PUBLIC SERVICES IN EU TRADE AND INVESTMENT AGREEMENTS

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The politics of Globalization and public services: putting EU´s trade and investment agenda in its place

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Public services in EU trade and investment agreements[1]

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I. Introduction

The debate about services of general interest in European law has focused so far on internal law, i.e. fundamental freedoms, internal market, competition, state aid and procurement law. The impact and the role of external EU law, in particular of the international agreements to which the EU is a party, has not been at the centre of attention. If external aspects have been addressed, the discussions mostly concerned the potential limitation and restrictions of the provisions of the General Agreement on Trade in Services (GATS) on the provision and organisation of public services.[2] The impact of bilateral and regional trade and investment agreements of the EU on these services has not yet been thoroughly analyzed and discussed. These agreements contain approaches to the regulation of public services which are partly built on, but partly also differ from the GATS approach. In some instances, they provide greater legal flexibility for the provision of services of general interest while other agreements tend to be stricter. The impact of the EU's bilateral free trade agreements on public services mirrors the impact of the GATS on public services in a number of aspects. However, there are also new issues, specifically with regards to the "new generation" free trade agreements (FTAs) of the EU. These issues

[1] Presented at the Conference "Beyond the Single Market - External and international dimensions of services of general interest in EU law", Erlangen 18 and 19 September 2013. The paper builds on the results of a research project funded by the European Federation of Public Service Unions (EPSU) and the Austrian Federal Chamber of Labour (AK) in 2011. Available at SSRN: http://ssrn.com/abstract=1964288.

[2] See the contribution by Arena.

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, and the increasing inclusion of chapters on investment – and most recently on investment protection in bilateral trade agreements.

The EU Commission seemed to have acknowledged the contentiousness of the impact of FTAs on public services in a "Reflections Paper on Services of General Interest in Bilateral FTAs" (hereinafter: Reflections Paper) published in February 2011[3] and a 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 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 which 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 debate about public services and trade agreements is not a technical discussion about specific details of European external and international economic 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

[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 has not been released officially by the EU, but 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 Agreements, 26 October 2011 (on file with author).

provide for public service exemptions indicates if and how these agreements aim to balance liberalisation commitments and non-commercial or non-market regulatory options.[5]

The specific impact of the EU's trade and investment agreements on services of general interest is also relevant in the context of the general legal and political framework of EU external relations. The founding treaties of the EU suggest a value-driven approach to external relations.[6] Article 21 para 1 TEU declares that the EU's "action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement (…)". This includes the principles of equality and solidarity. Article 207 TFEU states that the common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action. It can be argued that the general constitutional values of the EU are among the principles which Article 21 TEU refers to. In its 2006 Trade Policy Paper "Global Europe" the European Commission seemd to have concurred with this perspective when it stated: "As we pursue social justice and cohesion at home, we should also seek to promote our values, including social and environmental standards and cultural diversity, around the world."[7]

The special role of services of general interest is a common constitutional value of the EU and its Member States as stipulated already in Article 14 TFEU and re-emphasised in Protocol No. 26 on Services of General Interest. It could therefore be argued that the special role of services of general interest is one of the principles and values which should be respected by the EU in the conduct of its external relations and in particular when negotiating trade agreements. The Directives for the negotiation of the plurilateral Trade in Services agreement (TiSA)[8] connect Protocol Nr. 26 and trade negotiations for the first time. They state: "The high quality of the EU's public utilities should be preserved in accordance

[5] 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).

[6] See the contribution by Eeckhout.

[7] European Commission, Global Europe – Competing in the World, A Contribution to the EU's Growth and Jobs Strategy, 2006, p. 5. Unfortunately, no such wording can be found in the most recent Communication "Trade, Growth & World Affairs – Trade Policy as a Coherent Component of the EU's 2020 Strategy, 2010, available at http://trade.ec.europa.eu/doclib/html/146953.htm.

