

# Securing the public interest in trade in services agreements – Disciplines on domestic regulation revisited

Professor Markus Krajewski

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FRIEDRICH-ALEXANDER  
UNIVERSITÄT  
ERLANGEN-NÜRNBERG

FACHBEREICH  
RECHTSWISSENSCHAFT

# Overview

- Introduction
- GATS framework
- Types of disciplines and their impact on public interest regulation
- Possible remedies
- Negotiation theatres
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# Introduction

- Two functions of regulation in the trade liberalisation context
  - Regulation can be burden on service suppliers and impede trade liberalization → main focus of trade agreements
  - Regulation necessary to address market failures and anti-competitive practices → limited relevance in trade agreements
- Disciplines on domestic regulation may reduce policy space for public interest regulation (“regulatory chill” effect)

- Institutional settings for domestic services regulations
  - Multilateral level: WTO (including recent Joint Initiative)
  - Plurilateral level: Trade in Services Agreement (TiSA)
  - Bilateral and regional level: Free trade agreements (focus on EU)
  - Note: Domestic regulations disciplines plurilateral, regional and bilateral agreements are usually *de facto* applied on an MFN basis, because domestic regulations are measures of general application
  - Example: The requirement of „necessity“ or „proportionality“ in a free trade agreement cannot be limited to parties of that agreement

# GATS framework

- Article VI GATS on domestic regulation
  - General obligations on application, review and transparency of regulatory measures (Art. VI:1 to 3 GATS)
  - Mandate to negotiate (Art. VI:4 GATS) to negotiate disciplines ensuring that domestic regulations are
    - based on objective and transparent criteria
    - not more burdensome than necessary to ensure quality of service
    - not in themselves a restriction on the supply of the service
  - Disciplines would apply to licensing and qualification requirements and procedures and technical standards (and authorisations)

# Types of disciplines and their impact on public interest regulation

- Transparency
  - Publication of regulations → low impact (potential administrative burden)
  - Publication of drafts and right to comment on new regulations → medium impact (openness to lobbying)
  - Information and enquiries → low impact
- Administration
  - Submission of application → low impact
  - Processing of application → low impact

- Substantive standards

- Necessity test → high impact (may rank trade higher than other public interests)
- Proportionality → medium to high impact (depending on structure of balancing and relevance of balancing objectives)
- Objective and transparent criteria → medium impact (means to pursue public interest could be challenged)
- Use of international standards → medium impact (standard setting organization may not have been sufficiently inclusive)
- Impact assessment → medium impact (may put trade-restrictive measures under pressure during law-making process)

- Institutional setting
  - Independence of institution → medium impact (change in regulatory system may be necessary)
  - Coordination among agencies → low impact
- Further issues
  - Fees → low to medium impact (sometimes fees are used as additional revenue source or as disincentive)
  - Mutual recognition → low impact (usually limited to possibility to recognise qualifications gained abroad or foreign certifications )
- New approach in some FTAs: Good regulatory standards applying to all measures covered by trade agreement



## Possible remedies

- Include provisions on transparency and application
- Use soft language (“aim at”, “endeavour” instead of „shall“)
- Refer to consistency with domestic law and practicability
- If substantive provisions are included
  - Leave scope for domestic regulatory systems
  - Exclude necessity test
  - Clarify proportionality test

- A public interest regulation clause? (Proposal)
  - „Nothing in this agreement shall prevent or impede the development, application and enforcement of non-discriminatory measures aimed at protecting public interests, including protection of the environment, human and labour rights, consumer interests, cultural diversity (...) and the general welfare.”
- A clause to rule them all?

## Negotiation theatres

- WTO Working Party on Domestic Regulation (WPDR)
  - negotiations on general disciplines since 1999
  - based on Article VI:4 GATS
  - latest draft at WTO Ministerial Conference in 2017, but not based on consensus in WPDR
  - Contents: Application, transparency, independence of regulators, few substantive standards, some Members favour necessity test
  - Fundamental differences between WTO Members (concerning relation with other negotiations, scope of mandate of Article VI:4 GATS, relevance for Mode 4)

- Joint Initiative on Services Domestic Regulation
  - Plurilateral negotiations of 33 WTO Members (including EU, Latin America, China, Japan, South Korea, Russia, Canada, Australia)
  - Launched in 2017 as reaction to lack of consensus in WPDR
  - Negotiations in WTO, but outside of Article VI:4 GATS mandate
  - Aiming at Reference Paper on Services Domestic Regulation
  - Current contents (March 2020): Application, transparency (including opportunity to comment), limited substantive standards
  - Planned implementation
    - Inclusion in Schedules of Specific Commitments of Members as Additional Commitments (Article XVIII GATS)
    - Applicable on most-favoured nation basis
    - Model: Reference Paper on Telecommunications

- Trade in Services Agreement (TiSA)
  - Plurilateral initiative on services liberalisation of 23 WTO Members (including EU, US, Canada, Chile, Mexico, Australia, New Zealand)
  - Negotiations between 2013 and 2016
  - Scope
    - Further liberalisation commitments (Market access and national treatment)
    - Annex on Domestic Regulation (similar contents as 2017 WPDR Draft)
  - Formally on hold since December 2016

- Free trade agreements (FTAs) of EU
  - Association agreements / deep and comprehensive trade agreements with Eastern and Mediterranean neighbours
  - Bilateral free trade agreements
    - Latin America: Chile, Mexico, Colombia/Peru, Central America, Mercosur
    - Asia: Singapore, Japan, Vietnam
    - Canada (CETA)
  - Economic Partnership Agreements with ACP countries typically do not cover trade in services
  - Negotiations *inter alia* with China, Australia, New Zealand and United Kingdom (EU-UK FTA post-Brexit)

## Next steps to monitor

- EU FTA negotiations
  - United Kingdom (end of transition period 31 December 2020)
  - Australia (negotiations since 2018)
  - New Zealand (negotiations since 2018)
  - Chile (Revision of 2003 Agreement)
- WTO
  - Joint Initiative (→ WTO MC12 in 2021)
  - WPDR (→ consensus unlikely)
- TiSA: possible resumption in 2021 (if change in US policy)

Thank you very much for your attention

[markus.krajewski@fau.de](mailto:markus.krajewski@fau.de)



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