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Legal Issues of Services of General Interest

Services of General Interest Beyond the Single Market

External and International Law Dimensions

Markus Krajewski *Editor*

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Series Information

The aim of the series *Legal Issues of Services of General Interest* is to sketch the framework for services of general interest in the EU and to explore the issues raised by developments related to these services. The Series encompasses, inter alia, analyses of EU internal market, competition law, legislation (such as the Services Directive), international economic law and national (economic) law from a comparative perspective. Sector-specific approaches will also be covered (health, social services). In essence, the present Series addresses the emergence of a European Social Model and will therefore raise issues of fundamental and theoretical interest in Europe and the global economy.

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Preface

After six volumes dealing with internal dimensions of the law of services of general interest, the present contribution of the series "Legal Issues of Services of General Interest" focuses on external and international law. It hopes to address new and pertinent questions and contribute to the ongoing debate about the future of services of general interest in the EU with fresh ideas and perspectives. Given the contentiousness of international trade and investment agreements as well as the EU's external policies, the issues discussed in this volume seem timely and relevant.

The chapters of this volume were developed on the basis of papers first presented at a workshop entitled "Beyond the Single Market" held on 18 and 19 September 2013 at the University of Erlangen-Nürnberg. The papers were redrafted in light of the conference proceedings and supplemented with two additional contributions. Our thanks go to the authors and other workshop participants who created a fruitful academic setting of the workshop and allowed in-depth discussions of the various matters. We are also grateful for the rich and stimulating written contributions which turned this collection into a comprehensive treatise on the external and international law dimensions of services of general interest in the EU.

We gratefully acknowledge the support of the German Research Foundation (Deutsche Forschungsgemeinschaft—DFG), the Alfred Vinzl-Stiftung and the Luise Prell-Stiftung for financially supporting the initial workshop. We are indebted to the Law School of the University of Erlangen-Nürnberg for hosting the conference. Special thanks are owed to Kathrin Schuster who was in charge of all organisational matters of the workshop as well as to Johanna Goldbach and Anja Nestler for assisting with the workshop organisation and for checking footnotes and citation styles in the final manuscripts. Without their help this could not have been done. The Language Service Centre of the University of Erlangen-Nürnberg helped us with final proofreading.

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Erlangen Markus Krajewski
February 2015

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Chapter 1
Introduction

Markus Krajewski

Abstract The chapters of this book address the external and international dimensions of the European legal framework for services of general interest which are often overlooked in the debates about public service in Europe. The questions raised in this context are analysed from three different angles: The chapters in Part I of the book approach the special nature of services of general interest from the perspective of the different dimensions of international economic law including international trade, procurement, investment and competition law. Part II then turns to the EU's external policy dimension and asks if and how the EU pursues its constitutional value of services of general interest in its general external policy as well as in its common commercial and neighbourhood policies. Finally, Part III turns to sector-specific analyses in the fields of telecommunications, energy, water supply and health services. The contributions within this part illustrate and deepen the general discussions of the first two parts of the book.

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1.1 Services of General Interest in EU International Law and External Policies

Services of general interest remain high on the political and legal agenda of the European Union. However, the debates about the impact of EU law on services of general interest usually focus on internal market law such as the free movement of services, competition law, state aid rules and the law of public procurement.[1] The external and international dimensions of the European legal framework for services of general interest are often overlooked, even though the EU is party to a number of international agreements which may influence providing, financing, commissioning and organising services of general interest. Most prominently these agreements include the World Trade Organization's General Agreement on Trade in Services (GATS),[2] but also recently negotiated bilateral free trade agreements such as the Comprehensive Trade and Economic Agreement (CETA) between the EU and Canada. As the EU is about to conclude its first agreements on investment protection, the impact of international investment law on public services is also becoming more relevant.[3]

The impact of trade and investment agreements, in particular the GATS, on public services has been subject to a general debate for more than a decade.[4] However, this debate seems largely de-linked from the general EU debate about services of general interest. This is especially noteworthy, since the general themes of both debates are comparable. The inherent tension between rules aimed at establishing and securing undistorted competition on markets and the logic of organising, financing and supplying services in the public interest can be shown with regards to the EU internal law as well as with regards to international economic law. Key questions relevant in both contexts are the scope and definition of services of general interest or public services, the legality of monopolies and other restrictions on competition or market access, procurement requirements, the preservation of regulatory autonomy and the discretion of national, regional and local authorities in regulating and providing services of general interest, and the general balance between open and competitive markets and public interest regulation.

