

# Services Liberalisation in the WTO: Implications for Public Services in Europe

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## **Abstract:**

Liberalisation of public services cannot only be implemented via autonomous legislative action by nation states, but also as a consequence of obligations arising from supra- or international organisations. In this paper, we will try to analyse how the process of the commodification of services at the level of the WTO, i.e. via the General Agreement on Trade in Services (GATS), interacts with the politics of trade and services liberalisation in the European Union. Thus, we will try to highlight the specific role of services negotiations in the WTO for the political dynamics of liberalising public services in the EU. Our conclusions highlight three specific functions of the GATS agreement: firstly it serves as an institutional mechanism to lock-in liberalisations achieved at a national or European level, secondly it exercises a disciplinary effect on national regulation, and thirdly, it provides an additional platform for the application of forum-shifting in the politics of international trade.

**Keywords:** Liberalisation, public services, World Trade Organisation (WTO), European Union

## **Introduction**

One of the most significant characteristics of the neoliberal transformation of the last three decades has been the commodification of public goods and services. The latter has taken a variety of concrete forms, *inter alia* that of liberalisation or of privatisation. The former term describes a process of marketisation of a formerly publicly provided good or service, i.e. the public monopoly provider loses its monopoly and has to face competition from private for-profit companies. The latter term, privatisation, means the sale of formerly public companies to private owners. This can entail the establishment of a market and competition, but does not necessarily imply so. However, in many cases, liberalisation and privatisation go hand in hand. The establishment of a market for a public services has frequently preceded the sale of public providers to private investors. Liberalisation can be implemented via diverse institutional channels. Either through autonomous legislative action by a certain state, a mechanism that was applied by e.g. conservative governments in the USA or the UK in the 1980s. Or under the influence or pressure from supra- or international organisations. The IMF and the World Bank have been very active in promoting liberalisation and privatisation as components of their structural assistance to many developing countries. Likewise, the European Union has executed sectoral liberalisation programmes, in particular for public utilities (telecoms, energy, transport, postal services), as part of the implementation of the Single Market Project. A third mechanism has gained in importance during the last two decades: international trade. That is – to some extent – a systemic consequence of the first two channels. By way of establishing markets for the provision of public services, the logic of private enterprise - i.e. profit-maximization, accumulation of capital – has become the major driving force for the supply of these services. Private, for-profit companies have developed which seek to expand their potential market beyond narrow national confines. These so-called multi-utilities or utility-multinationals are actively promoting the dismantling of existing public monopolies or state-provision of public services on a transnational scale. Trade in services, with the

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exception of transport and tourism an economic activity that has traditionally been considered to be a domain of domestic exchange, has thus become a major issue in international economic policy. Needless to say that the major players in the international provision of public services almost exclusively come from industrialised economies, in particular from the USA and the European Union. These companies have pressured their governments to utilize trade policy for the expansion of their business opportunities already in the early 1980s. The negotiations of a General Agreement on Trade in Services (GATS) during the Uruguay Round of the GATT and its conclusion as part of the Marrakesh Agreement to establish the World Trade Organisation in 1994 mark a turning point in the international political economy of trade. Services are considered to be an integral element of a global agenda for the establishment of a liberal economic order, which is to be executed via their liberalisation, i.e. through the deregulation of any trade-impeding and/or discriminatory national barriers.

In this paper we will try to analyze how the process of the commodification of services at the international level interacts with the politics of trade and services liberalisation in the European Union. Thus, we will try to highlight the specific role of the GATS and of services negotiations in the framework of the WTO for the political dynamics that has arisen around the question of the future of public services - or in EU parlance *Services of General Economic Interest* - in the EU. We will proceed as follows: Firstly, we will outline the basic institutional characteristics and politico-economic rationale of trade policy in the EU. Then the basic provisions of the GATS as they relate to public services and the current state of affairs of the Doha-Round negotiations on services will be reported. In the subsequent chapters we shall analyze the particular role of GATS in the (de-)regulation of services in the EU and shall illustrate our arguments by two case studies, (i) on postal services and (ii) on water liberalisation. Finally, we will draw some conclusions on the particular nature of services liberalisation under the GATS framework and its implications for the politics of public services in the EU.

## **EU trade policy and public services – institutional aspects**

Trade has always been an important field of European Union politics. Indeed, it can be listed among the earliest fields of competence of the European Communities (Smith 1999). Though not the core of the European integration process itself, from an economic point of view, much of what was materializing in terms of economic integration - in particular the creation of the Single Market – was motivated by the idea that the removal of barriers to trade through the creation of a common market would be beneficial to welfare and growth. This is in essence the conceptual basis upon which external trade politics in general is founded. Not surprisingly then, the common commercial policy of the EU was seen as an outward-oriented complement to the central economic dimension of European integration. With the implementation of the European Single Market, the liberalisation of network industries and the evolution of big European corporations with an explicitly international outreach in the 1990s, both the internal structure of economic and political interests and the distribution of competences between the Member States and the European Union, upon which external trade policy rests, have however undergone a profound transformation. As a consequence the economic significance of trade policy has increased, and the political importance attached to trade policy by major political actors has expanded considerably.

