

Recent Preferential Trade Agreements' disciplines for tackling regulatory divergence in services: how far beyond GATS?

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Regulatory Divergence

➤ Concept

- Pure' regulatory heterogeneity of services regulations, i.e. differences that are not in any way attributable to protectionist or anti-competitive goals (Mattoo, 2015)

➤ Trade costs

- Need to adjust supply to non-discriminatory but different license or qualification requirements, technical standards, etc. raises trade costs
- Problem compounded by the regulatory intensity of services
- Empirical assessment (Kox & Lejour (2005), Schweltnus (2007) Kox & Nordås, (2007) and (2009); Van der Marel, E., and B. Shepherd (2013) and Nordås (2016)

➤ Policy option

- How far beyond GATS have PTAs gone in their quest for tackling regulatory divergence on services?

Tools for Tackling Regulatory Divergence

- I. Disciplines on transparency
- II. Disciplines on development of measures
 - A. Substantive disciplines for LRs, LPs, QRs, QPs, TSs
 - B. Good regulatory practices
- III. Disciplines on administration of measures
 - A. Authorisation processes
 - B. Administration and review of administrative decisions
- IV. Regulatory Cooperation

Preferential Trade Agreements (PTAs) Examined

Parties	Code	Parties	Code
China - Costa Rica	CHN-CRC	Japan - Switzerland	JPN-CHE
China – Islandia	CHN-ISL	Japan - India	JPN-IND
China - Switzerland	CHN-CHE	Japan - Peru	JPN-PER
China - Korea	CHN-KOR	Japan - Australia	JPN-AUS
China - Australia	CHN-AUS	Japan - Mongolia	JPN-MNG
China - Georgia	CHN-GEO	USA - Oman	USA-OMN
EU - CARIFORUM	EU-CARIFORUM	USA - Peru	USA-PER
EU-KOREA	EU-KOR	USA - Colombia	USA-COL
EU-COLOMBIA-PERU	EU-COL-PER	USA - Panama	USA-PAN
EU - Central America	EU-CEN	USA - Korea	USA-KOR
CETA	CETA	USA - Mexico - Canada	USMCA
EU - Armenia	EU-ARM	CPTPP	CPTPP
EU - Japan	EU-JPN	Australia - Indonesia	AUS-IDN
EU - Singapore	EU-SGP	Canada - Korea	CAN-KOR
EU - Vietnam	EU-VNM		
EU - Mexico	EU-MX		

Aspects of disciplines reviewed

Comprehensiveness	Enforceability		Scope of Application
Number and extent of disciplines	Hard Language	Soft Language	<p>Horizontally ('H')</p> <p>Horizontally, but for to existing non-conforming measure maintained by a Party as set out in their schedules ('H-')</p> <p>In sectors in which the Party has undertaken specific commitments in its PTA Schedule</p> <p>In sectors in which the Party has undertaken specific commitments in its GATS Schedule</p>
	<p>'shall ensure'</p> <p>'shall apply'</p> <p>'shall be based on'</p> <p>'shall not in themselves'</p>	<p>'shall aim to ensure'</p> <p>'shall endeavour to ensure'</p> <p>'shall encourage'</p> <p>'shall, to the extent practicable'</p>	



Disciplines on Transparency

Disciplines on Transparency

Disciplines	PTAs' Chapter
<p><u>Duty to publish</u></p> <ul style="list-style-type: none"> • Measures of general application • Licensing criteria <p><u>Duty to consult</u></p> <ul style="list-style-type: none"> • Duty to publish proposals of laws and regulations (Duty to explain their purpose / rationale) • Duty to provide a reasonable opportunity to comment (Duty to consider comments received) • Duty to allow reasonable time between publication and entry into force <p><u>Duty to inform</u></p> <ul style="list-style-type: none"> • Duty to notify measures affecting trade in services • Duty to respond to inquiries from the other party • Duty to establish enquiry points for interested persons 	<ul style="list-style-type: none"> • Horizontal Provisions • Trade in services • Financial Services • Telecommunications • Movement of Natural Persons / Temporary Entry of Business Persons • E-commerce / Digital Trade