The Treaty of Lisbon added two aspects which connect external and internal aspects of the law of services of general interest even further. First, it firmly established protecting and maintaining the special situation of services of general interest as a core constitutional value of EU law and further defined the contents of this value in Protocol No. 26 on services of general interest.[5] Second, it affirmed

[1] See the contributions in Van de Gronden et al. 2011; Szyszczak et al. 2011; Neergaard et al. 2013 and Szyszczak and van de Gronden 2013.

[2] See Chap. 2 in this volume.

[3] See Chap. 4 in this volume.

[4] Krajewski 2003; Adlung 2006; Arena 2011.

[5] Protocol (No. 26) on services of general interest, *OJ* 2008 C 115/308.

the value-driven nature of EU external policies. Article 21 para 1 TEU declares that the EU's "action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement (…)". This includes the principles of equality and solidarity. In its 2006 Trade Policy Paper "Global Europe" the European Commission concurred with this perspective when it stated: "As we pursue social justice and cohesion at home, we should also seek to promote our values, including social and environmental standards and cultural diversity, around the world."[6] Arguably, the general constitutional values of the EU are among the principles which Article 21 TEU refers to and encompass the special nature of services of general interest.[7]

As the EU is required to pursue its internal values which include the special situation of services of general interest in its external policies, the EU's common commercial policy including current trade negotiations in the field of services needs to be assessed in this light. This includes two dimensions: First, international agreements should not limit the EU's and Member States' abilities to organise and provide services of general interest. Second, agreements signed by the EU should not impede the ability of the EU's trading partners to provide and organise public services according to their own political interest and legal framework. The former aspect is increasingly accepted in the public and academic debate. The latter still needs to be developed further. For example, can it be reconciled with the values of services of general interest if the EU requests its trading partners to open their markets in key public services sectors such as water supply or postal services?

The EU Commission seemed to have acknowledged that the impact of trade agreements on services of general interest needs to be carefully monitored and managed in a "Reflections Paper on Services of General Interest in Bilateral FTAs" published in February 2011[8] and a paper entitled "Commission Proposal for the Modernisation of the Treatment of Public Services in EU Trade Agreements" of October 2011.[9] Even though these documents did not contain official trade policy statements, they showed that the relationship between public services and free trade agreements needed special attention. It is also noteworthy that the directives for the negotiation of the plurilateral Trade in Services

[6]European Commission, External Trade, Global Europe—Competing in the World, A Contribution to the EU's Growth and Jobs Strategy, available at http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130376.pdf (last accessed on 30 January 2015), p. 5.

[7]See Chaps. 8 and 9 in this volume.

[8]European Commission, Reflections Paper on Services of General Interest in Bilateral FTAs (Applicable to both Positive and Negative Lists), TRADE.B.1/SJ D(2011), 28 February 2011, available at http://www.epsu.org/IMG/pdf/Reflections_Paper_on_SGIs_in_Bilateral_FTAs.pdf (last accessed 30 January 2015).

[9]European Commission, Commission Proposal for the Modernization of the Treatment of Public Services in EU Trade Agreements, TRADE.B.1/SC/am D(2011) 1146318, 26 October 2011, available at http://www.epsu.org/IMG/pdf/154b-11_EC_paper_on_public_services_pdf (last accessed 30 January 2015).

agreement (TiSA) and for the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the US connect Protocol No. 26 and trade negotiations for the first time. They state: "The high quality of the EU's public utilities should be preserved in accordance with the TFEU and in particular Protocol No. 26 on Services of General Interest, and taking into account the EU's commitments in this area, including the GATS".[10] It can be argued, that these references to Protocol No. 26 in recent trade negotiations directives reflect the special value of services of general interest which the EU's negotiators of trade agreements should respect.

The contributions collected in this volume address the questions raised in this context from three different angles: The chapters in Part I of the book approach the special nature of services of general interest from the perspective of the different dimensions of international economic law including international trade, procurement, investment and competition law. Part II then turns to the EU's external policy dimension and asks if and how the EU pursues its constitutional value of services of general interest in its general external policy as well as in its common commercial and neighbourhood policies. Finally, Part III turns to sector-specific analyses in the fields of telecommunications, energy, water supply and health services. The contributions within this part illustrate and deepen the general discussions of the first two parts of the book.

1.2 Public Services in International Trade, Investment and Competition Law

International economic law consists of different regimes. As a consequence, the impact of international economic law on services of general interest (or public services) depends on the scope, contents and principal obligations of each regime. The chapters of the first part of the book therefore address public services in the context of the regimes of international economic law.