[8] See below II.

with the TFEU and in particular Protocol No 26 on Services of General Interest, and taking into account the EU's commitments in this area, including the GATS".[9] Exactly the same wording can be found in the Directives for the negotiations of the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the US. [10] It can be argued, that this reflects not only the contentiousness of the impact of trade agreements on public services, but also indicates the special value of services of general interest which the EU's negotiators of trade agreements should respect.

Against this background, this paper analyses the various approaches used in free trade agreements to safeguard regulatory space for the provision, financing and organisation of public services. The paper focuses on agreements signed by the EU including texts of recently negotiated agreements and drafts of agreements under negotiations. As a comparison, the paper 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 paper 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 paper.[11]

[9] Council of the European Union, Draft Directives for the negotiation of a plurilateral agreement on trade in services, 8 March 2013, on file with author.

[10] Council of the European Union, Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America, 17 June 2013, on file with author. On the TTIP see below section II.

[11] 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 paper, “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.[12] The paper 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. Whenever this paper refers to specific agreements and provisions, it uses the term as adopted in the respective agreement.

II. Overview of agreements and negotiations

The European Union is party to a number of bilateral free trade agreements and in the process of negotiating further agreements with various partners.[13] The existing bilateral free trade agreements consist of two groups. Traditional free trade agreements are based on the WTO-model. Examples are the EU-Mexico and the EU-Chile agreement. A “new generation” of FTAs contain comprehensive services and investment chapters, but no provisions on investment protection. However, they often also include sector-specific regulatory frameworks and sometimes also provisions on competition law. The first and archetypical agreement is the EU-Korea FTA, which is in force since 2011. Other agreements of the new generation are the EU-Colombia and Peru FTA, signed in 2012 and provisionally applicable since 2013 and the EU-Central America (Honduras, Nicaragua and Panama) FTA, signed in 2012 and provisionally applicable since 2013.

The EU is currently negotiating FTAs with India (since 2007), Malaysia (since 2010), Vietnam (since 2012), Thailand (since 2013) and Japan (since 2013). Negotiations on the trade elements of an FTA with Singapore ere concluded in 2012, but negotiations on an investment protection chapter are still on-going. The EU and Canada are negotiating a Comprehensive Economic and Trade Agreement (CETA) since 2009. The EU Commission predicts that the negotiations will be concluded by the end of 2013. Most recently, the EU

[12] For a similar definition see Arena (above note), p.495.

[13] The most recent overview of the negotiations see European Commission, Overview of FTA and other trade negotiations, available at http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf, 13 September 2013.

began negotiations with the US on a Transatlantic Trade and Investment Partnership (TTIP) in July 2013.

Apart from FTAs, other relevant agreements in the present context are the Economic Partnership Agreements (EPAs) with African, Caribbean and Pacific Countries (ACP) based on the Cotonou Agreement of 2000. Of these only the EU-CARIFORUM EPA contains a full chapter on services which is comparable to the new generation FTAs. Interim EPAs with some African and Pacific States exclude services, but contain so-called rendez-vous clauses which mandate negotiations on services in the future. The EU is currently also negotiating further EPAs with some ACP countries and regions. These negotiations also cover trade in services.

Two further negotiations deserve to be mentioned in the present context. The EU is engaged in negotiations on a plurilateral Trade in Services Agreement (TiSA) since 2012. This agreement is built on the GATS and aims at further liberalisation commitments of the participating WTO Members. The agreement is controversial as it is not clear if and how the agreement can be integrated into the WTO framework. Finally, it needs to be noted that the EU begins to negotiate agreements covering investment protection.[14] These negotiations would be based on the new competence of the EU: Since the Treaty of Lisbon the EU's competence in the field of the common commercial policy also includes agreements on foreign direct investment. In May 2013 the EU Commission proposed negotiations about an agreement on investment protection with China to the Council. Furthermore, the EU intends to include a chapter on investment protection in its newest FTAs such as the agreement with Singapore and the TTIP.

