Public services in bilateral free trade agreements of the EU

by Markus Krajewski*

Abstract

The impact of international trade agreements on public services has been a controversial subject for a number of years already. Generally, the obligations of trade agreements limit the ability of governments to choose freely between different regulatory instruments and techniques for the organisation and provision of services considered to be essential for the general public such as network communications, energy and water distribution, education, health and social services. With their focus on market access and competition, liberalisation commitments in trade agreements put domestic policy makers under the pressure to consider only measures which are in conformity with these agreements ("regulatory chill" effect) and effectively bind governments to the current level of liberalisation which makes a review and reconsideration of liberalisation measures difficult ("lock-in" effect).

These issues have recently become subject of renewed attention as the EU is currently negotiating bilateral trade agreements with a number of strategic trading partners. The EU Commission would like to abandon the traditional model of safeguarding regulatory space for public services which was applied for the first time in the GATS context. This model is based on a horizontal limitation clause for "public utilities".

The paper reviews different ways of reducing the impact of trade agreements on public services and assesses their potentials and limitations. The study analyses approaches used in the GATS and NAFTA contexts as well as in free trade agreements of the EU and other countries. As a result of this analysis the paper concludes that existing models are deficient as they do not adequately reflect the dynamic nature and necessary regulatory flexibility for public services. The paper therefore proposes two reform options which could be further discussed and studied. The first is based on the current logic of trade agreements while the second is more-fare reaching and suggests a simplified procedure for the modification of specific commitments.

* University of Erlangen-Nuremberg, contact: markus.krajewski@jura.uni-erlangen.de. This study contains the results of a research project funded by the European Federation of Public Service Unions (EPSU) and the Austrian Federal Chamber of Labour (AK). The views presented in this study do not necessarily represent official positions of the funding institutions or their member organisations. I would like to thank Amedeo Arena, David Hall, Rhea Hoffmann, Oliver Prausmüller, Scott Sinclair and Elisabeth Türk for their valuable comments on an earlier version of this study. All errors remain mine.

Table of contents

I. Introduction

The European Union is currently negotiating bilateral free trade agreements (FTAs) with a number of countries or regional groups including India, Singapore, Malaysia, Mercosur and Canada. Recently the EU concluded such an agreement with Korea while FTAs with Central America and with Peru and Colombia have been initialled.[1] These bilateral free trade agreements with strategic trading partners are a core element of the new EU trade policy agenda.[2] The commitments in these trade agreements usually go beyond the level of liberalisation of trade in services under the GATS, the WTO's agreement on trade in services ("GATS Plus"). One of the contested aspects of these new trade agreements concerns the treatment of public services (or services of general interest in EU parlance). As will be explained in greater detail below, trade agreements reduce the policy space of governments to regulate public services and to provide these services through public entities and corporations. With their focus on liberalisation and market access trade agreements may increase tendencies of commercialisation of public services and may lock-in liberalisation measures taken at the domestic level. As a result, there have been approaches to reduce the impact of trade agreements on public services and to safeguard domestic policy space for the provision and regulation of these services. The approach taken in the context of the GATS – which has been the subject of heated academic and political debates – does not seem to be the most appropriate model. However, any deviation from the GATS model is also controversial because it is unclear whether the deviation would increase the level of protection of public services or reduce it.

The EU Commission acknowledged the contentiousness of this issue in a "Reflections Paper on Services of General Interest in Bilateral FTAs" (hereinafter: Reflections Paper) published in February 2011[3] and a more recent paper entitled "Commission Proposal for the Modernisation of the Treatment of Public Services in EU Trade Agreements" (hereinafter: October Proposal) of October 2011.[4] Even though these documents do not contain official

[1] For a summary see European Commission, Overview of FTA and other trade negotiations, Updated on 12 August 2011, available at http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf

[2] European Commission, Global Europe - A stronger Partnership to Deliver Market Access for European Exporters, 2007, p. 7. See also European Commission, Trade, Growth and World Affairs – Trade Policy as a Core Component of the EU's 2020 Strategy, 2010, COM(2010)612, p. 5.

[3] European Commission, Reflections Paper on Services of General Interest in Bilateral FTAs (Applicable to both Positive and Negative Lists) Revised 28 February 2011. The Reflections Paper is available on various websites such as http://www.epsu.org/IMG/pdf/Reflections_Paper_on_SGIs_in_Bilateral_FTAs.pdf

[4] European Commission, Commission Proposal for the Modernisation of the Treatment of Public Services in EU

trade policy statements, they show that the relationship between public services and free trade agreements remains controversial and topical. In the Reflections Paper and the October Proposal, the Commission asserts a number of problems associated with the approach towards public services taken under the GATS and suggests a new model. According to the Commission, the new model would provide greater legal certainty and balance the offensive interests of the EU in certain sectors of public services with its defensive interests of protecting the current system of public service regulation in the Member States and of maintaining regulatory space and flexibility in the future. The Reflections Paper has already led to some political debate about its approach[5], but has not yet been in the centre of academic reflection.

The concerns voiced about the impact of free trade agreements on public services mirror arguments brought forward in the debates in the early 2000s relating to the relationship between GATS and public services. However, new aspects and issues arose since then. These include the structure of specific commitments in trade agreements ("negative list" or "positive list" approach), the emergence of new rules on sectoral regulations and competition, the EU's own debate about the distinction between economic and non-economic services of general interest (SGI)[6] and the new focus of the debate through the changes of the Lisbon Treaty, in particular the inclusion of Protocol No. 26 on Services of General Interest.[7]

Even though public services have not yet been the subject of a trade dispute in the WTO the impact of trade liberalisation on public services remains a contentious and topical issue. The obligations of trade agreements are often used in domestic political debates about certain regulatory models and may have a "regulatory chill" effect, i.e. prevent policy makers from pursuing non-market solutions or market interventions because of an alleged potential violation of these agreements. This also limits the scope for domestic policy debates and reviews of existing liberalisation policies because certain options such as the reversal of liberalising steps may be considered inconsistent with trade agreements and therefore not

---

Trade Agreements, 26 October 2011 (on file with author).

[5] See the Position paper of Austrian Federal Chamber of Labour, "Services of General Interest in Bilateral Free Trade Agreements" - Reflection Paper of the European Commission, available at http://ak-europa.eu/_includes/mods/akeu/docs/main_report_en_170.pdf and a letter of EPSU to Commissioner De Gucht, available at http://www.epsu.org/a/7619. See also European Parliament resolution of 8 June 2011 on EU-Canada trade relations, 8 June 2011, P7_TA-PROV(2011)0257.

[6] European Commission, Green Paper on Services of General Interest, COM(2003)270 final, White Paper on services of general interest, COM(2004) 374 final.

[7] On the protocol see Wolf Sauter, Services of general economic interest and universal Service in EU law, in: ELRev 2008, p. 167 (173-174); Dragana Damjanovic and Bruno de Witte, Welfare Integration through EU Law: The Overall Picture in the Light of the Lisbon Treaty, EUI Working Papers LAW 2008/34, p. 28-29; M. Krajewski, Dienstleistungen von allgemeinem Interesse im Vertrag von Lissabon, Zeitschrift für öffentliche und gemeinwirtschaftliche Unternehmen Journal for Public and Nonprofit Services 2010, p. 75 (84-92).

pursued further. The debate about public services and trade agreements is hence not a technical discussion about specific details of international law. Rather, the controversy is part of two larger discourses relating to the future of public services (services of general interest) in the EU and the impact of EU trade policy on regulatory autonomy and policy space. In fact, the debate about public services and trade agreements is situated exactly where these two larger discourses come together. The extent to which trade agreements provide for public service exemptions indicates if and how these agreements aim to balance liberalisation commitments and non-commercial or non-market regulatory options.[8] From a theoretical perspective, the impact of trade agreements on public services can also be analysed as an example of the conflict between democratic autonomy and a neo-liberal biased transnational constitutionalism.[9]

Against this background, the present study analyses the various approaches used in free trade agreements to safeguard regulatory space for the provision, financing and organisation of public services. The study focuses on agreements signed by the EU including texts of recently negotiated and initialled agreements and drafts of agreements under negotiations. As a comparison, the study also takes other free trade agreements into account where they use interesting other models of managing the interplay between trade liberalisation and public services.

In general, two approaches in trade agreements toward public services need to be distinguished: A first, more common approach, attempts to exempt public services or certain elements of regulating the organisation and provision of public services from the disciplines of trade agreements. A second approach, which has not yet been used widely, introduces obligations to regulate the specifics of public services in trade agreements such as elements of universal services obligations. The first approach aims to defend policy spaces at national level for the regulation of public services whereas the second approach pursues a strategy of (re-)regulation of public services at the international level. The present study will only focus on the first approach and will analyse the public service exemption clauses. The analysis of positive public service obligations in international trade agreements is beyond the ambit of this study.[10]

---

[8] Amedeo Arena, The GATS Notion of Public Services as an Instance of Intergovernrnental Agnosticism: Comparative Insights from the EU Supranational Dialectic, JWT 2011, 489 (494).

[9] See also Scott Sinclair, Trade Agreements, the New Constitutionalism, and Public Services, Draft September 2011 to be published in Stephen Gill and Claire Cutler (eds.), The New Constitutionalism and World Order, forthcoming Cambridge University Press, 2012.

[10] For an attempt in this direction see M. Krajewski, Universal Service Provisions in International Agreements of the EU: From Derogation to Obligation, in: Erika Szyszczak et al. (eds), Developments in Services of General Interest, 2011, S. 231-252

For the purposes of this study, "public services exemptions" are defined as those provisions of trade agreements which exempt public services or aspects of their provision, financing and regulation from all or some disciplines of those agreements.[11] The study uses the term "public services" as a general proxy for different types of definitions including services supplied in the exercise of governmental authority, public utilities, services of general interest, etc.[12] Whenever this study refers to specific agreements and provisions, it uses the term as adopted in the respective agreement.

The study is organised in five Parts. Part II revisits the main aspects of the impact of free trade agreements on public services. It serves a reminder of the pertinent issues for those who have already followed the debate on GATS and public services and as a brief introduction for those who come to these issues for the first time. Part III presents the main existing public service exemption clauses in international trade agreements and indicates in which contexts they have been used. Part IV develops an analytical framework for the assessment of these exemption clauses based on two determining parameters of public service exemptions: Level of protection and substantive scope. Part V compares the traditional EU approach towards public service exemptions in trade agreements with an apparently emerging new approach of the EU. The comparison is supplemented by the NAFTA-approach because it was among the first trade agreements on services built on a negative list approach and was negotiated at the same time as the GATS. The analysis of the EU models highlights the problematic elements of the traditional and the new EU approach. Based on this, part VI develops two reform proposals: One is based on the current logic of international trade agreement and remains within the boundaries of the existing regime. The second proposal is slightly more fundamental and challenges the underlying logic of the function and effect of trade agreements from a critical perspective.