Chapter 2 addresses the impact of the GATS on public services. *Amedeo Arena* revisits the pertinent debates and shows inconsistencies between the requirements of public services regulation and key GATS provisions such as market access and national treatment. Based on this finding he analyses the layers of GATS exemptions for public services including Article I:3(b) and (c) GATS which exempts services supplied in the exercise of governmental authority from the scope of the GATS. Arena concludes that the GATS remains "agnostic" towards

[10]Council of the European Union, Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America, ST 11103/13, 17 June 2013, available at http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf (last accessed on 29 January 2015). See also Council of the European Union, Draft Directives for the negotiation of a plurilateral agreement on trade in services, 8 March 2013, on file with author.

public services. While the actual impact of the GATS on services of general interest may be limited, the ideological focus of the GATS could interfere with a global concept of public services. This finding resonates with some of the outcomes of the debates on services of general interest in the EU internal market order which also showed that the conceptual differences may be more fundamental than the actual conflicts.

The global procurement rules established in the framework of the World Trade Organisation are at the centre of Chap. 3 by *Wolfgang Weiß*. He addresses the revised plurilateral Government Procurement Agreement (GPA) of 2012 and its impact on services of general interest. In particular, the chapter analyses whether and to which extent the GPA disciplines limit the ability of public entities to provide services of general interest directly ("in-house") and through public private partnerships. It is shown that these questions which are at the core of the debates on services of general interest and procurement in EU law[11] are yet to be answered with regards to global procurement law. While concessions and public-private partnership arrangements are not covered by the GPA, it is unclear whether the term "government procurement" extends to "in house" procurement. However, it needs to be kept in mind that the GPA and procurement chapters in free trade agreements only apply to sectors which have been specifically opened to the procurement market by the respective party. So far, environmental services including sewage services are the only services of general interest which the EU submitted to global procurement rules.

Chapter 4 moves the focus from trade to investment law. *Francesco Costamagna* relates the general debate about the impact of international investment law on regulatory autonomy to the concrete questions of public services regulation. He points in particular to the privatisation of key services sectors and subsequent regulatory challenges which may lead to investment disputes. Given the broad wording of many provisions of investment agreements and the lack of specific provisions for public services this is hardly surprising. In fact, Costamagna notes that investment tribunals showed an agnostic approach towards the needs and specialities of regulating public services in the past. More recent state-investor dispute settlement practice however, seems to show a greater appreciation for public services regulation. In light of the agnosticism diagnosed by Arena in his chapter on GATS, it could be asked whether the trade regime can learn from the investment regime in this context.

Rules on trade, procurement and investment cannot only be found at the global level, but also in regional and bilateral free trade agreements. One of the best-known regional agreements is the North American Free Trade Agreement (NAFTA). *J. Anthony VanDuzer* assesses in Chap. 5 NAFTA's approach towards public services which can be used as an important comparison with the GATS approach and the approach of EU free trade agreements. One of the most important differences between NAFTA and GATS is that the former follows a

[11]See e.g. ECJ, Case C-26/03 *Stadt Halle* [2005] ECR I-1 and ECJ, Case C-458/03 *Parking Brixen* [2005] ECR I-8585.

"negative list-approach" towards services liberalisation while the latter adopts a "positive list-approach". VanDuzer shows how public services can be protected in the context of a negative list which is important for the EU, because recent EU trade agreements such as CETA and possibly TTIP also follow a negative list-approach. Another difference is that NAFTA does not rely on functional exemptions for certain types of activities, but on sector-specific lists with specific reservations. This seems to lead to greater legal certainty, but also entails a more fragmented approach than the GATS according to VanDuzer. Yet, in light of the limited scope of the GATS exemption for governmental authority and the importance of sectoral commitments (and the absence thereof) in the GATS the differences between GATS and NAFTA may be less significant from a practical perspective than in theory. Another key difference between NAFTA and GATS is that the latter also contains investor protection which extends to all public services. In fact, NAFTA investment arbitration practice was among the first to also contain cases relating to public services. Finally, NAFTA contains chapters on procurement, telecommunications and energy which also allow us to draw comparisons with the global approach towards these fields as discussed in the chapters by Weiß (3), Batura (12) and Delimatsis (13).

Chapters 6 and 7 address fields of law which have not yet been thoroughly codified on the basis of public international law treaties. The first relates to international competition law which is still a relatively new and emerging field of international economic law. Its rules can be found in a variety of legal sources, such as bilateral and regional trade agreements, specific competition law treaties and customary law. *Johan van de Gronden* assesses whether services of general interest which are a key concept in the context of EU competition law are also of relevance in international competition law. He distinguishes between a "market approach" and a "carve-out approach". While the former is the dominant thinking within internal EU competition law as exemplified in Article 106(2) TFEU and weighs the benefits of competition in public services, the latter exempts of public services from the scope of competition law. It can be said that this approach would be comparable to the function of the GATS carve-out for services supplied in the exercise of governmental authority. The market approach, however, can only be found in a few EU bilateral trade agreements. If future trade and investment agreements were to include robust rules on competition law including provisions on monopolies, relying on a market approach could be an option to safeguard public services without fully shielding them from competition law.