III. 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

[14] On this concept and the relevant agreements see paper by Costamagna.

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.

1. 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. Other disciplines of a trade agreement (in particular disciplines for domestic regulation) would not be excluded based on an 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 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. Nevertheless, the differences between the two approaches are significant[15]: 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.

[15] S. M. Stephenson, Regional versus multilateral liberalisation of services, WTRev 2002, 187 (193).

Most EU agreements so far also follow a positive list approach, but recent negotiations suggest a shift: The economic and trade agreement between Canada and the EU (CETA) adopts a negative list approach. The negotiations of the Trade in Service Agreement are based on a hybrid approach which uses a negative list in the context of national treatment and a positive list for market access. A similar approach seems to be favoured for the Transatlantic Trade and Investment Partnership (TTIP). 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".[16]

A negative list approach usually distinguishes two types of reservations which are often associated with an Annex I and an Annex II to the agreement.[17] 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.[18] 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.[19] Measures listed in Annex I can therefore only be amended to make them more consistent with the trade agreement. If an exempted measure is amended to be more liberal or eliminated altogether it cannot be restored at its previous level later. 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.

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

[17] See paper by VanDuzer.

[18] Stephenson (as note), p. 198.

[19] 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.

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 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[20], 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.

2. 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 specific limitations to the commitment have been scheduled. Monopolies and exclusive service suppliers are, however, regulatory instruments which are often used in the context of public services. Since the GATS and most trade agreements do not contain justification clauses such as Article 106 (2) TFEU[21], 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

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

[21] 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. See below IV.5.

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 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. While the GATS and older trade agreements treat ENTs like other market access restrictions, some of the more recent negotiation proposals adopt a general prohibition of them.

National treatment 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.[22]

[22] 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 Zdouc 1999.

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).

3. Disciplines on domestic regulation, procurement and subsidies

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. GATS and a number of other trade agreements mandate multilateral negotiations on the development of such disciplines while other agreements contain a basic rule which states that domestic regulations may not be more burdensome than necessary. Disciplines on domestic regulation should ensure that domestic regulations including licensing rules, technical standards, and planning restrictions are no more burdensome (no more trade restrictive) than necessary. These disciplines have the potential of greatly reducing governments' regulatory autonomy.[23] Depending on the scope of them and the specific design of a necessity test in such disciplines[24], domestic regulations such a universal service obligations could be seen as more burdensome than necessary to ensure the quality of the service.[25] As

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

[24] 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, pp. 199-233, at 223-225.

[25] Arena (above note), p. 511; R. Adlung, Public Services and the GATS, JIEL 2006, 455 and Trachtman in Mattoo/Sauve, 68.

a consequence, governments could find it more difficult to impose such obligations on public service providers.

Unlike in trade in goods there is no specific regime for subsidies in the GATS.[26] 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.

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, 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. [27] 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 EC stated in its schedule that the subsidisation of a service within the public sector is not in breach of its commitment.[28]

The WTO's regime regarding disciplines for public procurement is split into two regimes.[29] 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

[26] See paper by Wegener Jessen.

[27] 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.

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

[29] See paper by Weiss.

important GATS disciplines. Second, government procurement is covered by the plurilateral Agreement on Government Procurement (GPA) revised in 2012. 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. 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.

4. 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[30] 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.[31] 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

[30] See paper by Batura.

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

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.[32]

IV. Existing public service exemptions in international trade agreements

1. GATS and GATS-type clauses

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. It states that the agreement does not apply to "services supplied in the exercise of governmental authority" which are defined as services "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[33], Art. 7.4.3 (b) EU-Korea Free Trade Agreement[34], and Article 108 of the EU-Peru/Colombia FTA.[35] The 2010 Draft Consolidated Text of the Investment and Services of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) contains also a GATS-type exception clause.[36]

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

[32] See below Section IV. 5.

[33] OJ L 289, 30.10.2008, p. 3.

[34] OJ L 127, 14.5.2011, p. 6.