The institutional architecture of EU trade policy is characterized by a peculiar and rather complex net of competences and relations between the principal political organisations of the EU (EU Commission, Council, European Parliament), the Member States and business as well as civil society organisations. Trade policy was already established as a competence of the European Communities in the Treaty of Rome in 1957. Together with internal market, competition and agriculture policies, trade policy formed the core of the economic dimension of European integration right from its start. However, it was restricted to include basically trade in goods. Although over the decades there have been efforts to extend the sectoral coverage to agriculture and services, the distribution of competences between the Community and the Member States remained almost unchanged till the 1990s. Only with the Treaty of Amsterdam came along minor changes. To Art 113, which became renumbered as Art 133, a paragraph (5) was amended which allowed for future expansion of exclusive competence to the new issues of services and intellectual property through unanimous vote, preserving Member States the right to veto any shifts in competences.

A new though only partially successful initiative to shift the distribution of competences in favour of the Union happened with the Treaty of Nice. The new issues of services and intellectual property rights became exclusive competences of the Union, except for certain exceptions, where the rule of unanimous decision and a mixed competence continued to apply. These included matters where the adoption of internal rules requires unanimity and the Community has not yet exercised the powers conferred upon it. Similar applies to certain essential services (education, culture, health & social services). The latter in effect secured Member States' parliaments a stake in trade politics, since national ratification of trade treaties was still required. With the Treaty of Lisbon (signed by the European Council in December 2007) the field of Foreign Direct Investment was designated to become an element of the common commercial policy, while competences with regard to services and intellectual property rights have been further shifted to the Community level. Though as a consequence of pressure in particular from France, the rule of unanimity has been upheld with some qualifications, however, for sensitive services sectors, the area of services (as well as intellectual property rights) generally falls within the exclusive competence of the Union. Any remaining competences of national parliaments in trade politics will thus be eliminated, though on the other hand the competences of the European Parliament will be expanded with regard to the implementation of the common commercial policy.

Nonetheless, since it is the European Commission that has the right to represent the community in international trade negotiations, the initiative, agenda-setting and execution of EU trade policy has increasingly resided with the former for the last two decades. Member States dispose over important decision-making powers via the Council, with the 133-Committee serving as the central institutional forum for day-to-day policy-making. The influence of national parliaments has been gradually eroding, while the European Parliament has gained in importance most recently. It remains to be seen, however, to which extent it will influence trade matters after the entry into force of the Treaty of Lisbon in 2009.

As a consequence, the Commission has taken a pro-active role in pursuing trade liberalisation in services both in the WTO framework and in bilateral trade policy. Since the late 1990s it has actively sought to include services liberalisation in

bilateral trade negotiations, notably in the trade agreements with Mexico, Chile, the Gulf-Cooperation Council, Mercosur, the Mediterranean countries, and most recently with the ACP countries and Korea.

### **Public services and the neomercantilist logic of EU trade policy**

As is codified in Article 131 of the Treaty of the European Communities, it seems to be generally accepted among EU trade policy makers that liberal trade theory and the economic benefits it promises should form the legitimate conceptual framework for EU trade politics. Indeed, it would be very hard to find an EU trade-policy maker to express himself openly in favour of protectionism. Most of all, the EU Commissioners in charge of external trade to date have all been very outspoken about their liberal trade convictions. Otherwise, one might suppose, they would not be considered as qualified for the position.

The strategic approach taken in practical trade policy work by EU trade officials seems however to be inspired to a greater extent by another important theoretical tradition in politico-economic thinking, i.e. Mercantilism (for an introduction see Schumpeter 1954, ch.7; the classic study is Heckscher 1934). This doctrine prescribes as a general rule for policy the maximization of the proceeds from external trade, which entails fostering exports while restricting imports.

Under this doctrine, whether we refer to it historically or in order to characterize present-day trade policy, the state is seen as the principal agent for safeguarding the international interests of a national economy and its prime stake holders. The intervention of the state in external trade policies is motivated by a variety of reasons, both political and economic. While the absolutist state first and foremost wanted to maximize the inflow of gold and currency, modern capitalist states aim at fostering business opportunities for domestic enterprises abroad, while at the same token they shield particular businesses from economic pressure that might arise from international competition. Apart from the interests of capital, states, in particular democratically legitimized ones have to accommodate other interests and so called non-trade concerns with their trade policy objectives. These relate to geo-strategic and defense interests, but also to social, environmental, or developmental motivations as expressed by political agents or civil society. Thus, trade policy makers need to take into account a variety of aspects in their strategies. It is thus hardly surprising that modern capitalist states have extensively used a variety of economic instruments in trade politics in order to foster their specific ends. Indeed, it could be argued that quite paradoxically the importance of trade politics increased with the establishment and consolidation of a world market. States have thus always been active agents. What has changed were the particular forms and degrees of freedom, states had at their disposal when applying instruments of trade policy. While in the second half of 20th century, the application of classical or primary instruments of trade, like tariffs, quotas, or export subsidies became increasingly circumscribed as a consequence of the multilateral rules of GATT and processes of regional integration, states shifted to using a wide array of secondary economic policies to foster their external commercial interests. These include virtually every field of economic policy, in particular exchange rate policy, fiscal policy, industrial and technology policy, but increasingly also labour market and wage policy, education policy and even health policy (cf. Jones 1986). Indeed, during the era of neoliberal globalization, i.e. since the late 1970s, the majority of industrialized and developing

