

GATS: its local impact in England

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Summary

The services sector of the economy includes activities such as transport, construction, environmental health, retailing and even some government services. It accounts for 25% of all UK exports and further growth of the sector through the development of export markets is considered to be a priority by the Department for Trade and Industry.

The World Trade Organisation (WTO) is an international body dealing with the rules of trade between countries. It is generally considered to be very much in favour of the 'liberalisation' of international trade i.e. the removal of barriers and rules that may control trade and inhibit competition and growth. Almost every country in the world is a member of the WTO and in 1994 they signed the General Agreement on Trade in Services (GATS). As a member of the WTO, the UK is obliged to abide by all of the GATS requirements. These include:

- a) treating all other members (or countries) equally,
- b) giving suppliers (or companies) from other countries access to UK markets in a way which is equal to the access which UK companies have,
- c) and removing any barriers that may exist to getting access to UK markets.

In creating this framework for the international trade in services, GATS seeks to encourage greater transparency in how decisions are made and to control those regulations which might interfere with trade. This could have far reaching implications for the UK, potentially reaching beyond those areas normally associated with international trade. However, a full public debate about the impact of GATS has not been encouraged by the Government. Such a debate may have allowed a full assessment of the pros and cons of GATS. Instead, the Government has preferred to limit the debate to those sectors of the economy that will benefit from the increased access to overseas markets. Where debate has taken place, it has responded to criticism with descriptions of the benefits that GATS will bring to developing countries. Not only are these supposed benefits challenged by many NGOs but it also fails to address the impact of GATS on the UK itself.

Government services and government purchases (or procurement) are supposedly exempted from GATS. The wording of the relevant clauses is, however, vague and in need of further interpretation and clarification. This will ultimately be undertaken through the Dispute Settlement Body of the WTO which will, by definition, tend to favour greater liberalisation with the result that more services are opened to competition with overseas service providers.

Neither the EU or the UK have undertaken any assessment of the impact of GATS at the local level. This report therefore attempts to examine those parts of GATS that relate to five key areas of activity for local government in England and to identify the potential impact.

In essence, the implications for local government are that a) overseas companies may be able to insist that they be given the opportunity to supply services that the Council currently supplies itself and b) the ability of Councils to regulate the activities of service suppliers in their local area is diminished.

The Town and Country Planning System

GATS aims to remove barriers to trade in services. Distribution services include retailing and it is in this context that many statements and requests have been made by WTO members relating to the exercise of planning powers. Members could therefore use GATS to pose a potential threat to the town and country planning system through its statements (or, to use the WTO jargon, obligations and disciplines) on regulations, its requirements for transparency in regulations and its opposition to the use of economic needs tests (i.e. asking the question, ‘do we need this?’). Indications from the statements of various members show that there could be pressure to remove controls on the size and location of stores, remove controls on opening hours, disregard the potential impact on existing stores and codify planning regulations much more strictly (thereby restricting the use of discretion when regulations are locally applied).

Regeneration

‘Regeneration’ covers many disciplines and activities. Increasingly though it is desirable that communities are actively involved in regeneration programmes and the delivery of services. GATS could require overseas suppliers to be allowed to provide local services linked to regeneration without any requirement to work in partnership with local communities. It could impact on programmes seeking to raise the number of local people employed in major construction contracts or by major companies. It could impact upon the consideration of local regeneration agendas when administering planning applications. It could create barriers to market entry for smaller companies and lead to domination of local markets by large international companies. Finally, the making of grants to certain types of organisation (such as those in the social economy e.g. community owned businesses or co-ops), the requirement for the use of local produce and even some regional funding programmes could also be constrained by GATS.

Green Procurement

Procurement (or purchasing) by English and Welsh Councils is worth £25bn per annum and covers everything from the buying of computers through to contracting in housing benefit services. Green procurement is increasingly being acknowledged as a way for local authorities to lead by example by reducing their environmental impact and encouraging environmentally friendly products and services. It is not entirely clear how much GATS will apply to local government procurement, but it is unlikely that it will be completely exempt. In that case, a reliance on price, competence and ability to supply as the only criteria for tender selection is possible together with the adoption of some of the principles of the WTO Agreement on Government Procurement. These include the removal of ‘discriminatory procedures’ such as the promotion of local industry and a preference for locally produced goods. This could prevent the implementation of most of the green procurement agenda.

Environmental Protection

Local government has a considerable role to play in protecting the local environment through the implementation of regulations and the exercise of the powers granted to their environmental health staff. GATS will potentially impact upon this in two ways. Firstly through the commitments on regulations. Each local authority resources its environmental health departments differently and there are therefore differences in the

way that the regulations are monitored and enforced. Consistency of implementation, however, is a central requirement of WTO guidelines on regulations so a member could claim that there has been a breach of this commitment. In addition, the use of flexibility and discretion by officers could breach the regulations commitment. Secondly, competition in the market to provide environmental services could force local authorities to offer overseas companies the opportunity to provide the environmental health function. This could undermine the currently used process of ensuring best value in service delivery.

Transport

The public transport system in the UK is already highly deregulated. However, the use of subsidies to ensure that certain routes are operated could be challenged by a competing mode of transport as a distortion of trade. The use of regulations to ensure health and safety could also be challenged if those regulations were considered to be more burdensome than necessary, probably compared to the regulations applied in other countries. The role of Network Rail in directly providing a range of track services could be challenged as the same service was previously provided by a private sector company. The current system of taxi regulation is already under consideration by the Office of Fair Trading which could seek to remove any rules that restrict the number of operators and other 'burdensome' requirements thus ensuring that the sector complies with GATS commitments. Finally, the increasing use of design build operate contracts for the provision of roads could ultimately be used to pose some interesting challenges in the form of private proposals to build new roads.

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Introduction

Although it was agreed in 1994, the General Agreement on Trade in Services has only attracted noticeable debate in recent years. The Government has been reluctant to encourage a full dialogue about its implications and has normally focused on predicted benefits for developing countries as a result of their increased access to world markets. This has been heavily criticised by many commentators, NGOs and citizens of developing countries and has resulted in most of the debate focusing in this area. There has only been limited analysis and debate however about the impact of GATS in the UK. The Canadian Centre for Policy Alternatives undertook an extensive analysis of the impact of GATS on Canada in 2002 and the World Development Movement issued their analysis of the impact of GATS in every UK service sector. This report seeks to delve more deeply into five key sectors and examine the potential impact that GATS may have on planning, regeneration, green procurement, environmental protection and transport.

England, Wales and Northern Ireland

For the most part, the analysis in this paper, which focuses on England, will also apply to Wales which draws the majority of its legislations and regulation from English law. Administrative arrangements, especially regarding planning, in Northern Ireland are however considerably different. The principles can therefore be taken but further consideration of the local situation is needed before conclusions can be drawn.

Terminology

This paper and most other commentaries on GATS are, by necessity, somewhat speculative. GATS has not been fully implemented or tested and therefore assumptions have to be made in trying to assess its likely implications for local government. This is made especially difficult by the wording of the documentation which lacks clear definitions and, even by legislative standards, is hard to comprehend.

This presents great difficulties for anyone trying to understand and assess the likely impact of GATS on the service sector of any country and means that assessments of the impact of GATS are somewhat speculative. But just as this difficulty exists for observers and commentators, it will also exist for governments and trade negotiators.

Therein lies the problem, for it is not until cases have been through the dispute settlement processes of the WTO that any clarity will be brought to those clauses that have been left wanting by their drafting. By definition the WTO promotes and is in favour of the ongoing liberalisation of international trade so it is therefore likely that interpretations will favour trade concerns over others such as social and environmental considerations.

In this paper the term 'member' is used to describe the countries that are signatories to GATS. Corporations are not members of the WTO or GATS although they may sit in on some discussions.

An Introduction to GATS

What is GATS?

- 1.1. The General Agreement on Trade in Services (GATS) is an international treaty signed in 1994 by 140 governments. Its stated aim is to liberalise the trade in services across the world by establishing a set of international principles and rules. The intention is that this will expand the trade in services in a transparent way. It will also promote the economic growth of WTO members and the development of developing countries¹.

The context

- 1.2. The context for GATS is the protectionist policies of the 1930s, which contributed to the great depression in the developed world and the post war agenda of promoting greater economic integration between countries as a way of reducing the risk of war. As a result, the **General Agreement on Tariffs and Trade (GATT)** was established in 1947 by 23 nations as a way of promoting trade between countries and removing the barriers to trade that may exist.

Barriers to trade

- 1.3. There is a long history of countries using barriers to trade. In order to protect their own industries, countries have traditionally placed quotas or tariffs on imported goods; usually at the port of entry by the customs authorities.
- 1.4. Imported services, however, can be delivered direct to the consumer without going through a port of entry. They are therefore much harder to control. For this reason the barriers tend to be in the form of regulations, licences, working practices and other special controls.
- 1.5. Some countries have been very creative in finding ways of blocking imports. Japan, for example, has a system of exclusive supplier contracts which make it impossible for a non-Japanese company to distribute its products. France, for a time, was able to slow down the importation of electronics products by insisting that every VCR go through a minute inspection; and, this check could only be carried out at a small customs post that was open just a few hours each day².
- 1.6. If world trade is to be developed, or **liberalised**, it is said by its advocates to be important to remove the barriers to trade. Where barriers are retained, GATT preferred the use of tariffs as opposed to quotas.

Principles of the WTO

- 1.7. In 1995, GATT was succeeded by the **World Trade Organisation (WTO)** which is based in Geneva.
- 1.8. As the WTO puts it; “the liberalization of trade in goods has been one of the greatest contributions to economic growth and relief of poverty in mankind’s history. Following the catastrophic experience of the first half of

the 20th century, Governments deliberately turned away from the policies of economic nationalism and protectionism which has helped to produce disaster, and towards economic cooperation based on international law,,³

- 1.9. GATT/WTO law is founded on three fundamental principles—the **most-favoured-nation** (MFN) obligation, the **national treatment** obligation, and the prohibition against **quantitative measures**. MFN and national treatment are “relative,, standards that govern the treatment that must be shown by a member to similar or dissimilar goods or services originating from another member. Quantitative measures are the WTO’s “absolute,, standards and prohibit members from using certain kinds of trade measures to block **market access**⁴.
- 1.10. The **MFN** obligation requires every WTO member to give the goods, services or service providers of any other member treatment no less favourable than they accord to the same goods, services or service providers of any other member. This prevents members from playing favourites. Consequently, the way in which a good or service is treated must be based upon the qualities of the product or service itself, rather than its country of origin or destination⁵.
- 1.11. The **national treatment** obligation extends the MFN obligation to the way in which a member treats foreign goods and services. Consequently, a member must treat imported foreign goods, services and service providers in the same way that it treats its own similar domestic goods, services and service providers⁶. The WTO describes this as “no less favourable,, treatment⁷.
- 1.12. The prohibition against quantitative measures on **market access** generally restricts a member’s ability to impose quotas on imports or exports of goods.
- 1.13. Disputes between WTO members are settled first through consultation and negotiation between the disagreeing members (for which the WTO provides a framework) with the aim of the members settling the dispute themselves. Ultimately however the WTO can play a direct role through the **Dispute Settlement Body** which will establish a panel of experts to consider the case and can ultimately authorise retaliation by the aggrieved member⁸.
- 1.14. GATT was initially concerned with the trade in goods. By the 1980s however there was interest in extending its remit to include the trade in services.
“The lack of a legal framework for international services trade was anomalous and dangerous - anomalous because the potential benefits of services liberalization are at least as great as in the goods sector, and dangerous because there was no legal basis on which to resolve conflicting national interests”⁹.

The importance of the services sector and the trade in services

- 1.15. The **services sector** is considered to include virtually any economic activity that is not agricultural production or manufacturing. Or, to use the World Development Movement’s definition “anything that you can’t drop on your

- foot,,¹⁰. It includes education, banking, legal advice, architectural design, rubbish collection, transport, water, health, the post and telecoms. According to the OECD, the services sector is the fastest growing component in the global economy. World trade in services accounts for nearly one fifth of the total trade in goods and services¹¹.
- 1.16. In the UK in 2001, the services sector accounted for 70% of GDP and employed 77% of the workforce¹².
 - 1.17. After the USA, the UK is the largest exporter of services in the world (25% of all UK exports or £77bn in 2001) and is the fourth largest importer of services. The DTI states that “the UK depends upon open export markets for continued growth in the services sector,,¹³ .
 - 1.18. The WTO considers that countries can not prosper if their services infrastructure is inefficient and expensive as companies will not be competitive if they don't have access to efficient services such as banking, telecoms and transport. The way to improve the efficiency of a country's services, in the WTO's opinion, is to open its market to international competition and trade.¹⁴
 - 1.19. The international framework for the trade in services is being driven by two key sectors. Firstly national governments which are committed to the benefits of globalisation and liberalisation of trade. They believe that the benefits from economic development and the eradication of poverty outweigh any disbenefits. The second sector is the companies which export services¹⁵.
 - 1.20. The role of the USA in the emergence of GATS can not be understated. For some time in the USA there was great concern about the competitive success of the newly industrialised nations in securing market share in manufactured produce from long established US manufacturers. There was, therefore, a strategic need to develop and secure the strength of the US service sector, especially in those fields which were knowledge and technology intensive.
 - 1.21. Meanwhile, the EU and UK believe that there is a huge global market for the export of services. Consequently it is prepared to negotiate trade-offs to allow foreign countries into Europe in return for European countries gaining enhanced access to markets elsewhere. The EC has acknowledged that the resulting agreements are “first and foremost, an instrument for the benefit of business,,¹⁶ .
 - 1.22. Within the UK the Department for Trade and Industry (DTI) maintains that *“Liberalisation of services has led to greater choice of products and cheaper services. For example, having a liberal policy towards the participation by foreign financial services companies in the UK has helped to maintain the UK as one of the three leading financial centres in the world. In utilities such as telecommunications and energy, the UK pioneered privatisation, trends that are now being followed worldwide. In the telecommunications sector, private investment has led to enormous growth in the sector and the emergence of new services”*¹⁷.