[35] Text available at http://trade.ec.europa.eu/doclib/html/147704.htm.

[36] An unofficial text is available at EU-Canada Comprehensive Economic and Trade Agreement (CETA)

of Mercosur[37], Art. 23 (k) of the 2003 EFTA-Chile Free Trade Agreement[38], Art. 11.1 (6) of the US-Chile FTA[39], Art. 8.2 (5) US-Singapore FTA[40], Art. 11.1 (6) CAFTA-DR[41] and Chapter 8, Art. 2 q) of the ASEAN-Australia-New Zealand FTA (AANZFTA)[42].

An interesting novelty can be found in the EU-Central America Free Trade Agreement.[43] Article 162 of that agreement which addresses the scope of the chapter on establishment (Mode 3 under the GATS) defines "economic activity" as not to include "activities carried out in the exercise of governmental authority, ***for example***, activities carried out neither on a commercial basis nor in competition with one or more economic operators" (emphasis added). Contrary – and contradictory – the chapter on cross border supply of services (Modes 1 and 2 under the GATS) contains the traditional GATS-type clause without the qualification "for example" in Article 169 (2) (b).

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

A second – not so common – exemption clause is similar, 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[44] which holds that 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

[37] Text available at http://www.cvm.gov.br/ingl/inter/mercosul/montv-e.asp

[38] Text available at http://www.efta.int/free-trade/free-trade-agreements/chile/fta.aspx.

[39] Text available at http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta.

[40] Text available at http://www.ustr.gov/trade-agreements/free-trade-agreements/singapore-fta.

[41] Text available at http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text.

[42] Text available at http://www.dfat.gov.au/fta/aanzfta/contents.html.

[43] Text available at http://trade.ec.europa.eu/doclib/html/147664.htm.

[44] 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.

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.[45] Both provisions seem 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.[46]

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 public services. Historically the oldest type[47] 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."

[45] Decision 2/2001 of the EU-Mexico Joint Council of 27 February 2001, OJ 2001, L 70/7.

[46] European Commission, Global Europe - A stronger Partnership to Deliver Market Access for European Exporters, 2007,

[47] 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.

The Canada-Chile Free Trade Agreement of 1996 contains an identical provision in Art. H-01(3)(b).[48] 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).[49] 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.[50]

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: "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."

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

[49] 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.".

[50] See paper by VanDuzer.

The provision is 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 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. It states that regarding public enterprises and “enterprises entrusted with special rights or exclusive rights” 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”. 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 and Art. 280 of the EU-Central America FTA contain a similar clause as does Art. 179 of the EU-Chile

agreement which, however, places the application of the provision in the hands of the Association Committee.

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.[51] 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.

V. 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[52] and the second the level of protection.[53] 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.

[51] See the paper by Van de Gronden.

[52] See also Arena (above note) who calls this the „objective scope", p. 495.

[53] In Arena's terminology, this concerns the "effects" of the exemption clause, Arena (above note), 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.[54] 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.[55] 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.

[54] See above IV.1. and 2. for the wording of these provisions.

[55] See paper by Arena. See also 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.

There seems to be a growing consensus in academic literature and 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*).[56] 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.[57] In fact, it may very well be argued that the additional definition is probably circular, because activities considered as "governmental authority" are by definition inconsistent with ideas of commerce and competition.[58]

In this context, the deviation from the standard model in the EU-Central America Free Trade Agreement is noteworthy.[59] By adding the words "for example" between the term and the definition, the drafters turned the narrow definition into a broader concept which might include approaches other than the functional definition.

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.

[56] Arena (above note), p. 505.

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

[58] Leroux (above note), p. 352.

[59] See above IV.1.

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 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 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.]"[60]

[60] 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

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.

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". [61] This explanatory list is non-exhaustive. It is therefore not limited to the sectors specifically mentioned in that clause, but can apply to sectors with similar characteristics.

