European and External Relations Committee
The Transatlantic Trade and Investment Partnership (TTIP)

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1. Introduction

The purpose of this paper is to investigate some of the possible implications of the Transatlantic Trade and Investment Partnership agreement (hereinafter referred to as TTIP) for Scotland’s economy and in particular its possible impact on the provision of public services. It will start from a short examination of the EU’s role and powers as regards external relations within the Founding Treaties and in that context will analyse the scope and legal effects of international agreements concluded by the Union in its areas of competence vis-à-vis its Member States. Thereafter, it will concentrate on the question of whether the stipulation of TTIP will have any impact on the existing modes of organisation of public services’ provision in Scotland, with a clear emphasis on health care and other “services to the person”.

2. The EU as an international actor

2.1. General remarks—the Treaty-making powers of the EU

According to Article 216(1) of the Treaty on the Functioning of the European Union (TFEU) the EU enjoys the power to “conclude an agreement with one or more third countries (…) where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaty (…)”; it can also do so when stipulating an agreement with non-member countries is “provided for in a legally binding Union act” and where it is “likely to affect common rules or alter their scope”.¹ Thus the Union shall be competent to conclude agreements with third countries in all the areas in which it enjoys internal competence—and that includes, inter alia, trade and commerce—in accordance with the principle of conferral. In addition, the case law of the Court of Justice of the EU indicates that the Union can do so regardless of whether the Treaty expressly provides it with external powers in certain circumstances: thus, it was held in, inter alia, the ERTA case, that Member States would no longer be entitled, “acting individually or even collectively, to undertake obligations with third countries which affect these rules”, once the Union had “adopted common rules” aimed at “implementing a common policy envisaged by the Treaty”.²

² Case 22/70, Commission v Council (ERTA), [1971] ECR 263, para. 17.
This approach was later applied and to an extent finessed in the Opinion concerning whether the Union enjoyed competence to accede to major international treaties, such as those belonging to the WTO acquis.\(^3\) The Court of Justice, commenting explicitly on the GATS agreement, took the view that the Union enjoyed treaty making powers in respect of the trade in services, as a consequence of its powers to enact common rules in this area.\(^4\)

However, it also clarified that this competence would not be exclusive, but would in principle remain shared with the Member States, except in two cases. The first exception concerned a situation where, as in ERTA, the Union had already adopted common rules in a specific field, which would be affected by the unilateral stipulation of international agreements on the part of certain Member States.\(^5\) The second concerned the case in which the EU had already adopted legislation aimed at harmonising fully the rules governing a specific policy field: in the Court’s view, providing that such a power has already been exercised, the existence of “such harmonisation measures (…) may (…) even remove the freedom of the Member States to negotiate with non-member countries” in the affected area.\(^6\)

In light of the above, it is suggested that the EU, in accordance with the principle of conferral, only enjoys Treaty making powers in those areas in which it also has a competence to act; furthermore, such competence remains, in accordance with the same rules governing its powers, shared with the Member States unless the corresponding “internal power” has already been exercised.\(^7\) As was forcefully held by the EU Court of Justice, in order to eliminate altogether the ability of the Member States to conclude international agreements the Union must have concretely exercised its powers by adopting common rules that are effective within the EU.\(^8\) It may therefore be concluded that Union action on the international plain can only bind the Member States, in accordance with Article 216(2) TFEU, in fields which the latter have already relinquished to it. In other words, it is submitted that in areas in which the Member States retain powers to act, the Union cannot, through the stipulation of international agreements, take any action designed to affect domestic arrangements, unless in the two narrow exceptions outlined above. In the words of the Court of Justice in the Re: ECHR Opinion,\(^9\) “the principle of conferred powers must be respected in both the internal action and the international action” of the EU\(^10\) and precludes the

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\(^4\) Id., para. 76-77.  
\(^5\) Id., para. 77.  
\(^6\) Id., para. 88.  
\(^7\) See e.g. Hartley, cit. (fn. 1), p. 183.  
\(^8\) Ibid.; see also WTO, cit. (fn. 3), para. 89.  
\(^10\) Id., para. 24.
latter from “widening the scope of (...) [its] powers beyond the general framework created by” and in particular of the areas of competence identified, either expressly or impliedly, by the Treaty.11

2.2. TTIP—procedural issues
The previous section sought to briefly illustrate the limited nature of EU competences and to highlight that the Union can only take external action to the extent that it is allowed to do so by the Treaty, that is in those areas in which Member States have relinquished their sovereignty in its favour. This section will move on to provide a short overview of the treaty-making procedures enshrined in the Treaty of Lisbon, with a view to addressing some of the questions concerning the process through which the contracting parties are discussing TTIP’s contents.