The emergence of GATS

- 1.23. In response to the push from key governments and the business sector, the drafting began of the General Agreement on Trade in Services (GATS). It is described by the WTO as the “first and only set of multilateral rules covering international trade in services,¹⁸. It was negotiated between 1987 and 1994 and was even then controversial, as it was taking trade law (which until then had been concerned with the trade in goods) into a new area and was perceived as working in the favour of multinational companies from developing countries that already dominated the services sector.¹⁹

The GATS timeline and process

- 1.24. GATS was signed in 1994 by the 140 member governments of the GATT as part of the Uruguay round of negotiations. It came into force in January 1995.
- 1.25. As part of the agreement, there was a commitment for governments to enter into successive rounds of negotiations “with a view to achieving a progressively higher level of liberalization,²⁰. These negotiations started in January 2000.
- 1.26. The UK’s interests are represented by the European Union, as are those of all 15 member states.
- 1.27. Following the 4th WTO Ministerial Conference in Doha in November 2001, the services negotiations have been brought within a broader set of multilateral trade negotiations known as the Doha Development Round.
- 1.28. At Doha the WTO Members agreed key dates for negotiating each country’s commitment to GATS. The negotiations take the form of a ‘request-offer’²¹ process.
- 1.29. In the request phase, any country is able to request another country to liberalise its regulations concerning specific services. Initial requests had to be submitted by 30 June 2002. On behalf of all the EU member states the EU submitted requests to 109 countries and received requests from 19 countries. The UK’s input was informed by consultation carried out by the DTI in September 1998 inviting comments on the UK’s objectives for the negotiations, and identification of barriers to trade in services that could be addressed in the negotiations. Replies came mostly from business and broadly supported further trade liberalisation²².
- 1.30. Upon receipt of a request, each country can then respond, by 31 March 2003, with an initial offer stating which of their sectors will be opened up to GATS rules. What the UK puts in its offer was the subject of public consultation by the DTI which ended on 3 January 2003²³.
- 1.31. There is then a process of negotiation aimed at agreeing which sectors in each country will be liberalised. These negotiations have to be concluded by 1 January 2005²⁴.

How GATS works

- 1.32. GATS applies to all measures (e.g. laws, regulations, rules, procedures, decisions, administrative actions etc), including those taken by local government, which may affect the trade in services (e.g. by limiting access to local services or by controlling the purchase, payment or use of a service)²⁵.
- 1.33. GATS applies to any trade in services in any **sector**. For convenience, service sectors are divided into twelve sectors as defined by the UN Central Product Classification. Within each sector there are sub-sectors.
- 1.34. The service can be supplied through 4 modes of supply
Mode 1: “Cross border supply,, i.e. from the territory of one country to that of another
Mode 2: “Consumption abroad,, i.e. from the territory of one country to a consumer of another e.g. a tourist
Mode 3: “Commercial presence,, i.e. by a service provider of one country, based in the territory of another
Mode 4: “Presence of natural persons,, i.e. the staff of a service provider of one country who are based in the territory of another²⁶

The exemption for services supplied by government

- 1.35. The only exception to GATS, as provided by Article I, is those services supplied “in the exercise of governmental authority,,. This is defined by GATS as meaning “any service which is supplied neither on a commercial basis nor in competition with one or more service suppliers,,²⁷.
- 1.36. The meaning of this has not been clarified by the WTO or the Council for Trade in Services. Consequently it lies at the heart of concerns about the impact of GATS on the activities of local and regional government and policies at all levels aimed at economic and social development and environmental protection.
- 1.37. The issue is discussed at length in a paper published by CIEL²⁸ in which the means of interpretation are explained and then the potential for a broad or a narrow interpretation discussed. A broad interpretation of ‘commercial basis’ and ‘in competition’ would mean that governmental authority is narrow and therefore almost all services are covered by GATS. A narrow interpretation however would mean that the scope of governmental authority is larger and therefore more services are not covered by GATS. The author concludes that a broad interpretation (i.e. GATS applies to almost all services) would be in conformity with international law but that there are other principles used in international law (principle of restrictive interpretation and principle of effective interpretation) that can be legitimately applied which narrow the meaning. There is no guarantee however that the WTO Appellate Body would apply these methods. The author is only able to conclude that the appellate body is only suitable for determining whether measures are consistent with WTO provisions and not to resolving larger issues such as the scope of WTO agreements. Instead this should be directly addressed by the WTO.

1.38. However, Pascal Lamy of the EC maintains that “no WTO Member has to date proposed to change this carve-out nor has anybody expressed the need to adopt an authoritative interpretation of the criteria,”²⁹. He explains this by referring to the lack of any single global definition of what constitutes public services. He does however state that “public services can and are carried out by the state or by public or private undertakings,,”. This seems to come very close to accepting that competition may exist in the provision of some government services.

1.39. If there is a broad interpretation of Article I there are likely to be implications for any services formerly considered to be a public service (i.e. delivered in the exercise of governmental authority) but which, in the event, are deemed to be a commercial service competing with others; for example, the NHS. The service would then have to be treated as any other private company to avoid being in breach of GATS rules i.e. by having an unfair competitive advantage over foreign service suppliers.

Part II of GATS: General Obligations and Disciplines

1.40. If a service is covered by GATS then all the general obligations and disciplines identified in Part II will apply.

1.41. Part II has 14 Articles. Under Article II, all members guarantee **most favoured nation** treatment in all their service sectors, unless they have listed an exemption for a specific sector³⁰. This means that all WTO members are required to treat the services and service providers of every other member in the same way.

1.42. The **Most Favoured Nation** obligation is applied to all sectors of every member’s service economy. It requires the services and service suppliers of every country to be treated in the same way. For example, the UK can not allow an Indian company to provide data services in the UK while refusing to allow Canadian companies to provide the same service.

1.43. Exemptions from the Most Favoured Nation obligation are permitted so long as they are entered in a schedule. The EU has recorded almost 30 horizontal exemptions relating to the Most Favoured Nation obligation, none of which relate to public services in the UK.

1.44. However, these exemptions are limited to a maximum of 10 years from the date the agreement entered into force (i.e. 1995) and “In any event, they shall be subject to negotiation in subsequent trade liberalizing rounds,”³¹. (Note: nearly all EU exemptions are shown as indefinite³²).

1.45. The requirement for **transparency** (Article III) requires every member to publish all their measures relating to or affecting the operation of GATS. Enquiry points have to be established to deal with any queries from members relating to these measures. Any member can inform the Council for Trade in Services of any other member’s measures which it considers to affect the operation of GATS.

- 1.46. Article IV promotes the participation of developing countries in trade, Article V allows members to have membership of other trade liberalisation agreements and Article VI allows labour market agreements between members.
- 1.47. **Domestic regulations** affecting the trade in services have to be “administered in a reasonable, objective and impartial manner,, (Article VI).
- 1.48. A service supplier can request a review by the member of any administrative decisions affecting the trade in services. This does not, however, require the member to institute proceedings where this is inconsistent with their constitution or legal system.
- 1.49. Qualification requirements and procedures, technical standards and licensing requirements must not present barriers to trade and should instead be:
- a) based on objective and transparent criteria (e.g. competence and ability to supply the service)
 - b) no more burdensome than necessary to ensure the quality of the service
 - c) in themselves, no restriction on the supply of service (this could apply to licences)
 - d) in accordance with the standards of other relevant international organisations (i.e. those bodies whose membership is open to all members of the WTO)
- 1.50. For further discussion about GATS and regulations, see Chapter 2.
- 1.51. Members may, under Article VII, have a system to **recognise** the licenses, certificates and qualifications granted by other members. Any member is able to request to join arrangements between other members.
- 1.52. GATS does not prohibit **monopolies and exclusive service suppliers** (Article VIII). However, a monopoly supplier must treat all other GATS members equally in accordance with Article II and also abide by the member’s specific commitments (see 1.59). These provisions on monopolies also apply where a member authorises a small number of service providers or substantially prevents competition between service suppliers in its territory.
- 1.53. Efforts must be made to eliminate any **business practices** which may restrict competition and thereby the trade in services. Under Article IX this is through a process of negotiation with any member so requesting.
- 1.54. Articles X to XII deal with emergency safeguard measures, payments and transfers and the restrictions to safeguard the balance of payments.
- 1.55. Article XIII addresses **government procurement** and exempts it from the rules on most favoured nation, market access and national treatment. Government procurement is defined as “procurement by government agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale,,³³. Procurement by national government is the subject of a

separate WTO agreement which is discussed in chapter 4. GATS, however, is the first time that rules on government procurement have been extended to regional and local government.

- 1.56. GATS (Article XIV) contains a number of **general exceptions** which state that the agreement shall not be construed to prevent a member adopting or enforcing measures “necessary to protect human, animal or plant life or health, or for compliance with safety laws and regulations³⁴. (Note that GATS does not include the GATT exemption on “the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption,,³⁵).
- 1.57. However, such measures may not be taken if they “constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services.,,³⁶ In other words, these measures can not be used as a way of restricting trade.
- 1.58. Article XV deals with **subsidies** which, although having a legitimate role in national development programmes, also have a potentially distortive effect on trade in services. The intention is to avoid these effects through the exchange of information regarding subsidies available to domestic service providers. If a member feels that they have been adversely affected by a subsidy they may request consultations with the other member. For more discussion on subsidies, see Chapter 3.

Part III of GATS: Specific Commitments and Schedules

- 1.59. GATS includes three articles on **specific commitments**. Under GATS, the specific commitments apply to specified sectors only if members elect to ‘opt-in’ through their national schedules³⁷. This is described by the DTI as a ‘bottom-up’ approach³⁸.
- 1.60. The first specific commitment secures **market access** (Article XVI) rights for the service suppliers of all members. A number of mostly quantitative measures are identified which must not be used to restrict trade. These include limitations on the number of service suppliers or on the number of operations by way of quotas or economic needs tests, limitations on the value of transactions and requirements to enter into specific types of legal entity or joint venture.
- 1.61. As the article is subject to the opt-in approach however, the market access rules only apply if the member has specifically listed that sector in its **schedule** (see also para 1.68). By listing the sector in the schedule a member is stating that GATS rules will apply. However, specific exemptions are still allowed, even if the sector is listed.
- 1.62. The EU has recorded only one very broad horizontal exemption that applies to the UK:

“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”³⁹.

- 1.63. The explanatory note adds:
“Public utilities exist in sectors such as related scientific and technical consulting services, R&D services on social sciences and humanities, technical testing and analysis services, environmental services, health services, transport services and services auxiliary to all modes of transport. Exclusive rights on such services are often granted to private operators, for instance operators with concessions from public authorities, subject to specific service obligations.”
- 1.64. This seems to duplicate the existing exemption from GATS which is given by Article I to all services ‘supplied in the exercise of governmental authority’ (see para 1.35 above).
- 1.65. Quite why the EU has chosen to add this horizontal exemption has been the subject of much debate. The exemption of public services from GATS is considered by Pascal Lamy⁴⁰ to be sufficient, but here it seems to be repeated. It could be a belt and braces approach, or it could represent some concern about Article I; for example the wide spread privatisation of public utilities across the EU could potentially remove them from the protection of Article I as they are now provided on a commercial basis and in competition. The EU does not define what it means by ‘public utilities’ possibly for the reason given by Pascal Lamy that there is no single definition (see para 1.38 above). This could present a weakness for the EU member states as it removes some transparency from the overall trading environment and potentially means that a different interpretation of ‘public utility’ is applied by each member state.
- 1.66. The second specific commitment is the **national treatment** obligation (Article XVII) which obligates each member to accord the services and service suppliers of all other members treatment no less favourable than that given to its own like services and service suppliers. However, just as in the market access rule, this concession is due only when the member has affirmatively listed the service sector in its schedule of specific commitments⁴¹.
- 1.67. The EU has registered one horizontal exemption that applies to the UK. This specifically applies to Mode 3 (Commercial presence) and effectively prevents non EU service suppliers from setting up subsidiaries in Europe unless they are registered in their own right in accordance with the law of a member state⁴². This prevents a Korean bus company, for example, running services in Europe unless the company or a subsidiary is registered in a European country. This may be to ensure that companies providing services are operating entirely within European laws and could, for example, avoid problems with public liability if the bus operator were entirely controlled outside the EU.
- 1.68. The third specific commitment is for any **additional and voluntary commitments** that the member may wish to make. These commitments have to be broken down into the four ‘modes of supply’ (see para 1.34) and declared

on the appropriate schedule. In the current negotiating process the ability to make additional commitments is being used by some members to request further liberalisation in other member's service sectors over and above those required by GATS.