Variables' Codes / Results' Codes

Variables' Codes		Results' codes	
PUB I	Duty to publish measures of general application	-	No duty
PUB II	Duty to publish licensing criteria	S	Soft duty
ADP	Duty to publish in advance any such measure that it proposes to adopt	H	Hard duty
OTC	Duty to provide interested persons and the other Party a reasonable opportunity to comment on such measures	H+ (PUB I)	Includes hard duty to explain the purpose of and rationale of the measure
REP	Duty to allow for a reasonable period between publication and entry into force – Number	H+ /S+ (OTC)	Includes hard/soft duty to take into account comments received
NOT	Duty to notify the other Party of any actual or proposed measure that the Party considers might materially affect the operation of this Agreement or otherwise substantially affect the other Party's interests under this Agreement.	S- (OTC)	Duty extends only to the other party (excludes interested persons)
POI	Duty to provide information and respond to questions from the other party on matters pertaining to any actual or proposed measure that the requesting Party considers might affect the operation of this Agreement		
ENP	Duty to establish or maintain appropriate mechanisms for responding to enquiries from interested persons regarding its measures of general application which may have an impact on matters covered by this Agreement		

Disciplines on Transparency

	Duty to Publish		Duty to Consult			Duty to Inform		
	PUB I	PUB II	ADV	OTC	REP	NOT	POI	ENP
GATS	X	-	-	-	-	X	X	X(*)
PTAs	X	X	X	X	X	X	X	X

Horizontal Provisions

	PUB I	ADP	OTC	REP	NOT	POI	ENP			PUB I	ADP	OTC	REP	NOT	POI	ENP
CHN-CRC	H	S	S	-	S	H	-		JPN-CHE	H	-	-	S	-	H	-
CHN-ISL	H	-	-	-	-	S	-		JPN-IND	H	-	-	-	-	H	-
CHN-CHE	H	-	-	-	-	H	-		JPN-PER	H	-	S	S	-	H	-
CHN-KOR	H	S	S	-	S	H	-		JPN-AUS	H	-	S	-	-	H	-
CHN-AUS	H	S	S	-	S	H	-		JPN-MNG	H	-	S	-	-	H	-
CHN-GEO	H	-	-	-	S	H	-		USA-OMN	H	S	S	-	-	H	-
EU-CARIFO	H	-	-	-	-	S	-		USA-PER	H	S	S	-	S	H	-
EU-KOR	H	S	H+	H	-	H	H		USA-COL	H	S	S	-	S	H	-
EU-COL-PER	H	-	S+		-	S	-		USA-PAN	H	S	S	-	S	H	-
EU-CEN	H+	-	S+	S	-	S	-		USA-KOR	H+	S	H+	-	-	H-	-
CETA	H	S	S		-	S	-		USMCA	H	S	S	-	-	-	-
EU-ARM	H+	S	H+	H	-	H	H		CPTPP	H	S	S	S	S	H	-
EU-JPN	H	-	-	S	-	H	H		AUS-IDN	H	S	S	S	S	H	-
EU-SGP	H+	S	H+	H	-	H	H		CAN-KOR	H	S	S	-	S	H	-
EU-VNM	H	S	H+	H	-	H	S									
EU-MEX	H+	-	-	S	-	H-	-									

Other Provisions

- PUB I
 - include 'judicial decisions' that may affect the operation of the Agreement
 - captures measures adopted by central, regional or local governments and non-governmental bodies in the exercise of delegated powers
 - explain the purpose of and rationale of the measure
- PUB II: few chapters on services include it. Mostly found in chapters on financial services and telecom
- OTC: duty to make publicly available all relevant comments filed by interested persons and to respond to all significant and relevant issues raised in comments filed
- POI: duty to respond within 30 days following the receipt of the request
- ENP: many chapters on trade in services add duty to establish ENPs for responding to inquiries from interested persons regarding its regulations relating to the subject matter of this Chapter.