According to Article 218 TFEU, proceedings begin when the Commission recommends to the Council of Ministers that negotiations should take place: if the Council approves the recommendation, then it will appoint also a negotiator heading the team responsible for the discussion. In that context, the Council can also issue directives to the team and establish mechanisms for oversight and reporting. Upon completion of successful negotiations, the agreement is signed on behalf of the EU and submitted to the Council for approval at qualified majority voting, together with the decision to conclude it. The European Parliament must be consulted in this process and must give its consent in a number of cases, notably when the agreement has "budgetary implications" or when it affects areas "where the Parliament's consent would have to be obtained for the enactment of internal legislation".12

Importantly, when the agreement concerns matter falling within the common commercial policy, Article 207 TFEU lays down a special procedure, according to which the agreement is negotiated by the Commission upon authorisation from the Council and under the supervision of a Council-appointed committee. The Commission has to abide by stringent reporting obligations vis-a-vis the Council and the European Parliament; once negotiations have been successfully concluded the agreement is concluded by the Council acting at qualified majority voting.13 Importantly, however, the TFEU did not provide for any arrangements for the disclosure of documents related to the negotiations, a factor which, particularly with regard to TTIP, raised considerable concerns: civil society groups protested at the perceived lack of transparency surrounding the negotiations.14 They argued that despite

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11 Id., para. 30; see also para. 26.
13 Id., pp. 188-189.
14 See e.g. “Civil Society call for full transparency in EU-US trade negotiations”, from Corporate Europe Observatory, 19 May 2014, accessible via: http://www.statewatch.org/news/; also, among others, see the letter signed by Friends of the
repeated reassurances on the part of the EU Commission, these discussions were held in secret and especially the contributions to them originating from business stakeholders were not disclosed routinely to the wider public.

Corporate Europe Observatory, among others, expressed the view early in 2014 that despite repeated Freedom of Information requests made to the Commission, only a fraction of the minutes taken at meetings with key businesses and of the relevant written submissions had been made public. It was alleged that the arguments used to justify maintaining them confidential were "flawed" and that keeping the cloak of secrecy on the conduct of the negotiations was motivated by the Commission's desire to "keep big business on side". Following repeated calls for its disclosure, the Commission published in full its negotiating mandate, originally approved by the Council in June 2013, in October 2014: this followed not only considerable debate and strong calls for greater transparency, but also, perhaps more importantly, the opening of an investigation on the part of the European Ombudsman, on the 31 July 2014, concerning allegations of maladministration stemming from the conduct of the negotiations. Emily O'Reilly expressed the view that while the confidentiality of certain documents should be maintained, to ensure the smooth running of the negotiations, the Commission should adopt a "proactive transparency policy" in all other cases.

Seen in this context, it is clear that the Commission's decision to disclose its mandate in full, together with many of the negotiating directives it had received from the Council could be regarded as a victory for transparency and for the public. Speaking in October 2014, the Ombudsman praised the Commission and the Member States for having committed to greater openness in this area, due to the projected impact of TTIP on the lives of citizens. It is especially noteworthy that thanks to this more "proactive" approach to transparency, the members of the European Parliament's steering committee, responsible for the oversight of the negotiations, were

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16 Ibid.


19 Ibid.

granted access to further confidential documents to be consulted in specially appointed venues.\textsuperscript{21}

3. The Transatlantic Trade and Investment Partnership agreement: what does it mean for Scotland and its public services?

3.1. Introductory remarks

The previous sections gave a brief account of the treaty-making powers enjoyed by the EU according to Articles 207, 216 and 218 of the TFEU and sought to place these powers in the wider context of the principle of conferral, which governs the exercise of the whole array of powers that the Member States have bestowed upon the Union. Thereafter, section 2.2 analysed some of the procedural issues arising from the negotiations of the TTIP and highlighted how, after authoritative calls to increase the transparency and the opportunity for public scrutiny the EU Commission had adopted a far more inclusive approach to the access of negotiation-related documents. This section will move on to examine some of the implications that TTIP could have for Scotland. As was anticipated this submission will concentrate on the question of the extent to which the Partnership agreement is likely to influence how the delivery of public services may be structured in the future: the provision of health care services will be chosen as the focus for this analysis.