- 1.69. As mentioned above, GATS requires each member has to set out in a **schedule** the specific commitments it makes regarding the four modes of supply in the context of national treatment and market access (Article XX). The wording is confusing because the schedules seem to show 'exemptions from' GATS as opposed to 'commitments to' GATS. Nevertheless, the result is that members are allowed to maintain restricted access rules and to continue favouring their own domestic service sectors through the use of the schedule.
- 1.70. The first part of each member's schedule deals with **horizontal commitments** i.e. those commitments that apply to all sectors. For example, under the limitations on market access column, the EU's horizontal commitment 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,"⁴³. As discussed above, this is intended to remove all such public monopolies from the control of the market access rules in every sector.
- 1.71. The second part of the schedule deals with the specific **sector commitments**. This part is structured around the various service sectors (see para 1.33). The schedule has to state any limitations the country makes on national treatment or market access and any additional commitments (e.g. re qualifications, standards or licensing matters) it is going to make together with timescales.
- 1.72. The schedules are public documents and can be found on the Internet at <http://gats-info.eu.int>. The language of the schedules is particularly complicated but the following attempts to unravel the complexities.
 - a) WTO members can commit to open up individual service sectors to free trade in which case they enter **none** in the appropriate column of the schedule. This means there are *no* restrictions incompatible with GATS.
 - b) If, however, a member chooses *not to commit* a particular sector then they can simply omit it from the schedules altogether.
 - c) If some modes of supply in a sector are committed but others are not then the sector will need to be included in the schedule. Those modes of supply which have no restrictions on trade again have the word **none** entered against them. This means that a member is committing itself to ensuring that there are no restrictions which are inconsistent with GATS rules covering participation in the market by foreign service suppliers. In the market access column, "none" means that foreign service suppliers are free to enter the market, while in the national treatment column, "none" means that the foreign service supplier is guaranteed the same level of fair treatment as domestic counterparts.
 - d) Those modes of supply which are being kept out of GATS are described as being **unbound**. In saying this the member is making no commitment

either to open-up its market or to even keep it as open as it currently is. This does not mean that the market is necessarily closed to foreigners, but does mean that the country is not bound by any commitment to maintain a certain level of openness in the future⁴⁴.

- e) Occasionally it may even be technically impossible to commit a particular mode of supply of a service to GATS e.g. the cross border supply of acupuncture. In these cases the sector is shown as unbound with a footnote stating that it is due to technical infeasibility.
- 1.73. A sector and a particular mode of supply can be partially in and partially out of GATS, in which case a clarification is added to the schedule. So, for example, the EU commitments on cross border supply in the distribution sector read “Unbound except for mail order: none,,”
- 1.74. The EU’s explanation of how to read the schedules can be found at <http://gats-info.eu.int/gats-info/gatscomm.pl?MENU=hhh> and Friends of the Earth International’s can be found at <http://www.foei.org/publications/trade/primer.html>.
- 1.75. The EU has submitted schedules on behalf of all the member states although differences between the member states can be, and have been, registered.
- 1.76. The UK has sought to restrict access to very few sectors and has placed fewer limitations than most other EU member states.

What happens when things change?

- 1.77. Members are permitted to modify the commitments they have made in their schedules after they have been in force for three years. However, any member which feels that it may be affected can request ‘compensatory adjustment’ (Article XXI).
- 1.78. GATS includes notification and transparency provisions. For example, WTO members must periodically publish their trade laws in a transparent manner. If the new laws could be inconsistent with WTO obligations, the member must first notify the WTO secretariat, who posts the notices for the benefit of all WTO members. These notices should allow sufficient time for other members to submit comments, which must be taken into account before the final regulation enters into force.

¹ WTO, 199?, General Agreement on Trade in Services, Article XIX, para 1 (page 285)

² see <http://www.dfait-maeci.gc.ca/ciw-cdm/wto1-en.asp> (visited October 2002)

³ WTO, 2001, GATS - Fact and Fiction, (page 3)

⁴ CIEL, 2002?, Frontiers in Trade: The Clean Development Mechanism and the General Agreement on Trade in Services (page 3) http://www.ciel.org/Publications/CDM_GATTS_Wiser.pdf

⁵ CIEL, 2002?, Frontiers in Trade: The Clean Development Mechanism and the General Agreement on Trade in Services (page 3) http://www.ciel.org/Publications/CDM_GATTS_Wiser.pdf

- ⁶ CIEL, 2002?, *Frontiers in Trade: The Clean Development Mechanism and the General Agreement on Trade in Services* (page 3) http://www.ciel.org/Publications/CDM_GATTs_Wiser.pdf
- ⁷ GATT art. III.
- ⁸ WTO, *Settling Disputes: The WTO's 'most individual contribution'* http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (visited 28/1/03)
- ⁹ WTO, 2001, *GATS - Fact and Fiction*, (page 4)
- ¹⁰ WDM, 2002, *Stop the GATSastrophe!* www.wdm.org.uk/campaign/GATS.htm
- ¹¹ Dept of Trade and Industry, October 2002, *Liberalising Trade in Services, A new consultation on the WTO and GATS negotiations* (para 6.3)
- ¹² Dept of Trade and Industry, October 2002, *Liberalising Trade in Services, A new consultation on the WTO and GATS negotiations* (para 6.1)
- ¹³ Dept of Trade and Industry, October 2002, *Liberalising Trade in Services, A new consultation on the WTO and GATS negotiations* (para 6.4-6.5)
- ¹⁴ WTO, 2001, *GATS - Fact and Fiction*, (page 3)
- ¹⁵ LGA/LGIB, April 2002, *GATS: Possible Implications for Local Government. An LGA/LGIB Briefing Paper.* (Page 2)
- ¹⁶ LGA/LGIB, April 2002, *GATS: Possible Implications for Local Government. An LGA/LGIB Briefing Paper.* (Page 2)
- ¹⁷ Dept of Trade and Industry, October 2002, *Liberalising Trade in Services, A new consultation on the WTO and GATS negotiations* (para 6.6)
- ¹⁸ WTO, 2001, *GATS - Fact and Fiction*, (page 1)
- ¹⁹ WDM, May 2002, *GATS Campaign Update* (pp1-2)
- ²⁰ WTO, 1997, *General Agreement on Trade in Services, Article XIX*, para 1 (page 298)
- ²¹ WDM, May 2002, *GATS Campaign Update* (page 2)
- ²² Dept of Trade and Industry, October 2002, *Liberalising Trade in Services, A new consultation on the WTO and GATS negotiations* (para 1.2-1.4)
- ²³ Dept of Trade and Industry, October 2002, *Liberalising Trade in Services, A new consultation on the WTO and GATS negotiations.* www.dti.gov.uk/worldtrade/service.htm
- ²⁴ WDM, May 2002, *GATS Campaign Update* (page 2)
- ²⁵ Department of Trade and Industry, 1998, *Liberalising Trade in Services: a consultative document on the GATS 2000 negotiations.* (page 9 para 2.1)
- ²⁶ GATS, Article I, para 2 (page 285)
- ²⁷ GATS, Article I, para 3 (page 286)
- ²⁸ CIEL, 2001, *Public Services and the scope of GATS*, by Markus Krajewski
- ²⁹ Annexed background note (section 4, page 5) to Letter dated 23 October 2002 from Pascal Lamy (Membre de la Commission Européenne) to Carlos Westendorp (Président de la Commission de L'Industrie, du Commerce extérieur, de la Recherche et de l'Energie)
- ³⁰ US Trade Representative, 2000, *WTO Services Trade Negotiations* <http://www.ustr.gov/sectors/services/gat.pdf> (page 4)
- ³¹ GATS, Annex on Article II Exemptions, para 6.
- ³² see http://gats-info.eu.int/gats-info/nwtosvc.pl?COUNTRY=European_Community&MFN=00
- ³³ GATS, Article XIII, para 1 (page 294)
- ³⁴ GATS, Article XIV, para b & c (page 295)
- ³⁵ CIEL, 2002?, *Frontiers in Trade: The Clean Development Mechanism and the General Agreement on Trade in Services* (page 4) http://www.ciel.org/Publications/CDM_GATTs_Wiser.pdf
- ³⁶ GATS, Article XIV (page 294)
- ³⁷ CIEL, 2002?, *Frontiers in Trade: The Clean Development Mechanism and the General Agreement on Trade in Services* (page 4) http://www.ciel.org/Publications/CDM_GATTs_Wiser.pdf
- ³⁸ Dept of Trade and Industry, October 2002, *Liberalising Trade in Services, A new consultation on the WTO and GATS negotiations* (para 6.22-6.23)
- ³⁹ European Community: *Horizontal Commitments* http://gats-info.eu.int/gats-info/nwtosvc.pl?COUNTRY=European_Community&SECCODE=00
- ⁴⁰ Annexed background note (section 4, page 5) to Letter dated 23 October 2002 from Pascal Lamy (Membre de la Commission Européenne) to Carlos Westendorp (Président de la Commission de L'Industrie, du Commerce extérieur, de la Recherche et de l'Energie)
- ⁴¹ CIEL, 2002?, *Frontiers in Trade: The Clean Development Mechanism and the General Agreement on Trade in Services* (page 11) http://www.ciel.org/Publications/CDM_GATTs_Wiser.pdf
- ⁴² European Community: *Horizontal Commitments* http://gats-info.eu.int/gats-info/nwtosvc.pl?COUNTRY=European_Community&SECCODE=00
- ⁴³ see http://gats-info.eu.int/gats-info/nwtosvc.pl?COUNTRY=European_Community&SECCODE=00
- ⁴⁴ see <http://gats-info.eu.int/gats-info/gatscomm.pl?MENU=hhh>

GATS and the Planning System

Introduction

- 2.1. The town and country planning system in the UK emerged from the environmental problems of industrialisation in the 19th and 20th centuries, in particular the threat to public health. As a result, there emerged an acknowledged need to ensure certain minimum standards of housing development and sanitation with ultimate enforcement of the standards by the state. The modern system of planning in which new development is both planned and regulated by, in the main, local authorities, emerged in the post-war period and is now enshrined in the Town and Country Planning Act 1990 with a considerable amount of subsidiary guidance and regulations.
- 2.2. A full explanation of how the planning system works is impossible in this report. The important aspect in the context of GATS however is firstly the role of the local authority in regulating new development, secondly the need to assess the impact of proposed development and finally the role of the planning officers in applying the regulations.

GATS and domestic regulations

- 2.3. GATS requires members to make general obligations regarding **domestic regulations**. The only exemption is if a member lists the relevant regulations in its schedules (which the UK has not specifically done). In all other cases, regulations must not be applied (by national or local government) that might nullify or impair specific commitments made in the schedules. In addition, any regulations that may affect trade in services have to be “administered in a reasonable, objective and impartial manner,,.
- 2.4. The aim of GATS is to ensure that laws, regulations etc relating to qualifications, technical standards and licensing requirements are:
 - a) based on objective and transparent criteria e.g. competence and ability to supply
 - b) not more burdensome than necessary to ensure quality of service
 - c) in the case of licensing, not a restriction on the supply of the service.
- 2.5. The WTO’s intention is to develop a range of guidelines on domestic regulations. These are being drafted by the Working Party on Domestic Regulations.
- 2.6. In October 2002 the Working Party produced a list of measures which WTO members felt needed to be addressed by GATS¹. These included licensing requirements (including restrictive regulations relating to zoning and operating hours) and a lack of transparency in domestic town planning regulations.
- 2.7. If there is a dispute regarding a regulation, Members have to set up independent tribunals which will review and provide remedies for administrative decisions affecting that service².

- 2.8. Consequently, GATS has received widespread criticism from development and environmental NGOs for the threat it poses to the right of individual countries to legislate and develop domestic regulations. This criticism is rejected by the WTO, the EC³ and the DTI⁴ on the basis that this is not the intention of GATS. However, this rather ignores a number of factors.
- a) GATS makes a commitment to progressively higher levels of trade liberalisation⁵.
 - b) GATS includes a process of negotiation in which members can request further liberalisation by other members⁶.
 - c) The disputes settlement process is operated by the WTO with an inbuilt preference for ongoing trade liberalisation.
 - d) GATS includes provision for members to make additional commitments⁷ to trade liberalisation beyond those required by GATS. In the negotiation process, some members have requested these additional commitments of others.
- 2.9. When these factors are considered together there is an implication that pressure for further liberalisation and changes to regulations can legitimately be requested and negotiated. Inevitably there will be trade offs or, potentially, political pressure brought to bear to ensure that certain objectives are achieved. Nevertheless, commitments made by officials today as to the intent and extent of GATS may not, as a result of the above factors, be born out in years to come.

What this means for local government in the UK

- 2.10. Local government has a substantial role to play in the application of regulations designed to protect the environment and the quality of life of local residents. The WTO's reference to 'licensing'⁸ however could include planning regulations (which provide a licence to undertake development) as well as licences to undertake various types of business operation and thereby open the basis for WTO intervention in the drafting and application of those regulations.

