Chapter 10
Public Services Exemptions in EU Free Trade and Investment Agreements

Markus Krajewski

Abstract This chapter analyses the various approaches used in free trade agreements to safeguard regulatory space for the provision, financing and organisation of public services. It focuses on agreements signed by the EU including texts of recently negotiated agreements and drafts of agreements under negotiation. After a brief overview of the current state-of-affairs of existing free trade agreements of the EU and of current negotiations the chapter explains why the obligations of free trade agreements may potentially conflict with the special function of the provision and organisation of public services. The main part of the chapter is devoted to the development and explanation of an analytical framework concerning the various exemptions and clauses which allows an assessment of the impact of a particular free trade agreement independently of a specific existing model. Based on this analytical framework, the current approach of the EU regarding public service exemptions in free trade agreements is assessed. The chapter concludes with some reform proposals.

Contents

M. Krajewski (✉)
Public and International Law, University of Erlangen-Nuremberg, Erlangen, Germany
e-mail: markus.krajewski@fau.de

M. Krajewski (ed.), *Services of General Interest Beyond the Single Market*, Legal Issues of Services of General Interest,
DOI 10.1007/978-94-6265-063-3_10

10.1 Introduction

Academic analyses and public debates about the impact of trade agreements on the provision and organisation of public services have so far mostly focussed on the General Agreement on Trade in Services (GATS).[1] Bilateral agreements including those signed by the European Union (EU) have largely gone unnoticed in this context. This changed only recently, in particular with the conclusion of the negotiations between the EU and Canada on Comprehensive Trade and Economic Agreement (CETA) and the ongoing negotiations of the EU and the US about a Transatlantic Trade and Investment Partnership (TTIP). While scholarly contributions are still rare, the public debate about public services and these agreements is in full swing.[2]

Observers of the discussions about the impact of GATS on public services may have noticed a few déjà-vus as many aspects which are relevant in the GATS context also play a role concerning bilateral agreements. Analysing and discussing the impact of EU agreements on trade and investment can therefore partly rely and built on existing knowledge concerning the GATS and public services as 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 also are new issues which need to be addressed because the GATS framework and bilateral trade also differ. In some cases, bilateral agreements provide greater legal flexibility for the provision of services of general interest while other agreements tend to be stricter. New issues, specifically with regards to the "new generation" free trade agreements (FTAs) of the EU, 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.[3]

[1] See Chap. 2 in this volume by Arena as well as Krajewski 2003; Leroux 2006; Adlung 2006.

[2] 'Protecting public services in TTIP and other EU trade agreements', http://trade.ec.europa.eu/doclib/press/index.cfm?id=1115. Accessed 29 January 2015; 'TTIP—A threat for public services', http://ttip2014.eu/blog-detail/blog/Services%20TTIP%20threat.html. Accessed 29 January 2015.

[3] For a general discussion of investment law and public services see Chap. 4 in this volume by Costamagna.

Most international trade agreements contain some form of exemptions for public services or exclude instruments regulating the organisation and provision of public services from the disciplines of trade agreements. They are based on the traditional understanding that liberalisation obligations should be made at the international level, whereas the regulation of services should remain within the domestic ambit. The respective model hence aims at defending policy space at the national level for the regulation of public services through various "public services exemptions". "Public policy exemptions" are 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.[4] Against this background, this chapter analyses the various approaches used in free trade agreements to safeguard regulatory space for the provision, financing and organisation of public services. The chapter focuses on agreements signed by the EU including texts of recently negotiated agreements and drafts of agreements under negotiation. As a comparison, the chapter also takes other free trade agreements into account where they use interesting other models of managing the interplay between trade liberalisation and public services.

The chapter is structured as follows: Sect. 10.2 contains a brief overview of the current state-of-affairs of existing free trade agreements of the EU and of current negotiations. Section 10.3 explains why the obligations of free trade agreements may potentially conflict with the special function of the provision and organisation of public services. The main part of the chapter, Sect. 10.4, is then devoted to the development and explanation of an analytical framework concerning the various exemptions and clauses which allows an assessment of the impact of a particular free trade agreement independently of a specific existing model. Based on this analytical framework, Sect. 10.5 assesses the current approach of the EU regarding public service exemptions in free trade agreements. The paper concludes with some reform proposals (Sect. 10.6) and a summary of its main findings (Sect. 10.7).

10.2 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. 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" or "second generation" of free trade agreements was signed after and based on the "Global Europe" trade strategy of the EU in

[4]For a similar definition see Arena 2011, p. 495. This chapter 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.