According to the negotiating mandate, the scope of the TTIP is to cover "trade and trade-related areas applicable between the parties".\textsuperscript{22} The EU Commission headed by Mr Barroso hailed these negotiations as a prime opportunity for “delivering better access to the US market” for European firms and thereby “unleashing untapped potential of a truly transatlantic market place”.\textsuperscript{23} In the Economic Study commissioned by the Commission it was illustrated how the implementation of the new agreement would have yielded increases of EU exports to the US of about 28\% and, overall, a rise in cross-Atlantic trade of 6\% for the EU and 8\% for the US.\textsuperscript{24}

Not all other stakeholders, however, were as enthusiastic: civil society groups, for instance, expressed grave concerns that adhering to such a wide ranging agreement, by seeking to attain greater regulatory coherence, would have led to the lowering of technical, environmental, employment and social standards in Europe.\textsuperscript{25} It was also feared that the stipulation of the TTIP would have de facto significantly limited the powers of the Member States’

\textsuperscript{21} Ibid.
\textsuperscript{25} Ibid.
Governments to regulate specific sectors of the economy, especially in light of its provisions seeking to establish a framework for investor-state disputes.26

This admittedly bleak depiction of the impact of the TTIP was to an extent counterbalanced by Member States governments’ voices: the British Government, among others, argued that the TTIP would have made the relationship with the US stronger and thereby added “as much as £10 million annually to the UK economy in the long term” not only via the elimination of almost all the existing tariff barriers but also through ensuring “reduced bureaucracy and greater regulatory coherence”. 27 Also, it was forcefully argued that the TTIP, rather than leading to a “race to the bottom” in a number of areas, including that of technical standards and of safeguards enjoyed by workers and by consumers would have led to greater regulatory coherence between the two jurisdictions, by allowing the parties to “take stock” of the normative and regulatory status quo and eliminate duplications.28

The Government sought to address one of the concerns raised by the 14th Report of the House of Lords’ EU Select Committee, concerning the TTIP, namely the need to “disentangle” those concerns stemming from the negotiations that were not as “well-founded” as others (such as, inter alia, those stemming from the lack of transparency arising from the negotiations or those relating to future impacts of the TTIP’s tariff abolitions on developing countries)29. Its Response emphasised that adhering to the TTIP’s investment protection and investor-state dispute settlement mechanisms would not have prejudiced the right of individual states to regulate specific sectors of the economy: provided that they were framed in a way that allows a “fair balance” to be struck between the state’s right to formulate policies in the public interest and ensuring effective protection to the legitimate rights of investors,30 these provisions were seen as a realistic opportunity to provide a transparent and effective “enforcement mechanism”31 for foreign investors’ rights while seeking to avoid spurious claims that could overtime hamper the states’ regulatory prerogatives.32

Protecting public services and especially the provision of “highest quality health care at the point of need” was an extremely pressing concern.

31 14th Report, cit. (fn. 29), para 167.
for civil society, especially in the UK. Many argued that the TTIP would have given American and, more generally, multi-national companies the right to enter and operate without obstacles within the European and, more specifically, the British market;\textsuperscript{33} it was also claimed that these companies could have relied on their expectation of equal treatment to access subsidies and, in the event of new regulations being introduced, could have availed of the investor-state dispute settlement framework to obtain compensation for the loss of future profits caused by the new rules.\textsuperscript{34} More generally, it was feared that, as a result of the partnership agreement, a “wholesale privatisation” of the NHS would have been set in motion.\textsuperscript{35}

It is well-known that significant changes have been taken place in the NHS in England and Wales since the Coalition Government took up office in Westminster: the Health and Social Care Act 2012 has had a wide-ranging impact on the way in which healthcare services are organised and provided to patients: the Act has heralded the almost wholesale application of the competition rules to health and social care provision, with clinical commissioning groups being responsible for the purchase of services from “providers”, namely NHS trusts.\textsuperscript{36} It is therefore suggested that the 2012 reforms reflect closely a “neoliberal model” for the provision of health care services which ushers greater involvement on the part of private providers whose objectives may not necessarily be of a “mutualistic” and “solidarity based” nature.\textsuperscript{37}

By contrast, Scotland has taken a rather different route: the Scottish Parliament, to which health and social care have been devolved, has expressly maintained the NHS “in public hands”, via the rejection of the NHS trusts as providers of services and through replacing an “internal market” of services with a culture of cooperation.\textsuperscript{38} Today, its running is devolved by the Government to a structure of fourteen area boards, responsible for the allocation of resources and the implementation of healthcare strategies via Community Health Partnerships and Operating Divisions.\textsuperscript{39}