A final caveat is necessary: The present study is limited to rules on international trade. It does not address the impact of international investment agreements, such as bilateral investment treaties, or chapters in free trade agreements which contain rules on investment protection. Until the Treaty of Lisbon, the EU did not have any competence in the area of international investment law which is why the EU has not yet signed any classical investment agreements. The impact of these agreements on public services, in particular in the field of water and energy regulation[13] is very significant, especially since these agreements do not contain public

[11] For a similar definition see Arena (above note 8), p.495.
[12] For a short discussion of the term "public services" see section II.1. below.
[13] On this see M. Krajewski, The Impact of International Investment Agreements on Energy Regulation, forthcoming in European Yearbook on International Economic Law, Volume 3 (2012).

service exemption clauses like many trade agreements. However, the relationship between investment agreements and public services is beyond the scope of this study and will have to be revisited another time.

II. A primer on public services and trade agreements – What's all the fuss about?[14]

1. Why are public services special?

Before analysing the impact of trade agreements on public services in greater detail it is necessary to answer two fundamental questions: What are "public services"? And: What is so special about them that they can or should be distinguished from other services? At the outset it should be noted that the term "public services" is neither a term of international or EU law nor of any national legal system. Its legal meaning is ambiguous, if not non-existent.[15] Nevertheless, the term figures prominently in many legal and political debates and can be used as a generic term for services which are considered to be of a special "public" concern. In general, three different approaches can be distinguished.

A first concept is based on the economic concepts of public goods and natural monopolies.[16] Based on this understanding, services such as the administration of justice, the provision of internal and external security and the establishment of transportation networks (railroads, energy transportation, land-line telecommunications or water supply) would be considered public services. This approach focuses therefore on the economics of the supply of the service and considers those services as "public" which the market would not provide on a competitive basis.

A second understanding stems from continental European legal doctrine (such as the German *Daseinsvorsorge* (or *Leistungsverwaltung)* or the French *service public*) and associates public services with activities of the state.[17] Hence, every service provided by the state or one of its units, divisions or entities would be considered a public service. Traditionally, public services would therefore be those provided by state monopolies (postal, telecommunications, rail transportation, energy, sometimes health and education) or local and regional entities (water,

[14] The title borrows from P. Sauvé, Trade, Education and the GATS: What's In, What's Out, What's All the Fuss About? 14 Higher Education Management and Policy (2002), vol. 3, p. 47-76.

[15] Harlow, Public Services, Market Ideology, and Citizenship, in: M. Freedland and S. Sciarra (eds), Public Services and Citizenship in European Law (1998) 49, at 50-51 and Scott, Services of General Interest in EC Law, 6 European Law Journal (2000) 310, at 312.

[16] Arena (above note 8).

[17] M. Krajewski, Grundstrukturen des Rechts öffentlicher Dienstleistungen (Springer: Heidelberg), 2011, p 15 et seq.

sewage, social, sometimes health and education services). This approach is based on the state as the supplier of the service.

A third approach which can be derived from the EU law concept of services of general economic interest in the meaning of Art. 106 (2) TFEU focuses on the imposition of specific obligations by a competent public authority on the provider of certain services in order to ensure that public interest objectives are met (public service obligations).[18] These obligations can take different forms, they may have different scopes and they may apply at different government levels (i.e. local, regional, national and supranational). Public service obligations normally aim at securing a certain quality of the service, general or universal access and affordable prices. This approach is based on the regulatory framework and instruments applied to the supply of the service.

It should be noted that none of these three approaches is based on a sectoral understanding, i.e. a pre-defined set of services which are considered as public services. Instead all three approaches are dynamic. It is also important to realize that the notion of the public services involves value judgments, which may be different in different parts of the world and at different moments in time. The concept of public services is hence flexible and varies over time and space.[19] It should be developed in a process of democratic deliberation and articulated by democratically accountable public bodies.

In general, public services are services which are provided and regulated based on non-commercial public interests and on the need for the provision of such services in a way the market cannot achieve. They are often provided on the basis of a monopoly, by an exclusive service supplier or the number of suppliers is limited in a certain manner. Furthermore, the supply itself is usually regulated through universal or other public service obligations. This suggests that there are tensions and potential for conflict between the general liberalisation objectives of trade agreements, in particular the objective of "progressive liberalisation" and the regulatory objectives of public services.

Furthermore, the provision and regulation of public services is intrinsically linked to democratic autonomy. Public services are a key element of the modern social and welfare state and are subject to continued processes of adaption and reform.[20] This implies also a

[18] White Paper on services of general interest, COM(2004) 374 final, p. 23; U. Neergaard, Services of General Economic Interest: The Nature of the Beast, in: M. Krajewski/U. Neergaard/J. van de Gronden (eds), The Changing Legal Framework of Services of General Interest in Europe (The Hague, TMC Asser Press), 2009, p. 17; Iris Houben, Public Service Obligations: Moral Counterbalance of Technical Liberalization Legislation, European Review of Private Law 2008, 7 (10).

[19] Helmut Cox, Entscheidungskriterien und Prinzipien für öffentliche Dienstleistungen, in: ibid. (ed.), Öffentliche Dienstleistungen in der Europäischen Union (1996), at 22.

[20] In this context, it is noteworthy that the concept of adaptation is one of the three key elements of the lois de

process of reviewing and re-assessing existing models of providing public services. In this context, it should be noted that models exclusively relying on market-based solutions are increasingly challenged. It is therefore as necessary to maintain regulatory flexibility as it is to create policy space for discourse and reflection. This must be taken into consideration when assessing the impact of trade agreements on public services.

2. Areas of potential conflict between trade agreements and public services

The potential conflict between international trade agreements and the provision, financing and organization of public services depends on the specific obligations of a trade agreement. The most important of these are market access, national treatment and potential disciplines for domestic regulation. In addition, provisions on monopolies, subsidies and government procurement are of relevance if they contain binding obligations for the provision and organisation of public services. The following paragraphs will briefly explain the impact of these provisions on public services using the example of the GATS. Most bilateral and regional trade agreements contain similar if not identical provisions.

a) Positive and negative list approaches

In most trade agreements, market access and national treatment apply subject to specific commitments or reservations. Hence, any limitation or exemption for public services taken at the level of commitments would normally only apply to the core obligations such as national treatment and market access. The application of disciplines of a trade agreement (in particular disciplines for domestic regulation) would not be excluded on the basis of a public services exemption listed in the specific commitments unless these other disciplines only apply to sectors with specific commitments. In order to assess the impact of a trade agreement on public services the approach of the agreement towards scheduling is therefore of significant importance.

If the agreement adopts a "positive list"-approach, the two provisions only apply in sectors with specific commitments and only subject to any limitations and conditions laid down in schedules of specific commitments. If the agreement adopts a "negative list"- approach, market access and national treatment apply unless the respective country specifically listed measures it wants to exclude from these obligations in specific annexes to that agreement. In both cases, the actual scope of these disciplines depends on the level of the commitments.

Rolland which are the corner-stones of the French doctrine of service public, see S. Braconnier, Droit des services publics, 2003; J.-F. Auby/O. Raymundie, Le Service Public, 2003 und J.-P. Valette, Droit des services publics, 2006.

Nevertheless, the differences between the two approaches are significant[21]: A negative list approach means that the core obligations of the agreement (market access, national treatment and – usually also - most-favoured nation treatment) apply generally, unless the parties of the agreement explicitly include existing or potential measures which would violate these obligations in the relevant annexes. Under a positive list approach these core obligations only apply to sectors, which are positively included in a list, and only subject to the conditions contained in such a list. NAFTA and other free trade agreements signed by the United States follow a negative list approach, while the GATS follows a positive list approach. Most EU agreements so far also follow a positive list approach, but the recent negotiations on an economic and trade agreement between Canada and the EU (CETA) adopt a negative list approach.

In the context of a negative list approach, it is important to distinguish two types of reservations which are often associated with an Annex I and an Annex II to the agreement. Measures listed in Annex I are existing measures which do not conform to the core obligations. Countries can maintain these measures, renew and revise them provided the revision does not decrease the conformity of the measure with the respective obligations of the agreement compared to the level of conformity which existed immediately before the amendment. This requirement leads to a so-called "ratchet effect" which locks-in future liberalisation measures and therefore contains an "autonomous built-in dynamic" towards liberalisation.[22] A country which listed a specific measure in its Annex I reservations and revises this measure in a more liberalising manner cannot re-introduce the original measure because that would be an amendment of the measure which decreases the conformity of the (revised) measure with the agreement.[23] Measures listed in Annex I can therefore only be amended to make them more consistent with the obligations of the agreement. If an exempted measure is amended or eliminated it cannot later be restored. The protection of public services afforded by Annex I reservations is hence designed to disappear over time.[24] This mechanism is of specific importance for public services which have been subject to policy reforms in many EU Member States sometimes including re-nationalisation or re-municipalisation.

Annex II enables countries to adopt and maintain measures inconsistent with the three core obligations and therefore covers existing and future measures. As a consequence, policy space for future regulations and deviations from the status quo will only be possible if there are

[21] S. M. Stephenson, Regional versus multilateral liberalisation of services, WTRev 2002, 187 (193).
[22] Stephenson (as note 23), p. 198.
[23] See also M. Houde et al, The interaction between investment and services chapters in selected Regional Trade Agreements: Key findings, OECD Trade Policy Working Paper No. 55, 2007, p. 35.
[24] I am grateful to Scott Sinclair for this helpful summary of the effects of Annex I.

appropriate reservations in Annex II. If a country only lists measures in Annex I it is essentially bound to maintain the status quo. According to this mechanism liberalization measures adopted by a country cannot be replaced by new measures which are more restrictive unless there are relevant reservations in Annex II.

While it is possible to maintain certain measures and exclude liberalisation obligations under both approaches, the negative list approach tends to have a more liberalising effect[25], because all sectors and measures are subject to the core obligations while a positive list approach requires specific liberalisation commitments. The shift from a positive to a negative list approach requires detailed and careful scheduling disciplines as any "omission" of a measure results in a liberalisation commitment ("list it or lose it"). Furthermore, such a shift complicates the comparison between the different levels of liberalisation commitments. In this context, it is important to recall that the European Parliament in its Resolution on EU-Canada trade relations of 8 June 2011 considered that the negative list approach in the CETA "should be seen as a mere exception and not serve as a precedent for future negotiations".[26]

b) Market access and national treatment

The market access obligations of GATS and bilateral trade agreements prohibit the maintenance or adoption of a number of specified quantitative and qualitative restrictions on market access. For example, market access requires the abolition and precludes the establishment of public monopolies or exclusive service suppliers unless a party to the agreement has scheduled a specific limitation to its commitments. Monopolies and exclusive service suppliers are, however, regulatory instruments which are often used in the context of public services. Moreover, whenever public authorities decide to provide public services themselves they usually provide them on the basis of a local or state-wide monopoly. Since the GATS and most trade agreements do not contain justification clauses such as Article 106 (2) TFEU[27], any monopoly or exclusive service supply arrangement is a violation of the market access principle unless the schedules contain a limitation or a restriction covering that arrangement. Furthermore, market access requires that the number of services suppliers is not limited unless specifically stated in its schedule. Another element of the market access obligation is the prohibition of so-called economic needs tests. Economic needs tests (ENT) are regulatory measures which restrict the number of service suppliers on the basis of

[25] For a similar assessment see M. Houde et al (above note 24), p. 9.

[26] European Parliament resolution of 8 June 2011 on EU-Canada trade relations, 8 June 2011, P7_TA-PROV(2011)0257, para 5.