The last chapter of Part I, Chap. 7, looks at the global financial system and addresses services of general interest in relation to international and European austerity policies. *David Hall's* chapter takes a political economy perspective and is hence less concerned with legal questions of these programmes, but rather with the social and economic impact of structural adjustment programmes of international financial institutions such as the IMF and the EU on services of general interest. After placing the current austerity programmes in their historic context and addressing their general impact on public spending and economic growth, the chapter shows that austerity programmes had a particular devastating effect on public services. Hall

links the current programmes also to their legal and constitutional framework which are—in the case of the EU—the rules on debt and deficit of the Maastricht Treaty and new instruments developed as a reaction to the financial crisis of 2008, namely the European Stabilisation Mechanism (ESM). It seems striking that these instruments and their counterparts at the global level "constitutionalise" a certain neoliberal economic paradigm without any room for balancing market rationales with the special requirements and logic of public services. This observation clearly calls for further research of the matter from a international and constitutional legal perspective.

1.3 External Policies of the European Union and Services of General Interest

Part II of the book turns specifically to the EU's external policies and asks how the special role and value of services of general interest can be protected and guaranteed within the framework of the EU's relations with other countries. Apart from a political interest in protecting services of general interest as part of its external policies, the EU might even legally be obliged to do so. The chapters by *Piet Eeckhout* (Chap. 8) and *Pierre Bauby* (Chap. 9) explore this perspective, while the chapters on the EU's trade and investment agreements (Chap. 10) and on the EU's Neighbourhood Policy (Chap. 11) concretise this general perspective on the basis of two specific fields of EU external relations.

Articles 3(5) and 21 TEU stipulate that EU foreign policy should be guided by the same principles which guided the internal development of the EU. *Piet Eeckhout* takes these provisions seriously and asks whether they provide a legally binding normative basis for EU external relations. He frames his analysis in the context of the wider concept of a Normative Power Europe and argues that the EU is obliged to be guided by the values underlying the protection of services of general interest in its external policies. This argument rests on the assumption that the protection of services of general interest is a value in the meaning of the provisions on external relations, an assumption which is based on the human rights element of services of general interest (Article 36 Charter of Fundamental Rights) and the solidarity aspects of these services (Article 3 TEU). As a consequence the EU must respect the principles of services of general interest in its common commercial policy. Eeckhout develops a broader constitutional framework for external policies of the EU but does not focus on what this could mean in concrete terms for services of general interest. Further research seems necessary, but the framework is clearly spelled out: The values which the EU is obliged to take into account when developing its trade and investment policies include the values mentioned in Article 14 TFEU ("the place occupied by services of general economic interest in the shared values of the Union") and spelled out in Protocol No. 26 on Services of General Interest.

In Chap. 9, *Pierre Bauby* reinforces this call by placing the development of the common commercial policy and of the EU approach towards services of general interest into their historic and political contexts. Like Eeckhout, Bauby

is convinced that the protection of services of general interest is included in the values the EU is required to pursue in its external economic policies and negotiations. This requires a clear strategy which may—in Bauby's view—support the objectives, aims and values of the European Union in international trade negotiations.

Markus Krajewski analyses the EU's trade policy agenda concerning trade agreements vis-à-vis services of general interests in Chap. 11. It shows that this agenda recognises these services as special and developed a number of legal and institutional tools to mitigate a negative impact of trade agreements on the provision and organisation of services of general interest. These include excluding "public utilities" from certain market access obligations, limiting commitments in education, health and social services to publicly funded services and to generally exclude activities in the exercise of governmental power. The chapter develops a framework of assessing the effectiveness of these "public service exemptions" based on the substantive scope and the level of protection offered by each of these exemption clauses. However, the chapter also shows that without such exemption clauses trade agreements would clearly have a negative impact on public services.