\textsuperscript{33} See: \url{http://www.patients4nhs.org.uk/eu-us-free-trade-agreement-or-ttip/}.
\textsuperscript{34} Ibid.
\textsuperscript{36} See inter alia Curran and Albert, “It seemed a good idea at the time”, (2014) 35(9) ECLR 419; see also Pownall, “Neoliberalism, austerity and the Health and Social Care Act 2012”, (2013) 42(4) Industrial L J 422 at 429-430.
\textsuperscript{38} See e.g. SPICe Briefing, “The National Health Service in Scotland”, 21 June 2011, No 11/49, pp. 5-6.
\textsuperscript{39} Ibid.
Against this background, should we fear for the continued integrity of a public NHS for Scotland? Scotland either becomes a member of the EU in the event of a vote for independence or remains within the UK in case of a ‘No vote’ and the TTIP is concluded? Is there anything either in the existing EU acquis or in the obligations enshrined in the agreement itself that can eventually “force” a marketization of health services north of the Border? The next section will consider these questions, in light of the principles governing the provision of healthcare services provided by the TFEU and developed by the EU Court of Justice in its case law.

3.2. Health care services’ provision and the internal market—a matter for Member States…

The Court of Justice of the EU has consistently held that member States are “sovereign” over their health services: in, inter alia, Watts the Court took the view that EU law would not hamper the power of the Member States to autonomously design and regulate their health care services.\(^\text{40}\) According to Article 168 of the TFEU the attainment of a “high level of human health protection shall be ensured” as part of all EU policies: the provision goes on to specify, however, that this remains an area of competence shared with the Member States, with the Union only empowered to adopt “supporting” measures, especially so as to foster coordination among domestic policies.\(^\text{41}\) At the heart of Article 168 is a clear commitment to the principle of subsidiarity, as a result of which the EU undertakes to respect as well as to support the national authorities in the adoption of key decisions in the area of healthcare provision.\(^\text{42}\)

As a result, each Member State can choose how to design and regulate health care systems: in the spectrum of choices available to it, it can opt for maintain the provision of its services firmly entrenched within its own structure, thus limiting private sector involvement to the minimum, if it regards this as “appropriate” for the needs of its population and so long as the general principles underscoring the Treaty, most importantly the rules on free movement of persons and of services, are respected.\(^\text{43}\) Member States can, inter alia, restrict the freedom of movement of persons, including their nationals, for the purpose of seeking and receiving medical treatment in another Member State in certain circumstances if that restriction aims to prevent the financial stability of the system from being undermined, thus

\(\text{40}\) Case C372/04, Watts, [2006] ECR I-4325, para. 86.

\(\text{41}\) See e.g., mutatis mutandis, case C158/96, Kohll, [1998] ECR I-1931, para. 18.


threatening treatment capacity level and, ultimately the survival of the population.44

In addition, it should be borne in mind that whenever health authorities and boards are engaged in purchase or supply activities in the context of their institutional mandate as providers of “social goods” such as healthcare services “free at the point of need” and without a “profit motive”, they do not act as “undertakings” for the purpose of competition law and, consequently, even though they may yield, for instance, significant purchasing power are not subject to the application of free market principles.45

Against this background, it is argued that it seems unlikely for the TTIP to change the status quo: it is submitted that any international law commitments to greater openness of the single market vis-à-vis US providers, undertaken by the Union, could not impact on the Member States’ power to design and regulate their healthcare systems since this is an area in which the Founding Treaties confer to the EU only “supporting and coordinating” competence.46 Unless the Member States were willing to “sacrifice their autonomy” vis-à-vis the regulation of mechanisms for the provision of “essential services to the person” in favour of Union powers in the area, through treaty amendment—e.g. by moving from the current system of “shared” and “supporting competence” to a more integrated approach in which the EU becomes responsible for regulating aspects of health care provision going beyond, inter alia, the free movement of medical services47—Union action, whether internal or external, would not be capable of encroaching upon the Member States’ powers to regulate these public services.