[27] But see Art. 129 (2) of the EU-CARIFORUM EPA or Art. 11:4(1) of the EU-Korea Agreement, which however only apply to the competition law chapter of that agreement.

economic needs in order to manage competition. The aim of such measures is to avoid ruinous competition which would affect the quality and security of services. By generally prohibiting monopolies, exclusive service supplier arrangements and ENT, the market access obligations target traditional instruments of providing and regulating public services and put pressure on governments which want to maintain or reintroduce such measures. As a consequence, governments may feel compelled to submit the provision of these services to competitive tendering and award contracts to the most cost-effective bidder which may however not provide the highest service quality.

The national treatment obligation requires that foreign services and service suppliers are treated no less favourable than domestic services and service suppliers, if foreign and domestic services or service suppliers are "like". This obligation is therefore generally at odds with any formal discrimination between foreign and domestic services and suppliers. Furthermore, the determination of the notion of "likeness" is of special importance in the context of public services. More often than not, public domestic service suppliers (e. g. a municipal hospital or a communal sewage operator) are faced with competition from private (foreign or domestic) service suppliers. While it seems likely that a public entity run by a local government would not be considered "like" a multinational company, it may be argued that the services they provide are "like". This raises the difficult question whether entities providing "like" services are also "like" service suppliers as suggested by the WTO's panel in the *EC – Bananas* case.[28]

These considerations show that while market access and national treatment obligations usually do not prevent the establishment and maintenance of special regimes for the provision of public services as such they influence the adoption and implementation of specific regulatory instruments. Certain forms of supplying and organising these services may be prohibited by the market access and national treatment obligations. In particular, monopolies, exclusive service supplier arrangements and so-called economic needs tests are typical regulatory instruments for the supply of services which are at odds with the market access obligation of trade agreements. National treatment obligations could interfere with the provision and regulation of services if the competent authority favours local or regional service suppliers in order to assure that the services are supplied "as closely as possible to the needs of the users" (Article 1 Protocol No. 26 on Services of General Interest).

c) Disciplines on domestic regulation

[28] WTO Panel Report, EC – Regime for the Importation, Sale and Distribution of Bananas, 18 August 1997, WT/DS/27/R, para. 7.311. For a critical assessment of this view see W. Zdouc, WTO dispute settlement practice relating to the GATS, J Int Economic Law 2 (1999), 295 (332 et seq.).

Most agreements on trade in services contain rules on disciplines for domestic regulations with a view that such regulations do not provide unnecessary barriers to trade and are no more burdensome than necessary to ensure the quality of the service. Some trade agreements contain a basic rule which states that domestic regulations may not be more burdensome than necessary while GATS and a number of other trade agreements mandate multilateral negotiations on the development of such disciplines.[29] WTO Members have not yet agreed on any such disciplines apart from disciplines for the regulation of accountancy services. However, existing and future disciplines on domestic regulation have the potential of greatly reducing governments' regulatory autonomy.[30] Such disciplines should ensure that domestic regulations including licensing rules, technical standards, and planning restrictions are no more burdensome (no more trade restrictive) than necessary. Depending on the scope of future disciplines and the specific design of a necessity test in such disciplines[31], domestic regulations such as universal service obligations could be seen as more burdensome than necessary to ensure the quality of the service.[32] As a consequence, governments could find it more difficult to impose such obligations on public service providers.

d) Rules on procurement and subsidies

Unlike in trade in goods there is no specific regime for subsidies in the GATS. In particular, there are no rules on the permissibility of subsidies in services sectors and on possible countervailing measures in the GATS. Some free trade agreements, including most EU agreements, contain provisions on subsidies in the goods context. However, these trade agreements generally contain exemption clauses for subsidies in their chapters on services and establishment. Therefore these chapters do not apply to subsidies relating to services.

Article XV:1 GATS, however, recognizes that subsidies may have distortive effects on trade in services. WTO Members therefore entered into negotiations to develop multilateral

[29] See Regarding Domestic Regulation, Government Procurement and Subsidies see also M. Krajewski, Services Liberalization in Regional Trade Agreements: Lessons for GATS „Unfinished Business"?, in: Lorand Bartels/Federico Ortino (eds), Regional Trade Agreements and the WTO Legal System (Oxford: OUP) 2006, p. 175-20.

[30] Djordjevic, Domestic Regulation and Free Trade in Services- A Balancing Act, Legal Issues of Economic Integration (LIEI) 2002, pp. 305-322.

[31] On the problems associated with a necessity test in this context see Neumann/Tuerk, Necessity Revisited – Proportionality in World Trade Organization Law after Korea – Beef, EC –Asbestos and EC – Sardines, JWT 2003, p. 199, at 223-225.

[32] Arena (above note 8), p. 511; R. Adlung, Public Services and the GATS, JIEL 2006, 455 and J. Trachtman, Lessons for the GATS from Existing WTO Rules on Domestic Regulation, in: A. Mattoo/P. Sauvé (eds), Domestic Regulation and Service Trade Liberalization (Washington, D.C.: World Bank Publications), 2003, p. 57 at 68.

disciplines to avoid such trade-distortive effects. So far, there has been no agreement among the WTO members on any of the substantive issues.

However, subsidies are not exempt from the other disciplines of the GATS. Members may therefore not use subsidies in a manner which would be inconsistent with the most-favoured-nation treatment obligation, i.e. a Member may not discriminate between two foreign service suppliers from different countries. In addition, the provision of subsidies must not violate the specific commitments. In particular, if a Member made a full national treatment commitment, it may not discriminate between foreign and domestic service supplier regarding subsidisation. [33] Many Members have therefore listed general exemptions for subsidies as limitations in their schedules or have excluded subsidies to public entities from their commitments. For example, the EU listed in its schedule that the subsidisation of a service within the public sector is not in breach of its commitment.[34]

The WTO's regime regarding disciplines for public procurement is split into two regimes. First, a procurement measure affecting trade in services would generally fall within the scope of the GATS. However, Article XIII:1 GATS holds that the obligations of most-favoured-nation treatment, market access and national treatment shall not apply to government procurement. For the time being, government procurement is hence excluded from some of the most important GATS disciplines. Article XIII:2 GATS mandates negotiations on government procurement in services. Like the negotiations on subsidies, these negotiations have not yet reached any results.

Second, government procurement is covered by the plurilateral Agreement on Government Procurement (GPA). The GPA applies to governmental agencies, public authorities and public undertakings as specified in the Annexes of each party to the GPA. The disciplines of that agreement include general principles such as transparency and non-discrimination as well as detailed tendering requirements for procurement activities which are covered by the agreement. The scope of the GPA as regards to services depends on the services sectors each party to the GPA listed in its Annexes. The EU has submitted transportation services, a number of professional services, some financial and telecommunication services as well as sewage and refuse disposal and sanitation services to the disciplines of the GPA.

[33] Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS), Adopted by the Council for Trade in Services on 23 March 2001, S/L/92, p. 6.

[34] European Communities and their Member States, Schedule of Specific Commitments, GATS/SC/31, 15 April 1994.

EU free trade agreements tend to exclude government procurement from the disciplines of the chapter on services and establishment, but contain separate chapters on government procurement which incorporate and amend the principles of the WTO GPA.

e) Sector-specific regulatory issues and competition law

The more recent bilateral and regional trade agreements to which the EU is a party include increasingly sector-specific regulatory obligations and elements of competition law. The agreements tend to incorporate the sector-specific regimes on telecommunications and financial services of the GATS, but also contain rules on computer services, postal and courier services, maritime transportation services and sometimes even tourism services. Trade agreements with sector-specific rules on certain services which could be considered as public services such as telecommunications or postal services may have a significant impact of the regulation of these services on the domestic level.

In addition, some free trade agreements also include chapters on basic competition law principles.[35] These provisions may also apply to public services. In this context, it is significant that the agreements contain provisions which are based on Article 106 (2) TFEU and excludes the application of the rules on competition for public enterprises and enterprises entrusted with special rights or exclusive rights if the application of the competition law principles obstructs the performance of the particular tasks assigned to them.[36]

f) Summary

The preceding overview indicated that the disciplines and obligations of international agreements on trade in services generally reduce the regulatory flexibility of countries to organise, provide and finance public services. In particular, national models which employ public monopolies or other instruments aimed at the reduction of service suppliers as well as measures which place particular obligations on service suppliers including public service obligations may not necessarily be in conformity with trade agreements. This reduction of domestic policy space also significantly affects democratic decision-making at the national level.

3. Public services current trade negotiations

[35] On this see Sauvé/Ward, The EC-Cariforum Economic Partnership Agreement: Assessing the Outcome on Services and Investment, ECIPE Paper, January 2009.

[36] See below Section III. 5.

Negotiations on services and in particular on public services have not been a high priority for WTO Members in the Doha Development Round, the current round of WTO negotiations, since 2006. While the EU has been reluctant regarding offers for market opening, it demanded market access from its negotiating partners in areas such as postal, energy and environmental services. The latter category also included the contested issue of water distribution. The offers of the EU and other countries tend to not go beyond the level of domestic liberalisation already achieved unilaterally. Members seek to bind (only) those commitments. In addition, the EU continues to push for regulatory principles in certain sectors such as postal services. Furthermore, the EU does not seem to pursue an active market opening policy in sectors which are highly contentious such as audio-visual or cultural services. Another trend, at least in the EU's trade policy concerns the dissection of sectors in commercially interesting for-profit sub-sectors and non-economic sectors which is based on the internal model of the EU of services of general interest.[37]

The – current – policy of the EU not to undertake any additional liberalisation commitments vis-a-vis public services does not mean that the EU is no longer pursuing liberalisation policies in the long run. In fact, countries often do not commit themselves beyond the level of domestic liberalisation in international trade agreements. Yet, achieving additional liberalisation commitments at the international level is not the only, arguably not even the most important, function of trade agreements anyway. More often than not trade agreements have the effect of "harvesting" the domestic liberalisation level in an international agreement and bind it through international commitments. This is one of the core functions of an international trade agreement: Ensuring that countries do not reverse the liberalisation trend. The EU commitments in telecommunications and postal services are a good example in this context. They tend to mirror the status of the EU's own internal market level of liberalisation and therefore bind the EU externally at the level of the respective current state of internal liberalisation.

III. Existing public service exemptions in international trade agreements

1. GATS and GATS-type clauses

[37] See below section V.3.

The most commonly used exemption clause for public services is a provision which excludes services supplied in the exercise of governmental authority from the scope of the agreement. The best-known example of such a clause is Art. I:3 (b) and (c) GATS:

> "For the purposes of this Agreement (…):
>
> (b) "services" includes any service in any sector except services supplied in the exercise of governmental authority;
>
> (c) "a service supplied in the exercise of governmental authority" means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers."

