

LGIU, TEN, DHN response to 'Liberalising trade in services', DTI consultation on the General Agreement on Trade in Services

Summary

Attached to this briefing is the joint response from the LGIU, TEN and DHN to the DTI consultation on the current World Trade Organisation's negotiations on the General Agreement on Trade in Services (GATS). The LGIU sent out a briefing on GATS in November 2002 (170/02).

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The information in this policy briefing applies to **the whole of the UK**

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Submission to the DTI consultation on “Liberalising trade in services”

Introduction

This response answers directly some of the questions in the document that are of particular importance to local government, but it begins with some key general points.

Comments on the DTI consultation process

Although we welcome the fact that the UK government is one of a very small number of governments to issue any sort of consultation on GATS, the consultation itself is inadequate. The document is difficult to understand and not very accessible to the public or even most councillors and MPs. It does not analyse the UK's current commitments. It is difficult to comment in detail on the consultation without an understanding of what the government has already agreed to. The summary of the requests made to the UK is also inadequate. The full official documents are not being made publicly available.

The consultation is, anyway, a partial one, as it does not include the details of the EU requests to other countries. The EU has tabled requests for wide ranging-commitments to 109 other WTO members. In order to gain access for the EU for these services requested, the EU would presumably have to make further offers in the negotiations.

The consultation refers only very briefly to the possible implications for local government, with little or no analysis of the potential effects of the requests made to the EU on local public services.

Public services under GATS

The LGIU is particularly concerned about the definitions of Article 1.3 referring to public services. The meaning of Article 1.3 is hotly disputed, and means that the protection it seems to offer to public services is ambiguous, and open to challenge through the disputes panel.

"*Commercial basis*" and "*in competition*" are not defined in the agreement. Even the DTI document concedes that there are public concerns about "governments' ability to maintain public services where they choose to do so", and "the right and ability of governments to regulate services in order to meet national policy objectives", and admits that Article 1.3 is unclear.

The interpretation of these clauses is critical to what effects GATS could have on public services in the UK. The EU's limitation relating to the provision of public services says that "*In all EC member states, services considered as public utilities at a national or local level, may be subject to public monopolies or to exclusive rights granted to private operators*". This shows that there is uncertainty at the EU level. As the World Development Movement (WDM) has said, listing this limitation suggests that the EU's faith in Article 1.3 "*is less than complete*".

There is also inconsistency in the DTI paper: the document says that none of the EU member states has taken commitments on libraries, archives, museums and other cultural services, reflecting "*the cautious approach of the EC to GATS commitments in the cultural area, and of the need to ensure continued provision of public library and museum services*". In relation to subsidies for sporting services, the document is clear that it intends to "*resist strongly the elimination of grants*", such as lottery and exchequer grants to sport governing bodies and to individual athletes, that are not available to federations or athletes from overseas. Why are these services to be protected but other crucial public services not, and why does the government not believe they would be protected by Article 1.3?

Other members have requested the removal of this limitation. If the EU concedes on this, public services would be subject to even greater uncertainty.

The legal status given to a private operator of a public service could define whether it is classified as a commercial venture. The increasing use of the private sector in the UK to finance and deliver services means that it could be argued that many are supplied "on a commercial basis" or "in competition". As the government and local government increases the use of the private sector, more public services could fall under GATS.

Regulation

The preamble to GATS enshrines the right of governments to regulate, but this is not legally enforceable. The DTI consultation says that GATS needs to balance government objectives to regulate for the benefit of the public with the need to limit barriers to trade. It is unclear, however, exactly what the implications of this statement are.

The existing market access and national treatment rules leave members open to challenge over domestic regulation, but the current negotiations will further refine Article 6.4 by establishing the 'necessity test'.

The necessity test would place constraints on governments on the use of what the WTO claims are “*unnecessary barriers to trade*” or “*more burdensome than necessary*”. Governments would have to prove regulations were ‘*necessary*’ to achieve ‘a legitimate objective’, and show that there is no other measure available to achieve the same objective that is ‘*less burdensome*’ for companies.

Regulations affecting all service sectors covered by GATS are subject to the WTO disputes panel, and will be judged on the grounds of whether they constitute a barrier to trade. The LGIU, TEN and the DHN are concerned that the criteria will be decided by the WTO and that social and environmental considerations will be of less or of no importance when the decisions are made.

GATS rules will mean that there will be legally binding obligations on governments to weigh whether a regulation is the least restrictive to trade. Governments would bear the burden of proof in demonstrating that any of their laws and regulations are “not more burdensome than necessary”. There would be an inevitable move towards increased deregulation and greater uncertainty at national and local level about the status of existing and proposed regulation.

The tests refer to ‘measures’ and can therefore cover more than regulations. There is no clarity about what ‘measures’ would be an ‘unnecessary barrier’. It is conceivable that, for example, public health policies relating to smoking could be challenged.

Subsidies

Government subsidies, including subsidies, loans and grants given by local government, are covered by the existing agreement, as they are “*measures, that must conform to the most favoured nation and national treatment rules*”. The consultation asks “*what kind of domestic subsidies might be considered trade distortive and why?*” and “*what exclusions from any GATS disciplines might be necessary or desirable?*” We strongly believe that given the uncertainty about the implications of the existing rules for subsidies, the development of new rules could put government subsidy further at risk. This could have serious consequences for the ability of local authorities to influence social and economic conditions at a local level.

Regulatory Services: Distribution Services

GATS could severely lessen the ability of local authorities to regulate on behalf of their communities, in relation to services such as planning, licensing, environmental health and public protection.

