the view of the statutory accident insurance institutions however, it is essential that the existing high level of safety in Europe be retained in the trade in products.

Arrangements for investment protection must not lead to the principles of the statutory accident insurance, particularly the requirements concerning prevention, being undermined by investment protection lawsuits brought by US companies.

→ **In the view of the statutory accident insurance institutions, the negotiations should therefore pay particular attention to the following aspects:**

Product standards must continue to constitute a reliable technical point of reference for all stakeholders. They should support the legislation consistently and without contradictions, thereby avoiding distortions in competition and contributing to the high level of safety called for in the Treaty on the Functioning of the European Union (TFEU). This cannot be attained by mere mutual recognition of statutory provisions and standards.

Conformity assessment of products presenting a high risk, conducted by independent conformity assessment bodies, is absolutely essential. Closer relations between the EU and the USA do not require mutual recognition, but common principles and technical harmonization.

EU-wide and national **provisions governing the safety and health of workers at work** must neither be presented for negotiation, nor be grounds for lawsuits in investor-state dispute settlements.

Arrangements for **public procurement** must not pave the way for privatization of the social insurance systems.

Interjurisdictional competition with the German social insurance system and its benefits, particularly those of a medical and rehabilitative nature, must be avoided.

Social services are not tradable goods.

Provisions concerning **temporary stays of natural persons for business purposes** in particular must not interfere with the regulatory scope of bilateral social insurance agreements; entry into such agreements is a matter for the individual Member States.

Provisions governing **investment protection** must not contravene the precautionary principle. The standard of social support must not be jeopardized. A reduction in occupational safety and health standards would also not be acceptable to the statutory accident insurance institutions.

The proven system of **indemnification against liability** assures planning security for German trade and industry. The TTIP must not put this system at risk.

Comments in detail

Technical harmonization

The statutory accident insurance institutions are actively and intensively involved in the development of European and international standards, since standards constitute the basis for safe and healthy work equipment and personal protective equipment. As an important prevention instrument, standards have a major role to play in preventing occupational accidents and diseases. Since product standardization work is already increasingly being conducted at international level under the Vienna and Dresden Agreements, the statutory accident insurance institutions regard standardization by ISO/IEC as a sound basis also for agreements reached within the TTIP. The statutory accident insurance institutions reject mere mutual recognition of European and US statutory provisions, standards and specifications: they regard this as inexpedient, since demonstrating the equivalence of safety standards is extremely difficult, particularly given that in contrast to the European standards system, that of the US is exceptionally heterogeneous.

It is essential that the close relationship between European legislation and standardization be respected. European Single Market directives under Article 114 of the TFEU (Treaty on the Functioning of the European Union) set out essential health and safety requirements, for example for machinery, electrical products and pressure equipment. In order for these essential health and safety requirements to be met, use is made of harmonized standards detailing the product quality requirements set out in the directives. For this purpose, the European Commission mandates the European standards bodies – CEN, CENELEC and ETSI – with the task of developing standards in consideration of the state of the art. Upon completion of these standards, their references are published within the Official Journal of the European Union. The harmonized standards then give rise to a “presumption of conformity”. This means that users applying a standard may claim the presumption that the essential requirements of the Single Market directives covered by the standard have also been satisfied. The burden of proof is thus reversed. These European standards must be transposed into the national bodies of standards of the individual EU Member States, and are of fundamental importance to the free movement of goods within Europe. The application of standards, including harmonized standards, is voluntary but useful, since they assist in satisfaction of the essential health and safety requirements set out in the Single Market directives.

The statutory accident insurance institutions expect the high level of safety demanded by the EU treaties to be observed in the trade in products. At the same time, standards and specifications must continue to support the essential health and safety requirements of the EU Single Market directives under the rules of the New Legislative Framework. The statutory accident insurance institutions further call upon the parties to the negotiations to lobby for bilateral documents formulating safety requirements to be drawn up in accordance with the principle of consensus.

Conformity assessment

The EU's mandate to negotiate an agreement calls for onerous testing and certification requirements to be reduced and for confidence in the respective opposite party's conformity assessment bodies to be enhanced. In the view of the statutory accident insurance institutions, testing and certification requirements are indispensable for products presenting a high risk. Closer relations between the EU and the USA necessitate not mutual recognition, but common principles and harmonization. Mutual recognition would tend to reinforce the different perspectives of certain safety aspects, thereby actually presenting an obstacle to harmonization.