Similar provisions can be found in many free trade agreements concluded by the EU, such as Art. 75 (2) lit b) EU-CARIFORUM Economic Partnership Agreement of 2008[38], Art. 7.4.3 (b) EU-Korea Free Trade Agreement of 2009[39], and Article 108 of the EU-Peru/Colombia FTA of 2011.[40] The most recent negotiating drafts for the EU – Canada Free Trade Agreement and the EU-Central America Free Trade Agreement suggest that these agreements will also contain such an exemption clause.[41] The clause is also contained in non-EU free trade agreements including Art. II:3 of the Montevideo Protocol on Trade in Services as the Montevideo Protocol on Trade in Services of Mercosur of 1997[42], Art. 23 (k) of the 2003 EFTA-Chile Free Trade Agreement[43], Art. 11.1 (6) of the US-Chile FTA of 2003[44], Art. 8.2 (5) US-Singapore FTA of 2003[45], Art. 11.1 (6) CAFTA-DR of 2004[46] and Chapter 8, Art. 2 q) of the ASEAN-Australia-New Zealand FTA (AANZFTA) of 2009[47].

The GATS-type exemption clause for services supplied in the exercise of governmental authority is modified in the context of financial services. The Annex on Financial Services to the GATS gives a special definition of governmental authority in Article 1 b) of the Annex. Accordingly, services supplied in the exercise of governmental authority are "(i) activities

[38] OJ L 289, 30.10.2008, p. 3.
[39] OJ L 127, 14.5.2011, p. 6.
[40] The final text of the agreement has not yet been officially released. A draft of the text after the negotiations were concluded can be found at http://www.bilaterals.org/spip.php?article17138
[41] The EU proposal on investment (Chapter 7) contains a definition of "economic activity" which would exclude "activities carried out in the exercise of governmental authority, i.e. activities carried out neither on a commercial basis nor in competition with one or more economic operators"; the proposal on cross-border trade in services (Art. X-08) contains a GATS-type exemption clause for services supplied in the exercise of governmental authority, see Canada-EU CETA Draft Consolidated Text –Post Round VI. In the Draft of the EU-Central America FTA of 2010, Article 11:2 (b) of Title III contains a GATS-type exemption clause.
[42] Text available at http://www.cvm.gov.br/ingl/inter/mercosul/montv-e.asp
[43] Text available at http://www.efta.int/free-trade/free-trade-agreements/chile/fta.aspx.
[44] Text available at http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta.
[45] Text available at http://www.ustr.gov/trade-agreements/free-trade-agreements/singapore-fta.
[46] Text available at http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text.
[47] Text available at http://www.dfat.gov.au/fta/aanzfta/contents.html.

conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies; (ii) activities forming part of a statutory system of social security or public retirement plans; and (iii) other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the Government." Other trade agreements incorporate similar provisions in the text of the framework agreement (see e. g. Art. 108 EU-CARIFORUM EPA or Art. 7.44 EU-Korea FTA).

2. Exemption clauses in the EU-Chile and EU-Mexico agreements

A second – not so common – exemption clause is similar to Art. I:3 (b) GATS, but does not contain an additional definition. An example can be found in Article 135(2) of the EU–Chile Agreement Association Agreement of 2002[48] which provides:.

> "The provisions of this Title shall not apply to the Parties' respective social security systems or to activities in the territory of each Party which are connected, even occasionally, with the exercise of official authority."

The same provision is contained in Article 29 (2) of Decision 2/2001 of the EU-Mexico Joint Council on trade in services implementing Article 6 of the 1997 EC-Mexico Partnership and Cooperation Agreement.[49] The reference to the notion of the exercise of official authority seems to be built on Art. 51 TFEU. The main difference between these provisions and the GATS-type exemption clause is that the former do not have a definition as to what amounts to services supplied in the exercise of governmental authority. It seems that the EU has been using the unqualified clause in the first phase of its bilateral trade agreements while the GATS-type exemption clause has been applied in the FTAs of the "second generation", i.e. FTAs signed after the adoption of the new "Global Europe" trade strategy of the EU in 2007.[50]

3. NAFTA and NAFTA-type clauses

Another type of exemption clause which has not been used by the EU yet, but by the NAFTA partners and some other Latin American countries is a general provision stating that the agreement should not be construed in such a way that it would prevent the provision of certain

[48] Agreement Establishing an Association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part of 18 November 2002, OJ 2002, L 352/3.
[49] Decision 2/2001 of the EU-Mexico Joint Council of 27 February 2001, OJ 2001, L 70/7.
[50] European Commission, Global Europe - A stronger Partnership to Deliver Market Access for European Exporters, 2007.

public services. Historically the oldest type[51] of such a clause can be found in Art. 1201.3 NAFTA which holds:

> "Nothing in this Chapter shall be construed to: (…) (b) prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, in a manner that is not inconsistent with this Chapter."

The Canada-Chile Free Trade Agreement of 1996 contains an identical provision in Art. H-01(3)(b).[52] Similar provisions can be found in the investment chapters of these agreements (Art. 1101:4 NAFTA and Art. G-01 of the Canada-Chile FTA). A number of Mexican free trade agreements with Central American countries contain similar clauses. Examples include the 1998 Mexico-Nicaragua Free Trade Agreement, the Mexico-Costa Rica Free Trade Agreement of 1995 and the 2001 Free Trade Agreement between Mexico and El Salvador, Honduras and Guatemala (The Triangle of the North).[53] It should be noted that these provisions are not exemption clauses in the formal sense, because the services mentioned are still covered by the agreement. In particular, the last part of the provision "in a manner that is not inconsistent with this Chapter" could be interpreted in such a way that the provision of these services on a discriminatory basis or in fragrant violations of the agreement would not be justified. It might even be questioned whether such a provision would be able to justify a deviation from the disciplines of the agreement at all or whether it only contains a symbolic statement.

4. Public utilities clause

The public service exemption clauses mentioned so far apply to all provisions of a trade agreement. Many countries have also included exemption clauses in their schedules of specific commitments or reservations. In this context, the "public utilities clause" is the most important reference point in the EU context. It reads as follows:

---

[51] It should be noted that pre-NAFTA agreements on trade in services such as the Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations Trade Agreement and Canadian-United States Free Trade Agreement, which entered into force in 1989, do not contain an exception clause for governmental services.

[52] Text available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/chile-chili/index.aspx?view=d

[53] Full texts (in Spanish) of these agreements are available from the webpage of the Mexican Ministry of Economics, http://www.economia.gob.mx/swb/es/economia/p_America_Latina_y_Caribe. The original of the provision reads as follows: "Este capítulo no se aplica a: los servicios o funciones gubernamentales tales como, y no limitados a, la ejecución de las leyes, los servicios de readaptación social, la seguridad o el seguro sobre el ingreso, la seguridad o el seguro social, el bienestar social, la educación pública, la capacitación pública, la salud y la atención a la niñez.".

> "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."

The provision is usually supplemented by the following explanatory footnote:

> "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. Given that public utilities often also exist at the sub-central level, detailed and exhaustive sector-specific scheduling is not practical."

This clause is not only used in the EU's GATS schedule, but also in the schedules of the EU-Chile, the EU-CARIFORUM, the EU-Korea and EU-Peru/Colombia agreements. In some of these agreements the explanatory footnote is slightly different though. In more recent agreements such as the EU-Korea agreement the footnote is supplemented by the following qualification: "This limitation does not apply to telecommunications services and to computer and related services."

5. Exemptions clauses applicable to competition law

The most recent addition to the set of exemption provisions can be found in those agreements which contain provisions on competition law. They apply to enterprises entrusted with special or exclusive rights. Hence, the focus is on the supplier of a public service and not the service as such. An example of such a clause can be found in Art. 11:4 of the EU-Korea agreement which holds:

> "1. With respect to public enterprises and enterprises entrusted with special rights or exclusive rights:
>
> (a) neither Party shall adopt or maintain any measure contrary to the principles contained in Article 11.1; and
>
> (b) the Parties shall ensure that such enterprises are subject to the competition laws set out in Article 11.2, in so far as the application of these principles and competition laws does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

2. Nothing in paragraph 1 shall be construed to prevent a Party from establishing or maintaining a public enterprise, entrusting enterprises with special or exclusive rights or maintaining such rights."

An explanatory footnote further defines the notion of enterprises entrusted with special rights:

"Special rights are granted by a Party when it designates or limits to two or more the number of enterprises authorised to provide goods or services, other than according to objective, proportional and non-discriminatory criteria, or confers on enterprises legal or regulatory advantages which substantially affect the ability of any other enterprise to provide the same goods or services."

Art. 129 EU-CARIFORUM EPA contains a similar clause as does Art. 179 of the EU-Chile agreement which places the application of the provision in the hands of the Association Committee. As mentioned above, these provisions are based on the model of Article 106 (2) TFEU which also restricts the application of EU competition law to enterprises which have been entrusted with the task to provide service of general economic interests. However, unlike Art. 106 (2) TFEU which also applies to state aid rules and to other provisions of EU law, the competition law exemption clauses in the EU's free trade agreements clearly only apply to the provisions of the competition law chapter.

IV. Analytical framework

In order to assess the potential scope of public service exemption clauses and their contribution to the protection of public services, it seems useful to develop a framework based on two determining factors. The first concerns the substantive scope of the clause[54] and the second the level of protection.[55] In order to determine the substantive scope it is necessary to interpret the respective term used in the clause thereby assessing which services are covered by the exemption clause. The level or protection concerns the application of the clause to obligations of the trade agreement. Does the clause exclude all obligations or only certain parts and elements?

1. Substantive scope

The first issue concerns the concept of public services employed in the relevant trade agreements which determines the substantial scope of the exemption.

[54] See also Arena (above note 8) who calls this the „objective scope", p. 495.
[55] In Arena's terminology, this concerns the "effects" of the exemption clause, Arena (above note 8), p. 495.

a) Functional definitions

Traditionally, trade agreements exclude activities which are associated with the exercise of governmental or official authority. The exemption clause of Article I:3 (b) GATS and Article 135(2) of the EC–Chile Agreement are typical examples.[56] The respective clauses differ regarding their use of "governmental" or "official" authority. However, it seems safe to assume that this difference is rather marginal. Both types of approaches adopt a functional model of the description of public services. They refer to a specific governmental function (exercising public authority) and do not specify to which sector the exemption clause applies. While it is normally assumed that activities such as public administration, the administration of justice, correctional services, police and military activities are covered by the notion of "exercising governmental authority" it is not clear whether this could also apply to other activities in particular if only the government engages (public monopoly) in them. For example, until the liberalisation in the late 1990s, postal services were considered part of governmental functions in many EU countries.

The perceived ambiguous concept of "governmental authority" may have been the reason why the GATS negotiators chose to further define the notion of governmental authority with references to "commercial basis" or "in competition". According to Art. I:3 (c) GATS a service supplied in the exercise of governmental authority "means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers", a definition which has also been used in other agreements. Much has been said and written about the scope and value of such an additional definition which does not need to be repeated here.[57] It seems sufficient to recall that the notions "on a commercial basis" or "in competition" mean that even services which are provided in a semi-market environment or on heavily regulated market would not fall under that exception clause.

There seems to be a growing consensus in the academic literature and in trade practice that the functional approach referring to governmental or public authority – with or without additional definition – only covers those governmental activities which are considered as core sovereign functions (*acta iure imperii, foctions régaliennes*).[58] This means that most public services, including social, health, educational services as well as network-based and universal services are not covered by this exemption clause.[59] In fact, it may very well be argued that

[56] See above III.1. and 2. for the wording of these provisions.