EU-Armenia PTA

Article 309 Publication

1. Each Party shall ensure that measures of general application adopted after the entry into force of this Agreement:

(a) are promptly and readily available via an officially designated medium, including electronic means, in such a manner as to enable any person to become acquainted with them;

(b) clearly state to the extent possible, the objective of and rationale for such measures; and

(c) allow for a sufficient period of time between publication and entry into force of such measures, except in duly justified cases.

2. Each Party shall:

(a) endeavour to publish at an early appropriate stage any proposal to adopt or amend any measure of general application, including an explanation of the objective of, and rationale for, the proposal;

(b) provide reasonable opportunities for interested persons to comment on any proposal to adopt or amend any measure of general application, allowing, in particular, for sufficient time for such opportunities; and

(c) endeavour to take into consideration the comments received from interested persons with respect to any such proposal.

EU-Armenia PTA (cont')

Article 310 Enquiry and Contact Points

1. Each Party shall, upon the entry into force of this Agreement, designate a contact point in order to ensure the effective implementation of this Agreement and to facilitate communication between the Parties on any matter covered by this Agreement.
2. Upon request of a Party, the contact point of the other Party shall identify the body or official responsible for the matter and assist, as necessary, in facilitating communication with the requesting Party.
3. Each Party shall establish or maintain appropriate mechanisms for responding to enquiries from any person regarding any measures of general application which are proposed or in force, including on the application of such measures. Enquiries may be addressed through contact points established under paragraph 1 or any other mechanism, as appropriate, unless a specific mechanism is established in this Agreement.
4. Each Party shall provide for procedures available to persons seeking a solution to problems that have arisen from the application of measures of general application under this Agreement. Those procedures shall be without prejudice to any appeal or review procedures which the Parties establish or maintain under this Agreement. They shall also be without prejudice to the Parties' rights and obligations under Chapter 13.
5. The Parties recognise that the response provided pursuant to this Article may not be definitive or legally binding but for information purposes only, unless otherwise provided for in their respective laws and regulations.
6. Upon request of a Party, the other Party shall without undue delay provide information and respond to questions pertaining to any measure of general application or any proposal to adopt or amend any measure of general application that the requesting Party considers might affect the operation of this Agreement, regardless of whether the requesting Party has been previously notified of that measure.



Disciplines on Development of Measures

Includes final disciplines on development of measures?

YES	NO (BUT TEMPORARY OBG PENDING CONCLUSION VI.4 NEGOTIATIONS)	NO
<p>CHN-CRC CHN-CHE</p> <p>EU-KOR CETA</p> <p>EU-ARM EU-JPN</p> <p>EU-SGP EU-VNM EU-MEX</p> <p>JPN-CHE JPN-PER</p> <p>JPN-AUS JPN-MNG</p> <p>USA-OMN USA-PER</p> <p>USA-COL USA-PAN</p> <p>USA-KOR USMCA</p> <p>CPTPP AUS-IDN</p>	<p>CHN-ISL</p> <p>CHN-KOR</p> <p>CHN-AUS</p> <p>CHN-GEO</p> <p>EU-COL-PER</p> <p>JPN-IND</p>	<p>EU-CARIFORUM</p> <p>EU-CEN</p> <p>CAN-KOR</p>

Variables' Codes

IDS	Includes final disciplines on development of measures	LPR	In the case of licensing procedures, not in themselves a restriction on the supply of the service
TNI	Pending the adoption of disciplines, temporary obligation not to apply LRs, QRs and TSs, that N or I specific commitments	OCR	Other Criteria
ENF	Enforceability	RIS	Relevance of international standards
MCV	Measures Covered	SCO	Scope of application
DEF	Includes definition of measures	DTR	Duty to review results of GATS VI:4 negotiations with a view to bring them into effect, as appropriate, under the agreement
O&T	Based on objective and transparent criteria, such as competence and the ability to supply the service		
NEC	Not more burdensome than necessary to ensure the quality of the service		