The EU's influence on its neighbouring countries is often overlooked in debates about services of general interest in EU law and policy. *Narine Ghazaryan* therefore addresses in Chap. 11 the role of services of general interest in the European Neighbourhood Policy (ENP) vis-à-vis its Eastern and Southern Neighbours. She shows that the ENP is especially value-driven and that many instruments and agreements of the ENP aim to export the EU social model which includes services of general interest. Even though the term is explicitly mentioned for the first time only in 2013, it is clear that many elements of sectoral policies in the ENP context have been promoting the specific EU model of regulating services. For example the idea of universal service in telecommunications or general affordability and accessibility issues with regards to health and social services have been addressed through instruments of the ENP. In the recently negotiated trade agreements with the ENP partners the EU also incorporated competition rules which have an exemption for services of general economic interest similar to Article 106(2) TFEU. However, the actual impact of EU agreements or the ENP in general on public services models in the partner countries and which elements of these models can and should be preserved and further developed, is still unknown and hardly ever debated. Nevertheless it can be shown that the EU is trying to protect and promote services of general interest as an element of the European social model at the same time.

1.4 Sector-Specific Perspectives: Telecommunications, Energy, Water and Health Services

Finally, Part III contains four sectoral case studies which exemplify some of the current challenges. The rules on liberalising and regulating telecommunications (electronic communications) are of crucial importance in the EU's internal market

and the WTO's services regime. In Chap. 12 *Olga Batura* analyses common elements and shows how the two regimes are different. She also considers which approach is better equipped to deal with the social and regulatory needs of the sector at the moment. Since the EU approach combines market efficiency with protecting social needs she considers this approach to be superior. Would it be possible to reach such an approach also at the global? Batura remains sceptical. She argues that the current global regime is split into a trade institutional approach based on the WTO legal framework and an approach attempting to reach common standards and regulations in the International Telecommunications Union (ITU). This shows that a key to the successful management of public services values and trade liberalisation is to realise that liberalisation presupposes regulation and that they go hence hand in hand with each other. Even though the current global trade system contains elements of telecommunications regulation Batura concludes that a framework linking liberalisation and social regulation for this sector is not to be expected at the international level in the near future.

Panagiotis Delimatsis (Chap. 13) chooses the energy sector to analyse the impact of services of general interest on the EU's external policies. Like the telecommunications sector, there is a rich and complex regulatory framework of the sector in the internal market, but no comparable system at the international level. In fact, the EU does not even seem to have a coherent external energy policy. After briefly recalling the current state of the energy sector in internal EU policies, Delimatsis addresses various instruments of energy regulation in trade and investment agreements. He shows that the global legal framework for trade and competition lacks a clear focus with regards to energy policies. Even the Energy Charter Treaty only employs traditional means of trade liberalisation and investment protection. In international trade agreements, energy-related activities are often carved out which may also explain why there is no global regulatory regime. The usual parallel development of internal market liberalisation and external trade commitments is lacking in the field of energy services. However, this picture may change according to Delimatsis as the EU will develop outward-looking strategies towards energy security and sustainability.

The impact of trade agreements on water provision is one the most controversial questions in the present context. *Britta Kynast* (Chap. 14) uses the case study of the provision and regulation of water supply through local entities in Germany to show the potential impact of trade agreements on water. She recalls the relevance of Article 4(2) TFEU which specifically requires the respect of local self-government and argues that this also applies to the negotiations and conclusion of free trade agreements. Hence, liberalising water services through a trade agreement could violate this requirement, because some of the key obligations of trade agreements such as national treatment or procurement regulations may negatively affect the possibilities of local governments to regulate and provide the supply of water. Kynast also recalls Protocol No. 26 which points to the essential role of—inter alia—local authorities in providing, commission and organising services of general interest "as closely as possible to the needs of the users". Kynast concludes that opening water supply services through international

trade agreements would also violate the proportionality principle, because the negative results of liberalisation outweigh any positive effects.

A new and emerging field is the regulation of transnational health care provision. Chapter 15 by *Meri Koivusalo* begins with a short overview of the development of health policies in the framework of the European treaties addressing both the challenges posed by the free movement of patients and the approach adopted by the Treaty of Lisbon regarding EU competence in the field. She then points out that the special nature of health services is also recognised in the decision-making process of the common commercial policy (Article 207(4) TFEU). In light of recent health policy reforms in many EU countries which involved an increased reliance on commercial and contractual elements, Koivusalo develops her main argument which concerns policy space for health systems both in the negotiations of trade agreements and the actual agreements themselves. She warns that a new generation of comprehensive trade and investment agreements with high-income countries such as Canada or the US may have negative effects on the necessary policy space in particular with regards to cost-containment, equity and quality. In this context, she also recalls the problems associated with patient mobility within the EU. She concludes by questioning the benefits of the inclusion of health services in free trade agreements and consequently prefers a carve-out for the entire sector. Such a sectoral carve-out would go beyond the current EU practice which only excludes publicly-funded health services from the commitments of trade agreements, but not services which are entirely funded through private means.