[57] E. Leroux, What Is a ''Service Supplied in the Exercise of Governmental Authority'' under Article I:3(b) and (c) of the General Agreement on Trade in Services?, JWT 2006, 345; M. Krajewski, Public Services and Trade Liberalization: Mapping the Legal Framework, JIEL 2003, 341.

[58] Arena (above note 8), p. 505.

[59] This understanding seems to be shared by the EU Commission in its Reflections Paper (above note 2), p. 2-3.

the additional definition is probably circular, because activities considered as "governmental authority" are by definition inconsistent with ideas of commerce and competition.[60]

b) Sector-based categorisations

A second, albeit less-common, approach for public service exemptions is based on sectoral categorisations. As mentioned above Art. 1203:3 NAFTA and a number of free trade agreements concluded by Latin American countries specifically list law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care. In this context, it is noteworthy that NAFTA does not contain an exemption clause for services supplied in the exercise of governmental authority.

Unlike the functional approach of Art. I:3 (b) and (c) GATS and similar agreements, a sector-based public service exemption clause implies greater clarity which activities are covered by the prospective clause. In particular, it is clear that the NAFTA-type exemption clause covers in any case social and welfare services, as well as public education and health services. Hence, it is possible that the NAFTA-clause has a wider scope of application than functional approaches based on governmental authority. However, the exact contours of these sectors may also be open to debate and discussion. It is therefore not clear whether the scope of a sector-based exemption clause is in fact more precise than the functional approaches mentioned above. Furthermore, sector-based exemption clauses could be static if they are based on an exhaustive list of sectors. In this case, these clauses cannot accommodate changes in the way certain services are provided and do not take into account that the conception and understanding of "public services" varies over time. Sector-specific approaches which are based on non-exhaustive indicative lists provide for greater flexibility and allow for a dynamic understanding of the respective scope.

c) Hybrid approaches

Functional and sectoral definitions of public services are sometimes combined. For example, the 2003 draft of the – meanwhile abandoned – Free Trade Agreement of the Americas (FTAA) combined the GATS and the NAFTA approach: "[For the purposes of this Chapter: a) "services" includes any service in any sector, except] [This Chapter does not apply to] services supplied in the exercise of governmental authority; b) "a service supplied in the

---

See also the October Proposal (above note 3), p. 2.

[60] Leroux (above note 59), p. 352.

exercise of governmental authority" means any service which is supplied neither on a commercial basis, nor in competition with one (1) or more service suppliers. [c) Nothing in this Chapter shall be construed to prevent a Party from providing a service or performing a function such as law enforcement, correctional services, pension or unemployment insurance or social security services, [income security or insurance, social security or insurance,] social welfare, public education, public training, health and child protection.]"[61]

The EU seems to follow hybrid approaches as well. In particular, the EU uses hybrid approaches which not only combine elements of functional and sectoral definitions but also try to incorporate aspects of the internal EU law concepts concerning services of general (economic) interest.

(1) Public utilities

According to the "public utilities" clause, the EU and its Member States maintain the right to establish or maintain monopolies or to grant exclusive rights to service providers in public utilities. As mentioned above, the term public utilities is usually not defined, but explained in a footnote which employs a non-exhaustive list. The meaning of the term is therefore not limited to the sectors specifically mentioned in that clause, but can apply to sectors with similar characteristics. By adopting such an approach the EU and its Member States aimed at maintaining a larger degree of flexibility.

The term "public utilities" has no specific meaning in international trade or EU law. According to dictionary definitions, a public utility is defined as a service or supply, such as electricity, water, or transport, considered necessary to the community and usually controlled by a (nationalized or private) monopoly and subject to public regulation". [62] This definition suggests that public utilities are large network industries, in particular energy and water supply, and transportation.[63] The ordinary meaning of the term public services is therefore narrower than the understanding of the term according to the footnote in the EU schedules, because this footnote also refers to research and development and health services. However, the dictionary definition places an emphasis on the fact that a utility is needed by everyone or necessary to the community. In fact, the ordinary meaning of the word utility includes a

[61] Free Trade of the Americas, Draft Agreement, FTAA.TNC/w/133/Rev.3, 21 November 2003, available at http://www.ftaa-alca.org/FTAADraft03/ChapterXVI_e.asp

[62] For details see M. Krajewski, in Of modes and sectors – External relations, internal debates and the special case of (trade in) services, in: Marise Cremona (ed.), New Developments in EU External Relations Law (Oxford: OUP) 2008, 172 at 210.

[63] For a similar understanding see C. Graham, Regulating Public Utilities – A Constitutional Approach (2000), at 1.

notion of necessity. This "public need" aspect of the term public utility can be used for the interpretation of the EU schedules. Public utilities would therefore be all services, which are considered necessary for a community. In fact, the Commission seems to have an even broader understanding of the term "utilities", because it defines it as service which is "of utility the public" only to conclude that this applies to all services.[64] This interpretation seems to coincide to a large extent with the various notions of public services in the EU Member States and the term 'services of general economic interest' in EU law. This interpretation is supported by the non-binding French and Spanish versions of the 1994 GATS schedule of the EC,[65] which refer to "services considérés comme services publics" and "servicios considerados servicios públicos" respectively. These translations of the term 'public utilities' point to the broad understanding of public services in the French and Spanish legal traditions.[66]

Nevertheless, it has to be conceded that the ordinary meaning of the term is not clear as the interpretation suggested above requires additional means of interpretation. This may explain why the Commission considers the term "public utilities" as ambiguous.[67] However, this ambiguity is only based on the term "utilities". If this term would be replaced with "services" the EU model would be based on the notion of "public services" which avoids the ambiguity of "public utilities" and the problematic reliance on internal EU concepts of the term "services of general economic interest".

(2) Services of general (economic) interest and other EU law concepts

A more recent approach which is also based on a hybrid understanding of public services is the distinction between services of general economic interest and non-economic services of general interest which was introduced in the Reflections paper of the European Commission of February 2011.[68] In this paper the Commission introduces three categories based on concepts which have been partly used in the EU internal debates about public services, but which are not based on primary or secondary EU law. The three categories are non-economic services of general interest; services of general economic interest considered to be network industries and services of general interest other than network industries. While the definition

[64] See October Proposal (note 3), p, 4.
[65] Only the English version of the EC's GATS Schedule of 1994 is binding.
[66] See also M. Krajewski, Protecting a Shared Value of the Union in a Globalized World: Services of General Economic Interest and External Trade, in: J. van de Gronden (ed), EU and WTO Law on Services: Limits to the Realization of General Interest Policies Within the Services Markets, 2008, 187 (208-210). This seems to be the perspective of the Commission as well, see October Proposal (above note), p. 4.
[67] October Proposal (as note 3), p. 4.
[68] Reflections Paper (as note 2), p. 2.

of the term services of general economic interest in the EU context is a functional one (see Article 106 para 2 TFEU), the proposal of the European Commission combines functional and sectoral aspects when defining and describing the different categories. According to the proposal, non-economic services of general interest include "police and judiciary, prisons, statutory social security schemes, border security, air traffic control, etc." This list is non-exhaustive. The proposal also states that the notion of non-economic services of general interest is "essentially equivalent to the GATS definition of services carried out in the exercise of governmental authority"[69]. According to the Commission's proposal network industries are "large network infrastructures – telecoms, energy, transport, postal, environmental". This list is considered to be exhaustive. Lastly, services of general interest other than network industries include "healthcare, social services, education, employment and training services, certain cultural services, etc." The proposal states that it may be possible to "narrow down the scope through a description of the characteristics (services of a economic nature subject to specific services obligations by virtue of a general interest criterion)."

In the context of the EU-Canada negotiations the EU seems to pursue yet another hybrid approach which combines the above-mentioned concept of services of general interest with the notion of public service obligations. The EU's Draft offer of 29 July 2011 contains an exemption of public services which holds: "The EU reserves the right to adopt or maintain any measure with respect to limiting the number of suppliers, through the designation of a monopoly or by conferring exclusive rights to private operators, for services of general economic interest which are subject to specific public service obligations imposed by public authorities on the provider of the service in order to meet certain public interest objectives." The new aspect of this definition is the reference to the services which are subject to specific public service obligations. This is also an element which has been used in the EU internal market context.

A similar approach seems to be followed by the October Proposal which only uses the term "services of general economic interest" without distinguishing between network services and other services. The term "non-economic services of general interest" is also no longer used for specific commitments, apparently because the meaning of term is equivalent to the meaning of the term "services supplied in the exercise of governmental authority".

d) Assessment

[69] This quote and the following are taken from the Reflections Paper and the October Proposal (above note 3), p. 2.

The major challenge of all definitions of public services in trade agreements concerns the dynamic and flexible nature of public services. Public services are determined by a particular society in a distinct historical, social and economic context based on the values of that society. As pointed out above, this involves social and policy choices which may be different in different countries and at different moments in time. The variety and flexibility is therefore a key element of the concept of public services.[70] In fact, many services which were traditionally considered public services have been subject to liberalization and privatization processes in recent years which lead to a limited scope of public services. More recently, however, there are trends towards a re-municipalisation in some countries suggesting that the scope of public services may increase again in the near future. Public service exemptions in trade agreements therefore need to be sufficiently flexible and open to accommodate the dynamic notion of public services, but also need to be precise in order to ensure that they exclude those sectors and services which are considered as public services from the scope of trade agreements.

Public service exemption clauses which are based on exhaustive lists may be precise and transparent, but they may not provide sufficient flexibility. Functional approaches such as Art. I:3 (b) and (c) GATS may offer flexibility, but their scope varies depending on the organization of the supply of the service. Provisions in a trade agreement referring to legal concepts which can only be found in specific legal systems, such as the EU's notion of services of general interest may be interpreted and understood differently in an international context as terms of international agreements are usually interpreted autonomously and not with reference to particular domestic legal concepts.

2. Level of protection

Apart from their substantive scope, public service exemption clauses can be distinguished on the basis of which provisions of a trade agreement they apply to.

a) Complete carve-out

Public service exemption clauses of the GATS-type apply to all provisions of an agreement and exclude the activities to which they apply completely from the respective trade agreement. These clauses are typically located in the framework agreement. They have the most far-reaching scope. Their scope is not limited to market access and national treatment, but applies to any other obligation (MFN, transparency, disciplines on domestic regulation,

[70] See also Art. 1 Protocol No 26 on Services of General Interest.

etc.) as well. Exemption clauses of this type also apply to annexes or later revisions of the agreement. In short: Activities which are covered by these exemption clauses are not subject to the trade agreement at all. The rationale for such general exemptions in the framework agreement is that the activities covered by these clauses are typically not considered to be economic or commercial activities which can or should be subject to liberalisation. A public service exemption clause in the framework agreement also applies to all parties of the agreement in the same manner, because the framework agreement is binding on all Members unlike the specific schedules which only bind the respective Member.