states have re-configured the ensemble of their economic policy instruments so as to foster external competitiveness. As a consequence of new currents in mainstream economic thinking, in particular endogenous growth theory, also EU policy makers have started to stress the importance of aligning the mentioned secondary economic policy fields to the presumptive necessities of the much acclaimed information and knowledge society. This becomes particularly clear with regard to the EU's Lisbon Strategy, which was adopted by the Heads of States and Governments in March 2000 at the European Council in Lisbon. The Lisbon Strategy (or Agenda) strives to transform the European Union into the most competitive and dynamic economic region by 2010 through a re-alignment of the totality of economic policies as described above. Thus societies and their many institutions like universities, schools, hospitals, kindergartens, their infrastructure and even the state apparatus itself are seen as an important source of an economy's competitiveness. Curiously, this strategy resembles many notions that were already advocated by economic thinkers of the late 18th/early 19th century like Alexander Hamilton (1791) and Friedrich List (1844).

In practical EU-trade policy this doctrine has been translated into the concept of offensive versus defensive interests. The overall objective then consists in achieving through trade negotiations a final balance that is considered to be generally advantageous by the main political actors in the EU. Offensive interests include those sectors where European companies are actively seeking improved market access and thus contribute towards increasing trade surpluses. Here the exports of certain agricultural products, most manufactured goods, and most services sectors are usually subsumed. Similarly the EU is actively pursuing a regulatory agenda that aims at firstly deregulating discriminatory national regimes relating to services, investment, government procurement, and intellectual property rights. Secondly, the EU pushes for the establishment of harmonized multilateral regulatory arrangements in these fields that secure non-discriminatory treatment for EU companies. Particularly in bilateral trade negotiations these objectives are intended to provide better market access and a reduction of regulatory requirements for EU companies.

Defensive interests, on the other hand, include those sectors, where domestic economic interests call for protection against competition from third countries – most notably in agriculture, or where certain economic activities are supplied on a not-for-profit basis, i.e. a range of public services like education, health and social services, etc.. Notwithstanding the aforementioned examples, the question if a certain economic activity is qualified as an offensive or defensive interest is not pre-given, but often subject to heated political debate. In these debates, the particular interests of the political actors, i.e. the Commission, Member States, Parliament, business and civil society organisations may diverge and result in sometimes contradictory outcomes. For instance, economic sectors which the Commission, a majority of Member States and business organisations consider to be of offensive interest, might as a result of political debate become later re-classified as a defensive interest. If neither side is able to push through its position entirely, a compromise might be struck which tries to advance certain offensive interests while safeguarding particular interests for protection. A case in point are public services, where some actors stress the export potential of, for instance, EU water, postal, or telecom service providers, while others stress the importance of these sectors for social welfare in the EU and argue against any (further) liberalisation moves. Thus, if neither side is able to fully push through its position, a seemingly schizophrenic outcome might be that the EU is

requesting from other countries to open up the respective sectors, while the EU is refusing to reciprocate in its own territory, with reference to some normative concerns – in WTO parlance “legitimate policy objectives”. A case in point is the water sector (see chapter below for details). In other words, while on the one hand the refusal to apply liberal economic logic is justified on political or ethical grounds, on the other hand it is demanded from the other party to subsume to the same economic logic, oneself has refused to apply.

## **Public services in the GATS – basic provisions and recent developments**

The international level obtained a new quality for public services at the latest with the GATT Uruguay Round (1986-1994). The agreements concluded during the Uruguay Round also comprised one on trade in services (General Agreement on Trade in Services, GATS). The aim of this agreement was to take into account the rapidly rising importance of international trade in services from a regulatory point of view. It came about not least at the instigation of the US service industry. Thus, it essentially aims at making the many national specifics of services more transparent, thereby increasing their compatibility at an international scale. Services, which have traditionally been oriented towards the domestic market, could only be opened up to international trade after international standards had been developed with regard to their regulation and incorporated into the legal systems of the individual member states of the GATS.