2007.[5] The free trade agreements of the second generation contain comprehensive services and investment chapters, but only with regards to investment liberalisation, but not concerning investment protection. The "second generation" agreements often also include sector-specific regulatory frameworks and sometimes also provisions on competition law. The first and archetypical agreement of the second generation 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 conclusion of the negotiations with Canada in September 2014[6] and with Singapore in October 2014[7] could mark the rise of a third group of agreements. These agreements do not only address matters of trade law, but also contain chapters on investment protection based on the new EU competence in the field of the common commercial policy for foreign direct investment. In addition they also contain enhanced forms of regulatory cooperation. The ongoing negotiations with the United States on a Transatlantic Trade and Investment Partnership Agreement (TTIP) which commenced in July 2013 have a similar objective. In addition, the EU is currently negotiating FTAs with India (since 2007), Malaysia (since 2010), Mercosur (resumed in 2010), Vietnam (since 2012), Thailand (since 2013) Japan (since 2013) and Morocco (since 2013).[8]

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 "rendezvous" 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 plurilateral negotiations of some 22 countries on a Trade in Services Agreement (TiSA) since 2012.[9] This agreement is built on the GATS and aims at further liberalisation commitments of the participating WTO Members.

[5]European Commission, Global Europe—A stronger Partnership to Deliver Market Access for European Exporters, COM(2007) 183 final, 18 April 2007.

[6]The text of CETA is available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf. Accessed 30 January 2015.

[7]The text of the EU-Singapore FTA is available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=961. Accessed 30 January 2015.

[8]See European Commission, Overview of FTA and other trade negotiations, 27 January 2015, available at http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf. Accessed 29 January 2015.

[9]On TiSA see Marchetti and Roy 2014.

The agreement is controversial as it is not clear if and how the agreement can be integrated into the WTO framework. In addition, the EU is also engaged in negotiating bilateral agreements covering investment protection only. Since November 2013, the EU is negotiating a comprehensive investment protection agreement with China while trade negotiations remain stalled.[10]

10.3 Areas of Potential Conflict Between Trade Agreements and Public Services

The potential conflict between international trade agreements and the provision, financing and organization of public services depends on the specific obligations of a trade agreement. The most important of these are market access, national treatment and potential disciplines for domestic regulation. In addition, provisions on monopolies, subsidies and government procurement are of relevance if they contain binding obligations for the provision and organisation of public services.

10.3.1 Market Access

The market access obligations of GATS and bilateral trade agreements prohibit maintaining of adopting 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.[11] 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,[12] any monopoly or exclusive service supply arrangement is a violation of the market access principle unless the schedules contain a limitation or a restriction covering that arrangement. Furthermore, market access requires that the number of services suppliers is not limited unless specifically stated in its schedule.

Another element of the market access obligation is the prohibition of so-called economic needs tests. Economic needs tests are regulatory measures which restrict the number of service suppliers on the basis of economic needs in order to manage

[10] See above note 7.

[11] Delimatsis and Molinuevo 2008, pp. 382–384.

[12] But see Article 129(2) of the EU-CARIFORUM EPA or Article 11:4(1) of the EU-Korea Agreement, which however only apply to the competition law chapter of that agreement. See Sect. 10.3.4.

competition.[13] The aim of such measures is to avoid ruinous competition which would affect the quality and security of services. Economic needs tests can be used in the context of regulating the number of taxi service providers or of emergency ambulance services. While the GATS and older trade agreements treat economic needs tests like other market access restrictions, some of the more recent negotiation proposals adopt a general prohibition of them. Typically, restrictions or requirements of specific types of legal entities are also considered to be market access restrictions. With regards to public services this may be relevant if certain activities are restricted to special forms of public law such as the French *établissement public* or *groupement d'intérêt public* or the German *Anstalt des Öffentlichen Rechts*.

By generally prohibiting monopolies, exclusive service supplier arrangements, economic needs tests and restrictions with regards to legal forms, 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.

Recent practice of trade agreements suggests that countries become more aware of the potential risks market access obligations pose on regulatory matters. In this context, it is noteworthy that the draft CETA text on market access contains a number of useful clarifications. In particular the respective provision states that certain measures are not considered to be a market access restriction. These include measures concerning zoning and planning regulations affecting the development or use of land, measures requiring the separation of the ownership of infrastructure from the ownership of the goods or services provided through that infrastructure to ensure fair competition as well as measures restricting the concentration of ownership ("unbundling") and measures seeking to ensure the conservation and protection of natural resources and the environment, including limitations on the availability, number and scope of concessions granted, and the imposition of moratoria or bans. The last clarification seems to be addressed at the concerns that the prohibition of certain environmentally dangerous or controversial activities could be seen as a market access violation. These clarifications are therefore useful instruments to ensure that domestic regulatory space is not limited unduly. However, it should be noted that the clarifications do not apply to public services in general.

10.3.2 National Treatment

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

[13]Delimatsis and Molinuevo 2008, p. 384.

and suppliers. Consequently, subsidies which are only given to domestic service suppliers violate the national treatment obligation unless the subsidies are exempted from this obligation on the basis of the specific commitments and reservations.[14] National treatment obligations could therefore 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).