It should be noted, however, that because of their general scope of application, these exception clauses tend to be construed narrowly. WTO Members agreed in a 1998 meeting of the Council for Trade in Services that "the exceptions provided in Article I:3 of the Agreement needed to be interpreted narrowly."[71] In a similar way, the ECJ held the official authority exemption of Art. 51 TFEU must be interpreted in a manner limiting its scope to what is strictly necessary to protect the interests of the Member States.[72] It must also be recalled that the substantive scope of these complete carve-out clauses tends to be limited as it is restricted to core governmental functions.

b) Schedules of commitments or reservations

Apart from public services exemption clauses in the framework agreements, exemption clauses can be found as limitations of specific commitments (positive list approach) or as reservations (negative list approach) in the schedule of commitments of each country. As such they only apply to the country which uses them and only to those disciplines which are subject to the commitments or reservation. Under a traditional GATS-type positive list approach market access and national treatment are the only disciplines which are subject to specific commitments.

Two approaches can to be distinguished: First, public service exemption clauses can be part of the horizontal section of a schedule of specific commitments and therefore apply to all sectors in which commitments were made. Similarly, exemptions can apply to "All sectors" in a negative list-type schedule of reservations. Second, public service exemptions could be integrated into sector-specific commitments or limitations. Such an approach excludes or limits the application of the trade agreements and/or their core obligations in the context of sectoral commitments or limitations. Instead of regulating the scope of application at the

[71] Council for Trade in Services, Report of the Meeting Held on 14 October 1998, S/C/M/30, para. 22 (b).
[72] ECJ, Case 147/86 Commission v Greece [1988] ECR 1637, para. 7 and Case C-114/97 Commission v Spain [1998] ECR I-6717, para. 34.

horizontal level, countries exclude those elements of a service which they consider public services at the sectoral level.

An example for a horizontal exemption clause is the traditional "public utilities" clause used by the EU in many trade agreements. This clause excludes public utilities from the full application of the market access disciplines (Art. XVI GATS or equivalent provisions in free trade agreements) regarding monopolies and exclusive service suppliers. It only applies to Mode 3 (commercial presence) of the GATS. Similarly, the public utilities exemption only applies to the commercial presence or establishment sections of the EU's free trade agreements. The public utilities exemption clause is a central element of the EU's current standard model of excluding the application of certain market access obligations to public services for those services which are covered by the agreement.

It should be noted that the public utilities exemption is a limitation of the specific commitments in all sectors which may be considered as public utilities. As such this clause is not just a stand-still clause as the Commission suggested in its latest position paper on this matter.[73] A stand-still clause would mean that only existing measures are protected, while future measures are not. However, at least in the context of GATS or FTAs based on a positive list approach the public utilities clause exempts all monopolies and exclusive service supplier requirements which apply to public utilities from the application of the specific commitments regardless of the time when they were introduced. Member states may therefore reintroduce monopolies without compensation because their commitments did not cover such measures in sectors which qualify as public utilities.

Sector-specific exemptions only apply to the respective sector. Examples for this type of exemptions are the EU's GATS commitments in education services which are limited to "privately funded education services". The Draft Offer for the CETA also refers to privately funded education services and uses a similar approach in health and social services by referring to "publicly-funded health and education services". A reference to the public or private nature of the funding of the services may seem attractive at first sight as it implies that only privately funded services are subject to liberalisation commitments. However, the devil is in the details: First, it needs to be determined whether "publicly-funded" means 100% public funding or only more than 50%? Are contributions to statutory public sickness funds "public funding", because they are based on a mandatory law while insurance fees paid to private insurers constitute "private funding"? Second, which is the basis of analysis? Does one look at the funding of the service or of the service supplier? Is the basis the – publicly

[73] October Proposal (as note), p. 5.

funded – university or the graduate programme which is funded by high student fees and corporate sponsors?

As noted above, the distinction between positive and negative list approaches is crucial for the determination of the impact of trade agreements on public services. In particular, while a positive list approach allows countries wishing to maintain a maximum level of regulatory flexibility in a certain sector to refrain from making any commitments in that sector by simply not including it in their schedules, a negative list approach precludes this technique. Instead, countries must list those sectors specifically in their Annexes and also positively mention those measures they wish to maintain or carefully design a regulatory carve-out for future measures.

c) Exemptions applicable to other obligations

In addition to public service exemptions in the relevant schedules of commitments which are only applicable to specific commitments, trade agreements may also include exemptions which apply to other obligations. For example, such clauses can reduce the application of certain general rules of a free trade agreement such as disciplines for subsidies or government procurement. These provisions would therefore not exempt from the entire agreement, but only from certain obligations or parts thereof. Finally, specific clauses, in particular in the context of schedules of commitments or reservations, could provide that certain domestic regulatory measures, for example public service obligations can be maintained. In these cases the focus is not on excluding a particular discipline of the trade agreement, but on maintaining a particular measure regardless of which obligation of the trade agreement could be violated by these measures.

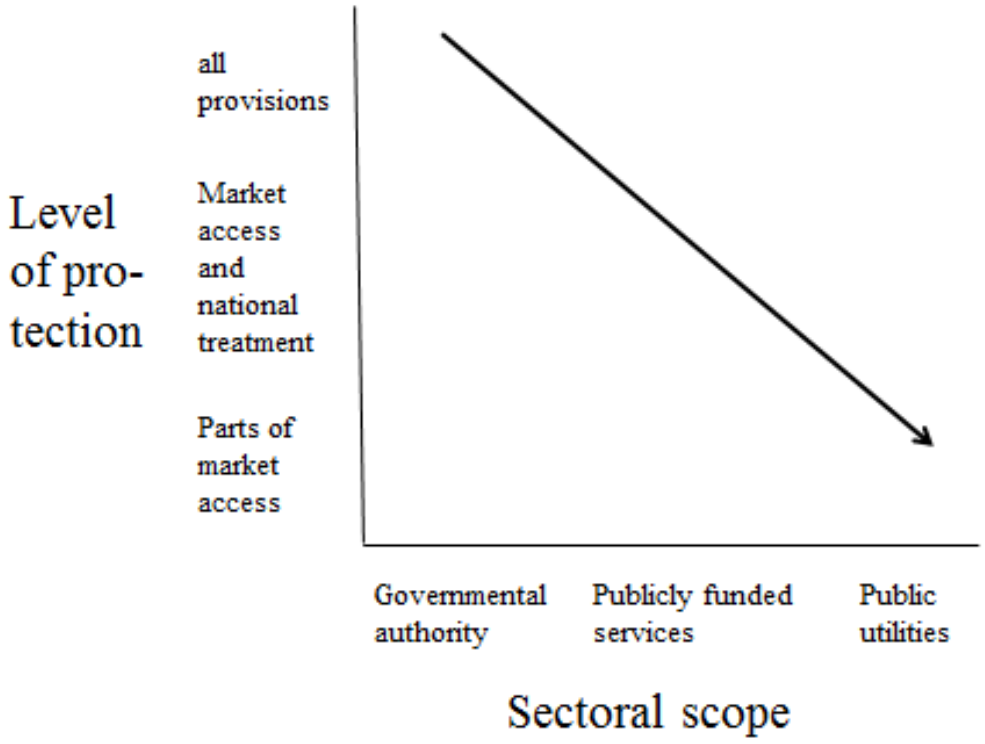
The exemption clauses for public enterprises and enterprises entrusted with special rights applicable to competition law mentioned above are also example of a clause which is only applicable to a specific set of rules of the trade agreement. These exemption clauses have a limited scope of application as they only apply to the respective obligation (or set of obligations). Their potential to reduce the impact of a trade agreement on public services may therefore be small. However, since public services exemptions at the level of specific commitments only apply to those obligations, public services would remain unprotected from the impact of the competition law principles in those agreements without such specific exemption clauses.

d) Assessment

The level at which countries choose to introduce public service exemptions is of particular importance regarding the breadth of application. Exemptions which are located in the core agreement apply to all parts of the agreement and therefore exclude public services to the extent they are covered by the respective provision from the agreement altogether. It follows that an exemption clause at that level offers by far the most comprehensive protection of public services from the impact of the disciplines of trade agreements. Contrary to this, exemptions located at the level of commitments or reservations only apply to specific disciplines, usually national treatment, market access and most favoured nation treatment. Other obligations of trade agreements such as disciplines on domestic regulation, subsidies and government procurement would apply nonetheless if they cover trade in services. Furthermore, sector-specific public services exemptions in the schedules of commitments or reservations only apply to the specific sector and have generally no impact on other public services in other sectors. Public service exemptions in sector-specific annexes usually apply to the whole agreement and not just to certain obligations. They are however, limited to the sector they address. The scope of public services exemptions therefore decreases in the following order: Framework agreement, sector-specific annex, horizontal section of the schedule, sectoral section of the schedule, exemption clause only applicable to a specific set of rules.

3. Summary

The previous discussion reveals an inverse relationship between the substantive scope of the public service exemption clause and its level of protection. While general carve-outs like Art. I:3 (b) and (c) GATS provide the highest level of protection, they only have a very narrow substantive scope ("governmental authority"), which has only a very limited impact on public services. Sectoral carve-outs which limit commitments to "privately-financed" services have a larger scope as they aim to protect all activities of the respective sector which would be considered as "publicly financed". They have, however, a more limited level or protection as they only exclude the applicability of key disciplines such as market access and national treatment. Lastly, public service exemption clauses such as the "public utilities" clause have the largest substantive scope. However, they only apply to two types of market access limitations and have therefore the most limited scope of application. It is not the argument of the present study that this relationship has an inherent logic, but it is the logic which has been followed by trade practice in the last two decades. The relationship between these two determining factors is illustrated in the graph below.



V. Models of public service exemptions

The references to the different public services exemptions in the previous section already indicated that most trade agreements employ more than one tool to protect public services from the full application of the disciplines of these agreements. In designing the regimes of public service exemption in trade agreements countries tend to adopt approaches which balance their defensive and offensive interests vis-à-vis public services. The Reflections Paper of the EU illustrates this. Under the heading "What is the problem?" the EU Commission not only notes the ambiguous scope of the public utilities exemption, but also acknowledges: "We have important offensive interests in certain privatised public utilities/sectors, notably in Telecommunications, Postal, and Energy".[74]

In general, three models can be distinguished: The first, most commonly used, can be found in the GATS and in many EU and other free trade agreements signed after the entry into force of the GATS in 1995. The second approach follows the NAFTA model while the last – emerging – model is based on the recent policy changes of the EU Commission.

[74] Reflections Paper (above note 2), p. 1.

1. The traditional GATS and EU FTA approach

The "traditional approach" is followed by the EU in the GATS context and adopted in many free trade agreements concluded between 1997 and 2011 including the EU-Mexico, EU-Chile, EU-Korea, and EU-Peru/Colombia agreements as well as the EU-CARIFORUM EPA. The approach consists of three layers of protecting public services.

The first layer is an exemption clause for services supplied in the exercise of governmental or official authority which excludes these activities from the scope of the agreement. These activities are therefore neither subject to specific commitments nor to general obligations. All public services which are not covered by this exemption clause are subject to all obligations of the respective agreement.

The second layer is the so-called "public utilities" clause in the horizontal section of the EU's GATS schedule. As mentioned above, this clause only applies to commercial presence and covers certain aspects of market access, in particular monopolies and exclusive service suppliers. However, the public utilities exemption is applicable to all sectors and therefore not limited regarding its sectoral scope. While the exact meaning of term "public utilities" remains not entirely clear it seems safe to assume that it is not restricted to certain network services, but covers all services which are considered as "public services" by the competent national, regional or local authority.