In co-operation with governments, transnational groups of companies (e.g. the US Roundtable of Industrialists, the International Chamber of Commerce) have been extremely committed since the 1980s to turning the WTO from a pure trade organisation into the most important international regulatory body of the entire non-financial economy. In co-operation with other international organisations such as the OECD, the WTO was designated to exert a strong and disciplining influence on national economic policies. This intention is borne out by the additional agreements that were concluded during the Uruguay Round. These include for instance investment protection (TRIMs agreement), and the protection of intellectual property rights (TRIPs agreement). With the new round of negotiations (Doha Round) heralded in November 2001 in Qatar, issues such as competition policy, investment and public procurement were also foreseen to become the subject of negotiations within the WTO.<sup>1</sup> The latter for instance is not just about creating greater transparency and comparability of nation state regulations. It has more to do with defining and enforcing multilateral standards that open up national markets for public tenders, thereby making it easier to integrate these markets on an international level.

Even if the GATS refers officially only to private sector services, the demarcation between private and publicly rendered services is unclear. Art I.3 GATS exempts “services in the exercise of governmental authority” from the GATS. However, this is meant to include only such services that are offered neither “on a commercial basis, nor in competition with one or more service suppliers”. The GATS explicates this definition only in the Annex on Financial Services. The Annex cites the activities of Central Banks and monetary supervisory bodies, and also statutory systems of social security and public retirement plans as examples for such services. Officially, it is up to each Member State to decide which services are classified as public and private. However, the wording in Art I.3 (c) suggests that it is ultimately market logic that

determines the demarcation line between public and private. If, for example, certain services are offered in a country by the public as well as the private sector, and this is the case in many EU countries e.g. in health and social services or the higher education system, there may well emerge demarcation problems in the future. Private foreign providers might feel discriminated against because of, for instance, the exclusive award of public subsidies to national providers. Disputes before the WTO dispute settlement mechanism might then be the consequence. In the event that a WTO panel found an infringement of WTO obligations, the defendant state would have to modify its laws accordingly. Otherwise sanctions could be imposed on its economy. If national policy makers wish to avoid such a situation in the future, basically two options are available: firstly, a concise definition of the content and scope of the term 'public services' in the GATS in the form of a general exemption clause. However, it is highly uncertain whether such an amendment to the agreement would be accepted by the 150 WTO members. Secondly, countries wishing to exclude public services from any liberalisation would have to exempt such services in their lists of specific commitments either via a horizontal exemption clause or on a sector by sector basis.

In the Uruguay Round of 1986-94, public services had still played a subordinated role in the GATS negotiations – it was first of all about opening up commercial service sectors. Only with the negotiations on financial services and telecommunication services in 1996-97 did public services gain in importance in the GATS context. Most of the privatisations of public services carried out until then were motivated by the World Bank or the IMF in the case of the developing world and to supranational (European Union) and national initiatives in the case of the industrialised countries. However, it emerged with the Doha Round heralded in November 2001 that one of the main topics of the current GATS negotiations would be the liberalisation of public services. The offensive interests of the EU referred primarily to water supply, telecoms, postal and courier services, transport and energy services, while those of the US and other industrialized countries were focussed on the areas of education, health as well as cultural and audiovisual services. In the 1990s, there was already significant autonomous liberalisation in parts of the areas cited. Thus, an interest on the part of the countries affected emerged for each of the other countries to also deregulate these sectors. This should be achieved via the GATS. The complementarities of liberalisation already carried out between the EU and the US, which is also reflected in the most recent requests, therefore implied a fairly extensive liberalisation round. However, the explosive nature of the current GATS negotiations has developed against the background of the liberalisation policy the European Commission has implemented since the 1990s first in public utilities and more recently also in health and social services. To wit, some of the liberalisation proposals of the Commission have encountered vehement resistance from regions, local authorities and cities. This goes in particular for local public transport and the water sector. Given this context, it might have been tempting for pro-liberalisation forces in the EU to use the GATS negotiations as a roundabout way to overcome resistance to the liberalisation of essential public services in Europe. We shall illustrate this assumption in our discussion of EU water liberalisation policies below.

From the viewpoint of the advocates of liberalisation, liberalisation obligations entered into within the framework of the GATS actually have a decisive advantage compared with liberalisation carried out by the nation state: that of the contractual obligation under international law. Unlike in national law, the removal of liberalisation

commitments after their formal establishment in the GATS on the basis of Art. XXI GATS is possibly associated with high costs, since other, potentially negatively affected WTO members have a legal entitlement to the compensation of the economic damage inflicted upon them. The withdrawal or modification of GATS commitments might thus become unfeasible for countries, in particular for economically vulnerable, developing countries. The GATS hence provides a legal mechanism for the “lock-in” of liberalisation, a policy which is definitely in the interest of the apologists of neoliberalism. From a democratic viewpoint, on the other hand this means a serious deficit, with the scope for autonomous policy space being severely constrained in the future.