In addition, the principle of national treatment also covers indirect or disguised discrimination. This exists in cases where a formally neutral measure places a heavier burden on foreign services and service suppliers than on like domestic ones.[15] The determination of the notion of "likeness" is of special importance in the context of public services if 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.[16] While it seems likely that a public entity run by a local government would not be considered "like" a multinational company,[17] 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.[18]

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.

10.3.3 Positive and Negative List Approaches

In most trade agreements market access and national treatment apply subject to specific commitments or reservations laid down in the respective country's schedules of commitments or reservation annexes. Countries can therefore determine whether and to which extend market access and national treatment obligations apply to specific sectors. In order to assess the impact of a trade agreement on public services the approach of the agreement towards scheduling is of significant importance.

---

[14]See Sect. 10.3.3.

[15]Diebold 2010, p. 38.

[16]Lang 2004, pp. 823–826; Connolly 2015.

[17]Lang 2004, p. 824.

[18]*European Communities—Regime for the Importation, Sale and Distribution of Bananas*, Report of the Panel, 22 May 1997, WT/DS/27/R, para 7.311. For a critical assessment of this view see Zdouc 1999, p. 333.

If the agreement adopts a "positive list"-approach (or bottom-up approach[19]), market access and national treatment 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 (or top-down), market access and national treatment apply unless the respective country specifically listed measures it wants to exclude from these obligations in annexes to that agreement. In both cases, the actual scope of these disciplines depends on the level of the commitments.

The differences between the two approaches are significant[20]: A negative list approach means that the core obligations of market access and national 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 GATS follows a positive list approach.

Most EU agreements so far also followed a positive list approach, but recent negotiations suggest a shift: The CETA agreed between Canada and the EU adopts a negative list approach. The negotiations of the Trade in Service Agreement seem to be based on a hybrid approach which uses a negative list in the context of national treatment and a positive list for market access.[21] 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".[22]

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.[23] Measures listed in Annex I are existing measures which do not conform to the core obligations. Countries can maintain and renew these measures. They may also revise them, but have to ensure that 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.[24]

[19]Adlung and Mamdouh 2014.

[20]Stephenson 2002, p. 193.

[21]See TiSA EU proposal for a core text and scheduling provisions, March 2013, available at http://trade.ec.europa.eu/doclib/html/152687.htm. Accessed 30 January 2015.

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

[23]See Chap. 5 in this volume, by VanDuzer.

[24]Stephenson 2002, p. 198.

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.[25] 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.

The "ratchet"-mechanism is of specific importance for public services which have been subject to various policy reforms in many EU Member States in the past. While regulatory reform in the 1980s and 1990s referred to liberalisation and abolishing public monopolies, in recent years some countries have opted for re-nationalisation or re-municipalisation: If a country listed a monopoly for a specific service in its Annex I and subsequently abolishes the monopoly autonomously in the context of a general privatisation and liberalisation policy, it may not reintroduce the monopoly at a later stage if liberalisation and privatisation failed.

Annex II enables countries to adopt and maintain measures inconsistent with the 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 a "negative list"- and a "positive list"-approach, the negative list approach tends to have a more liberalising effect,[26] because all sectors and measures are subject to the core obligations while a positive list approach requires specific liberalisation commitments. The shift from a positive to a negative list approach requires detailed and careful scheduling disciplines as any "omission" of a measure results in a liberalisation commitment ("list it or lose it"). Furthermore, such a shift complicates the comparison between the different levels of liberalisation commitments.

In conclusion, 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

[25]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. OECD Publishing.

[26]For a similar assessment see 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. 9. OECD Publishing.

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.

10.3.4 Disciplines on Domestic Regulation, Procurement, Subsidies and Competition

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.[27] These disciplines have the potential of greatly reducing governments' regulatory autonomy.[28] Depending on the scope of them and the specific design of a necessity test in such disciplines,[29] domestic regulations such a universal service obligations could be seen as more burdensome than necessary to ensure the quality of the service.[30] As 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. 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

[27]For a comprehensive discussion see Delimatsis 2008.

[28]Djordjevic 2002, pp. 305–322.

[29]On the problems associated with a necessity test in this context see Neumann and Türk 2003, pp. 223–225.

[30]Arena 2011, p. 511; Adlung 2006, p. 455; Trachtman 2003, p. 68.

between foreign and domestic service supplier regarding subsidisation.[31] Many Members have therefore listed general exemptions for subsidies as limitations in their schedules or have excluded subsidies to public entities from their commitments. For example, the EU stated in its schedule that the subsidisation of a service within the public sector is not in breach of its commitment.[32]

The WTO's regime regarding disciplines for public procurement is split into two regimes.[33] First, a procurement measure affecting trade in services would generally fall within the scope of the GATS. However, Article XIII:1 GATS holds that the obligations of most-favoured-nation treatment, market access and national treatment shall not apply to government procurement. For the time being, government procurement is hence excluded from some of the most important GATS disciplines. 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 follow the WTO model: They 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.