1.5 Main Themes and Agenda for Future Research

The chapters in this volume indicate that many conflicts and debates concerning services of general interest which exist in the internal market can also be seen in the legal regimes outside the internal market. However, often the conflicts seem more relevant at a systematic and general level involving clashes between different rationales and regulatory objectives and less so at the technical and practical level. In fact, the chapters of this volume suggest that practical challenges to the organisation, financing and commissioning of services of general interest can still be expected more from internal EU law (competition, state aid, procurement and free movement) than from the EU's international obligations. However, it seems clear that the relative lack of concrete challenges and risks is due to the fact that many trade and investment agreements do not contain specific requirements in this regard. In addition, the chapters in this volume also show that the relationship between services of general interest and the logic of trade liberalisation is often managed on a mere technical level through specific exemption provisions.

Another important lesson to be drawn from the contributions in this book is the importance of the connection between regulation and the possibility to legislate and liberalisation requirements at the international level. Liberalisation of key public services sectors within the EU has been accompanied by establishing the necessary

regulatory framework often specifically dedicated at the protection of social goals such as universal access. At the international level this connection is largely missing and it is not to be expected that a coherent regulatory and liberalisation regime will emerge anytime soon. This leads to the question how regulation and liberalisation can be reconciled in the future: Should the approach rely on incorporating regulatory principles in trade agreements or should sectoral liberalisation and regulation be addressed by sector-specific international organisations such as the ITU?

Maintaining policy space or national regulatory autonomy is also a theme which shapes both the internal and the external dimension of services of general interest. The compromise reached in the EU internal market includes the power of the Member States to define what services of general interest are and to institutionalise special regimes for the provision while EU law controls deviations from the general principles of competition and free movement. Such a compromise is also yet to be found at the international level. In fact, in most cases the definition of which activities constitute public services is generally not left to the parties themselves, but depends on the definition of key terms of an international agreement. In this context it should also be noted that both the international and the internal regime are challenged by the lack of a clear understanding of what services of general interest are. It is striking that the terminology used by the EU in its trade in services commitments ("public utilities") differs from the terminology derived from the TFEU and used internally ("services of general interest"), but that both terms are equally unclear.

These brief and preliminary observations of the main themes of the chapters of this volume suggest a two-fold research agenda for the future: First, the general and specific (potential) impact of international economic law and the EU's free trade agreements needs to be further studied and analysed, because these agreements may be binding on the EU and supersede secondary EU legislation. Second, the approaches and compromises found in the internal market can be used as a reference point in order to assess the effectiveness and appropriateness of approaches found in international trade and investment agreements or other international legal instruments. Future research along those lines may help implementing the normative basis of the EU's external policies and may also contribute to the development of international tools and instruments which seek to balance the policy goals of competition and market efficiency on the one side and the public interest in regulating services of general interest in a manner which make them accessible and affordable for all on the other side.

References

Adlung R (2006) Public services and the GATS. J Int Econ Law 9(2):455–485

Arena A (2011) The GATS notion of public services as an instance of intergovernmental agnosticism: comparative insights from EU supranational dialectic. J World Trade 45(3):489–528

Krajewski M (2003) Public services and trade liberalization: mapping the legal framework. J Int Econ Law 6(2):341–367

Neergaard U, Szyszczak E, van de Gronden JW, Krajewski M (eds) (2013) Social services of general interest in the EU. T.M.C. Asser Press, The Hague
Szyszczak E, Davies J, Andenæs M, Bekkedal T (eds) (2011) Developments in services of general interest. T.M.C. Asser Press, The Hague
Szyszczak E, van de Gronden JW (2013) Financing services of general economic interest—reform and modernization. T.M.C. Asser Press, The Hague
Van de Gronden JW, Szyszczak E, Neergaard U, Krajewski M (eds) (2011) Health care and EU law. T.M.C. Asser Press, The Hague

Part I
Public Services in International Economic Law

Chapter 2
Revisiting the Impact of GATS on Public Services

Amedeo Arena

Abstract The impact of the WTO's General Agreement on Trade in Services (GATS) on public services is the subject of intense debates. This chapter analyses the potential effects of the main GATS disciplines, such as most-favoured-nation treatment, market access, national treatment and rules on domestic regulation, on the provision of public services at the national and local level. It also examines the instruments WTO members are afforded by the GATS to mitigate those effects by exempting what they regard as public service from the GATS disciplines. In addition, this chapter examines the GATS overall approach to the notion of public services and its impact on the conceptualisation of public services beyond national borders through regional economic integration.