### **The GATS as an evolving regulatory regime for services and the erosion of existing international regulatory frameworks**

Interestingly, most public debates depict GATS as a central vehicle for the breaking up of domestic services markets and a major tool for pushing-through market liberalisation in services industry. While this is certainly not off the point, the particular mechanisms which are deployed to establish a more integrated services market internationally are not sufficiently differentiated in most public debates. While market access negotiations receive the thrust of public attention, arguably the so-called “rules negotiations” are – at least in the long run – of the same, if not of a higher importance for the effective liberalisation of services. The former term describes a wide array of domestic regulatory instruments which include *inter alia* subsidies, government procurement, safeguard clauses, the former three issues being at the centre of the current negotiations, but extend well into all sorts of qualification requirements, licensing procedures, technical standards etc. As opposed to trade in goods, where tariff-barriers have for a long time be considered the main impediment to trade, in services the existing diversity of the regulatory framework for a particular service sector between countries is commonly considered the major barrier to increasing international trade in that sector. For, companies which want to supply a service in another country will have to bear the cost of complying with the rules that govern the provision of those services in the host country. These rules may vary widely between countries, but in addition they might not be even uniform within a particular country, given that many countries have federal systems, which delegate to sub-national political entities (federal states, provinces, *Länder*, municipalities) certain competences. Thus, foreign service suppliers may face distinct legal norms pertaining to, say, zoning laws, construction codes, shop-opening hours etc. even within a single country. Of course, these particular legal architectures are the outcome of specific historical and political developments, and enshrine to a certain extent commonly held values and norms of a society. Nevertheless, from the perspective of liberal trade theory and their proponents they are in principle seen as barriers to trade.

Notwithstanding the existing diversity of legal norms between countries, efforts to standardize regulatory norms on an international scale have long preceded the current debate on globalization. Thus, many regulatory bodies and organisations have been established, partly as international associations of professional bodies, partly as organisations under the auspices of the United Nations, partly as independent international organisations, the aim of which was to develop regulatory frameworks for particular economic activities at international level. In certain sectors these efforts went further than in others, depending upon economic necessities and

political will. Nonetheless, in certain sectors, particularly in network services like postal and telecommunication services, well-established organisations have long been engaged in setting up international norms to facilitate the exchange of information or products across borders. However, from the perspective of liberal trade theory, this institutional framework had perhaps two serious shortcomings: firstly, it did not significantly reduce regulatory heterogeneity among countries, since typically the international norms would only establish the interfaces between distinct national regulatory systems; and secondly, these regulatory frameworks and the associated international organisations, respectively, would not dispose of effective means to enforce the implementation of internationally agreed standards.

Thus, very much like in the case of intellectual property rights, the establishment of the GATS agreement for the liberalisation of services' trade in the WTO was from its very beginnings an explicit project for the re-regulation of service activities at international level (cf. the seminal study of Krajewski 2003). Hence, in contrast to the prevailing international framework, the GATS does not only define the interfaces between regulatory systems, but aims at least in the long-term at institutional isomorphism, the over-arching template being what was termed "pro-competitive regulation" by critical commentators (Grieshaber-Otto/Sinclair 2004). Thus the GATS does include in its framework agreement provisions on major regulatory issues such as transparency, domestic regulation (qualification requirements, licensing, technical standards), subsidies, government procurement, mutual recognition of professional qualifications etc., the regulatory parameters of which are generally inscribed in liberal trade theory. For instance, all of these are as a matter of principle seen as an impediment to trade, as trade-distorting, as burdens to economic activity etc, which therefore should be subjected to disciplines, the latter either aiming to abolish them or at least securing that they not be more burdensome than necessary. Thus the framework agreement, though not outrightly abolishing most of these measures, defines the normative framework of a long-term working agenda to be executed within the WTO. Furthermore, in the context of sectoral market access negotiations, the harmonization of rules of the particular sector under scrutiny will typically be negotiated in parallel. This was the case with financial services, where in addition to sectoral liberalisation commitments contained in Member States' lists of specific commitments, annexes and protocols to the GATS negotiated after the conclusion of the Uruguay Round in 1996/97 contain a host of regulatory standards. Perhaps even more evident became this parallelism of market access and rules negotiations in the negotiations on basic telecommunication services, also concluded after the end of the Uruguay Round in 1997. Here again, the common regulatory principles were in detail laid down in an Annex and a so-called Reference Paper on Telecommunication Services. Thus, institutional dynamics with regard to regulation have been gradually shifted to the WTO at the detriment of existing institutional fora like the International Telecommunication Union.