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[34] 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.

[31]WTO, 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, 28 March 2001, p. 6.

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

[33]See Chap. 3 by Weiß in this volume.

[34]See Chap. 12 by Batura in this volume.

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

10.4 Analytical Framework for the Assessment of Public Service Exemptions

The previous brief overview of the potential impact of various obligations of free trade agreements on public services indicates why countries are trying to limit this impact through public service exemption clauses. In order to assess the potential of public service exemption clauses to protect public services, a framework based on two determining factors can be developed. The first determining factor concerns the substantive scope of the respective public services exemption clause[36] and the second factor is the level of protection of the clause.[37] The substantive scope relates to the services covered by the exemption clause. The level or protection concerns the application of the clause to obligations of the trade agreement and whether the clause excludes all obligations or only certain parts and elements of the agreement.

10.4.1 Substantive Scope

The substantive scope of public services exemption clauses can either be determined by functional definitions or by sector-based categorisations. The former rely on an abstract definition of specific activities or functions while the latter list those sectors which are covered by the exemption clause. In recent trade agreement practice, the two approaches have also been combined.

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

[36]See also Arena 2011, p. 495, who calls this the "objective scope".

[37]In Arena's terminology, this concerns the "effects" of the exemption clause, Arena 2011, p. 495.

10.4.1.1 Functional Definitions

Traditionally, trade agreements exclude activities which are associated with the exercise of governmental or official authority. The best-known example of such a clause is Article 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 the EU-CARIFORUM Economic Partnership Agreement,[38] the EU-Korea Free Trade Agreement,[39] the EU-Peru/Colombia FTA[40] and the EU-Central America Free Trade Agreement.[41] The CETA and the EU-Singapore Free Trade Agreement also contain GATS-type exception clauses as does the EU proposal for the TiSA core text.

The clauses built on the GATS 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 in them by maintaining a public monopoly. For example, until the liberalisation in the late 1990s, postal services were considered part of governmental functions in many EU countries, but this perception changed through the liberalisation of the sector.

The 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 Article 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

[38]Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, *OJ* 2008 L 289/3.

[39]Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, *OJ* 2011 L 127/6.

[40]Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, *OJ* 2012, L 354/3.

[41]Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, *OJ* 2012, L 346/3. However, it should be noted that 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).

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.[42] It seems sufficient to recall that the notions "on a commercial basis" or "in competition" mean that even services which are provided in a semi-market environment or on heavily regulated market would not fall under that exception clause.

There seems to be a growing consensus in 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*).[43] 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.[44] 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.[45]

In this context, the deviation from the standard model in the EU-Central America Free Trade Agreement is noteworthy.[46] 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.

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[47] 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 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

[42]See Chap. 2 in this volume by Arena. See also Leroux 2006; Krajewski 2003.

[43]Arena 2011, p. 505.

[44]This understanding seems to be shared by the European Commission, Reflections Paper on Services of General Interest in Bilateral FTAs (Applicable to both Positive and Negative Lists), TRADE.B.1/SJ D(2011), 28 February 2011, available at http://www.epsu.org/IMG/pdf/Reflections_Paper_on_SGIs_in_Bilateral_FTAs.pdf. Accessed 30 January 2015, pp. 2–3. See also European Commission, Commission Proposal for the Modernization of the Treatment of Public Services in EU Trade Agreements, TRADE.B.1/SC/am D(2011) 1146318, 26 October 2011, available at http://www.epsu.org/IMG/pdf/154b-11_EC_paper_on_public_services_.pdf. Accessed 30 January 2015, p. 2.

[45]Leroux 2006, p. 352.

[46]See note 4.1.

[47]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.

Agreement.[48] Both provisions seem to be built on Article 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".[49]

10.4.1.2 Sector-Based Categorisations

A second approach for public service exemptions is based on sectoral categorisations. This approach has not yet been used by the EU, but by the Members of NAFTA and Latin American countries. Historically the oldest type of a sectoral public services exemption clause can be found in Article 1201.3 NAFTA[50] which holds: "Nothing in this Chapter shall be construed to: (…) (b) prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, in a manner that is not inconsistent with this Chapter." The Canada-Chile Free Trade Agreement of 1996 contains an identical provision. Similar provisions can be found in the investment chapters of these agreements (e.g. Article 1101:4 NAFTA). A number of Mexican free trade agreements with Central American countries contain similar clauses.

It should be noted, however, that this provision is not an exemption clause 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.[51]

Unlike the functional approach of Article 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

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

[49]See Sect. 10.2.

[50]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.

[51]See Chap. 5 by VanDuzer in this volume.

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.

10.4.1.3 Hybrid Approaches

Functional and sectoral definitions of public services can also be combined. The "public utilities"-clause used by the EU in its free trade agreements and concepts built on EU law terminology such as services of general interest are examples of hybrid approaches.