The planning system - economic needs tests/retail impact assessments

- 2.11. As noted in para 2.3, new and existing measures can not be applied that may nullify specific commitments made under GATS. This includes, for example, any measures that may be construed to intentionally or unintentionally have an affect on national treatment or market access in the **distribution and retail sector**.
- 2.12. The EU has committed the distribution and retail sector (i.e. they have made a commitment to open it to trade under GATS) and the UK has not requested any limitations on how GATS rules apply. Consequently any new measure which might be deemed to limit the amount of services supplied or how they are supplied could be considered to be in breach of GATS. Similarly, any measure that means that the services of an overseas country are not treated in the same way as those from the UK would also be against GATS.

- 2.13. The forbidding of measures which control the supply of services could have significant implications for the UK planning system.
- 2.14. The GATS rules on market access (Article XVI) specifically identify **economic needs tests** as a measure which shall not be maintained or adopted, unless otherwise specified in the schedule. Economic needs tests are not defined. However, the EU schedule on commitments to retailing services gives the criteria as “the number of and impact on existing stores, population density, geographic spread, impact on traffic conditions and creation of new employment,⁹. We have assumed however that it includes any measure (including an administrative process) which undertakes a market assessment and thereby attempts to determine the extent to which a service should be supplied.
- 2.15. In this context, economic needs tests are used when assessing proposed retail development (when they are known as retail impact assessments). The assessment will calculate existing and projected consumer demand in a defined area and assess the impact of a proposed retail development on the existing shops in the surrounding area.
- 2.16. Retail impact assessments are of particular importance when considering proposals for supermarkets (which can have a massive impact on existing traders in the locality) and out of town retail developments. The latter was the subject of much debate in the 1990s when the opening of new retail parks in out of town locations was credited with destroying many older and established town centres. This gave rise to the sequential test embodied in Planning Policy Guidance Note 6¹⁰ (PPG6) which requires new retail development to locate as close as possible to existing centres.
- 2.17. Following a recent call-in of a planning decision, the Deputy Prime Minister refused permission for a new Ikea store in Stockport. The reasons given were that the need for the scheme in the sub-region had not been demonstrated and that it could adversely affect the vitality and viability of a range of existing shopping centres¹¹.
- 2.18. The basis of the decision is the advice given in PPG6 which states¹²:
“In assessing applications for developments which may have an impact on a nearby town, district or local centre, local planning authorities should consider:
- the extent to which developments would put at risk the strategy for the town centre.....;
- the likely effect on future private sector investment.....;
- changes tothe centre, and to its role in the economic and social life of the community;.....
- changes to the range of services that the centre will continue to provide; and
- likely increases in the number of vacant properties in the primary retail area.
Equally, local planning authorities should consider the likely effects on nearby centres if the proposed investment is not made.

- 2.19. On this basis, it would seem that GATS could require revisions to PPG6 in order to remove those elements that could be construed as requiring a retail impact assessment or economic needs test. It is therefore interesting to note that proposals to revise PPG6 have been announced by the government. Lord Rooker, the Planning Minister said that a review of PPG6 on town centres and retail development would not mean a change in policy on out-of-town shopping centres. “We will ruthlessly operate this policy,, he said. “If retailers want a new store, they’ll have to put it in the town,,¹³. It remains to be seen however if the review nevertheless removes the need for retail impact assessments. This would be particularly welcomed by Ikea who have been identified as strong lobbyists for curbs on local planning controls¹⁴ and will obviously be keen to reapply for permission in Stockport.

Protection of economic needs tests by other EU states

- 2.20. The decision by the UK not to protect the requirement for retail impact assessments stands in contrast to other EU member states. For example, Belgium, Denmark, Portugal and France have all reserved the right, in the EU schedule, to carry out economic needs test for department stores while Italy states “Economic needs test on establishment of any new department store/outlet and authorization can be denied in order to protect areas of particular historic and artistic interest,,¹⁵. Why the UK has taken decided not to protect retail impact assessments is not clear. It could reflect the views of the Treasury, DTI and CBI that the planning system is a constraint on business¹⁶.

International trade and the planning system

- 2.21. In its 1998 consultation paper, the DTI commented on the regulations which specifically affect the environmental services sector. The references to planning can, however, have a generic application.

“.....there are regulations which affect the location or operation of environmental services. These include urban planning restrictions..... Where regulations are more burdensome than necessary they can cause an excessive increase in the cost of supplying the service and become in themselves barriers to trade”¹⁷.

- 1.79. In its 2002 consultation paper on GATS, the DTI acknowledged the role of the planning system in relation to retail trade. “We maintain town-planning regulations relating for example to location of retail sites, operated largely at a local government level, which we consider to be non-discriminatory domestic regulatory measures falling within Article VI of the GATS.,, At the same time, however, they state “UK retailers have in the past found it hard to build up market presence in many countries due to a combination of factors. These include the private nature of many businesses, legal requirements and the use of planning or other legislation to restrict development¹⁸ ,,. So while the DTI states that the UK planning regulations are exempt from GATS, they are criticising other country’s planning regimes for restricting development.

- 2.22. In the GATS negotiation process members will make their requests of each other. The EU will make requests of other countries to liberalise their markets

and, for example, remove planning regulations that restrict development. Equally other members will make similar requests of the EU and UK. In return each will make offers. Ultimately, the direction of the negotiated compromises will be towards greater liberalisation and it is therefore possible that UK requests for relaxation of planning regulations overseas will be met by requests for similar relaxations of our own regulations.

- 2.23. The planning system is also the subject of debate in the WTO Working Party on Domestic Regulation¹⁹. In listing a number of measures which it feels should be addressed by GATS it includes:
- Lack of opportunity for interested non-governmental market participants to meet with government officials to discuss the impact of new or proposed regulations.
 - Restrictive regulations relating to zoning and operating hours, to protect small stores.
 - A lack of transparency in domestic town planning regulations, that might prejudice decisions on the location of installations to provide such services through commercial presence (distribution services).
 - Authorization requirements are cumbersome: e.g. a permit is required for every single project.
 - The period of time required for the processing of a license application is not very clear.
 - The processing period for a license application is long.
 - Excessive application and process fees.
 - National standards which diverge from international standards.
- 2.24. It is therefore apparent that there is considerable debate amongst those pushing for trade liberalisation about matters which could have a direct bearing on the operation of the planning system in the UK.

Transparency of the planning system

- 2.25. Transparency of regulations and administrative procedures is a key objective of GATS. Article III requires all measures that affect GATS to be quickly published and requests for information met with a prompt response. Equally the Article VI guidelines on domestic regulations require them to meet “objective and transparent,, criteria.
- 2.26. The United States has presented to the WTO Council for Trade in Services a list of obstacles which they consider represent restrictions on market access and/or national treatment in the distribution sector. These include regulatory provisions which make it difficult for foreign suppliers to market their services and a lack of transparency as to how laws and regulations are applied²⁰.
- 2.27. The USA has also identified a number of obstacles to trade in the distribution sector that it wishes to see removed, all of which, given a potential vulnerability around transparency, could be applied to the planning system²¹:
- Prohibition on size and/or location of stores and other facilities without an opportunity to establish such facilities under prescribed conditions

- Lack of transparency of domestic laws and regulations and fairness of administration, including lack of pre-determined, objective criteria for licensing requirements
- Lack of readily available information on zoning and lack of an opportunity for service suppliers to meet with local officials and community representatives to discuss location of facilities
- Discriminatory treatment with respect to size, configuration, and/or location of terminals, warehouses, and other facilities and denial of authorization to such facilities under prescribed condition
- Discriminatory treatment with respect to the scope of business and transportation licenses that may be required.

The American concept of transparency

2.28. The US is acknowledged as being one of the driving forces behind more transparency²². There are, however, two sides to the 'transparency coin'. On the positive side it could mean that GATS will have to be opened up to greater public scrutiny but on the negative side it could be a Trojan Horse that removes flexibility and discretion in local decision making.

2.29. First of all the positive side and the potential to lead to reforms of GATS. The USA has made some interesting comments regarding the operations of the WTO in general:

*"The public has a legitimate interest in the proceedings. WTO trade disputes, like other intergovernmental disputes, could benefit from being more transparent to the public..... At the same time, non-party WTO Members would benefit from being able to observe the arguments and proceedings of WTO disputes..... (There is a) commitment by Ministers 'to promote a better public understanding of the WTO', and 'to making the WTO's operations more transparent, including through more effective and prompt dissemination of information' "*²³.

2.30. This position is informed by academic debate in the US on the role of administrative transparency in tackling problems such as financial volatility, environmental degradation, money laundering, and corruption.

*"governance must be transparent because, as many governments and international organizations have found to their dismay in recent years, secretive decision making by small elites can no longer be sustained. Contrary to the claims often made by central bankers, government officials, and even some in the World Bank and the IMF that decision making on technical or complex subjects is best left to the experts, without informed participation by all those affected, policy decisions will fail to take into account important information and interests and will lack the legitimacy that only public voice can bring. Decision makers should not try to sneak even good public policy past the public "*²⁴.

2.31. Much of the literature on administrative transparency emanates from, or at least alongside, the World Bank but their main interest is in tackling

corruption, especially in the financial sectors. In this context, corruption is defined by the formula:

$$\text{Corruption} = \text{Monopoly} + \text{Discretion} - \text{Accountability}^{25}$$

- 2.32. To tackle corruption the literature seeks to tackle the accountability deficit by promoting transparency of decision making. This is defined as having three criteria: Information should be accessible to all on equal terms; information must be relevant and; information should be of good quality and reliable, timely, complete, fair, consistent and represented in clear and simple terms.²⁶
- 2.33. The formula suggests that as more discretion is available to the decision maker, corruption will increase. The degree of discretion must therefore be limited.

“The lesson is not to effect complete deregulation but to devise regulatory policies that mitigate incentives for corruption by increasing transparency and improving incentives for compliance. Such policies should assist in monitoring and enforcement and limit the discretionary power that regulations grant to the officials implementing them. Institutions should be supported that improve the flow of information, enabling transparency and trust”²⁷.

- 2.34. On face of it this proposal has many virtues, especially for the financial sector. But does the WTO take a different view on what transparency means?

The WTO's concept of transparency

- 2.35. The transparency obligations contained in the three main WTO agreements (GATT, GATS, TRIPS) are as follows²⁸:
- a) the obligation to publish, or at least make publicly available, all relevant regulations, and, as a general rule, not to apply or enforce them until this has been done;
 - b) provisions on the notification of various forms of governmental action to the WTO and other Members; and
 - c) obligations relating to the consistent, uniform, impartial and reasonable administration of regulations, and the right of review of decisions taken under them.
- 2.36. The WTO acknowledges that the terms "uniform", "impartial" and "reasonable" have not been the subject of legal interpretation²⁹.
- 2.37. But does this have any bearing on domestic regulations, such as the planning system? On the face of it, no. This view is upheld by the DTI which states “We maintain town-planning regulations relating for example to location of retail sites, operated largely at a local government level, which we consider to be non-discriminatory domestic regulatory measures falling within Article VI of the GATS.,³⁰
- 2.38. Equally, the WTO identifies a distinction between those government measures which are clearly concerned with matters of trade and those of legitimate

public policy, such as public health or environmental protection, but which nevertheless impact upon international competition.

“The challenge is how to find a proper balance between, on the one hand, the need to ensure that such policy instruments are not used as disguised restrictions on trade and, on the other hand, the need for the WTO not to be overly intrusive in areas where trade considerations are not paramount, nor to overload the process of increasing transparency to the point where it becomes impossible for Members to see the wood for the trees.”³¹

- 2.39. The WTO Agreement on Technical Barriers to Trade³² approaches the issue of balance by providing some broad rules of application. Firstly, ensure that regulations are drawn up and applied on a national treatment basis (i.e. treating overseas suppliers the same as domestic suppliers). Secondly, ensure that the regulation is no more restrictive than necessary to fulfil the legitimate objective. And finally put “a great deal of emphasis on transparency especially where Members deviate from international standards or where international standards are not available,,. This will allow proper scrutiny of proposed regulations to take place and, if appropriate, challenges made.

Will the WTO consider the planning system a restriction on trade?

- 2.40. The question that then must be posed is whether the planning system in the UK represents either a policy instrument that could constitute “a disguised restriction on trade,, (either intentionally or unintentionally) or a legitimate public policy objective. Certainly the planning system meets the national treatment test as it does not distinguish between domestic and foreign applicants for planning permission. Secondly, planning policies go through a rigorous process of consultation and inquiries which could be taken to indicate that they are no more restrictive than necessary. The final test is that of transparency i.e. is it uniform, impartial and reasonable. It is in this final test that the negative side of the ‘transparency coin’ starts to emerge.

The cascade of decision making in the planning system

- 2.41. The planning system has evolved over more than one hundred years since early public health legislation. It seeks to guide and control the development of land.
- a) National policies and guidance are published and widely circulated.
 - b) Regional and local policies (in the form of development plans) are guided by national policies. They are also published but are additionally subject to public inquiry before they can be adopted. The inquiry will test the policies to ensure that they comply with national policy, are impartial and reasonable.
 - c) Individual planning applications are considered by planning officers with decisions to grant or refuse permission made either by a planning committee of elected politicians or made by the officer using delegated powers. The officer will also be responsible for negotiating any conditions on the grant of planning permission and any planning

(Section 106) agreement to mitigate the impact of the proposed development.