It must be emphasised that the awareness of the limited reach of the Union competences vis-à-vis the provision of health care is reflected in the EU Commission’s mandate for the negotiation of the TTIP itself:48 a memorandum published in July 2014 by DG Trade49 confirms that the partnership deal would preserve the power of EU Governments to limit the reach of the principle of “national treatment” and “market access” to healthcare provision, including the possibility of opening up health care markets to competition50

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44 See Watts, cit. (fn. 40), para. 86-87.
46 See inter alia Szyszczak, “Patients’ Rights: a lost cause or a missed opportunity?”, in van den Gronden et al, cit. (fn. 21), 103 at 119-120.
47 Directive 2011/24/EU of 9 March 2011 on the application of patients’ rights to cross-border healthcare, OJ 2011 L88/45; see especially Preamble, Recitals 3, 4 and 8; cf. Recital 7.
48 See: http://trade.ec.europa.eu/doclib/press/index.cfm?id=918. A text of the draft mandate was leaked in March 2013 to the “Inside US Trade” website; it was marked with the reference: COM(2013) 136 final; see also, mutatis mutandis, Article 14, General Agreement on Trade in Services, available via: http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm#articleXIV; see also draft mandate, cit. (fn. 39), Annex, para. 6 and 14.
50 Ibid.
and of reducing the scope for third country individuals and firms to enter and operate within the single market.\textsuperscript{51} This commitment was also reiterated in communications occurring directly with the United Kingdom Parliament: in a letter dated 8 July 2014 and addressed to the Chair of the All-Party Parliamentary Group on TTIP, the Director for the USA and Canada division of the EU Commission’s Directorate General for Trade. In the letter, Mr Garcia Bercero expressed the view that adhering to TTIP would not affect the “rights of the Member States to manage their own health systems according to their various needs”\textsuperscript{52}. To quote verbatim from the letter, “the EU does not intend to change its approach to health services in trade negotiations for TTIP”; consequently, Member States remain entitled to, inter alia, establish rules designed to “control access to their health services markets by foreign suppliers, without constraints under EU trade agreements.”\textsuperscript{53}

Finally, it should be highlighted that the recent agreement reached by the EU and Canada on a “Comprehensive Economic and Trade Agreement”\textsuperscript{54} confirms the commitment to preserving the Member States’ power to regulate the manner of public services provision, including healthcare, thus remaining consistent with the need to preserve their powers to regulate the health care sector, by limiting the reach of the principle of equal treatment for non-EU providers.\textsuperscript{55}

In light of the above, it is concluded that due to the nature of the competence currently enjoyed by the EU vis-à-vis health care provision and to the application of the principle of conferral, the TFEU does not allow the Union, through the stipulation of international agreements such as the TTIP, to bind Member States as to the manner in which they wish to regulate the framework through which these services are supplied to their citizens: any decision as to whether to “privatise” the Scottish NHS therefore rests with the Scottish Parliament, as part of the exercise of its devolved powers.

3.3. The TTIP and public procurement markets—an unconditional “way in” for non-European companies?

The previous section briefly outlined the principles governing the impact that the EU treaties have on the provision of health care services and against that background argued that the rules governing the exercise of the EU competences prevent the Union, via an international agreement, to force the

\textsuperscript{51} Ibid.
\textsuperscript{53} Ibid.
privatisation of domestic health care services, including the NHS in Scotland. This section will move on to another area that TTIP is likely to affect, namely the access to public procurement markets on the part of US based healthcare services’ providers. According to the EU Commission’s Mandate, obtaining greater access to US public procurement, at least at Federal level, represented a key objective of the Union’s negotiating position. At the same time, the Mandate enshrined a commitment to “increasing transparency” in respect of the member states’ procurement activities and thereby allowing US businesses to bid for these contracts, in conditions of non-discrimination.

Admittedly this is an area which, as was recognised by the EU Select Committee of the Lords, is likely to be hard-fought. Nonetheless, it is argued that individual member states would likely be able to limit access to non-EU companies to bidding procedures for the award of healthcare services contracts. First of all, according to the *Teckal* judgment, the requirements introduced by the EU rules on public procurement would not apply to contracts granted to another body under the control of the contracting authority or for services that are going to be supplied “in-house”. The *Commission v Ireland* decision also stated that contracting authorities would not be obliged to “go out to tender” if services were entrusted with another public body and performed as part of their statutory duties. Consequently, it is argued that so long as the Scottish NHS is financed by the public sector, provides services free at point of need and therefore on a “not-profit making basis” and, in respect to its management, remains under the supervision of the competent Minister, it would continue to benefit from the “exception” to the application of the public procurement rules resulting from the judgments illustrated above.