Contents

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2.1 Introduction

The General Agreement on Trade in Services (GATS), the world's foremost agreement on services in terms of membership, constitutes an unavoidable reference in current and, possibly, future negotiations at the bilateral and plurilateral level. Just as Economic Integration Agreements (EIAs) take over ready-made clauses from the GATS or build upon their wording, they also share a more controversial legacy: the allegations of undermining the provision of public services in the countries concerned. The impact of the GATS on public services has been the subject of a lively academic discussion.[1] The purpose of this chapter is to assess, with the benefit of 20 years of hindsight, the impact that GATS has actually had on public services and the role it might play in regional service negotiations.

To this end, this chapter will first analyse the potential effects of GATS' cornerstone trade disciplines (i.e. Most-favoured-nation treatment, market access, national treatment, domestic regulation, etc.) on the provision of public services at the national and local level. Second, this chapter will examine the instruments WTO members are afforded by the GATS to mitigate those effects by exempting what they regard as public service providers from the above trade disciplines. Third, regard will be had to the GATS overall approach to the notion of public services and its impact on the conceptualisation of public services beyond national borders through regional economic integration.

Before delving into that analysis, a definitional note is in order. For the purpose of this chapter, the notion of 'public services' should be regarded as an inherently *domestic* pre-understanding (*Vorverständnis*).[2] To wit, 'public services' should be understood as comprising all activities functional to the pursuit of goals regarded as being in the general interest by a public authority *at the national or local level* and, for that reason, subject to rules different, in whole or in part, from those applying to other services and including elements compulsoriness (such as 'public service' or 'universal service' obligations).[3]

[1] For a comprehensive literature review, see Kulkarni 2009, pp. 247–248.

[2] See, generally, De Ruggiero 1984, pp. 596–597.

[3] See generally Marcou 2004, pp. 7–51; Marcou 2001, p. 386; Brancasi 2003, p. 30.

2.2 The Potential Impact of GATS Trade Disciplines on Public Services

The GATS seeks to pursue economic growth through 'progressive liberalization'. In essence, that agreement lays down a number of trade disciplines whose function is to constrain WTO members' ability to adopt measures affecting the provision of services through the four modes of supply described in Article I(2) GATS.

As noted by Krajewski, however, not all those constraints have the same impact on WTO member's ability to regulate, fund, and operate public services.[4] This section, therefore, will focus on GATS trade disciplines that are most likely to affect the provision of those services at the national and local level, viz. Most-Favored-Nation (MFN) treatment, market access, national treatment, domestic regulation, and a number of other horizontal and sectoral provisions. To that end, examples of public service regulation and support schemes that may be inconsistent with those disciplines will be provided.

Before turning to the specificities of each provision, it must be noted that, in general, GATS trade disciplines are 'import-related',[5] in that they seek to prevent WTO members from restricting supply of foreign services or by foreign suppliers, rather than from placing regulatory constraints on domestic services or service suppliers.[6] Accordingly, as it will be explained in greater detail in the following sections, certain regulatory schemes designed to ensure the availability of public services to domestic users lie outside the scope of the GATS trade disciplines altogether.

2.2.1 Most-Favoured-Nation Treatment

According to Article II GATS, each WTO member must accord to services and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country.

The MFN clause does not interfere with public services so long as only *national* providers supply those services.[7] The picture changes substantially, however, if also *foreign* suppliers are involved in the provision of public services. The MFN stipulates that all like foreign services and like service providers should be on equal footing, thus precluding reciprocity-based arrangements between WTO members.

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[4]See Krajewski 2003, p. 359.

[5]But see *China—Certain measures affecting electronic payment services*, Report of the Panel, WT/DS413/R, para 7.618 ("Nothing in the GATS suggests that the supply of a service through commercial presence in the territory of a Member does not extend to the "export" of services from that Member's territory to a recipient in the territory of another Member or to a foreign recipient located in the "exporting" Member's territory").

[6]Krajewski 2003, p. 347.

[7]Adlung 2006, p. 467; Krajewski 2003, p. 359.

Some examples may elucidate that proposition. If WTO member A and WTO member B enable their healthcare professionals to practice in one another's territory (mode 4), the MFN clause requires those WTO members to extend that treatment also to practitioners from every other WTO member. Likewise, if WTO member A reimburses expenses incurred by its nationals for medical treatments undergone in the territory of WTO member B (mode 2) on the basis of reciprocity, it must also cover the costs of medical care received by its nationals in other WTO members. Moreover, the MFN clause prohibits discrimination between suppliers of telecommunication or audiovisual services from different WTO members having a commercial presence in the same WTO member as regards access to the radio spectrum and to network infrastructure.