The third layer of the traditional approach concerns sectoral definitions limiting the scope of the commitment. One possibility is to limit the commitments to privately funded activities. Prominently, the EU used this technique in education services.

The traditional approach is based on three principles which correspond to the three layers: First, activities which are considered as exercise of governmental functions should not be subject to trade agreements. Second, there are certain aspects of public services which should be protected in all sectors such as the right to establish or maintain monopolies and exclusive service suppliers. Third, certain sectors may include elements which are considered public services and elements which are of a commercial nature. One way of distinguishing the two sets of services is through the way they are financed.

It should be noted that the elements of the traditional approach are not based on a coherent theoretical model. It combines functional, sectoral and hybrid definitions and uses terms which are not necessarily linked with each other. Nevertheless, the underlying concept of the three levels or layers of protection is a useful approach as it allows countries to distinguish between different activities and rationales for protecting them from parts of or the entire trade

agreement. However, the concrete application of the model and its terminology is problematic: It employs concepts which are less than clear (definition of services supplied in the exercise of governmental authority, public utilities, private funding) and it only exempts public utilities from two elements of the market access obligation while all other obligations of the trade agreements apply to public services. This does not provide sufficient regulatory space and flexibility from the domestic regulatory perspective.

2. The NAFTA approach

The approach adopted in the NAFTA context differs significantly from the GATS approach. NAFTA and NAFTA-type agreements do not contain a specific exemption clause for services supplied in the exercise of governmental authority. They do however contain a reservation clause for certain activities such as law enforcement, social benefits, public education, public training, health, and child care. This clause serves similar functions as the exemption clause for services supplied in the exercise of governmental authority, but it also contains unclear language as it is subject to the provision of these services in a manner not inconsistent with the agreement. The scope of the NAFTA- and the GATS-clauses overlaps partly, but the NAFTA clause seems broader in scope as it explicitly contains social and educational services. Nevertheless, as mentioned above the impact of the NAFTA reservation clause may be limited.

The most important instrument of limiting the impact of the NAFTA disciplines on public services are sector-specific reservations contained in Annex I (Reservations for Existing Measures and Liberalization Commitments) and Annex II (Reservations for Future Measures). The parties to NAFTA listed a number of public services sectors and respective regulatory measures in their schedules. In general, the Annex II exemptions which provide for regulatory space are more important for the present purposes than Annex I exemptions which are in effect a stand-still clause and subject to an inherent liberalisation mechanism. The NAFTA parties did use the possibility to schedule sectors they considered as public services to a certain degree. For example, Canada excluded telecommunication transport networks and services as well as certain social services by listing them in its Annex II schedule as exemptions from the market access, national treatment and most favoured nation treatment obligations. Mexico for its part included certain elements of telecommunication and postal services, audio-visual services and social services. Similar reservations were made by the United States.

The NAFTA-model shows that the parties to a trade agreement which employs a negative-list approach and which does not contain a strong and robust general carve-out for public services must pay particular attention to the design and scope of their reservations for future measures (Annex II in the NAFTA context).

3. The new EU approach

The publication of the EU Commission's Reflections Paper and the on-going negotiations with Canada seem to mark the beginning of a new EU approach towards public services in trade agreements. The October Proposal can be understood as a consolidation and refinement of that new approach. While this new approach seems to maintain certain elements of the traditional model such as a general GATS-type exemption clause for services supplied in the exercise of governmental authority, it could be radically different from previous agreements by shifting from a positive-list approach to a negative-list approach.[75] As pointed out, this shift is of particular importance in the context of public services. The new approach of the EU Commission would seek to further align the internal level of liberalisation of certain sectors (in particular telecommunications, postal and energy services) with the external level of commitments. However, it should be noted that not all public services are subject to specific internal market regimes. From a conceptual perspective, the new approach would employ a different terminology: The EU Commission would like to introduce the terminology and logic of services of general interest (SGI) and its derivatives such as non-economic services of general interest into trade agreements. These concepts are, however, based on terms used in the TFEU (Art. 16, 106, Protocol No 26) and relevant communications of the EU Commission regarding "services of general interest". They have no equivalent in international trade law until now. These terms are also not used coherently and throughout internal market legislation as the Commission proposals seem to suggest. In fact, the Services Directive is the first and still the only major piece of internal market legislation which employs this terminology.

a) General exemption for non-economic services of general interest

According to the Reflections paper, the new approach of the EU would contain a general exemption clause for "non-economic services of general interest carried out in the exercise of

[75] Even though the Reservations Paper claims that it is „Applicable to both Positive and Negative Lists", it is clear that the main intention is to provide tools which could be used in a negative-list approach. It remains to be seen if the European Parliaments resolution which called for a return to the positive-list approach after the conclusion of the Canada-EU negotiations will be adhered to by the European Commission. In this context, it should be recalled that the European Parliament's competences in trade matters increased significantly since the entry into force of the Treaty of Lisbon.

governmental authority" which would apply to all sectors and exclude market access, national treatment, most-favoured-nation treatment and commitments for "Senior Management and Boards of Directors". The EU Commission's proposals suggest that the scope of this clause should be determined on the basis of the case law of the European Court of Justice (ECJ). This reference itself is problematic because one of the approaches used by the ECJ to determine the non-economic nature of an activity is based on the question whether the service was provided for remuneration. The Court usually approached this question very narrowly. In most cases, the ECJ held that a particular activity was provided for remuneration and therefore constituted a service in the meaning of Art. 56 and 57 TFEU.[76]

The EU Commission explains that "This reservation is intended to replicate the exclusion in the GATS of services provided in the exercise of governmental authority while reflecting the specific EU understanding of these services."[77] This explanation highlights the ambiguous and potentially confusing approach. It is highly doubtful whether such a reservation for non-economic services of general interest would provide legal certainty, because the relationship between this reservation with its specific reference to ECJ case law and the GATS clause which does not contain such a reference remains unclear and leads to incoherence. Furthermore, it is unclear whether the reference to the case law is a static one (i.e. referring to the case law at the time of entry into force of the relevant trade agreement) or a dynamic one (i.e. referring to the case law at the time the relevant clause is interpreted). While the former might be acceptable to other trading partners, the latter would constitute a problematic possibility for the EU (i.e. its Court of Justice) to unilaterally determine the scope of its commitments.

In addition, a reservation clause for services supplied under governmental authority would be superfluous if the chapter on services and investment would contain a GATS-type exemption clause, because such an exemption clause would exclude services supplied in the exercise of governmental authority from the scope of the agreement altogether.[78] In this context, it should also be noted that the reservation clause for non-economic services of general interest provides a substantially lower level of protection than a general exemption clause for services supplied in the exercise of governmental authority, because the general exemption clause would exclude these services from all obligations of the agreement as pointed out above. Contrary to this, the new reservation clause suggested by the EU would only cover those

[76] ECJ, Case C-534/92, SAT/Eurocontrol [1994] ECR I-43, para. 30; Case C-343/95 Diego Cali [1997] ECR I-1547, para 23 and Case C-309/99 Wouters [2002] ECR I-1577, para 57.
[77] Reflections paper (above note 2) p. 4.
[78] The EU Commission seems to have realised that in its October Proposal (above note 3), p. 8.

obligations which are subject to schedules. It is also noteworthy that the EU Commission mentions Article 2 of Protocol No. 26 annexed to the Treaty of Lisbon in the Reflections Paper.[79] This provision maintains that "the provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest." Article 2 of the Protocol No. 26 therefore reaffirms that the EU has no competence in this field. It is therefore highly doubtful if the EU has the competence to include a reservation for these services in its reservations because this could suggest that these services would be subject to the liberalisation obligations unless they are mentioned in Annex II.

b) Reservation for public services or services of general economic interests

The new EU approach contains a second reservation for "services of general economic interest" (Reflections Paper and October Proposal) or "public services" (Draft Offer in the Canada-EU negotiations). This reservation is limited to market access only and would only apply to monopolies and exclusive rights in the same manner as the traditional public utilities clause. In the October Proposal, the Commission even proposes to limit this reservation to the local level only.

The first and most obvious deviation of the proposed reservation from the current standard is the wording. Even though the "public utilities" exemption is generally interpreted as a clause which goes beyond the ordinary meaning of the term public utilities as pointed out above, its wording always gave rise to interpretive question-marks. The term "public services" is therefore more appropriate to underline the broad scope of this clause.

Unlike the reservation for non-economic services of general interest and unlike the standard public utilities approach in the GATS and other trade agreements, the reservation for public services/services of general interest as suggested in the Reflections Paper does not apply to "all sectors." Instead, the proposal introduces a hybrid category ("services of general economic interest" or "public services") which does not seem to cover all sectors because otherwise there would be no need to distinguish between "all sectors" and the new categories. However, unlike the other sector-specific categories, the sectoral scope of these new categories cannot be defined on the basis of specific industry classification (CPC). Yet, the reservation specifically excludes telecommunications and computer services in the same way as the standard public utilities clause which, however, applies to "all sectors". This confusing

[79] Reflections Paper (as note 2), p. 4.

use of sectoral definitions and carve-outs increases the ambiguous nature of the new categories.

It should also be noted that the scope of the sector "public services/services of general economic interest" is smaller than the scope of "all sectors". In this respect, the new proposal is therefore narrower than the standard approach even though the exact sectoral scope of the proposed reservation is difficult to assess. The text of the reservation defines public services/services of general economic interest in a procedural manner as services "which are subject to specific public service obligations imposed by public authorities on the provider of the service in order to meet certain public interest objectives". This procedural definition indicates that every service could be subject to such public service obligations (PSO). Hence, it would be more appropriate and consistent if the reservation for public services would also apply to "all sectors".[80]

Furthermore, the understanding of the notion of public services/services of general economic interest in the proposed reservation is based on EU concepts. Both the reference to services of general interest and to the imposition of public service obligations link the notion to the respective EU debate. This definition of public services in the proposed reservation also significantly deviates from the public utilities standard because this clause referred to "services considered as public utilities at a national or local level". The competence to determine public utilities was therefore clearly allocated at the national or local level and not subject to EU definitions. The new approach refers to competent authorities at the national, regional and local level which impose public service obligations on service suppliers and therefore determine which services are considered as public services. Hence, the new reservation clause requires a specific, formal act consisting of the imposition of public service obligations. This would exclude a determination on the basis of legal traditions or other regulatory approaches. The new approach therefore formally maintains the right of the Member States and their regional and local authorities to determine what they consider as public services. However, this determination is only recognised if it is done in a specific form which is – again - derived from internal EU law (see Article 106 para. 2 TFEU).

In addition to these deviations from the standard public utility exemption clause, the new proposal also maintains a number of short-comings of the old approach. This concerns the fact that it is limited to market access and does not cover national treatment. If a domestic authority intends to rely on local service suppliers in order to provide public services "as closely as possible to the needs of the users" (Art. 1 Protocol No. 26) it may encounter

[80] Once again, the Commission seems to be aware of that as seen in the October Proposal (above note 3), p. 10.

difficulties if it treats local providers more favourable than foreign providers. Furthermore, the standard and the new approach only cover monopolies and exclusive service suppliers. Other elements of market access, especially economic needs tests (ENT) which are a typical instrument of limiting competition in sensitive sectors are not covered by the reservation. Lastly, the reservation clauses do not protect public services from the application of disciplines for domestic regulation which would prohibit the imposition of obligations on public service suppliers if they are more burdensome than necessary. These aspects significantly reduce the value of the old and new exemption clauses as instruments aimed at maintaining policy space at the national, regional and local level for the organisation, provision and financing of public services.