Disciplines on development of measures

	IDS	TNI	ENF	MCV	DEF	O&T	NEC	LPR	OCR	RIS	SCO	DTR
CHN-CRC	Y	-	S	LQT	N	Y	Y	Y	N	N	HR	Y
CHN-ISL	N	Y	-	-	N	-	-	-	-	Y	-	Y
CHN-CHE	Y	-	H/S	LQT	N	Y	Y	Y	N	Y	HR	N
CHN-KOR	N	Y	-	-	N	-	-	-	-	Y	-	Y
CHN-AUS	N	Y	-	-	N	-	-	-	-	Y	-	Y
CHN-GEO	N	Y	-	-	Y	-	-	-	-	Y	-	Y
EU-CARIFORUM	N	N	-	-	-	-	-	-	-	-	-	N
EU-KOR	Y	-	S	LQT	N	Y	N	Y	N	N	HR	Y
EU-COL-PER	N	Y	-	-	N	-	-	-	-	Y	-	Y
EU-CEN	N	N	-	-	-	-	-	-	-	-	-	N
CETA	Y	-	H	LQ	Y	Y	N	Y	Y	N	HR-	N
EU-ARM	Y	-	H	LQ	Y	Y	N	N	Y	N	SS	N
EU-JPN	Y	-	H/S	LQ/T	N	Y	N	Y	Y	N	HR-	N
EU-SGP	Y	-	H	LQ	Y	Y	N	Y	Y	N	SS	N
EU-VNM	Y	-	H	LQ	Y	Y	N	Y	Y	N	SS	N
EU-MEX	Y	-	H/S	LQ/T	N	Y	N	N	Y	N	SS	Y

Disciplines on development of measures

	IDS	TNI	ENF	MCV	DEF	O&T	NEC	LPR	OCR	RIS	SCO	DTR
JPN-CHE	Y	-	H	LQT	N	Y	Y	Y	Y	Y	SS (GATS)	Y
JPN-IND	N	Y	-	-	N	-	-	-	-	-	-	Y
JPN-PER	Y	-	H	LQT	N	Y	Y	Y	N	N	SS (GATS)/ HR	Y
JPN-AUS	Y	-	S	LQTA	N	Y	Y	Y	N	N	HR	Y
JPN-MNG	Y	-	H	LQTA	N	Y	Y	Y	N	N	HR	N
USA-OMN	Y	-	S	LQT	N	Y	Y	Y	N	N	HR	Y
USA-PER	Y	-	S	LQT	N	Y	Y	Y	N	N	HR	Y
USA-COL	Y	-	S	LQT	N	Y	Y	Y	N	N	HR	Y
USA-PAN	Y	-	S	LQT	N	Y	Y	Y	N	N	HR	Y
USA-KOR	Y	-	S	LQT	N	Y	N	Y	N	N	HR	Y
USMCA	Y	-	H/S	LQ/T	N	Y	N	N	Y	N	HR-	N
CPTPP	Y	-	S	LQT	N	Y	N	Y	N	Y	HR-	Y
AUS-IDN	Y	-	S	LQT	N	Y	N	Y	N	Y	HR	Y
CAN-KOR	N	N	-		N	-	-	-	-	-	-	Y

Examples of 'other' criteria:

- Clarity and unambiguity
- Simplicity and reasonability
- Publicly accessible
- Established in advance
- Proportionate to a public policy objective
- Relevant to the supply of the service
- Impartiality and adequacy of procedures (to enable applicants to demonstrate whether they meet the requirements)
- Non –discriminatory between men and women? (Not found any)

Role of international standards as benchmarks?

<p>CHN-CHE JPN-CHE CPTPP AUS-IDN</p>	<p>In determining whether a Party is in conformity with the obligation under paragraph 3, account shall be taken of international standards of relevant international organisations¹⁵ applied by that Party.”</p> <p>“Relevant international organisations” refers to international bodies whose membership is open to the relevant bodies of both Parties.</p>
<p>JPN-CHE Annex DR</p>	<p>The Parties shall exchange views in the Joint Committee or in relevant Sub-Committees or ad hoc working groups that may be established pursuant to Article 148, as necessary, on work relating to service standards conducted at an international level. <u>Where a Party prepares, adopts or applies standard-related measures for which relevant international standards exist, the Party shall use them, or the relevant parts of them, as a basis for its technical regulations,</u> except where such standards would be an ineffective or inappropriate means to fulfil its legitimate policy objectives, for instance, because of fundamental climatic, geographical, technological or infrastructural factors.</p>