Secondly, it should be emphasised that the award of contracts for the provision of “essential services to the person”, including healthcare, has traditionally been subject to a “light touch regime” since due to their nature, they are not always likely to be of “interest” to foreign providers. More generally, the EU measures harmonising the award of public contracts reflect the same principle enshrined in Article 168 TFEU, namely that national authorities retain discretion as to how to organise the delivery of these

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60 Case C-532/03, Commission v Ireland, [2007] ECR I-801, para. 26-28; see also para. 35-36.
61 See e.g. mutatis mutandis, case C-300/07, H & C Oymanns GbR and others, [2009] ECR I-4779, para. 51-56; see also para. 59.
62 See also Directive 2004/18/EC, OJ 2004 L134/114, Annex II B.
63 Inter alia, see case C-321/03, Coname, ECR I-7287, para. 16-19.
services, including the possibility of either provide them in-house or to “in a way that does not entail the conclusion of public service contracts”. However, these contracts are still subject to requirements of transparency as any other public service contract; however, awarding authorities will be allowed to apply award criteria that seek to uphold “non-market principles” such as, inter alia, continuity and accessibility of services and in that context will be able to, for instance, limit participation to the tendering process to cooperative organisations or other bodies based on employee or end-user involvement.

Having regard to access to these procedures on the part of third country nationals, it is clear from the current tone of the negotiations that the principle of non-discrimination should govern this issue under the TTIP; however, as both the WTO’s General Procurement Agreement (GPA) and the recent EU-Canada Trade agreement seem to suggest, there is every reason to believe that “essential services to the person” will be broadly excluded from any future deal with the US. According to Annex IV to the WTO GPA, “social and health services” are expressly excluded from the principle of equal treatment, thus allowing signatory states to restrict access to the market for the provision of these services to foreign suppliers; in addition, as illustrated above, CETA expressly exclude these services from the scope of the agreement. Importantly, it should be emphasised that the letter sent by the EU Commission’s Directorate General for Trade mentioned in section 3.2 above expressly confirms that the EU has no intention to change the existing approach to these issues. Consequently, it is submitted that in the determination of the criteria governing the award of these contracts, the Member States will retain the power of controlling access to public procurement processes for non-EU companies, by inter alia allowing awarding bodies to establish objective criteria of a strictly non-economic nature.

It may therefore be concluded that while TTIP is likely to facilitate reciprocal access for EU and US based businesses in their respective procurement markets, it is not going to alter the “light touch nature” of the regime governing the award of these contracts in the field of healthcare provision: given the scope of its existing obligations under other international agreements, the EU will not change its approach to these issues.

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65 See e.g. case C-324/98, Telaustria, [2000] ECR I10745, para. 60-61.
66 Directive 2014/24/EU, cit. (fn. 47), Recital 118.
69 See e.g. “Opening new markets in Europe”, cit. (fn. 55), p. 24-25.
trade deals, it appears improbable that the Union will depart from its current approach in current negotiations.

3. Conclusions: TTIP and healthcare services in Scotland—access (almost) denied…

The previous sections sought to place the negotiations of the TTIP agreement against the background of the action of the European Union for the purpose of achieving the objectives laid out in the Founding Treaties through not only “internal action” but also via engagement with non-Member countries on the international plain. In that context, it was illustrated that the Union, being an organisation having limited competences, is only empowered to enter into international obligations in areas in which the Member States have conferred to it the power to take action. On that basis, it was therefore argued that due to the limited competence the EU enjoys in the field of healthcare, the stipulation of the TTIP is not likely to threaten Scotland’s power to design, regulate and finance health care services via its NHS in the way it sees “appropriate to the needs of its population”. Article 168 TFEU is in fact going to preserve its “sovereignty” over health services without allowing the Union, by virtue of the limited nature of its competence in this area, to instigate the “marketization of health services” that the TTIP detractors fear may follow from the agreement’s stipulation.71

It is added that the commitment to greater access to public procurement markets is not going to threaten the existence of the “light touch” regime envisaged by EU public procurement legislation concerning the award of public contracts for the supply of “essential services to the person”. It was highlighted above that these services have both been excluded outright from the scope of the principle of “equal treatment” in similar international trade deals and expressly singled out by the EU Commission as likely to fall outside the scope of TTIP.72 Consequently, it is submitted that the Member States’ contracting authorities will remain entitled to apply certain “non-market” based criteria for the selection of winning bidders and to restrict the participation of non-EU firms on the ground that “opening up” the pool of bidders would not be consistent with principles of accessibility and continuity of service.

71 See also, mutatis mutandis, Directive 2011/24/EC, cit., (fn. 47), Preamble, Recital 12.