In its most recent October Proposal, the Commission suggests to limit any horizontal carve-out to measures taken at the local level.[81] This would significantly reduce the scope of the protection of public services compared with the traditional EU approach which applied to the national, regional and local level. In essence, the most recent proposal would effectively bar Member States from using monopolies and exclusive service suppliers at any level above the local government unless they specifically list the measures they want to maintain on a sectoral basis.

On a final note, it should be pointed out that the proposed reservation clauses for non-economic services of general interest and for public services state that "the EU reserves the right to adopt of maintain and measure with respect to". However, measures imposing restrictions on service suppliers due to public service obligations are not adopted by the EU, but by the Member States. In fact, the EU has no competence to impose specific public service obligation. There may be EU legislation which allows or even requires the imposition of such obligations. This concerns in particular universal service obligations in the telecommunications and postal sector. However, the EU institutions may not impose such obligations on individual service suppliers. This is why the traditional public utilities clause correctly referred to the Member States and not to the EC/EU.

c) Sectoral reservations

The new approach of the EU also contains sectoral elements. In particular, the October Proposal places significant importance on sectoral limitations. This is in part due to the fact that the horizontal limitation suggested in the October Proposal is restricted to measures at the

[81] October Proposal (above note 3), p. 10 et seq.

local level.[82] If this approach would be implemented, Member States would be restricted to sectoral limitations and commitments in order to protect policy space for public services at the national or regional (= provincial) level. This would have two serious consequences: First, Member States would not be able to introduce public service regulations which would be inconsistent with the obligations of the trade agreement in new sectors, because there would be no public service exemption clause would be scheduled with regards to sectors in which there are currently no public services. Unless a Member State applies a public services exemption clause to every sector, the new approach would effectively amount to a sectoral stand-still obligation, because there would be no horizontal exemption clause applying to all sectors. Second, Member States would in fact be compelled to list all monopolies and exclusive service supplier arrangements they maintain at the national and regional level.[83] This exercise would put these policy instruments in a particular bright spotlight and invite the EU's trading partners to abandon them in future trade negotiations or initiate a process of putting pressure on these monopolies from an internal market perspective.

d) Assessment

In conclusion, it can be argued that the new proposal of the EU Commission is problematic because it introduces new categories and layers of exemption public services which are not coherently connected with existing elements. The exchange of the term "public utilities" with the notion of "public services" would be a useful change if it would not be combined with attempts to reduce the already limited scope of that clause. Most importantly, the new approach would not address some of the underlying problems of the EU's policy towards public services in the context of trade agreements.

VI. Two proposals for reform

The analysis of the existing public service exemptions, in particular their scope and level of protection highlighted that they all have their limits: On the one hand, they lack legal and conceptual clarity and on the other hand they do not seem to be sufficiently flexible to accommodate changing political and social approaches towards public services. In general, the existing provisions do not offer public services a sufficient level of protection from the impact of the obligations of trade agreements. Any reform proposals will have to strike a balance between a large degree of legal clarity and a sufficient amount of legal flexibility.

[82] October Proposal (above note 3), p. 10.
[83] See the examples in Annex III of the October Proposal (above note 3), p. 13 et seq.

What follows are two different reform proposals which strike the balance between these two aspects in different ways. The two proposals also differ regarding their compatibility with the current trade regime. While the first follows the dominant logic of trade liberalisation and attempts to create specific carve-outs, the second proposal challenges the locking-in function of trade agreements and is therefore at odds with orthodox trade agreement logic.

1. Increasing legal certainty and providing for specific carve-outs

As shown above, the GATS-type exemption clause has an ambiguous content due to its confusing definition which does not increase the scope of the clause or its level of protection. It is therefore proposed to abandon the additional definition and simply exclude the application of the trade agreement to "activities considered as exercise of governmental authority in the jurisdiction of the respective Party/Member". Such a provision would make it clear that core governmental functions as defined by the legal system of each country would be excluded from the scope of the trade agreement.

For the remaining, large area of public services which fall under the scope of the agreement, Members should use the term "public services" and define it as "services which are subject to special regulatory regimes or special obligations imposed on services or service suppliers by the competent national, regional or local authority in the general interest". This definition would reflect a generally shared understanding of public services in most, if not all, countries of the world and would avoid the ambiguity of the term "public utilities".

Based on this definition, Members could then choose which provisions of the trade agreement should be applicable to public services and which should be excluded. To begin with Members could restrict the application of the specific market access and national treatment obligations and exclude public services from the scope of their commitments. In the context of a positive list approach, this could be achieved through a horizontal restriction. Compared with the current EU public utilities clause, such a broader public service limitation would provide more legal clarity as it would avoid the ambiguous term "public utilities". Furthermore, it should not be restricted to only two aspects of the market access obligation (monopolies and exclusive service suppliers). In the context of a negative-list approach, a public service exemption clause would need to apply to "all sectors" and to reservations for future measures (Annex II). Such a reservation could have the following wording: "With regards to public services, [Party to the agreement] reserves the right to limit the number of services and service suppliers, impose special obligations on service suppliers and regulate the provision of these services in the general interest."

Furthermore, public service exemption clauses could be included in the framework agreement applying to certain general obligations of the agreement which are not subject to the specific commitments. For example, a provision of subsidies could read: "The provisions of this agreement do not apply to the direct or indirect subsidisation of the provision of public services". In addition, Members could limit the impact of disciplines for domestic regulation on the provision of public services, by either excluding public services from the scope of future disciplines altogether or by specifying that certain public service regulations are not considered more burdensome than necessary. A possible provision could read: "The imposition of a public service obligation (or: universal service obligation) on a service supplier in a transparent and non-discriminatory manner is not considered as more burdensome than necessary".

It should be noted that this approach would not exclude public services from the application of general obligations such as transparency requirements (e. g. Art. III GATS) or other generally applicable obligations of a trade agreement if they do not contain a specific public service exemption clause. More importantly, the approach would not increase the flexibility of a country after it made its commitments. In fact, commitments would be binding and countries which adopted a liberal approach towards public services would be bound by their original commitments. Furthermore, the logic of progressive liberalisation which is inherent to all trade agreements would still apply. This means that public service exemption clauses would be subject to future trade negotiations and would have to be defended in these negotiations. In sum, the proposal would provide for greater regulatory flexibility and policy space, but would not fundamentally alter the existing regime of the impact of trade agreements on public services, which is characterised by carve-outs and exemptions. The underlying principle of this regime is that trade liberalisation and market-based operations are the rule whereas market intervention and the provision of public services remain exemptions.

2. Providing more flexibility: The case for a simplified modification of commitments

The last considerations lead to a more fundamental proposal for reform. A key problem of the impact of trade agreements on public services or domestic regulation in general is that the agreements are too restrictive. A substantial reform should therefore not be based on a refinement of exemption clauses. Instead, it would need to reduce the impact of bound commitments on regulation. This could be done through a simplified mechanism for the modification of commitments. The possibility to modify commitments contained in Art. XXI GATS requires a difficult and burdensome procedure without a predictable outcome. It

requires the notification of the intended modification to all WTO Members and negotiations about compensations in the form of additional commitments with all interested other members. Should these negotiations not result in a compensatory agreements an arbitrator will determine the level of compensations. The procedure to modify schedules has so far only been used by the EU in the context of the consolidations of its schedule after two rounds of enlargement[84] and by the United States as a reaction to the Appellate Body ruling in the Gambling case.[85] While the result in the EU's case was positive, the United States' attempt is still open.

In order to increase the flexibility of the GATS, a simplified modification procedure could be introduced in trade agreements. This procedure could include a requirement to announce the modification of a schedule, a period of comments by other parties of the agreement, a requirement to take those comments into consideration and the obligation to compensate any service supplier who lost significant values of his investment or commercial expectations on the basis of a case-by-case arbitration. In addition, one could impose a grace period of one or two years after the entry into force of the agreement in order to ensure a certain degree of legal stability.

A simplified modification procedure developed along those line could reduce the "regulatory chill" factor of trade agreements significantly because it would limit the impact of the claim that a particular regulatory measure violates the commitments. It would also provide countries with a real possibility to alter their international obligations in case of fundamental policy shifts regarding public services in that country. This would also create space for countries which review their current liberalisation policies and remove the restrictions created by the current "lock-in" rationale of trade agreements. A more limited version of such a simplified modification procedure could be restricted to public services only, but it would also be worth considering applying such a modification procedure to all sectors. A simplified procedure to modify commitments would also reopen policy space to review liberalisation policies and to withdraw them if the assessment of the liberalisation of a certain sector shows negative effects of that policy.

[84] Council for Trade in Services - Communication from the European Communities and its Member States - Certification - Draft Consolidated GATS Schedule, S/C/W/273, 9 October 2006.

[85] Trade in Services - Modification of Schedules - Invocation by the United States of Article XXI of the General Agreement on Trade in Services (GATS) - Notification from the European Communities, S/L/289, 19 June 2007.

VII. Conclusion

The impact of trade agreements on the provision, organisation and financing of public services is complex and not always directly apparent. However, key obligations in trade agreements limit the measures and instruments through which governments at the central, regional and local level to regulate or provide public services. It is therefore generally accepted that the disciplines of trade agreements should not fully apply to public services. Yet, beyond this general view, there is little agreement. A first set of issues concern which services are considered as public services which should be protected from the full application the liberalisation obligation of trade agreements. In particular, public services which are provided partly on commercial terms or by private business operators are sometimes seen as services which do not need to be exempted from disciplines of trade agreements. A second area of contestation relates to the impact of the different obligations of a trade agreement on specific regulatory instruments such as the use of public monopolies or universal service obligations. A third aspect concerns the general political and/or policy space which is necessary for the regulation of public services at different governmental level. Do trade agreements leave enough policy space in this respect? Furthermore, are trade agreements perceived as leaving enough policy space by the relevant actors or do they create a "chill effect" on domestic attempts to regulate public services or to reform existing liberalisation moves?

These issues show that it is paramount for countries negotiating an international trade agreement to carefully assess the impact of such an agreement on public services and to limit that impact to the extent necessary. Various techniques and instruments have been developed in international practice over the last 15 years. They range from general sectoral carve-out clauses which exclude the application of the agreement to certain services to concrete limitations of specific commitments. All existing methods face the difficulty that trade negotiators and regulators have to draft the agreements and their special rules based on the current understanding and needs of public services. They are therefore based on a static approach. This can be partly overcome by using non-exhaustive lists of services or measures or by creating large carve-outs. An alternative approach suggested in this paper could be to use more flexible rules for the modification of schedules of commitments. This would reclaim policy space and allow countries to avoid the strict liberalisation requirements and "lock-in" mechanisms associated with current trade agreements. Such a more flexible approach would also reflect the dynamic nature of the concept of public services and ensure that the necessary adaptability of the provision of public services is not unduly restricted.