Summary

Includes disciplines	Hard language	Necessity test	Applies horizontally	Covers LQTA
CHN-CRC CHN-CHE EU-KOR CETA EU-ARM EU-JPN EU-SGP EU-VNM EU-MEX JPN-CHE JPN-PER JPN-AUS JPN-MNG MNG USA-OMN USA-PER USA-COL USA-PAN USA-KOR USMCA CPTPP AUS-IDN	CHN-CHE CETA EU-ARM EU-JPN EU-SGP EU-VNM EU-MEX JPN-CHE JPN-PER JPN-MNG USMCA	CHN-CHE JPN-CHE JPN-PER JPN-MNG	CHN-CHE JPN-MNG	JPN-MNG

Japan – Mongolia PTA

Article 7.8 Domestic Regulation

3. With a view to ensuring that any measure adopted or maintained by a Party in any services sector related to the authorization, qualification requirements and procedures, technical standards and licensing requirements of service suppliers of the other Party does not constitute an unnecessary barrier to trade in services, each Party shall ensure that such measure:

(a) is based on objective and transparent criteria, such as the competence and ability to supply the service;

(b) is not more burdensome than necessary to ensure the quality of the service; and

(c) does not constitute a disguised restriction on the supply of the service.



Disciplines on Authorisation Process

Disciplines on Authorisation Process

Disciplines	PTAs' Chapter
<ul style="list-style-type: none">• Submission of Applications• Application Timeframes• Electronic Applications• Acceptance of Copies• Processing of Applications• Fees• Assessment of Qualifications• Independence	<ul style="list-style-type: none">• Trade in services• Financial Services• Telecommunications• Movement of Natural Persons / Temporary Entry of Business Persons

Variables' Codes

OCA	Duty to avoid requiring an applicant to approach more than one competent authority for each application for authorisation	IAS	Duty to inform, at request, about status of application
AAT	Duty to permit submission of an application at any time	IAE	Duty to inform applicant and provide opportunity to correct minor errors and omissions in the application
RPS	Duty to allow a reasonable period for the submission of the application where specific time periods for application exist	IAR	Duty to inform, upon request, reasons for rejection of application
AEF	Duty to accept applications in electronic format	WUD	Duty to ensure that authorisation, once granted, enters into effect without undue delay
AAC	Duty to accept authenticated copies of documents	FAR	Duty to ensure that fees are reasonable, transparent and not in themselves restrict the supply of the service
PIT	Duty to provide an indicative timeframe for processing an application	EFI	Duty to schedule examinations at frequent intervals
PAR	Duty to process applications within a reasonable timeframe	IFS	Duty to ensure that the competent authority reaches and administers its decisions in a manner independent from any supplier of the services for which authorization is required
IAD	Duty to inform applicant of the decision concerning the application within a reasonable period of time after the submission of the application	SCO	Scope

Disciplines on Authorisation Process

	Submission of Applications	Application Timeframes		Electronic Applications and Acceptance of Copies		Processing of Applications						Fees	Assessment of Qualifications	Independence	Scope		
		AAT	RPS	AEF	AAC	PIT	PAR	IAD	IAS	IAE	IAR					WUD	
GATS	-	-	-	-	-	-	X	X	X	-	-	-	-	-	-	-	SS
PTAs	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	SS HR- HR