- d) If permission is refused an appeal can be made to the Secretary of State responsible for planning, currently the Deputy Prime Minister (DPM).
- e) Equally the DPM can ‘call in’ any applications that he considers particularly significant or contentious.
- f) The courts also have a role to play in ensuring that all decisions are administratively proper.

2.42. Overall, the planning system seems, therefore, to meet the test of transparency. However, there is a potential weakness at the stage when the decision is made whether to grant or refuse planning permission.

2.43. The decision is made “in accordance with the (development) plan unless material considerations indicate otherwise,”³³. Material considerations must fairly and reasonably relate to planning legislation and the application. They include government advice in the form of circulars and guidance notes, the creating of precedent for future applications, the availability of alternative sites, the risk of piecemeal development and preservation of existing uses.

2.44. The final planning decision is inevitably one of balance; weighing up all the material considerations and coming to a conclusion. This will inevitably involve discretion on the part of the planning officer as to what is and isn’t a material consideration and how much weight to apply to it. Transparency is brought to this decision through public access to the relevant paperwork and by the reporting to the planning committee either of the delegated decision or of the issues for them to make a decision. However, the process of negotiating an application can be a long and complex one involving many players and it is inevitably therefore open to allegations of a lack of access to information, clarity of decision making and, ultimately, transparency.

2.45. The negotiation of the S.106 planning agreement (see para 2.41c)) can also remove transparency. Planning permission will have been granted subject to the planning agreement with the key issues for the legal paperwork identified. The final documentation, however, has to be drafted and agreed by lawyers at which point various amendments may be negotiated with the final agreement remaining confidential between the signatories.

2.46. Planning agreements already attract considerable criticism for their lack of transparency. Equally they are considered by some to represent an undue influence exerted by the state over private sector activity that siphons off profits and deters wealth generation³⁴. As a result there will be many who would welcome the opportunity, through GATS, to force a review of the planning agreement regulations.

2.47. It is therefore possible to build a case in the context of GATS arguing that the planning regulations lack transparency. This would then necessitate the setting up of a tribunal to review and provide remedies for the impact of those regulations and their lack of transparency on, say, the freedom to trade in the

distribution sector. The casualty, in this context, would almost certainly be the discretion of the planning officials.

How would the planning system be forced to change?

- 2.48. The solution commonly promoted to improve transparency, other than providing information, is to reduce the amount of discretion held by officials (see para 2.32). This would potentially have enormous implications for the operation of the planning system. It would mean that much more of the basis of every decision would have to be codified so that the precise outcome of any application could be predicted. In effect this would mean moving to a planning system based much more on zoning where areas are identified for a particular use but, apart from prescribed limitation on e.g. the height and building: site ratio, no attempt is made to control the type of building. This is very much the free market model of town planning found in the USA but is at odds with the model more commonly found in Europe.
- 2.49. The planning system could also have to adopt much tighter national controls thereby removing the flexibility for decision making at the local level. Decision making processes do vary throughout the country in order to meet local circumstance. As a result, what is acceptable in one area may be refused planning permission in another. The reasons for the difference can be and are justified but to a party intent on unravelling the consensus it does represent an inviting opportunity.
- 2.50. The process of negotiating planning agreements could be forced to change by requiring much higher levels of transparency but also less flexibility to use the contributions to meet local objectives.
- 2.51. The use of retail impact assessments could be deemed a barrier to trade and therefore banned while calls for the removal of any limitations on store size, location and trading hours could greatly reduce the ability of the planning system to protect the local environment and the interests of the local community.

¹ WTO Working Party on Domestic Regulation, 18 October 2002, JOB(02)/20/Rev.2

² GATS, Article VI, para 2(a)

³ Annexed background paper (section 2, pp 1-2) to Letter dated 23 October 2002 from Pascal Lamy (Membre de la Commission Européenne) to Carlos Westendorp (Président de la Commission de L'Industrie, du Commerce extérieur, de la Recherche et de l'Energie)

⁴ DTI, October 2002, Liberalising Trade in Services, para 5.16, page 54

⁵ GATS, Article XIX, para 1.

⁶ GATS, Article XIX

⁷ GATS, Article XVIII

⁸ WTO Working Party on Domestic Regulation, 18 October 2002, JOB(02)/20/Rev.2 Annex I (A)

⁹ Commitments by Country European Community: Distribution Services - Retailing Services http://gats-info.eu.int/gats-info/nwtosvc.pl?COUNTRY=European_Community&SECCODE=04.C (visited 22/10/02)

¹⁰ HMSO, June 1996, Planning Policy Guidance Note 6: Town Centres And Retail Developments.

¹¹ Reported in Planning, 15 November 2002, page 17. (DCS No:38520941;Inquiry)

¹² HMSO, June 1996, Planning Policy Guidance Note 6: Town Centres And Retail Developments, Para 4.3

¹³ Planning, 13 December 2002, 'Minister picks decision quality ahead of speed' (page 2)

¹⁴ Toronto Star, 3 March 2002, Globalization - coming to your town?

¹⁵ Commitments by Country European Community: Distribution Services - Retailing Services http://gats-info.eu.int/gats-info/nwtosvc.pl?COUNTRY=European_Community&SECCODE=04.C (visited 22/10/02)

¹⁶ CBI, July 2001, Planning Brief: Planning for Productivity

¹⁷ Department of Trade and Industry, 1998, Liberalising Trade in Services: a consultative document on the GATS 2000 negotiations (Page 24, para 4.33)

- ¹⁸ DTI, 2002, A new consultation on the World Trade Organisation GATS negotiations Liberalising trade in services (page 34)
- ¹⁹ WTO Working Party on Domestic Regulation, 18 October 2002, JOB(02)/20/Rev.2 Annex I (A)
- ²⁰ United States Trade Representative, 2000, Communication From The United States: Distribution Services S/CSS/W/22 http://www.esf.be/docs/GATS_Negotiating_proposals/USTR_Distribution_Services.doc
- ²¹ United States Trade Representative, 2000, Communication From The United States: Distribution Services S/CSS/W/22 http://www.esf.be/docs/GATS_Negotiating_proposals/USTR_Distribution_Services.doc
- ²² DTI, October 2002, Liberalising Trade in Services, para 5.15, page 54
- ²³ 'Contribution of the United States to the Improvement of The Dispute Settlement Understanding [DSU] of the WTO Related to Transparency', communication from the Permanent Mission of the United States, 9 August 2002, <http://usinfo.state.gov/topical/econ/wto/dsu020809.htm>
- ²⁴ Ann M. Florini, 1999, 'Does the Invisible Hand Need a Transparent Glove? The Politics of Transparency', Carnegie Endowment for International Peace. Paper presented at the World Banks Annual Conference on Development Economics, Washington, DC., April 1999.
- ²⁵ Robert Klitgaard, Controlling Corruption, in Kimberly Ann Elliot (ed), Corruption and the Global Economy, (Washington, DC: Institute for International Economics, 1997) pp.181-185)
- ²⁶ Tara Vishwanath And Daniel Kaufmann, September 6th, 1999, Towards Transparency In Finance And Governance (Draft), The World Bank, (pp 3-4) <http://www.worldbank.org/wbi/governance/pdf/tarawish.pdf>
- ²⁷ Tara Vishwanath And Daniel Kaufmann, September 6th, 1999, Towards Transparency In Finance And Governance (Draft), The World Bank, (pp 18-19) <http://www.worldbank.org/wbi/governance/pdf/tarawish.pdf>
- ²⁸ WTO, 27 March 2002, 'Transparency. Note by the Secretariat' WT/WGTI/W/109 (para 15) http://www.modelwto.org/freetrade/Document_Center/CTI/Material/Transparency_Notes_by_the_Secretariat.doc
- ²⁹ WTO, 27 March 2002, 'Transparency. Note by the Secretariat' WT/WGTI/W/109 (para 27) http://www.modelwto.org/freetrade/Document_Center/CTI/Material/Transparency_Notes_by_the_Secretariat.doc
- ³⁰ DTI, 2002, A new consultation on the World Trade Organisation GATS negotiations Liberalising trade in services (page 28)
- ³¹ WTO, 27 March 2002, 'Transparency. Note by the Secretariat' WT/WGTI/W/109 (para 39) http://www.modelwto.org/freetrade/Document_Center/CTI/Material/Transparency_Notes_by_the_Secretariat.doc
- ³² WTO, 27 March 2002, 'Transparency. Note by the Secretariat' WT/WGTI/W/109 (para 40) http://www.modelwto.org/freetrade/Document_Center/CTI/Material/Transparency_Notes_by_the_Secretariat.doc
- ³³ S.26, Planning and Compensation Act 1991 cited in Rydin Y, 1993, The British Planning System (p.101)
- ³⁴ Rydin Y, 1993, The British Planning System (p.220)

Regeneration

What is Regeneration?

- 3.1. In essence the term 'regeneration' describes the actions taken to improve the physical, social and environmental fabric of any given area.
- 3.2. Regeneration first made an appearance in Britain's inner cities in the 1980s in response to the riots and subsequent Scarman report that identified the causes in the underlying social, environmental, economic conditions of Brixton, Toxteth, St Pauls and other troubled areas.
- 3.3. For a while, however, much of the regeneration activity focused on major physical investment. The creation of Urban Development Corporations in many cities saw the adoption of the 'trickle down' theory whereby it was believed that major investment in infrastructure and buildings would eventually find its way via increased employment, improved services etc to those people in the area who were most in need. Not surprisingly, the benefits rarely found their way through the system so people started looking for alternative models.
- 3.4. The 1990s saw an increasingly sophisticated concept of regeneration emerge. Modern regeneration is multi-disciplinary and combines the skills of architects, planners, economic development, youth and community workers, leisure workers etc. The 1990s also saw the emergence of community led regeneration as people who had previously had regeneration 'done to them' demanded a say in how decisions were made and how money was spent. Today the genuine involvement of local residents in regeneration is accepted as essential and consequently the talk is of community leadership and a partnership approach to tackling local problems. Regeneration has also become increasingly targeted at 'socially excluded' neighbourhoods and communities i.e. those with the greatest need.
- 3.5. Another feature of the modern regeneration agenda is the role of the social economy. This includes a range of enterprises including co-operative businesses, community owned businesses, credit unions and LETS. Social enterprises will often provide services and products in markets where the private sector is unable to make sufficient profit. As there is greater community (and therefore consumer) commitment as well as staff involvement, the enterprise can be more successful. It also enables trading surpluses to be reinvested in the local area or consumers to share in any profits. The sector is now being promoted by the Government and a dedicated unit has been established in the DTI. Regional Development Agencies and local authorities also promote development of the sector through their policies and through funding programmes providing finance for start-ups, investment and business advice.
- 3.6. Finally regeneration has taken in many initiatives aimed at developing and supporting the local economy and small businesses. Through national initiatives such as the Small Business Service or local projects, resources are

used to help small and medium sized businesses grow, adapt to changing markets and deal with the challenges of bureaucracy. The benefits are considered to come from increased employment, higher productivity, improved profitability and greater competitiveness. Encouraging local purchasing amongst businesses, communities and government is also a proven means of developing the local economy and so assistance is frequently provided to set up local supply networks and encourage purchasing managers to 'buy local'.

Delivering regeneration

- 3.7. Many Councils will have teams of staff dedicated to regeneration. Some Councils will apply for funding in their own name and use it to deliver regeneration services themselves e.g. providing advice to businesses or unemployed people on specific issues or managing environmental improvements. Alternatively they may fund these activities out of their general budgets.
- 3.8. Councils can also act as a conduit for funding, passing it out to other organisations whether voluntary or private to deliver defined actions on the ground.
- 3.9. Local organisations, voluntary and community groups have a significant role to play in delivering regeneration. They can benefit directly from regeneration funding or be partners with local authorities. Increasingly voluntary sector organisations and charities will hold contracts from the local authority to deliver specific services in their local area.
- 3.10. There are also many local regeneration partnerships involved in delivering regeneration programmes. These will usually include representatives of local authorities, residents, community organisations, businesses and agencies. They will have varying degrees of authority, some being little more than consultation panels while others will be limited companies with direct responsibility for multi-million pound investment programmes. Frequently regeneration funding programmes will require a multi-agency and partnership approach to be adopted.

The role of the private sector in regeneration

- 3.11. The involvement of the private sector is a common feature of many regeneration programmes. Local companies will often play a valuable part in regeneration partnerships; helping secure resources, providing expertise and providing endorsement or contacts otherwise unavailable. There is, however, always a risk that regeneration contributions will be used to cloak the external costs of a development that will have to be borne by the local community, economy and environment.

Regulating regeneration

- 3.12. There are no specific regulations that apply to 'regeneration' as an activity distinct from any others. Instead practitioners have to deal with everything from employment programmes through to the planning system and from Treasury funding guidelines to housing improvement programmes.

Consequently, a complex mass of interrelated rules, regulations and systems are the daily ingredients of any regeneration programme. Sometimes they make life easier, and sometimes harder. The main issue for many, therefore, is for consistency, ease of understanding and access to the people who implement the regulations. Nevertheless, the number of disciplines, agencies, funding programmes and agendas affecting regeneration make it a complex and at times confusing field in which to work and operate.