The public utilities-clause

The so-called "public utilities"-clause is one of the most important instruments of the EU in the context of trade agreements and trade negotiations.[52] It reads as follows: "In all EC (or EU) 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." Accordingly, 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. The "public utilities"-clause therefore only covers these types of market access restrictions.[53]

The "public utilities"-clause is usually supplemented by an following explanatory footnote stating that

> [p]ublic 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 was first used in the EC's GATS schedule in 1994 and has also been used in the schedules of the EU-Chile, the EU-CARIFORUM, the EU-Korea and EU-Peru/Colombia agreements. The EU also used the "public utilities"-clause in

[52]See 'Protecting public services in TTIP and other EU trade agreements', available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1115&title=Protecting-public-services-in-TTIP-and-other-EU-trade-agreements. Accessed 30 January 2015.

[53]See Sect. 10.4.2 under 'Limitations or Reservations of Specific Commitments'.

its Annex II reservations in the CETA with Canada and in the schedules of the EU-Singapore FTA. While in most of these agreements the explanatory footnote is similar,[54] the EU-Singapore FTA follows a slightly different approach. Instead of referring to specific sectors in the explanatory footnote, the footnote states that since "public utilities often also exist at the sub-central level, detailed and exhaustive sector-specific listing is not practical. To facilitate comprehension, specific footnotes in this list of commitments will indicate in an illustrative and non-exhaustive way those sectors where public utilities play a major role." Following this approach, many sectors or subsectors listed in the schedules of specific commitments contain a footnote which states that the horizontal "public utilities"-clause applies. Mostly, the respective services fall into the categories of energy activities and services, transportation, social and health services and cultural services.[55] Interestingly, education services are not marked with a reference to the "public utilities"-clause.

The explanatory lists used in the "public utilities"-clauses are non-exhaustive. They are therefore not limited to the sectors specifically mentioned in that clause, but can apply to sectors with similar characteristics. This would also be the case with regards to the technique employed in the EU-Singapore FTA although it may be difficult to argue that a sector which is not specifically mentioned as one to which the "public utilities"-clause applies to, also contains public utilities.

The term "public utilities" has no specific meaning in international trade or EU law. The ordinary meaning of the term public utilities relates the concept to large network industries, in particular energy and water supply, and transportation.[56] This understanding seems narrower than the understanding of the term according to the footnote(s) in the EU schedules. However, the ordinary meaning of the term utilities emphasises the fact that a utility is needed by everyone or necessary to the community. In fact, 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 utilities would therefore be all services, which are considered

[54]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."

[55]The sectors include mining and quarrying; manufacture of refined petroleum products; transmission and distribution on own account of electricity, gas, steam and hot water; research and development services; technical testing and analysis services, which are compulsory for the granting of marketing authorisations or for utilisation authorisations (e.g. car inspection, food inspection); distribution of chemical products, of pharmaceuticals, of products for medical use such as medical and surgical devices, medical substances and objects for medical use, of military equipment and precious metals (and stones) and, in some Member States of the European Union, also to the distribution of tobacco and tobacco products and of alcoholic beverages; environmental services; health services and social services; libraries, archives, museums and other cultural services; port services and other maritime transport services requiring the use of the public domain; rail transport services requiring the use of the public domain; road transportation; freight transportation; services auxiliary to transport; energy services; spa services and non-therapeutical massages provided in domains of public utility such as certain water sources.

[56]Geddes 2000, p. 1162; Graham 2000, p. 1.

necessary for a community.[57] 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,[58] 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.[59]

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 understandable that the Commission considered the term "public utilities" as ambiguous in its "Reflections Paper on Services of General Interest in Bilateral FTAs" published in February 2011.[60]

Services of general (*economic*) *interest*

Another approach which also follows a hybrid understanding is based on the EU law concept of services of general economic interest. In trade agreements clauses using this term have so far only been introduced in chapters relating to competition law. An example of such a clause can be found in Article 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

[57]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 European Commission, Commission Proposal for the Modernization of the Treatment of Public Services in EU Trade Agreements, TRADE.B.1/SC/am D(2011) 1146318, 26 October 2011, available at http://www.epsu.org/IMG/pdf/154b-11_EC_paper_on_public_services_.pdf. Accessed 30 January 2015, p. 4.

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

[59]See also Krajewski 2009, pp. 208–210. This seems to be the perspective of the Commission as well, see European Commission, Commission Proposal for the Modernization of the Treatment of Public Services in EU Trade Agreements, TRADE.B.1/SC/am D(2011) 1146318, 26 October 2011, available at http://www.epsu.org/IMG/pdf/154b-11_EC_paper_on_public_services_.pdf. Accessed 30 January 2015, p. 4.