Within the EU, conformity assessment procedures are an important part of the arrangements for ensuring that products placed on the market are safe and conducive to health. Depending upon the risk associated with the use of the products, the methods may make provision for external conformity assessment bodies to be involved during the design phase, and where appropriate also during the production phase.

The importance of independent testing and certification bodies being involved in this way can be seen in practice: the statutory accident insurance institutions and their testing and certification bodies frequently find products placed upon the market to be unsatisfactory. A substantial proportion of the products tested fail to satisfy the essential health and safety requirements of the European legislation when tested for the first time. Conformity assessment performed by independent conformity assessment bodies assists in identifying non-compliant products and preventing them from being placed on the market. This strengthens fair competition, increases purchasers' confidence in the products, and eases the burden upon market surveillance authorities. The requirements for external conformity assessment must not therefore be relaxed merely in order to facilitate market access. In emerging product areas, particular those of innovative technology, it is however appropriate for harmonized conformity assessment procedures to be implemented, and market access thus to be simplified.

In order for the EU and the USA to align their conformity assessment arrangements, a common basis must be found (accreditation and monitoring of the bodies; joint application and further development of test methods and methods for the interpretation of product requirements). Mere mutual recognition of conformity assessment bodies is not expedient, since it does not provide any motivation for a common basis actually to be created.

Conformity assessment procedures are based upon provisions governing products and test methods formulated in legislation and – in particular – in European and international standards. Technical harmonization thus represents an important step, not least for alignment of conformity assessment arrangements. Accordingly, a lack of alignment in technical harmonization is an obstacle to alignment in conformity assessment: different requirements or test methods not only lead to different results, but also obstruct fair competition between manufacturers and between conformity assessment bodies.

Besides the provisions in the legislation governing the involvement of external conformity assessment bodies, voluntary test marks have, in the view of the statutory accident insurance institutions, also proved effective in assuring safe and healthy products.

The experience of the test and certification bodies of the statutory accident insurance institutions is that many manufacturers, particularly small and medium-sized enterprises, have difficulty understanding the other jurisdiction's system and its requirements for market access and conformity assessment. An overview by product group (for example in the form of a website) would be very helpful in this respect. Such an overview would also have to cover the arrangements below the federal level in the USA.

Safety and health of workers at work

In the opinion of the statutory accident insurance institutions, EU-wide and national provisions governing the safety and health of workers at work should neither be the subject of negotiation, nor constitute grounds for lawsuits in investor-state dispute settlements.

Within the individual EU Member States, occupational safety and health is regulated essentially by transposition of the relevant EU directives under Article 153 of the TFEU into the national legislation of the country concerned. These directives constitute a minimum standard for occupational safety and health throughout the EU that is democratically legitimized. Should these EU directives be considered non-tariff barriers to trade and thus made the subject of negotiations regarding transatlantic alignment, the distinction between directives for assurance of the free movement of goods (Article 114 of the TFEU) and the social directives (Article 153 of the TFEU) – a deliberate distinction which has proved effective since the EU was established – would be abolished. In addition, should provisions governing the safety and health of workers at work be aligned at transatlantic level, it could also be expected that standards in this area would be reduced to the lowest common denominator agreed between the transatlantic partners. This particularly applies to all bodies of regulations of the Member States created by transposition of the EU OSH Framework Directive into national legislation. In Germany, this concerns the bodies of state regulations pursuant to Section 18 of the German Occupational Health and Safety Act (ArbSchG) and the rules and regulations of the statutory accident insurance institutions. Such a transatlantic alignment could also be expected to provide considerable impetus for certification systems for the safety and health of workers at work and to lead to additional costs to companies, whilst not delivering any improvement in safety. The social partners, currently represented within the statutory accident insurance institutions, would certainly cease to have almost any influence upon the content of provisions governing the safety and health of workers at work, as would the German national and regional governments. Consequently, not only would the level of safety and health of workers at work be reduced, but provisions would become less relevant to the field and would no longer meet with acceptance within companies.