Funding regeneration

- 3.13. Beyond people's time, funding is the lifeblood of all regeneration activity. It comes from a range of public, private and charitable sources and is generally used where there are specific problems to be addressed or the market has failed to provide goods and services to a specific area or community of need.
- 3.14. The EU provides a range of regeneration funding programmes (for example, Objectives 1, 2 and 3, URBAN and INTERREG can all be classified as regeneration funds). The government also runs many programmes, increasingly through other agencies such as the Countryside Agency and the Regional Development Agencies in England.
- 3.15. Funding is usually provided in the form of grants, i.e. the money does not have to be repaid. Local authorities and agencies are frequently required to bid for the grants. Most are time limited and issue or area specific. They will reflect the changing trends on Government agendas and their policy on regeneration issues. Grants often have a requirement that the recipient match it with funding from elsewhere. In the case of EU funding this is usually 50%. On occasion funding may be provided in the form of loans when it is for business development and there is both a need to recycle the money and to avoid it disappearing to private benefit.
- 3.16. The private sector will sometimes fund regeneration either as part of its corporate responsibility programme or as a result of S.106 planning agreements. Equally, the provision of staff time or other help in kind is often provided by the private sector. The private sector can also contribute by signing local labour agreements as a way of ensuring that major development projects give some benefit to the local people. Equally, local employers may be encouraged and even receive assistance with employing people from the local workforce.
- 3.17. The charitable sector will also provide funding to projects while the National Lottery provides millions of pounds of funding to a wide range of projects.
- 3.18. EU State Aid rules¹ prohibit any grants or assistance (e.g. subsidised land) that distort or threaten to distort competition by favouring certain firms or the production of certain goods. There are exceptions, such as regional aid grants, but generally funding over a prescribed limit (€100,000 over three years²) can not be provided to individual companies.

- 3.19. In most cases private sector companies can not apply for regeneration funds in their own right. The exception is, for example, where the cost of the decontamination of brownfield sites is so high that no form of development is economically viable. Government funding has traditionally then been available to fill the funding gap although in 1999 the Partnership Investment Programme (as it was then called) was banned when the European Commission decided that it broke state aid rules by unfairly helping companies who used the funding. By late 2002 this seemed to have been overcome with a new dereliction aid scheme in which the government agreed with the EC a smaller level of investment and persuaded them of the principle of funding being used to bring otherwise abandoned sites back into use, thereby avoiding a contravention of state aid rules³. It nevertheless points to the interventions that can take place by international bodies in what are otherwise considered worthwhile and valuable schemes.

GATS and regeneration

- 3.20. In assessing the impact of GATS upon regeneration, the first question to ask is whether regeneration is a service? Certainly it is not identified as such by GATS. However, many of the roles discussed above have a role in regeneration e.g. architecture, planning and of course services provided by government itself.
- 3.21. Any service provided by a local authority which is potentially provided in competition with other service providers could be deemed subject to GATS. In these circumstances, there must be no barriers to market access (e.g. requirements for specific types of joint venture or partnerships) and there must be no discrimination against overseas suppliers. In certain circumstances (see Chapter 5) this could require the local authority to allow the private sector to provide the service. Any attempt by a local authority to require this to be done in partnership with the local community could then go against the market access commitments of GATS (Article XVI) despite the fact that this is now acknowledged as the most successful way of delivering local regeneration.
- 3.22. The market access requirement of GATS bans the use of numeric quotas or limitations (including economic needs tests) on the number of people employed by a service provider (Article XVII). It is possible that this could be used to challenge local labour requirements placed on major investment schemes as part of a local regeneration programme. The EU has stated that it is to be unbound by this requirement in many of its schedules but in the context of trade negotiations between GATS signatories and the commitment to ongoing liberalisation, the concern about the implication for local labour agreements nevertheless exists.
- 3.23. GATS also makes requirements of all domestic regulations affecting trade (Article VI). The general aim is to make regulations and their administration transparent. The issue of regulations is discussed in more depth in the Chapter 2 but one of the concerns being highlighted by some WTO members is that overseas suppliers may be facing discrimination as a result of domestic regulations and their application. Local regeneration agendas will play a part

in the implementation of some regulations, such as the planning system, where they will be a material consideration. In these circumstances it is possible that locally based companies will have a better understanding and knowledge of the local context, not all of which will be embodied in the regulations themselves, which could be construed as discriminating in their favour and providing them with an unfair advantage. As a result, the consideration of local regeneration needs could have to be removed from decision making processes unless they are enshrined in published policy documents.

- 3.24. A potential irony of GATS is that while it promotes the removal of barriers to international trade it could also result in the creation of barriers to market entry by the creation of complex sets of minimal yet internationally agreed regulations on a wide range of issues. Major corporations would doubtless be involved in the drafting of such regulations and would therefore have the knowledge and most probably the resources to respond to them. Small businesses however would not have this level of understanding or the resources needed and could therefore find that they are excluded from entering particular markets to the cost of local economic development and regeneration.
- 3.25. The growing importance of international trade will benefit the large corporations. As they gain access to local markets their purchasing power is likely to become a dominant factor throughout the supply chain with smaller companies being squeezed out. This can rapidly result in the creation of local monopolies. This has already been experienced in various 'liberalised' markets in the UK in which control is increasingly falling into the hands of a very small number of service providers. As the power of the local authority to intervene and or regulate is increasingly limited, it is the local community that stands to lose as the quality of the product and the price fails to meet consumer needs. The impact is likely to be greatest in communities already experiencing social exclusion.
- 3.26. Regeneration funding is often provided where there is an element of market failure and as such can be considered to be a subsidy. Article XV of GATS deals specifically with subsidies and deems them to have a distortive effect on trade. Consequently it commits members to entering into negotiations to remove them. The need for some flexibility is noted for developing countries but otherwise, the emphasis is upon the removal of subsidies wherever they are considered to represent a barrier to trade.
- 3.27. As with other aspects of the agreement, GATS does not attempt to define what it means by 'subsidy' and neither does it state when Article XV should be used. It thereby leaves considerable vagueness as to which subsidies have a distortive effect on trade. Nevertheless, other WTO agreements may provide some guidance.

WTO Agreement on Subsidies

- 3.28. The WTO's Agreement on Subsidies and Countervailing Measures⁴ (SCM) was signed in 1994 at the end of the Uruguay round of GATT negotiations. It defines those subsidies which are of interest but, in acknowledging that there

are many circumstances in which they may have a legitimate role, also categorises them into three groups: prohibited, actionable and non-actionable.

- 3.29. A subsidy is deemed to exist if there is a benefit⁵ from a financial contribution by a government or its agent which involves either a direct transfer of funds, a tax credit, or provision of goods or services other than general infrastructure.
- 3.30. To fall within the control of the SCM, the subsidy must be ‘specific’ to an enterprise, industry or group of enterprises or industries⁶. So if the subsidy is intended to be, or is in practice, limited to certain enterprises it will be considered ‘specific’. This definition extends to subsidies which are aimed at enterprises located in a defined geographical area.
- 3.31. The exception to the ‘specificity rule’ is where objective conditions and criteria are used to govern eligibility for the subsidy, i.e. they do not favour certain enterprises over others, are economic in nature and are horizontal in application e.g. number of employees. In that case, the subsidy is not specific and SCM does not apply.
- 3.32. As noted above (para 3.27) there are three categories of specific subsidy.
- a) **Prohibited subsidies** are those which are dependent upon the export performance of the enterprise or which require the use of domestic as opposed to imported goods.
 - b) **Actionable subsidies** are those which cause an adverse effect on the interests of other WTO members, for example injury to the domestic industry of the other member.
 - c) **Non-actionable subsidies** are those which are not ‘specific’ (as discussed above in para 3.29) or which are specific and yet meet the following conditions:
 - i) the subsidy gives assistance for certain costs incurred during research activities.
 - ii) the subsidy is part of a regional development programme. The criteria for this are closely defined. The subsidy criteria must include funding ceilings expressed in terms of investment costs or cost of job creation and must avoid the use of substantial parts of the subsidy by specific enterprises or industries. The region must be identified on the basis of neutral and objective criteria and must include a measurement of economic development. These are defined as 85% of the national income per capita, income per household or GDP per capita; or unemployment of at least 110% of the national average.
 - iii) the subsidy gives assistance with the adaptation of facilities to new environmental standards required by law and increasing the financial burden on firms.
- 3.33. If a member feels that a non-actionable subsidy has nevertheless resulted in serious adverse effects on its domestic industry then it can require consultation with the subsidy giving member and ultimately require the effect to be removed⁷.

GATS, subsidies and regeneration

- 3.34. As stated above, GATS makes some blanket commitments to remove subsidies but does not elaborate about the circumstances. The SCM addresses the issue in more detail although GATS does not specifically refer to it. In the absence of any other guidance however, the WTO's Dispute Settlement Body may well refer to the SCM.
- 3.35. In the first place, the SCM specificity rule states that subsidies must not discriminate between one type of enterprise and another. This could cause problems for regeneration programmes seeking to develop the social economy by providing, for example, funding for co-operatives and community enterprises.
- 3.36. It could also have an impact on situations where voluntary sector organisations or social enterprises are in receipt of local authority or state grants to support their activities but are also contracted to the local authority to deliver services in the area. Some businesses operating in the same sectors are already raising concerns about the support given to potential competitors from the voluntary sector. GATS increases the risk of such a complaint but would mean that resolution of the dispute would be the task of the WTO and not any domestic body. This could represent a major constraint on the ability of the social economy to expand and flourish.
- 3.37. Secondly, the prohibited subsidies include those that require the use of domestic goods as opposed to imported goods. This could have implications for any regeneration funding package that required, for example, the use of local materials in a new building or the use of local labour. The benefits to the local economy of regeneration investment will therefore be reduced.
- 3.38. Thirdly, the non-actionable subsidies would seem to include regional regeneration programmes but only on the basis of tightly defined conditions. Whether all UK funding programmes have been cross checked against the SCM is questionable.
- 3.39. Subsidies have been the focus of debate especially in the media sector as many countries subsidise to some extent the production of films and other media in their own territory. The media sector is obviously concerned that GATS could require the removal of these subsidies. There have therefore been many suggestions that special exemptions should be agreed, even from the USA:
*"There is a precedent in the WTO for devising rules which recognize the use of carefully circumscribed subsidies for specifically defined purposes, all the while ensuring that the potential for trade distortive effects is effectively contained or significantly neutralized."*⁸
- 3.40. The concern in the media sector about the controls on the use of subsidies should perhaps be felt in the regeneration sector.

¹ Article 87, EC Treaty, http://europa.eu.int/comm/competition/state_aid/overview/ (visited 26/1/03)

² Vademecum Community Rules On State Aid, 2002, page 13

http://europa.eu.int/comm/competition/state_aid/others/vademecum/vademecum_en.pdf

³ 'Dereliction aid is approved by EC', Regeneration & Renewal, 27 Sept 2002, page 1

⁴ WTO, 1994, Agreement on Subsidies and Countervailing Measures

http://www.wto.org/english/docs_e/legal_e/24-scm.pdf visited 14/1/03

⁵ 'Benefit' is not defined although Article 14 of SCM identifies four circumstances in which benefit could be experienced, e.g. a loan, loan guarantee or provision of services at a preferential rate to the market norm.

⁶ WTO, 1994, Agreement on Subsidies and Countervailing Measures, page 230, Article 2

http://www.wto.org/english/docs_e/legal_e/24-scm.pdf visited 14/1/03

⁷ WTO, 1994, Agreement on Subsidies and Countervailing Measures, page 240, Article 9 para 9.1

http://www.wto.org/english/docs_e/legal_e/24-scm.pdf visited 14/1/03

⁸ European Broadcasting Union, Oct. 2001, Synopsis of contributions from GATS members, citing United States S/CSS/W/21 - 18 December 2000 (Audiovisual and Related Services)

http://www.ebu.ch/departments/legal/pdf/leg_t_gats_wto_gatsmembers_positions_180901.pdf visited 23/12/03

Green Procurement

Local Government Procurement in England

- 4.1. The value of local government contracts is immense. English and Welsh councils have a combined spend on bought in goods and service of £25bn per annum¹. Procurement covers many items such as:
 - buying in everything from paperclips to computers
 - procuring new buildings (e.g. through direct contract or the Private Finance Initiative)
 - buying services e.g. office catering, housing benefit service, housing management, etc.
 - hiring of consultants
 - hiring care workers
- 4.2. The trend over the last 20 years in local government has been towards greater levels of private involvement in service delivery. In the 1980s and 1990s this was through Compulsory Competitive Tendering but since 1997 it has been through a more flexible and broad consideration of 'best value' in which private sector provision only has to be considered as an option.
- 4.3. A private sector style of management has also been introduced with many parts of local authorities now being managed as self contained business units, especially where they are deemed to be trading e.g. a concert hall owned by the Council. This enables Managers to identify the income and expenditure more clearly and also to make clear comparisons with other services both within the Council and elsewhere.
- 4.4. Greater involvement of the private sector has also been introduced by the partial deregulation of some areas of work. For example, building control services were traditionally provided by Council staff but can now additionally be provided by the private sector so long as they meet national standards. This puts local authority staff in direct competition with the private sector.
- 4.5. The procurement of goods and services by local government was the subject of the Byatt report². Included amongst the recommendations are the development of standard documentation for tendering; a review by Councils of their procurement structures and management; the publication of contracts to be awarded in the following three years; improved information to be provided to suppliers; and the creation of specialist procurement teams with the appropriate skills. The government responded to the recommendations in July 2002 and has committed to establish a local government procurement forum to take forward the development of a national strategy³.
- 4.6. Much of this appears to respond to the WTO agendas for transparency in trade and regulation, although it equally responds to established good practice in the UK.