[60]European Commission, Commission Proposal for the Modernization of the Treatment of Public Services in EU Trade Agreements, TRADE.B.1/SC/am D(2011) 1146318, 26 October 2011, available at http://www.epsu.org/IMG/pdf/154b-11_EC_paper_on_public_services_.pdf. Accessed 30 January 2015, p. 4.

ability of any other enterprise to provide the same goods or services." Article 129 EU-CARIFORUM EPA and Article 280 of the EU-Central America FTA contain a similar clause as does CETA.

These provisions are based on the model of Article 106(2) TFEU which restricts the application of EU competition law to enterprises which have been entrusted with the task to provide service of general economic interests.[61] Based on this concept a distinction between services of general economic interest and non-economic services of general interest was suggested in two trade policy documents of the EU Commission in 2011, the "Reflections Paper on Services of General Interest in Bilateral FTAs" of February 2011[62] and a subsequent paper entitled "Commission Proposal for the Modernisation of the Treatment of Public Services in EU Trade Agreements" of October 2011.[63] In the Reflections Paper the Commission introduced three categories based on concepts which have already been used in the EU internal market[64]: 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, the proposal of the European Commission combined functional and sectoral aspects when defining and describing the different categories. According to the proposal, non-economic services of general interest include "police and judiciary, prisons, statutory social security schemes, border security, air traffic control, etc." This list is non-exhaustive. The proposal also stated 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".[65] 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,

[61] See Chap. 6 by Van de Gronden in this volume.

[62] European Commission, Reflections Paper on Services of General Interest in Bilateral FTAs (Applicable to both Positive and Negative Lists), TRADE.B.1/SJ D(2011), 28 February 2011, available at http://www.epsu.org/IMG/pdf/Reflections_Paper_on_SGIs_in_Bilateral_FTAs.pdf. Accessed 30 January 2015.

[63] European Commission, Commission Proposal for the Modernization of the Treatment of Public Services in EU Trade Agreements, TRADE.B.1/SC/am D(2011) 1146318, 26 October 2011, available at http://www.epsu.org/IMG/pdf/154b-11_EC_paper_on_public_services_.pdf. Accessed 30 January 2015.

[64] For an in-depth analysis of the Commission proposals see M. Krajewski, Public Services in Bilateral Free Trade Agreements of the EU, available at SSRN: http://ssrn.com/abstract=1964288. 1 November 2011. Accessed 30 January 2015.

[65] European Commission, Commission Proposal for the Modernization of the Treatment of Public Services in EU Trade Agreements, TRADE.B.1/SC/am D(2011) 1146318, 26 October 2011, available at http://www.epsu.org/IMG/pdf/154b-11_EC_paper_on_public_services_.pdf. Accessed 30 January 2015, p. 2.

certain cultural services, etc." The proposal stated 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)." Apart from one offer in the negotiations with Canada, the approach of the Reflections Paper and the October Proposal have not been used in current negotiations of the EU.

10.4.1.4 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 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.[66] 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.[67] 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 exemption clauses 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 Article 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.

10.4.2 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.

[66] See also Article 1 Protocol No. 26 on Services of General Interest.

[67] Geddes 2000, pp. 1162–1163.

10.4.2.1 Complete Carve-Out

Public service exemption clauses such as Article I:3(b) and (c) GATS apply to all provisions of an agreement and exclude the activities to which they apply completely from the respective trade agreement. These clauses are typically located in the framework agreement. They have the most far-reaching scope. Their scope is not limited to market access and national treatment, but applies to any other obligation (most favoured nation-treatment, 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. In a 1998 meeting of the WTO's Council for Trade in Services it was suggested that "the exceptions provided in Article I:3 of the Agreement needed to be interpreted narrowly."[68] In a similar way, the ECJ held the official authority exemption of Article 51 TFEU must be interpreted in a manner limiting its scope to what is strictly necessary to protect the interests of the Member States.[69] 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. It could be argued that the broad level of protection of these clauses corresponds with their narrow substantive scope.

10.4.2.2 Limitations or Reservations of Specific Commitments

Apart from public services exemption clauses in the framework of trade 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 approach market access and national treatment are the only disciplines which are subject to specific

[68]WTO, Council for Trade in Services, Report of the Meeting Held on 14 October 1998, Note by the Secretariat, S/C/M/30, 12 November 1998, para 22(b).

[69]CJEU, Case C-147/86 *Commission of the European Communities v. Hellenic Republic* [1988] ECR 1637, para 7 and CJEU, Case C-114/97 *Commission of the European Communities v. Kingdom of Spain* [1998] ECR I–6717, para 34.

commitments. Two approaches of limitations or reservations concerning specific commitments can be distinguished: Horizontal limitations and sector-specific limitations.

Horizontal limitations

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.

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. Hence, the other modes of supply (cross-border supply, consumption abroad or movement of natural persons) are not covered. While the "public utilities"-clause was originally developed in the context of "positive list"-approaches the EU is also using it in "negative list"-agreements. For example, Annex II of the EU's commitments in CETA contains the usual reference to public utilities. However, even though it applies to all sectors it remains limited to monopolies and exclusive service suppliers.