In the view of the statutory accident insurance institutions, agreements concerning the TTIP must therefore set out clearly that EU-wide and national provisions governing the safety and health of workers at work are not subject to negotiation, nor do they constitute grounds for lawsuits in investor-state dispute settlements.

In addition, the statutory accident insurance institutions are opposed to any agreement that might reduce the standards of safety and health of workers at work. The possibility expressed by some stakeholders of aligning chemical legislation at transatlantic level

solely on the basis of the precautionary principle may therefore be expedient. This approach anticipates that the TTIP will include an agreement by all parties to ratify at least the eight ILO agreements concerning the core labour standards (agreements 29, 87, 98, 100, 105, 111, 138, 182) and to adopt the ILO Declaration on Fundamental Principles and Rights at Work.

The statutory accident insurance institutions expressly reject standardization, at both European and transatlantic level, of the safety and health of workers at work as governed by Article 153 of the TFEU. National legislatures must continue to be able to regulate the safety and health of workers at work, in order to permit the formulation of provisions that are tailored to everyday application by the companies.

Public procurement

Far-reaching liberalization of the public procurement process is also being discussed during the negotiations with the USA. It must be ensured that this has no influence upon how the state conducts its affairs, and in particular how it structures the statutory social insurance.

Public services

Negotiations by the European Commission of free-trade agreements with third countries are increasingly focusing upon trade in services. As providers of medical care and rehabilitation services, the statutory accident insurance institutions note with concern that the liberalization of public services is increasingly being brought to the table. Rules for the delivery of services are considered a barrier to trade; freetrade agreements may therefore restrict the ability of national governments to limit the access to the market for public services. The mandate also makes provision for public services to be considered within the scope of the discussions. The view of the statutory accident insurance institutions is that competition with the US system must be prevented. In addition, a situation must be avoided in which benefits delivered by the statutory social insurance institutions are in competition with the US system or with providers in the USA. The statutory accident insurance institutions thus refer to the particular relevance of public services. Unlike private goods, these are not forprofit services; instead, they are delivered in the interests of the public good, and must therefore be clearly excluded from the scope of the TTIP. Although the mandate for negotiations contains an exemption clause based upon Article I.3 of the GATS, according to which certain public services are to be excluded from negotiations, the scope of the services delivered by public administrations and covered and protected by this article is not clearly defined and is a subject of disagreement in both political and academic discussion. Article I.3 (b) of the GATS states that only services supplied in the exercise of governmental authority are not covered by the GATS. The scope of this exemption clause is thus defined very narrowly. It should be beyond dispute that it covers typical state functions such as justice, general administrative tasks and law enforcement. It is unclear however whether statutory social insurance as such and the services delivered by the statutory social insurance institutions also fall within the exemption clause. Article I.3 (c) also constrains this exemption further in that it covers only services that are supplied neither on a commercial basis, nor in competition with one or more service suppliers. Here too,

however, what is meant by the terms “commercial basis” and “competition” is not clearly defined. The statutory accident insurance institutions thus call for the TTIP not to pave the way for US providers to enter into interjurisdictional competition with the German social insurance system. The same applies to personal benefits delivered by the social insurance system. It must consequently be ensured that medical care and rehabilitation services delivered by the German statutory social insurance do not find themselves in competition with services available from US providers.

Are social services tradable goods?

The European Commission also appears to be conscious of the fact that the scope covered by Article I.3 of the GATS is not clearly defined. It drew attention to this for example as early as 2011, discussing if and to what extent the exemption clause concerning public services in trade agreements could be modernized. The Commission draws attention to the common understanding existing within the WTO that certain non-economic social services are “non-tradable” services and should not therefore be covered by trade agreements. In this context, the Commission further mentions that the exemption formulated in Article I.3 of the GATS generally covers a number of essential core services such as the police and judiciary, and under certain conditions also parts of the statutory social security schemes (where they are based on solidarity in the form of mandatory insurance, being controlled by the state, no relationship existing between contributions and benefits, etc.). For this reason, the statutory accident insurance institutions call for a formulation over and above that of Article I.3. of the GATS that clearly and unambiguously excludes statutory social insurance systems and the benefits delivered by their institutions from the scope of the TTIP. This could be attained for example by commitments to liberalize services under the TTIP being entered into only by use of a positive list. It would however have to be clear from this list that the areas stated within it do not include statutory social insurance. The adoption of a negative list, i.e. an arrangement under which all areas must be liberalized that are not explicitly listed, is expressly rejected by the statutory accident insurance institutions. The statutory accident insurance institutions also reject the ratchet clauses that are frequently applied, according to which listed services are initially excluded but cannot be excluded again once they have been included in the course of subsequent liberalization. In this context, the European Parliament also noted in its resolution of 8 June 2011 on EU-Canada trade relations that the “negative list approach” in the CETA Agreement should be regarded as a mere exception and should not serve as a precedent for future negotiations.