Green procurement by local government

- 4.7. At the same time as the government is looking at improving the procurement process, there is increasing interest in local authorities as to how they can use their buying power to best advantage. Do they just buy at best price irrespective of where product comes from or do they target local suppliers and thereby gain advantages for local economic development? Equally, do they try to encourage more environmentally sustainable products by targeting their expenditure?
- 4.8. The Byatt report dedicates a chapter to green procurement and noted the House of Commons Environment Committee's previous recommendation "*that all areas of Central and Local Government should lead industry by example in the use of recycled products and the encouragement of suppliers to behave in the same way*"⁴.
- 4.9. The potential for local government to use its procurement processes to influence the surrounding world was also noted by the LGA in a survey of local government response to climate change:
*"(This survey) confirms that the link between procurement, sustainability and climate change is one where local authorities feel they can make an impact and is a fruitful area for further work"*⁵.
- 4.10. At the local level, the Corporate Procurement Strategy for Bristol City Council⁶ states that they will use their powers "to improve the economic, social and environmental well being of the city and its population,.. It notes that the procurement process can only do this to a limited extent "but it is important to ensure that these issues inform the initial decisions as to what to procure,.. Consequently strategic procurement should contribute to the Council's corporate aims including investing for a sustainable environment, building a thriving economy and strengthening local communities. "The ultimate goal for all procurement actions must be 'getting the best deal for Bristol',,..
- 4.11. The use of green procurement has received added interest in recent years as a result of the new power of 'well being' provided by the Local Government Act 2000. This gives local authorities the power to do anything which they consider is likely to achieve the promotion or improvement of the economic, social or environmental well being of the area.
- 4.12. In this context, the principle of green procurement by local government has attracted increasing support in the UK. However, the power of well being "does not enable a local authority to do anything which they are unable to do by virtue of any prohibition, restriction or limitation on their powers,,⁷ which exists in any other Act or regulation. As a result of this, the ability to use procurement to maximum effect is limited by the Local Government Act 1988 which prohibits consideration of non-commercial matters. These are broadly defined as those not directly relevant to the performance of the contract⁸ and was initially used to prevent Councils boycotting South African produce during the apartheid years. This constraint is reinforced by EU rules which

prohibit actions which would damage fair and open competition or equality of treatment between tenderers.

- 4.13. The scope to achieve green objectives through the procurement process is therefore limited. Instead, the focus must be on the green credentials of the service to be procured when the contract is initially scoped.
- 4.14. Bristol City Council identifies a number of ways in which sustainability can be taken into account in the procurement process⁹:
- choice of processes, service design and delivery methods to secure better resource use
 - use of reclaimed materials and reduced packaging to reduce pollution or waste
 - better durability and potential to reuse or recycle
 - selection of services that comply with Council priorities and standards
 - use of renewable energy sources in keeping with Council policy.
- 4.15. There is therefore a potential to source organic, fair trade and local produce so long as there is clear justification and a tie in to the service being delivered.

Other potential benefits from procurement

- 4.16. Procurement can also contribute to local regeneration and help support local communities. This can be through the packaging of tenders to make them attractive to smaller local suppliers, prioritisation in certain situations of local suppliers, requirements for minimum levels of local labour and use of suppliers from the social economy. Consultation with local communities can help identify the opportunities for procurement to best benefit the local area.

What GATS says about procurement

- 4.17. GATS applies to all local government measures which are defined as including any ‘procedure, decision, administrative action or any other form’¹⁰ except (as defined by Article I) ‘services supplied in the exercise of government authority’ i.e. ‘any service supplied neither on a commercial basis nor in competition with one or more service suppliers’.
- 4.18. The only exclusion from Article I is provided by the Article on Government Procurement (Article XIII) which states that Article II, XVI and XVII (i.e. the most favoured nation, national treatment and market access commitments) will not apply to:
- “laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale”.*
- 4.19. The concern, however, is how the terms “commercial resale,, and “commercial sale,, will be interpreted. There is a broad consensus amongst commentators that if the procurement is of services that have purely internal application (e.g. accountancy advice) then GATS does not apply. If however the service has a commercial dimension (e.g. purchase of food for sale in a museum café) then

GATS does apply. There is most uncertainty about the meaning of the terms when there is the potential to sell the service commercially but a choice not to (for example, purchase of food for school meals) or where there is commercial involvement in the provision of a similar service either historically or elsewhere (e.g. internet access provided in libraries and in private internet cafés). It is in these areas that GATS rules could influence local government procurement.

What the WTO says about procurement

- 4.20. In seeking to bring clarification to those elements of GATS which are vague it is legitimate to look to other WTO agreements for guidance. The WTO Agreement on Government Procurement (GPA) applies only to national governments and does not, in the case of the UK at least, extend to local government but may cast some light on the intent of GATS when it comes to local government procurement. The potential future linkage between the GPA and GATS is confirmed by WTO comments:

“government procurement has been carved out of main commitments of the General Agreement on Trade in Services. Since it is estimated that government procurement typically represents 10-15% of GDP, this represents a considerable gap in the multilateral trading system”¹¹.

- 4.21. The GPA, to which the UK is a signatory, was first agreed in 1971 with a new version coming into force in 1996. This is how it is introduced:

“Procurement of products and services by government agencies for their own purposes represents an important share of total government expenditure and thus has a significant role in domestic economies. While ensuring best value for money will be secured through an open and non-discriminatory procurement regime, governments sometimes seek to achieve certain other domestic policy goals through their purchasing decisions, such as promotion of local industrial sectors or business groups..... Such discriminatory government procurement procedures and practices can lead to distortions in international trade”¹².

- 4.22. Under the GPA, signatories are required to ensure that they do not treat suppliers differently on the basis of foreign affiliation or ownership, or on the basis of the country of production of the good or service being supplied.
- 4.23. The agreement sets out the types of acceptable tendering, tendering timescales, types of documentation and the process for tender selection.
- “(Members) have the obligation to award contracts to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender is either the lowest tender or the tender which is determined to be the most advantageous in terms of the specific evaluation criteria set forth in the notices or tender documentation”.*

- 4.24. However, the agreement goes on to say:

“The use of measures to encourage local development are explicitly prohibited in the Agreement” and furthermore, “The Agreement contains obligations on technical specifications in order to prevent entities from discriminating against and among foreign goods and suppliers through the technical characteristics of products and services that they specify. Technical specifications shall be in terms of performance rather than design”.

- 4.25. It is possible that GATS will require local government to procure services in a similar way to the GPA. The implications of this are discussed below.

The implication of GATS for green procurement

- 4.26. It is firstly necessary to assume that GATS will be found to apply to certain parts of local government procurement. As already discussed, the wording of Article XIII makes it difficult to anticipate where it will apply but it is unlikely that it will have no affect, especially in the context of Article XIX commitments to ongoing trade liberalisation.
- 4.27. Local government procurement will then have to avoid any breach of the most favoured nation, market access and national treatment commitments. This could potentially prevent procurement that favours local suppliers or which requires the use of local labour.
- 4.28. Article VI defines the criteria for regulations that do not constitute unnecessary barriers to trade. If these are applied in the field of procurement then the only acceptable criteria for a successful tender will be price, competence and the ability to supply with no additional criteria that are ‘more burdensome than necessary’¹³. This could prevent the implementation of most of the green procurement agenda and effectively give control over what is and isn’t acceptable local government tender criteria to the WTO.
- 4.29. Further problems are created if the GPA principles are applied to local government procurement. It is then possible that any attempt by local government to “achieve certain domestic policy goals through their purchasing decisions,, will be deemed to “lead to distortions in international trade,,¹⁴. This would potentially remove the scope to include the laudable objectives of using purchasing power to promote the growth of the local businesses and encourage more environmentally sustainable products.

¹ IDeA study referred to in correspondence with John Charters, Bristol City Council

² Delivering Better Services for Citizens, June 2001, HMSO

³ Towards a National Strategy for Local Government Procurement, July 2002, Office of the Deputy Prime Minister
It is worth noting that the Government response to the Byatt report makes no mention of GATS or its potential implications for local government procurement.

⁴ Delivering Better Services for Citizens, June 2001, HMSO (the Byatt report) Chapter 7 citing SOPO’s Environmental Purchasing Guide, 1998

⁵ LGA, 2002, Climate Change: A Survey of Local Authorities. Research briefing 19

⁶ Bristol City Council, May 2002, Procurement Strategy Issue 2 (page 1)

⁷ Local Government Act 2000, Part 1, para 3 (1)

⁸ Delivering Better Services for Citizens, June 2001, HMSO (the Byatt report)

⁹ Bristol City Council, May 2002, Procurement Strategy Issue 2 (page 17)

¹⁰ GATS, Article XXVIII - definitions

¹¹ Overview of the Agreement on Government Procurement, http://www.wto.org/english/tratop_e/gproc_e/over_e.htm visited 16/12/02

¹² WTO, Overview of the Agreement on Government Procurement, http://www.wto.org/english/tratop_e/gproc_e/over_e.htm. Visited 16/12/02

¹³ GATS, Article VI, para 4(a)&(b)

¹⁴ WTO, Overview of the Agreement on Government Procurement, http://www.wto.org/english/tratop_e/gproc_e/over_e.htm. Visited 16/12/02

Environmental Protection

Environmental Protection and Local Government

- 5.1. Environmental protection is a statutory function of local government and as such is highly regulated and defined by legislation. There are a number of functions:
- prevention of statutory nuisance e.g. dust, noise and other local impacts (under the Environmental Protection Act 1990),
 - monitoring and addressing contaminated land (under the Environment Protection Act 1990),
 - monitoring and improving air quality (under the Environment Act 1995),
 - monitoring and enforcing regulations to ensure standards of hygiene and to enforce codes of conduct in the manufacture and retail sale of food (under the Food Safety Act 1990),
 - Enforcing regulations in a range of retail and service businesses (under the Health and Safety at Work Act 1974 and various EU Directives),
 - Monitoring and enforcing consumer protection covering everything from food quality and labelling through to money lending.
- 5.2. In broad terms, the national bodies (e.g. the Environment Agency or the Food Standards Agency) determine policy and regulate at the upper level (including large industrial businesses) while local government is responsible for monitoring and enforcement at the local level.
- 5.3. Most local authorities employ staff in a range of roles to deliver the environmental protection function e.g. trading standards officers, environmental health officers, pest control officers, dog wardens, housing officers etc.

GATS and Environmental Protection

- 5.4. GATS makes no explicit reference to environmental protection although, as with planning, the regulations are covered by Article VI. Furthermore, Environmental Services (which includes waste management, water supply and management, protection and air and climate, noise abatement etc) are a defined service sector.
- 5.5. There are two areas in which GATS has a potential impact on the operation of environmental protection. Firstly by influencing the power and wording of regulations (through Article VI) and secondly through the commitments to allow overseas service suppliers equal and open access to UK markets which could impact upon local government directly providing environmental protection services.

The implications for Environmental Protection Regulations

- 5.6. The impact of GATS on regulations has already been discussed in the context of the Planning system (see Chapter 2). In particular, GATS seeks to ensure that regulations are no more burdensome than necessary. In addition, it seeks

to ensure high levels of transparency in all regulations and administrative decisions. As with the Planning system, therefore, GATS has implications for the consistency with which the regulations are applied throughout the country and the level of discretion exercised by officers monitoring and enforcing environmental regulations. It also enables the WTO to determine any disagreement between its members regarding local regulations.

- 5.7. Much of the environmental protection function of local government is a pro-active activity. It requires the local authority to exercise its powers (which are defined by National Process Guidance Notes) to dictate the circumstances under which pollution and other environmental impacts are allowed to occur and the measures to be taken to control them. There are 400 local authorities in England and Wales exercising these powers, but the degree to which their environmental protection departments are resourced varies between authorities. The amount of time that staff can therefore apply to monitoring individual businesses for their compliance with minimum standards will therefore vary and as a result the manner in which the regulations are enforced will differ. This potentially falls foul of transparency objectives because, while GATS makes no specific reference to the need for consistency, the WTO note on transparency¹ identifies consistency as a central requirement of transparency. There is therefore a risk that a WTO Member will claim that environmental regulations in the UK are not being consistently applied between local authorities. This could result in a requirement to review the manner in which local authorities implement their pro-active environmental protection duties.
- 5.8. Environmental protection also has a reactive element through its response to complaints received about environmental nuisance. In this context, environmental protection does not have the same regulatory requirements. There are certain standards which should be checked against, but there is a much greater reliance upon the common law of nuisance, case law and the judgement of the individual officer dealing with the case. In defence of a complaint, a company against whom the allegation of nuisance has been made can claim that they have used the 'best practical means' (a concept rooted in the Public Health Act 1936 and before and essentially meaning the best options and techniques available) to avoid creating the nuisance. There is no precise definition of 'best practical means' so it falls upon the officer (and ultimately the courts) to use their judgement and discretion to establish whether the complaint should be upheld.
- 5.9. From a professional point of view, good enforcement allows flexibility. As a result however there are likely to be different outcomes in different parts of the country as approaches and circumstances invariable change. This has given rise to frequent complaints from UK businesses that the enforcement of environmental protection is not a level playing field as different rules, conditions and barriers can be construed to exist between one authority and another. Even at the EU level, a single company may have a plant in the UK and a plant in Germany but be required to operate them in very different ways.
- 5.10. There is a risk that a WTO member could use this perceived inconsistency to launch an attack on a local authority trying to control nuisance in its local area.