The "public utilities"-clause therefore has a broader scope of application than Article I:3(b) and (c) of the GATS, because the notion of "public services" covers more activities than the concept of "services supplied in the exercise of governmental authority". However, the level of protection of the public utilities clause is lower than that of Article I:3(2) and (3) GATS as it only applies to parts of the market access obligation.

Sector-specific limitations

Public service exemptions can also 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.

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 including in the context of social and health services. 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" covers only a complete (100 %) public funding or whether the dominant part needs to be publicly financed. Concerning health services it needs to be established if contributions by members of a public sickness fund constitute "public funding", because they are based on a law while insurance fees paid to private insurers

constitute "private funding". Second, it is unclear whether the nature of the funding relates to the service or the service supplier. For example, in the case of a graduate programme of a public university which is funded by high student fees and corporate sponsors, would the privately-funded service or the publicly funded service supplier (i.e. the university) determine whether the commitments apply?

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. This term has been introduced in the CETA agreements. For example, in the EU's Annex II the reservation concerning education services refers to "educational services which receive public funding or State support in any form, and are therefore not considered to be privately funded." The same definition can be found with regards to health services. The broad term public funding or State support in "any form" suggests that even a small contribution to the service by the public purse excludes them from the application of the specific commitments.

Excluding publicly-funded services from specific commitments is hence a public service exception clause of an intermediate level of protection. It applies to national treatment and market access and offers hence a higher level of protection than the "public utilities"-clause which only applies to parts of the market access obligation but offers a lower level of protection than the exception for services in the exercise of governmental authority, because this clause applies to all provisions of an agreement.

10.4.2.3 Exemptions Applicable to Other Obligations

In addition to public service exemptions in the relevant schedules 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.

The exemption clauses for public enterprises and enterprises entrusted with special rights applicable to competition law mentioned above[70] 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.

[70]See Sect. 10.4.1 under 'Services of General (Economic) Interest'.

10.4.2.4 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 and market access. 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. The level of protection 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.

10.4.3 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 Article 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.

10.5 The Multi-layer System of Public Services Exemption Clauses in EU Trade Agreements

Since the conclusion of the GATS in 1994 and in all subsequent trade agreements the EU has followed a specific model combining public services exemption clauses at different layers. The first layer is an exemption clause for services

supplied in the exercise of governmental or official authority (e.g. Article I:3(b) and (c) GATS) 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 of the traditional EU 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 and health services.

The third layer is the "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 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, 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. Third, 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.

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.

The CETA agreement, the EU-Singapore Free Trade Agreement and the recent negotiations about the TTIP suggest a refinement of this approach. The EU-Singapore Agreement uses clearer indications concerning the sectors which are covered by the public utilities clause. CETA and possibly TTIP are agreements based on the negative list approach which means that the public utilities clause needs to be incorporated into the Annex II reservations. The CETA agreement also contained a precise definition of publicly funded services which allows for a clearer line between the commitments and the non-committed sectors.

However, the CETA agreement did not adopt an approach based on the notion of services of general interest as suggested in the 2011 Reflections Paper or the Proposal of the EU Commission.[71] While the EU's Draft offer of 29 July 2011 in the CETA negotiations contained an exemption of public services referring to "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 final version of the EU's commitments have returned to the "public utilities". It is unclear whether the EU will revisit the idea to align the terminology of trade agreements and of Article 106 para 2 TFEU in future trade negotiations.

10.6 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 an sufficient degree of legal clarity and an appropriate 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.

10.6.1 Increasing Legal Certainty and Providing for Specific Carve-Outs

As shown above, the GATS-type exemption clause covering "services supplied in the exercise of governmental authority" has an ambiguous content due to its confusing definition of this term which does not increase the scope of the clause or

[71]European Commission, Reflections Paper on Services of General Interest in Bilateral FTAs (Applicable to both Positive and Negative Lists), TRADE.B.1/SJ D(2011), 28 February 2011, available at http://www.epsu.org/IMG/pdf/Reflections_Paper_on_SGIs_in_Bilateral_FTAs.pdf. Accessed 30 January 2015, and European Commission, Commission Proposal for the Modernization of the Treatment of Public Services in EU Trade Agreements, TRADE.B.1/SC/am D(2011) 1146318, 26 October 2011, available at http://www.epsu.org/IMG/pdf/154b-11_EC_paper_on_public_services_.pdf. Accessed 30 January 2015.

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 negative-list approach, a public service exemption clause would need to apply to "all sectors" and to reservations for future measures (Annex II). Such a reservation could have the following wording: "With regards to public services, [Party to the agreement] reserves the right to limit the number of services and service suppliers, impose special obligations on service suppliers and regulate the provision of these services in the general interest."