Provisions concerning (temporary) stays of natural persons for business purposes

Critical consideration must be given in the negotiations to possible provisions concerning temporary stays of persons for the purpose of investment and the promotion of trade between the EU and the USA. The mandate includes the development of a framework to facilitate mutual recognition of professional qualifications. With regard to the delivery of services, the agreement should not prevent the parties from applying their national legislation, regulations and requirements regarding entry into and stays within their territory, provided that in doing so they do not nullify or impair the benefits accruing from the TTIP. Even though a general easing of provisions for the mutual recognition

of professional qualifications and for simplified arrangements for temporary stays by natural persons for business purposes may have positive effects for workers and companies, it must be ensured that this does not impact upon the area of social insurance, which is the responsibility of the Member States.

In the area of social insurance, the Member States negotiate bilateral agreements concerning social security; the scope of these agreements includes arrangements for the temporary posting of workers. An agreement of this kind also exists between Germany and the USA with respect to retirement pension insurance. In the USA, arrangements concerning accident insurance are the responsibility of the individual states.

If, as in the negotiations with Canada, arrangements are negotiated concerning temporary stays by internal company employees, company or sales representatives, agents, investors and members of the liberal professions, these agreements should be consistent with the provisions of bilateral social insurance agreements negotiated by the Member States. Entering into such agreements is the prerogative of the latter. In particular, it must be ensured that the Member States' responsibility for administrating their own social insurance systems is not eroded by arrangements governing the mobility of persons for business purposes. No arrangements for temporary stays by workers impacting upon the area of social security, particularly that of accident insurance, may be negotiated between the USA and the EU under the mantle of foreign trade policy.

Investment protection

The mandate for negotiations also covers investment protection. The statutory accident insurance institutions take a critical view of arrangements concerning investor-state dispute settlements and reject them where they would pave the way for fundamental systematic changes to the statutory social insurance systems. Structuring of the social security systems is a prerogative of the individual EU Member States.

Provisions for investment protection must not contravene the precautionary principle. The standard of social support must not be jeopardized. A reduction in occupational safety and health standards would also not be acceptable to the statutory accident insurance institutions.

Should the proposed arrangements for investor-state dispute settlement be implemented, they could have far-reaching consequences for the statutory accident insurance. In order for compensation claims to be avoided, governments might forgo improvements to occupational safety and health or align existing arrangements at international level, possibly reducing standards in order to do so. Institutions with a monopoly in the area of statutory social insurance could be privatized in order to avoid the payment of compensation. This would result in fundamental change to the German statutory accident insurance system, change which would fundamentally contravene the underlying principles of the German social insurance system and which must be rejected for this reason. The rights of the Member States to define the principles of their own social security systems (as set out in Article 153 (4) of the TFEU) must be defended from change under the mantle of agreements governing free trade or investment protection. Should the precautionary principle be replaced by a guideline according to which everything must be allowed in the absence of any validated scientific evidence of harm, the effort re-

quired for the formulation of occupational safety and health provisions would be substantially higher. A reduction in data protection could result in personal data held by the accident insurance institutions no longer enjoying the same protection.

The DGUV rejects all agreements posing a threat to the standard of social protection accorded to the population. This includes privatization of the statutory accident insurance system. The DGUV rejects agreements at international level that could result in lowering of the occupational safety and health standards. The statutory accident insurance institutions reject provisions potentially leading to a reduction in data security. The statutory accident insurance institutions attach importance to the ability to create a user-friendly body of regulations.

The statutory accident insurance institutions in Germany are following the negotiations of the Transatlantic Trade and Investment Partnership very closely, and will continue to contribute their experience and expertise.

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