### **The introduction of pro-competitive regulation – the case of postal services**

In the current GATS 2000 negotiations, regulatory rivalry appeared in other sectors as well. One sector of particular export interest to the EU are postal and courier services. Here as a consequence of the process of liberalizing postal services in the EU, which was started in the second half of the 1990s and is projected to be fully implemented by 2009, big corporations with international outreach have developed, the most important of these being *Deutsche Post AG*. These companies have been pressing the Commission and the Member States to support their expansion

strategies via the GATS negotiations. To this effect the Commission has followed three avenues: firstly, it has requested comprehensive market access for postal services to its WTO partner in the GATS negotiations since 2000; secondly, it has done so on the basis of a new classification scheme for postal and courier services, which was tailored to the interests of European postal services providers; and thirdly, together with like-minded WTO Members it has developed a new reference paper for postal services (WTO Document TN/S/W/26) in an attempt to establish a common regulatory framework for the sector. The reference paper contains standards for licensing, universal service obligations, independent regulatory authorities, and transparency, which basically mimic the prevailing regulatory framework in the liberalized postal services sector in the EU. By actively promoting a regulatory framework for postal and courier services, the scope and importance of the regulatory work conducted in the Universal Postal Union (UPU) has been significantly reduced (cf. Grieshaber-Otto/Sinclair 2004). UPU, like the ITU, was already founded in the second half of the 19<sup>th</sup> century (1874). After World War II it became a special agency of the UN. UPU has traditionally been in charge of setting the rules for international mail exchange. In 1999 a report to the UPU Convention written by the Secretary-General highlighted possible conflicts between GATS and a number of UPU regulations, concerning in particular remailing, terminal dues, and the issue of postage stamps. Though these issues have not been resolved in detail, it is clear that pressure is increasing to align UPU regulations to binding WTO and GATS principles. Thus, the EU Reference Paper on Postal and Courier Services (chapter III.D.) questions the conformity of the UPU terminal dues system with GATS and notably its Most-Favoured Nation obligation.<sup>2</sup> The paper concludes by calling upon WTO Members to support ongoing efforts within the UPU to establish a more cost-oriented terminal dues system. Thus a process typical for forum-shifting will possibly be reinforced that drawing upon two strategies described by Drahos & Braithwaite (2000: 564f.) could be characterized as pursuing the same agenda in more than one organisation while threatening the organisation less advantageous to one's objectives with abandonment. For, as Grieshaber-Otto/Sinclair (2004) assert, since the 1980s pressure by transnational courier operators and other lobbying groups upon UPU to reform its regulatory system and assist in converting postal services provision into a "competitive, customer-oriented business"<sup>3</sup> has continually increased. In an effort to maintain its role and position, the organisation itself started in the early 1990s already to re-orient its function and agenda by establishing a Postal Development Action Group. The work programme for the period 2004-2008 explicitly stresses the need for "public Posts to transform themselves into viable, active businesses able to compete in the communications market and provide the universal postal services to the entire population throughout the territory".<sup>4</sup> Thus, although reform activities in UPU well pre-date the entry into force of the GATS, and should thus be seen as related to the emergence of sectoral liberalisation/privatisation trends that were initiated either at national level or through other international organisations, in particular the World Bank and the IMF, it seems feasible to conclude that the coming into existence of GATS in 1994 and subsequent liberalisation work on postal services within GATS were a decisive impetus in dynamizing the institutionalization of "pro-competitive regulation" also in the activities of UPU. By drafting a reference paper and pushing other WTO Members to adopt it in the current round of GATS negotiations, the EU is actively advancing this particular strategy of forum shifting for the sake of its big postal corporations.

### **The GATS 2000 negotiations and EU water liberalisation policies**

The service sector has in recent trade negotiations been one, if not the preeminent issue for European Union trade politics. This applies both to the multilateral trade negotiations at WTO level and to bilateral trade policies. With the start of the GATS 2000 negotiations in January 2000, the EU has been the main thriving force (*démandeur* in WTO parlance) of further liberalisation of trade in services. During the first phase of the GATS negotiations which culminated in the submission of liberalisation requests in June 2002, the EC has been intensively engaged in submitting negotiating proposals both for the market access pillar of the GATS negotiations and the “rules-negotiations”, the latter being concerned with extending the regulatory framework of the GATS to disciplines for domestic regulation, transparency, subsidies, government procurement and safeguard clauses. With regard to the internal preparatory process in the EU, the EC extensively consulted with services industries in order to gain a deeper understanding of major demands of business in particular service sectors (cf. WEED/EED 2005). That refers to most of the major sectors of export interest for large European service companies, but is particularly well-documented for the water industry (Gould 2000). In a series of communications between DG Trade and major European water multinationals, the EC actively engaged the companies to participate in the GATS negotiations and asked for detailed information on the particular problems, demands and wishes of the companies in terms of improved market access in third-countries as well as regulatory obstacles the companies encountered during their business operations abroad. The latter, for instance, explicitly referring to universal service obligations, companies might consider too burdensome.<sup>5</sup> Following the intense contacts with business organisations and Member States, the Commission on June 30<sup>th</sup> 2002 tabled initial requests for market access to 109 WTO Member States. 72 of these contained requests to provide market access for water provision and waste water services for European companies, thus actively promoting the business interests of the French, and to a lesser extent the German and English water multinationals. Interestingly, a number of EU Member States, most notably Germany, were not particularly pleased with these offers, since they rightly feared that these requests would in turn step up pressure to open up the water sector in the EU. Hence, these Member States explicitly stated in the 133 Committee (Services) that they would not accept any offer of the EU on water services. This in turn, was seemingly against the interests of France, which promoted an EU offer on water provision, obviously in the interest of the French water companies, which consider the prevailing system of public water provision in countries like Germany or Austria an obstacle to their business interests. The pressure exercised by the EU on water liberalisation in the framework of the GATS negotiations is particularly interesting since it came at a time, when the liberalisation of the water sector within the European Union had not been accomplished, but became a prominent goal of the Commission in its internal market strategy 2003-2006.<sup>6</sup> Then Internal-Market Commissioner Frits Bolkestein repeatedly declared that the Commission wanted to open public sector water services to competition. Since liberalisation of water traditionally has been – besides pensions, health and social services – a most sensitive political issue, the plans of the Commission met with stiff opposition from towns and municipalities as well as a wide variety of civil society organisations. Against this background of strong resistance within the EU, the GATS negotiations became a second strategic forum for the proponents of water liberalisation (cf Scherrer et al. 2004). If a direct liberalisation in the EU were not to be achieved, the drive to liberalize water provision internationally would arguably increase the medium and long-term prospects of liberalisation also in