A global regulatory framework

- 5.11. The WTO seems to suggest that it would prefer a global level playing field of regulations based on international standards; essentially a global regulatory framework. To some extent this has been achieved in Europe and the EU would probably be eager to offer its expertise and experience to those charged with drafting such a framework, as would many of the large companies experienced in the control exerted by these regulations.
- 5.12. Experience of the European system however shows that it creates vast amounts of paperwork and becomes, therefore, a barrier to market entry for small and new companies. While we would not advocate a relaxation of environmental standards, this implied contradiction within GATS (that on the one hand markets should be opened up to trade, especially to benefit the developing world, but on the other hand extensive international regulations should be adopted thereby blocking market access for small companies) is worth noting.

The implication for local authority environmental services

- 5.13. The second area of concern is the extent to which the provision of government environmental protection services could have to be opened up under GATS to allow overseas service suppliers equal and open access to the UK market. This could prevent local government directly providing environmental protection services thus leading to effective privatisation.
- 5.14. The Government has been adamant that GATS does not equate to privatisation. *“Privatisation is not in itself an objective of the GATS, and cannot be forced on any government through the GATS process²”*
- 5.15. However, while the DTI goes to lengths to state that it will not make commitments that could call into question the continued provision of public services through the NHS or the state education system, it clearly omits inclusion of any other public services. It also notes that the EC is trying to achieve greater opportunities for private suppliers to access markets alongside public services³.
- 5.16. Furthermore, the WDM has noted claims made by service industry lobbyists about the role of GATS in basic service privatisation. According to the Chair of the US Coalition of Service Industries, “GATS can encourage more privatisation⁴”.
- 5.17. Based on the DTI’s comments, there appears to be some disagreement amongst advocates of GATS as to how far the exemption for “services supplied in the exercise of government authority.... neither on a commercial basis, nor in competition with one or more service suppliers,⁵ extends. On the one hand they argue that the exemption extends to a range of public services, including health and education and potentially including environmental protection. On the other hand, they note that competition already exists in some sectors between public and private service suppliers.

- 5.18. If competition does exist, it could remove the protection offered to government services by GATS. As a result, government services such as health, education and environmental protection could be exposed to the rules on market access and national treatment and, potentially, other WTO rules on procurement. Quite how these latter rules might be applied is a vague area but, as discussed in Chapter 4, they potentially include tender criteria that are restricted to price, competence and the ability to supply. At the same time other considerations, such as a preference for local suppliers, would be banned. There is therefore a risk that contracts to supply local government services would have to be offered to the private sector and overseas suppliers on the basis of little more than price.
- 5.19. Although this could be a new threat to local government services, ‘virtual’ competition between public service providers and the private sector already exists in many areas of local government work through a regular review process known as Best Value Reviews. Local authorities are required to undertake reviews of all their functions to ensure that the best value for both money and other criteria is met. The reviews are carried out on a regular basis and consider, amongst other things, a theoretical if not actual potential for the private sector to deliver a better quality and more cost effective service compared to the Council’s own staff. However, if a competitive situation were to be proven to exist (as discussed above), GATS could be used to require a local authority to open opportunities for an overseas supplier to provide the service prior to any Best Value Review. This would restrict the consideration of who should provide local services to the much narrower set of criteria i.e. price, competence and ability to supply and would thereby potentially undermine one of the tools used by government to improve the quality of local service delivery.
- 5.20. In conclusion, the opening up of the environmental services sector to GATS rules potentially means the environmental protection functions of local authorities could be privatised irrespective of Best Value and the wishes of the local authority, its staff and the local population.

¹ WTO, 27 March 2002, ‘Transparency. Note by the Secretariat’ WT/WGTI/W/109 (para 15)

[http://www.modelwto.org/freetrade/Document Center/CTI/Material/Transparency Notes by the Secretariat.doc](http://www.modelwto.org/freetrade/Document%20Center/CTI/Material/Transparency%20Notes%20by%20the%20Secretariat.doc)

² DTI, October 2002, Liberalising Trade in Services, para 2.10

³ DTI, October 2002, Liberalising Trade in Services, para 2.10

⁴ WDM, November 2002, Serving (up) the nation, page 24 citing Dean O’Hare, Chair of the Coalition of Service Industries, to the House Committee on Ways and Means, ‘Hearing on the United States Negotiating Objectives for the WTO Seattle Ministerial Meeting’, August 5, 1999

⁵ GATS, Article 1 para 3

Transport

Government role in public transport

- 6.1. For most of the post-war years the government and local authorities were both the operator and regulator of public transport services in the UK. Since the 1980s however the private sector has become the major service provider leaving the government to play only a regulatory role. The motivation for this change has been the greater level of investment that the private sector can supposedly bring to public transport infrastructure and services.
- 6.2. Meanwhile, the overall transportation policy since the late 1990s has been for a modal shift from private car use to greater use of public transport and walking/cycling. However, the difficulties encountered in meeting previously set targets mean that the government is now scaling back if not abandoning attempts to increase public transport use. The focus of policy may therefore change to tackling congestion through road charging. London will be the trail blazer for this from February 2003 but ultimately it could be extended to all major roads and urban areas in the country.

Public transport

- 6.3. In order to ensure that public transport services are provided to all sectors of the community, subsidies are often paid to private operators to enable them to operate services on non-profitable routes.
- 6.4. Article XV of GATS states that subsidies represent a ‘trade distortion’ and should therefore be avoided. As discussed in Chapter 3, there is little clarification in GATS about what constitutes a subsidy although some guidance can be found in the Agreement on Subsidies and Countervailing Measures (SCM). This identifies a series of criteria for assessing subsidies and their impact on international trade.
- 6.5. To fall within the SCM, a subsidy must be ‘specific’ to an enterprise, industry or group of enterprises or industries¹. So if the subsidy is intended to be, or is in practice, limited to certain enterprises (such as public transport operators) it will be considered ‘specific’. The exception to the ‘specificity rule’ is where objective conditions and criteria are used to govern eligibility for the subsidy, i.e. they do not favour certain enterprises over others, are economic in nature and are horizontal in application e.g. number of employees. In that case, the subsidy is not specific and SCM does not apply. This may well apply to public transport subsidies and would therefore seem to exempt them from the SCM.
- 6.6. However, at this stage GATS has not been openly linked to the SCM. It is therefore possible that a different set of rules on subsidies will be developed. If that were the case, and public transport subsidies fell within a definition of trade distortion, then a competitor with the public transport sector, such as the automobile industry, could potentially claim that public transport subsidies distort the market by encouraging consumer use of public transport instead of purchasing private cars. There would therefore be a barrier to the automobile industry’s ability to trade in the UK market².

Regulation of buses

- 6.7. GATS poses a threat to the ability of countries to regulate suppliers. The supply of bus and coach services is already liberalised in the UK with local operators having to do little more than notify the authorities of a proposed route and comply with health and safety requirements.
- 6.8. If an overseas operator wanted to start running bus or coach services in the UK using their own imported vehicles they would have to comply with UK safety regulations. This is allowed as Article XIV of GATS gives a general exemption to safety rules so long as they do not represent a disguised restriction on trade. In deciding whether a safety rule is a disguised restriction on trade, reference will be made to other countries with similar conditions and possibly also to Article VI on domestic regulations which provides that regulations must not be any more burdensome than necessary. If it were found that the UK regulations were more stringent than those found in most of the rest of the world, it is possible that the operator could argue that the UK regulations are excessively burdensome. Consequently it is possible that the regulations would have to be amended with a resulting reduction in passenger safety and protection.
- 6.9. If the regulations are, however, found to be no more burdensome than necessary then the extra cost of the safety works to the coaches could act as a barrier to market entry for, say, a supplier of bus services based in a developing country. This isn't an issue for this report, but does indicate a contradiction in the spirit of the GATS agreement which is, as stated by the WTO, to encourage developing countries to trade by giving them greater access to world markets³.

Rail

- 6.10. The UK government, working through the regulatory authorities, exercises a high degree of control on market entry, pricing etc of the supply of passenger rail services. The rail network itself is now owned and operated by a not for profit company, Network Rail, which is owned by the government. Full commitments have already been made to the maintenance and repair of railways so the sector is open to supply by overseas companies. There may, however, be implications for those areas where Network Rail has decided to take direct control of all rail maintenance responsibilities from the existing contractors to enable the company "to become a well-informed buyer of maintenance services and ensure that it achieves the best value for money and an improved network performance,"⁴. In these situations, Network Rail will presumably argue that this is providing a service in the exercise of government authority and that GATS rules do not apply. However, as the same service was previously provided by the private sector, it is possible to argue that the exemption is not valid. This could potentially mean that the market to provide the services of Network Rail would have to be reopened to allow international suppliers to tender.
- 6.11. It is also possible that the GATS rules on regulations could be used to challenge the role of the regulator in this and other industries. Equally the

GATS rules on market access which prohibit economic needs tests could potentially be used to challenge the regulator.

- 6.12. Challenges could also be mounted to the subsidies that the rail industry receives potentially by providers of other forms of public transport.

Taxis

- 6.13. The provision of taxi services in the UK is highly regulated. To quote the Office of Fair Trading:

“Fares are set in all areas, as are criteria for being a fit and proper driver and owner. Many local authorities restrict the number of taxi licences available and apply restrictions on the type of vehicle permitted, the age of the vehicle and where taxis can and cannot ply for hire. As a result, competition may be weakened in some local areas”⁵.

- 6.14. Taxi regulations are invoked by 45% of local authorities and typically cover fares, design specifications for taxis, the areas in which taxis may operate and the extent drivers are compelled to accept a hire, where taxi ranks are located, the standard of road worthiness of the vehicle and the criteria for being a fit and proper driver and owner.
- 6.15. The Office of Fair Trading has announced an investigation to examine whether consumers are best served by the regulations that restrict the number of taxi licences available in England and Wales and will aim to identify any other competition or consumer welfare issues. They intend to report in the summer 2003.
- 6.16. What the OFT does not mention is the potential role of GATS in triggering the investigation. The DTI states that “the UK maintains an economic needs test in relation to taxi services, allowing local authorities to limit the number of licensed taxis in a given area,, but goes on to invite “views on whether this is still needed,,⁶. It would certainly appear that the existing regulations constitute restrictions on market access could be in breach of the rules on regulations and market access. The recommendations of the OFT investigation could recommend liberalisation of the market with the resultant opportunity for overseas operators to establish themselves in the UK.

Roads

- 6.17. Roads are effectively provided free of charge to the user. The economic cost of congestion is used by business organisations and motoring lobby groups to argue for investment in a greater number and size of roads. The financial cost of responding to this is considerable and so the government has been exploring opportunities to use private sector finance to fund the capital investment. Consequently the ‘design, build, operate’ model has been used for projects such as the Birmingham Northern Relief Road while many toll bridges such as the Second Severn Crossing and the Skye Bridge are also built and operated by the private sector. Similarly the private sector is awarded contracts in some areas to undertake the management of trunk roads.

- 6.18. GATS presents a potential, if remote, challenge to control of privately operated roads in the UK as the Market Access requirements prohibit the use of limitations on the total number of service providers or on the quantity of service output (Article XVIc). If an overseas operator decided that there was sufficient market demand to justify building a new road, could the government legitimately stop them without infringing the market access rules? It might be argued that the provision of roads is exempt from GATS as it is a government service not supplied on a commercial basis or in competition (Article I). However, the charging for the use of roads and the ability of private operators to make a profit does perhaps show that there is a commercial basis for the supply of this service. Equally, the presence of private operators in a 'design, build, operate' capacity points to some competition with the freely accessible road network.
- 6.19. There would of course be many logistical barriers to building such a road, not least the purchase of the required land, but there is nevertheless at least a theoretical risk that GATS could require an overseas operator to be allowed to build new roads where they desire.

¹ WTO, 1994, Agreement on Subsidies and Countervailing Measures, page 230, Article 2
http://www.wto.org/english/docs_e/legal_e/24-scm.pdf visited 14/1/03

² This argument was developed in Swenarchuk M, 2002, From Global to Local: GATS Impacts on Canadian Municipalities pp23-24

³ WTO, The World Trade Organisation in Brief, http://www.wto.org/english/res_e/doload_e/inbr_e.pdf

⁴ Network Rail, 2003, press release, <http://www.networkrail.co.uk/pressoffice/pressreleases.htm/news/723C56AB-5C81-11D7-A3BE-0008C7334167/index.htm> visited 1 April 2003

⁵ Office of Fair Trading, August 2002, Investigation into UK taxi services, Issues paper
<http://www.offt.gov.uk/NR/rdonlyres/evsli42vivicct6h7rtoxkqa72bk7ebpkklgyzpd5rkh6j52tl7m3afzx2rbuhmsl6euz36nvujcan3w2hucy6dezkch/taxi.pdf>

⁶ DTI, October 2002, Liberalising Trade in Services, page 43