Planning could be affected by the government’s prior commitments in retail services, and by the ‘de facto’ discrimination rule. The WTO Secretariat has stated that restrictions on companies setting up stores remains a key barrier to trade in distribution services. It notes that many regulations affecting the distribution sector are implemented by local authorities, “*who have a powerful influence on the authorisation of new stores and the conditions of operation*”. The WDM believes that this singling out of local authority regulations “*is particularly worrying for the UK*”.

The UK, unlike many other European countries, has not maintained any specific limitations on foreign companies establishing stores here. It has to be asked why the other EU members felt the need to protect their ability to regulate in this sector. The LGIU is very concerned that the UK has not maintained specific limitations in this area.

The DTI consultation says that although there is already a high degree of liberalisation within the retail sector of distribution services, the UK has maintained town-planning regulations relating for example to location of retail sites, “*which we consider to be non-discriminatory domestic regulatory*

measures falling within Article 6 of GATS". Given the uncertainties over interpreting GATS rules, this statement seems rather complacent. The WTO's agenda is clear: they want to remove what they consider to be unnecessary domestic regulations, and they ask member countries to consider whether "*the existing regulations are the most efficient means of achieving the relevant objectives*". The LGIU, TEN and the DHN are very worried that, over time, local authorities will be forced to drop planning objections to developments such as out-of-town shopping, because of the pressure and challenges from foreign multinationals wanting to increase market access.

Education Services

The consultation stresses that GATS in the school sector only covers private education. The document again stresses that GATS is not intended to cover public services and that the government "*will not make commitments that could call into question the funding and regulation of the state education system*".

The government claims, therefore, that the potential impact of further liberalisation of educational services in the UK is limited. Given the increasing role of the private sector in the delivery and financing of state education in the UK, there must be some doubt as to this claim. Further and higher education is clearly vulnerable to being fully within the scope of GATS. The private sector is providing services throughout the state system; private capital is funding new schools through PFI and city academies; and governors can now set up companies. Where LEA services, such as school improvement and recruitment, have been taken over by the private sector, they seem to fall under GATS.

There is clearly uncertainty about whether state schooling could be open to challenge under GATS and about the possible impact of school companies.

Some of our members have expressed concerns about the implications for Voluntary and Aided Church Schools, where the buildings are mostly privately provided and with running expenses from LEAs. They believe that GATS could raise difficult issues between communities, with GATS opening up the door to exclusive schools, (existing schools are not generally exclusive to one religion). If these schools are affected by GATS, it could be hard to establish a line between mainstream religions and sects that could be highly controversial.

In response to the question, we believe that all areas of public education that could be viewed as supplied through competition with the private sector should be ring-fenced from GATS commitments, to protect the regulation of, and subsidies to, state education at all levels.

Health and Social Services

The UK has made commitments in convalescent (intermediate) care and rest (residential) homes, and in hospital services. This has to be seen in the context of the increased use of the private sector in the delivery of social care, including the extensive use of PFI and PPPs. As with education, the critical issue is whether public services in this sector are exempt or not. The increasing role of the private sector in social care, with the outsourcing of care homes and home care, and the NHS, with PFI hospitals, the concordat with the private sector, and potentially, the establishment of NHS foundation trusts, further blurs the line between the public and private sectors.

The application of Article 1.3 to health services was debated at the WTO's Council for Trade in Services in November 1999. At this meeting, members decided that the exception provided for in the Article needed to be "*interpreted narrow*" and did not cover the whole health sector. They also noted "*increasing possibilities for private participation, whether domestic or foreign, in various health and social-care related activity*". This is particularly significant given that dispute panels to settle differences in interpretation when WTO challenges are brought can use WTO Council minutes.

The paper says very little about the potential impact of GATS on health and social services. The government need to be much more analytical and specific about the possible effects of GATS in this area.

Up to the present, GATS has not had a major liberalisation effect on services, except on telecommunications and financial services. Potentially, however, it could threaten the delivery and regulation of public services.

The LGIU, TEN and the DHN have serious concerns about the possible impact on accessibility and quality of services and universal access; about the lack of transparency and undermining of democracy of the negotiating process and the agreement itself; and on the virtual irreversibility of the commitments, where the

rules for modification or withdrawal are rigid. The uncertainty over the interpretation of GATS could result in local authorities being unduly cautious about regulatory services.

The LGIU, TEN and DHN believe that the UK government should:

- be pressing for an explicit reference to the primacy of social and environmental concerns over the principle of free trade – that is, that there should be revision of the necessity test
- ensure the clarification of Article 1.3, to make it clear that it unambiguously allows the exclusion of public services
- press for a much more open and transparent process, where there is proper public and parliamentary scrutiny of the negotiations, and consultation with local government and civic society, in all WTO member states
- provide much greater independent assessment of the potential implications of both existing and proposed new rules on public services and the right to regulate for local communities
- oppose any proposals that could reduce the right of local authorities to regulate services.

The extension of GATS raises major issues about the powers and freedom of local authorities: it could have a serious impact on a range of services, such as education, health and social services, on regulatory and planning services, and on procurement.

GATS could affect the implementation of the well-being power, if it limits the powers of authorities to regulate to promote the local economy and achieve social and environmental objectives through regulation. The use of the well-being power, for example, to promote local industry, could be open to challenge. Even where a local authority allows all companies access, they could be challenged, if a foreign supplier believed that any conditions imposed were disadvantaging foreign companies, such as a condition that a construction company had to train local staff.

Given these concerns that are shared across local government the one paragraph in the consultation document referring specifically to local government (6.31) is inadequate. Prior consultation over GATS with local government has been almost non-existent. We trust that the views of local government organisations such as the LGIU and the LGA, and those of individual local authorities, will be taken seriously by the DTI and given equal weight with those from other interested groups in the private and voluntary sectors.

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