This definition suggests that public utilities are large network industries, in particular energy and water supply, and transportation.[62] This definition is 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 notion of necessity. This "public need" aspect of the term public utility can be used for the interpretation of the EU schedules. Public

[61] 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.

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

utilities would therefore be all services, which are considered necessary for a community.[63] 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,[64] 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. [65]

Nevertheless, it should be emphasised that the ordinary meaning of the term is not clear as the interpretation suggested above requires additional means of interpretation. It is therefore plausible that the Commission considers the term "public utilities" as ambiguous.[66]

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

Another 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 suggested in the Reflections paper of the European Commission of February 2011.[67] In this paper the Commission introduces three categories based on concepts which have already been used in the EU internal market. 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 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

[63] The Commission seems to have a 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. See October Proposal (note 3), p, 4.

[64] Only the English version of the EC's GATS Schedule of 1994 is binding.

[65] 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.

[66] October Proposal (as note 3), p. 4.

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

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"[68]. 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 an economic nature subject to specific services obligations by virtue of a general interest criterion)." Apparently, the approach of the Reflections Paper has not yet been used in current negotiations of the EU.

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 contained 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.

d) Assessment

The major challenge of all definitions of public services in trade agreements concerns the dynamic and flexible nature of the concept of public services. Public services are determined

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

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 parts of the world and at different moments in time. The variety and flexibility is therefore a key element of the concept of public services.[69] 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.

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

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

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, 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."[70] 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.[71] 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 use them and only to those disciplines which are subject to the commitments or reservation. Under a traditional GATS-type positive list

[70] Council for Trade in Services, Report of the Meeting Held on 14 October 1998, S/C/M/30, para. 22 (b).

[71] 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.

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 based on positive list. In this case, the exemption clause applies 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 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 application of the market access disciplines, but only regarding monopolies and exclusive service suppliers. Furthermore, it only applies to Mode 3 (commercial presence) in GATS and 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.[72] 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 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.

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

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". A reference to the public or private nature of the funding of the services has also been used in recent trade negotiations. This reference 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 by members of a public sickness fund "public funding", because they are based on a 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 funded – university or the graduate programme which is funded by high student fees and corporate sponsors? Some of these problems can be avoided if the exemption clause refers to services "which receive public funding or State support in any form", because this does would include fully and partially State-funded institutions.

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 on 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 public service exemption clauses and their 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, 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 or the public services clause have the largest substantive scope. However, so far they only apply to two types of market access limitations and have therefore the most limited scope of application. The relationship between these two determining factors is illustrated in Figure 1 below.