The MFN principle may also interfere with the regulation of public services provided across the border (mode 1), such as the international postal service.[8] When mail is sent from one country to another, the receiving postal administration charges the sending postal administration for access to its delivery network (the so-called 'terminal dues'). The MFN clause precludes WTO members to apply different terminal dues based on the incoming mail's country of origin.[9]

The liberalization potential of the MFN principle is, however, subject to constraints. First, it only applies to 'like' services and 'like' service providers. Moreover, since the MFN principle is aimed at measures affecting the 'import' of services, each WTO member remains at liberty to treat incoming service recipients from different WTO members in a different manner. Thus, WTO member A may grant preferential access to hospital facilities located in its territory to patients that are nationals of WTO member B, with which a reciprocity arrangement is in place, relative to citizens of other WTO members, which are not bound by an equivalent agreement. Moreover, outbound movements of domestic suppliers are not subject to the MFN clause. Therefore, a WTO member may provide financial assistance only to domestic educators wishing to teach at academic institutions located in WTO members that have tighter cultural or economic links with the former WTO member.

2.2.2 Market Access

Article XVI requires WTO members to refrain from applying six types of measures that may hinder market access: quantitative restrictions (on the number of service suppliers, on the value of service transactions or assets, on the number of

[8]See WTO, Background Paper by the Universal Postal Union, Informal Note from the Secretariat, JOB(02)/17, 4 March 2002.

[9]See Perrazzelli and Vergano 2000, pp. 744–746; Luff 2002, pp. 77–78; T.M.C. Asser Instituut, The Study of the Relationship between the Constitution, Rules, and Practice of the Universal Postal Union, the WTO Rules (in particular the GATS), and the European Community Law, Final Report, prepared for the European Commission. http://ec.europa.eu/internal_market/post/doc/activities/tmc-asser-final-report-300604_en.pdf. 30 June 2004, p. 79. Accessed 20 October 2014.

operations or quantity of output, and on the number of natural persons supplying a service) as well as limitations on forms of legal entity, and on the participation of foreign capital.

The obligations flowing from Article XVI may interfere with regulatory arrangements commonly adopted by national and local governments in the field of public services, notably special and exclusive rights. WTO members may entrust the provision of public services to a limited number of providers to achieve cost efficiency (e.g., in the case of natural monopolies or natural oligopolies) or to allocate scarce resources (such as the broadcasting spectrum). Moreover, exclusive rights may enable public service providers to operate in conditions of economic equilibrium by offsetting profitable activities (e.g. courier services) against unprofitable ones (e.g. the universal postal service). By the same token, in concession contracts, the concessionaire's exclusive right to exploit the works or services constitutes its consideration for the provision of those works or services in addition or as an alternative to payment. Yet, those schemes may fall within the mischief of Article XVI:2(a), insofar as they limit the number of service providers, thus hindering market access.[10]

Article XVI may also preclude public ownership requirements, as well as restrictions on foreign investment in the share capital of public service providers. Economic theory has shown that under conditions of contract incompleteness public ownership may prove more efficient than regulation of private firms.[11] Several WTO members have thus discontinued the privatization trend of their utilities or even reversed it, through remunicipalisation of certain essential services. Some WTO members have also imposed foreign equity ceilings in the field of audio-visual, education and postal services.[12] However, those measures may be inconsistent with Article XVI:2(f), which outlaws restrictions on foreign capital and investment.

Moreover, the GATS provision on market access may bar WTO members from regulating the legal form of public service providers.[13] In several countries, for instance, higher education institutions may only be constituted as non-profit organizations.[14]

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[10]Choudhury 2012, p. 78; Krajewski 2003, p. 360.

[11]See Laffont and Tirole 1993, p. 644.

[12]WTO Council for Trade in Services, Education Services, Background Note by the Secretariat, S/C/W/313, 1 April 2010, para 78; WTO Council for Trade in Services, Audiovisual Services, Background Note by the Secretariat, S/C/W/310, 12 January 2010, para 67; WTO Council for Trade in Services, Postal and Courier Services, Background Note by the Secretariat, S/C/W/319, 11 August 2010, para 77.

[13]A. Ostrovsky, E. Türk and R. Speed, GATS and Water: Retaining Policy Space to Serve the Poor. Center for International Environmental Law 3–4. http://www.ciel.org/Publications/GATS_5Sep03.pdf. 5 September 2003, pp. 3–4. Accessed 20 October 2014.

[14]APEC, Measures Affecting Cross-Border Exchange and Investment in Higher Education in the APEC Region. http://aplicaciones2.colombiaaprende.edu.co/mesas_dialogo/documentos/mesa80/21113MeasuresAffectingCrossBorderexchangeanfinvestmentinHEintheAPECregion.pdf. May 2009. Accessed 20 October 2014.