Processing of Applications

	PIT	PAR	IAD	IAS	IAE	IAR	WUD	SCO			PIT	PAR	IAD	IAS	IAE	IAR	WUD	SCO
CHN-CRC	-	H	H	H	-	-	-	SS		JPN-CHE	-	H	H	H	-	-	-	SS
CHN-ISL	-	H	H	H	-	-	-	SS		JPN-IND	-	H	H	H	-	-	-	SS
CHN-CHE	H	H	H	H	H	H	H	SS		JPN-PER	-	H	H	H	-	-	-	HR
CHN-KOR	-	H	H	H	-	-	-	SS		JPN-AUS	-	H	H	H	S	H	-	HR
CHN-AUS	-	-	-	H	H	S	-	SS		JPN-MNG	-	H	H	H	-	-	-	HR
CHN-GEO	-	-	-	H	H	S	-	SS		USA-OMN	-	H	H	H	-	-	-	HR-
EU-CARIFORUM	-	H	H	H	-	-	-	SS		USA-PER	-	H	H	H	-	-	-	HR-
EU-KOR	-	H	H	H	-	-	-	SS		USA-COL	-	H	H	H	-	-	-	HR-
EU-COL-PER	-	H	H	H	-	-	-	SS		USA-PAN	-	H	H	H	-	-	-	HR-
EU-CEN	-	H	H	H	-	-	-	SS		USA-KOR	-	H	H	H	-	-	-	HR-
CETA	S	H	-	H	H	H	H	HR-		USMCA	S	H	H	H	S	S	H	HR-
EU-ARM	S	H	-	-	H	H	H	SS		CPTPP	S	H	H	H	S	S	-	HR-
EU-JPN	S	H	-	-	H	H	H	HR-		AUS-IDN	S	H	H	H	S	S	S	HR-/H
EU-SGP	S	H	-	-	H	H	H	SS		CAN-KOR	-	H	H	H	-	-	-	HR
EU-VNM	S	H	-	-	H	H	H	SS										
EU-MEX	S	H	H	H	S	S	H	HR-										

Other Disciplines on Authorisation Process

	OCA	AAT	RPS	AEF	AAC	FAR	EFI	IFS			OCA	AAT	RPS	AEF	AAC	FAR	EFI	IFS
CHN-CRC	-	-	-	-	-	-	-	-		JPN-CHE	-	-	-	-	-	-	-	-
CHN-ISL	-	-	-	-	-	-	-	-		JPN-IND	-	-	-	-	-	-	-	-
CHN-CHE	-	-	-	-	-	H	-	-		JPN-PER	-	-	-	-	-	-	-	-
CHN-KOR	-	-	-	-	-	-	-	-		JPN-AUS	-	-	-	-	-	-	-	-
CHN-AUS	-	-	-	-	-	-	-	-		JPN-MNG	-	-	-	-	-	-	-	-
CHN-GEO	-	-	-	-	-	-	-	-		USA-OMN	-	-	-	-	-	-	-	-
EU-CARIFOR	-	-	-	-	-	-	-	-		USA-PER	-	-	-	-	-	-	-	-
EU-KOR	-	-	-	-	-	-	-	-		USA-COL	-	-	-	-	-	-	-	-
EU-COL-PER	-	-	-	-	-	-	-	-		USA-PAN	-	-	-	-	-	-	-	-
EU-CEN	-	-	-	-	-	-	-	-		USA-KOR	-	-	-	-	-	-	-	-
CETA	-	-	H	S	S	H	-	S		USMCA	S	S	H	S	H	H	H	H
EU-ARM	-	-	H	S	S	H	-	H		CPTPP	-	-	H	-	S	H	H	-
EU-JPN	-	-	H	-	S	S	-	H		AUS-IDN	-	-	H	S	S	H	H	-
EU-SGP	-	-	H	S	S	S	-	S		CAN-KOR	-	-	-	-	-	-	-	-
EU-VNM			H	S	S	S	-	S										
EU-MEX	-	S	H	S	H	H	H	-										

Findings

- Plenty of evidence of GATS plus and GATS extra disciplines on development of measures, authorisation process and transparency
- While there are some common patterns within each 'family' of PTAs, there is not such a thing as a PTA template
- Changing nature of trade agreements (negative vs positive obligations; specific commitments vs trade rules; horizontal vs vertical obligations)
- Increasingly blurring remit of 'trade' agreements
- Implications for parties, third parties, individuals?

Implications for parties to PTA

- Expected trade gains from tackling regulatory divergence

But...

- Trade gains outweigh implementation costs?
- Forced alignment to regulatory hegemon?
- Too soon to tell. Empirical evidence not yet available

Implications for third parties

- Trade diversion?
- Multilateral negotiations?



Thank You

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“Queen Mary University of London is one of the UK’s leading research universities, committed to improving social justice and achieving the previously unthinkable”