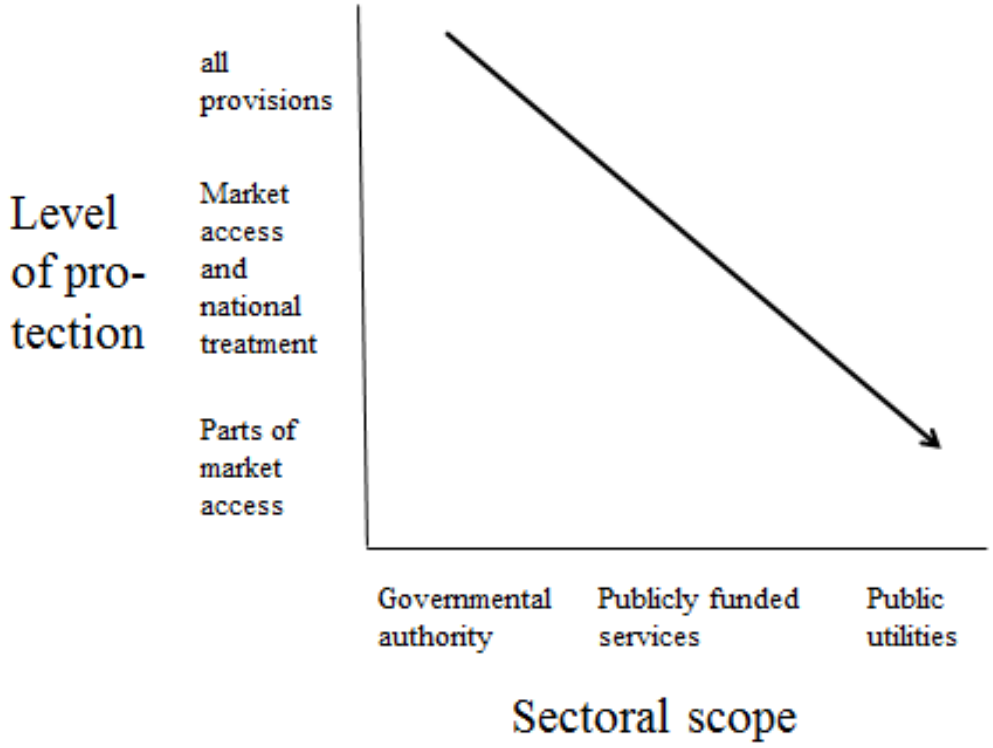

Figure 1: Types of public services exemptions in trade agreements in relation to level of protection and sectoral scope.

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 2011 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”.[73]

In general, two 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 and is applicable for agreements which follow a negative list approach. It is currently unclear whether a new EU approach is emerging as a third model.

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 unclear 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.

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

The traditional approach is based on three principles: 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 or the whole of the GATS. However, the concrete application of the model and its terminology is problematic: It employs ambiguous concepts (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 regulation 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. However, the clauses contain unclear language as it is subject to the provision of these services in a manner not inconsistent with the agreement. The impact of the NAFTA reservation clause may therefore 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).[74] 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. A new EU approach?

The EU Commission's Reflections Paper and on-going negotiations with Canada raise the question whether the EU wants to adopt a new approach towards public services in trade agreements. While the 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

[74] Paper by VanDuzer.

[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.

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. From a conceptual perspective, the new approach would employ a different terminology: The EU Commission suggested 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.

The subsequent discussion of a potential new EU approach is based on the 2011 Reflections Paper and a draft offer in the context of the CETA negotiations. In the more recent TiSA negotiations, the EU Commission does not seem to follow that approach. This is however not surprising because the EU aims at an agreement which is very similar to the GATS in the TiSA negotiations.

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

A new approach might include a general exemption clause for "non-economic services of general interest carried out in the exercise of 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]

[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.

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 a chapter on services and investment in a trade agreement 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. 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 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.[78] 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

[77] Reflections paper (above note 2) p. 4.

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

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) 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.

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 new wording 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 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 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”.

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 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 proposal of October 2011, the Commission suggested to limit any horizontal carve-out to measures taken at the local level.[79] 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, this 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 any 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) 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

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

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.

VII. Proposals for reform

The analysis of the existing public service exemptions, in particular their scope and level of protection have 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. 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. This could be achieved either through specific public service clauses in the framework agreement. 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”.

Furthermore, 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 positive-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.”

It should be noted that the approach suggested in this section would not exclude public services from the application of general obligations such as transparency. 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. In sum, the proposal would provide for greater regulatory flexibility and policy space it 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 procedure to modify 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. This possibility which is contained in Art. XXI GATS is currently a very 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[80] and by the United States as a reaction to the Appellate Body ruling in the Gambling case.[81] While the result in the EU's case was positive, the United States' attempt is still open.

[80] See documentation of EU's modification procedure.

[81] United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Report of the Appellate Body adopted on 20 April 2005, WT/DS285/AB/R.

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 might also be worth considering applying such a modification procedure to all sectors.

VII. Conclusion

(…)

14 November 2013

EPSU is the European Federation of Public Service Unions. It is the largest federation of the ETUC and comprises 8 million public service workers from over 275 trade unions; EPSU organises workers in the energy, water and waste sectors, health and social services and local and national administration, in all European countries including in the EU's Eastern Neighbourhood. EPSU is the recognized regional organization of Public Services International (PSI).

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