the EU. For, a state that aggressively pursues the liberalisation and privatisation of water services on a global scale will sooner or later erode the legitimacy of its case for liberalisation, if he refuses to surrender its own water services to private companies for the sake of a rather dubious “European social model”, as the EU has done in the GATS negotiations. Thus the rationale for pushing water liberalisation in the GATS negotiations was at least to a considerable degree motivated by domestic interests to break up public sector water services also in those EU Member States that had not done so yet. Furthermore, the decision to subjecting water services to the logic of trade negotiations made it a “tradable commodity”, which under specific tactical or strategic constellations could be bargained against some other concession from trading partners. Thus by maintaining the full range of requests on other WTO Member States, while at the same time withholding any market access offers on water services, in such a system the opportunity costs in terms of foregone bargaining concessions from other countries tend to rise. Overtime, this makes it increasingly difficult to maintain opposition to water liberalisation in its own territory.

Nevertheless, for the time being, three major reasons can be identified, which have prevented any commitment from the EU Member States on liberalizing water services since 2003. Firstly, under the terms of the Treaty of Nice, for such a decision unanimity would be required in the Council. Secondly, public protests all over Europe were strongly opposing any liberalisation move. Thirdly, as was to be seen shortly thereafter, requests for reciprocity in water liberalisation from other WTO Members in response to the EU requests were largely absent. This owes to a number of reasons, which include inter alia: a widespread unpopularity of water liberalisation/privatisation in most parts of the world, a negative record of already implemented liberalisation/privatisation of water services, and thirdly the lack of competitive water utility companies outside Europe, since basically all major international players in the water industry have their headquarters in the EU.

Thus, although the Commission had to exclude any offer on water liberalisation from the initial EU offer it submitted to WTO Members on 29 April 2003, it succeeded in stepping up political pressure upon a wide range of mainly developing countries to surrender their water sectors to private companies. Also in the revised requests to WTO Members in January 2005, the EU maintained its requests for improved market access for European water multinationals. It was however clarified that the EU did not aim at dismantling public sector provision or provision through exclusive rights. That meant, in effect, that the EU requested that European water companies be allowed to participate on a non-discriminatory basis in public tendering procedures. Thanks to massive protests from civil society and trade unions, the EU also had to scale down the requests to LDCs. For, these were given the “option” either to open-up water provision or, alternatively, refuse-disposal services. An attempt of a few EU Member States at the initiative of Belgium to withdraw the requests on water liberalisation from the EU list of requests was however not successful, due to the resistance from the Commission, France and other Member States (in particular the UK and the Netherlands).

Besides the multilateral level and its interplay with domestic EU politics, we have also to consider the interplay with bilateral trade negotiations. Being an explicit goal of the EU that bilateral agreements should be by definition so-called “WTO-plus” agreements, the EU as a matter of principle in bilateral negotiations intends to extend the level of liberalisation commitments beyond that already achieved in the WTO, or

in this case, the GATS level of commitments. Liberalisation of water provision came into play, in this respect, in the trade negotiations with Mercosur about the conclusion of an association agreement. These negotiations started in 1999, but were only gaining momentum in 2003 after a phase of stagnation caused in particular by the severe economic crisis in Argentina in 2001/02. The negotiations were planned to be finalized in October 2004. The main interest of Mercosur in the negotiations was directed towards agricultural market access, while the EU wanted further liberalisation in industrial goods, services, investment and government procurement. After the initial EU offer in the GATS negotiations was submitted by the end of April 2003, the Commission intensified its preparatory work in the EU-Mercosur negotiations. In particular it prepared a services offer, which in its first draft did contain a market access commitment for water services. This, of course, completely contradicted the official position of the Commission, in particular of Trade Commissioner Pascal Lamy, who shortly before in the context of heated public debates about the EU's GATS offer had declared that the EU did not intend to open up public services via trade negotiations. Obviously after diverse protests the offer on water services was withdrawn in subsequent drafts of the EC offer on services to Mercosur.

The political project of liberalizing the public provision of water extends however beyond the domain of trade policies. It is well-known that the EU actively promotes the participation of private companies in the water sectors in the transition economies through public-private-partnership-projects funded by the European Investment Bank and the European Bank for Reconstruction and Development, respectively, and other financing facilities (cf. Hall 2006). Furthermore, the EC and the governments of Member States actively intervene on behalf of European water companies when it is considered that their interests are negatively affected by host country governments in- and outside Europe.<sup>7</sup>

## Conclusion

From the previous discussion, we are able to draw a number of conclusions with regard to the specific role the GATS plays within the governance structure of the liberalisation of services:

1. The GATS serves to *lock-in* liberalisation commitments that have been implemented earlier through autonomous liberalisation or through policies enforced by international agencies like the IMF or World Bank. The provisions of the framework agreement (in particular Art XXI) make it potentially very costly to withdraw or modify existing commitments. Thus, a liberal economic order is "constitutionalized" (cf Gill 1998), which severely restricts the degrees of freedom for autonomous political action in the future. Policy makers, not least in the EU, should therefore be particularly cautious when undertaking any GATS commitments with regard to sensitive public services, even if those services were already liberalised autonomously in the EU.
2. Through its built-in mechanism for advancing liberalisation through successive rounds of negotiations, the GATS provides a platform for pursuing a strategy of forum-shifting in international trade policy. Pro-liberalisation political forces like the European Commission have used the GATS-negotiations to increase pressure both on other countries and, arguably, on anti-liberalisation movements within the EU to open up sensitive services sectors. Since, however, the current

Doha round of trade negotiations has been stagnating for the last years, the major driving forces for services trade liberalisation, the US and the EU, have shifted their efforts to bilateral trade negotiations recently. Thus forum-shifting has become a deliberate strategy in trade policy, which poses a particular organisational and political challenge to trade unions and civil society.

3. The GATS does not only provide a mechanism for the - gradual – abolishment of barriers to market access or discriminatory treatment against foreign providers. It has also evolved into an institutional platform for the international convergence and homogenization of regulatory standards. For, the promotion of international trade in services is intrinsically linked to the establishment of a common international framework for the regulation of services. The conceptual blueprint propagated within the GATS for the regulatory homogenization of public services is that of pro-competitive regulation. This will have serious repercussions for the future capacity of governments to achieve public policy goals such as universal access and affordability, regional development, socio-economic cohesion or environmental sustainability via the regulation of the provision of public services. Trade unions and civil society organisations will need to expand their technical expertise in this area of rules negotiations in order to safeguard the public interests of workers and the citizenry at large.

It must not be forgotten, however, that the economic and political forces that shape the agenda of the WTO, and the GATS in particular, are ultimately nation states. Thus, given the distribution of competences with regard to the common commercial policy, both the Member States of the European Union and the European Commission should be equally the focus of critical academic enquiry and of political action by trade unions and other organisations of civil society.

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## **Endnotes:**

<sup>1</sup> The failure to initialize negotiations on the so-called „Singapore Issues“ at the WTO Ministerial Conference in Cancún in 2003, did not, however, stop the intentions of the main *démandeurs* of these negotiations, the EU und the US, to integrate these issues in trade agreements. Their efforts now concentrate on bilateral trade agreements, which both the US and the EU have negotiated with a great number of countries during the last years. Most of those agreements contain chapters on these new issues.

<sup>2</sup> Terminal dues are tariffs received by postal operators for the delivery of international mail. However, the UPU terminal dues regulations grant operators from developing countries differential treatment, thus possibly violating the GATS Art II MFN-obligation.

<sup>3</sup> UPU Resolution C 25/1999, cited in Grieshaber-Otto/Sinclair 2004.

<sup>4</sup> UPU Resolution C 7/2004, Universal Postal Union policy and action on postal reform and development for 2005- 2008, [www.upu.int/postal\\_dev\\_reform/en/pdag/resolution\\_c7-2004\\_en.pdf](http://www.upu.int/postal_dev_reform/en/pdag/resolution_c7-2004_en.pdf), accessed at 04.06.2005;

<sup>5</sup> See Gould (2003) and [www.corporateeurope.org](http://www.corporateeurope.org)

<sup>6</sup> Internal Market Strategy - Priorities 2003-2006 [COM(2003) 238 final]

<sup>7</sup> One of the latest examples being the conflict between water multinational Suéz and the government of Argentina on the results of private water provision in Buenos Aires in 2004-05. The Commission but also individual EU Member States have repeatedly intervened in favour of the French based company and reminded the Argentine authorities to comply with their contractual obligations under GATS and other international treaties, in particular Bilateral Investment Treaties.