It should be noted that the approach suggested in this section would not exclude public services from the application of general obligations. 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 but not fundamentally alter the existing relationship of trade agreements and 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.

10.6.2 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 binding commitments on domestic regulation. This could be done through a simplified mechanism for the modification of commitments. The possibility to modify commitments as contained in Article XXI GATS and similar provisions in free trade agreements is currently a very difficult and burdensome procedure[72] 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 agreement 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,[73] by the United States as a reaction to the Appellate Body ruling in the Gambling case[74] and by Bolivia concerning its commitments in health services.[75]

In order to increase the flexibility of the GATS, a simplified modification procedure could be introduced in trade agreements. This procedure could include a

[72]See WTO, Council for Trade in Services, Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments, Adopted by the Council for Trade in Services on 14 April 2000, S/L/84, 18 April 2000.

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

[74]*United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Report of the Appellate Body, WT/DS285/AB/R. See WTO, Council for Trade in Services, Notification from the United States Pursuant to Article XXI of the General Agreement on Trade in Services (GATS), Restricted Document, 8 May 2007.

[75]WTO, Council for Trade in Services, Notification from Bolivia Pursuant to Article XXI of the General Agreement on Trade in Services (GATS), Restricted Document, 11 November 2008.

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 1 or 2 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.

10.7 Conclusion

Trade agreements contain a number of different provisions, techniques and instruments aimed at limiting the impact of the obligations of these agreements on the provision of public services. This paper suggested an analytical framework which can be used to assess the effect of these clauses. Specifically, the paper showed that the ambit of public service exemption clauses depends on their sectoral scope, i.e. which activities and services they cover, and on the level of protection of these clauses, i.e. which provisions of the agreements they exclude or modify. The paper applied this analytical model to the most commonly used public service clauses, in particular the exclusion of services supplied in the exercise of governmental authority, the "public utilities"-clause of the EU and sector-specific restrictions such as those limited to privately-funded health and social services. The discussion of these clauses and provisions showed that they have some potential to protect public services from the application of disciplines of trade agreements which would be problematic for public services. However, it has also been shown that many provisions suffer from ambiguities and could therefore be improved. It has been suggested that such improvements should address two elements: They should increase legal certainty without restricting the policy space for public entities in charge of organising public services and they should provide more flexibility in particular for a modification of commitments.

References

Adlung R (2006) Public services and the GATS. J Int Econ Law 9(2):455–485
Adlung R, Mamdouh H (2014) How to design trade agreements in services: top down or bottom-up? J World Trade 48(2):191–218
Arena A (2011) The GATS notion of public services as an instance of intergovernmental agnosticism: comparative insights from the EU supranational dialectic. J World Trade 45(3):489–528
Connolly K (2015) Finding space for regulatory autonomy in GATS Article XVII after EC—seals: public services and the 'Likeness' of public and private service providers. Leg Issues Econ Integr 42(1):57–83
Delimatsis P (2008) Determining the necessity of domestic regulations in services—the best is yet to come. Eur J Int Law 19(2):365–408
Delimatsis P, Molinuevo M (2008) Article XVI GATS market access. In: Wolfrum R, Stoll PT, Feinäugle C (eds) WTO—trade in services. Brill, Leiden, pp 367–395
Diebold N (2010) Non-discrimination in international trade in services. CUP, Cambridge
Djordjevic M (2002) Domestic regulation and free trade in services—a balancing act, legal issues of economic integration. Legal Issues Econ Integr 29(3):305–322
Geddes R (2000) Public utilities. In: Bouckaert B, De Geest G (eds) Encyclopedia of law and economics: the regulation of contracts, vol III. Edward Elgar, Cheltenham, pp 1162–1205
Graham C (2000) Regulating public utilities—a constitutional approach. Hart Publishing, Oxford
Krajewski M (2003) Public services and trade liberalization: mapping the legal framework. J Int Econ Law 6(2):341–367
Krajewski M (2009) Protecting a shared value of the union in a globalized world: services of general economic interest and external trade. In: van de Gronden JW (ed) EU and WTO Law on services: limits to the realisation of general interest policies within the services markets? Kluwer Law International, Alphen aan de Rijn, pp 187–213
Lang A (2004) The GATS and regulatory autonomy: a case study of social regulation of the water industry. J Int Econ Law 7(4):801–838
Leroux E (2006) 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? J World Trade 40(3):345–385
Marchetti JA, Roy M (2014) The TISA initiative: an overview of market access issues. J World Trade 48(4):683–728
Neumann J, Türk E (2003) Necessity revisited—proportionality in World Trade Organization Law after Korea—Beef, EC—Asbestos and EC—Sardines. J World Trade 37(1):199–233
Stephenson SM (2002) Regional versus multilateral liberalisation of services. World Trade Rev 1(2):187–209
Trachtman J (2003) Lessons for the GATS from existing WTO rules on domestic regulation. In: Mattoo A, Sauvé P (eds) Domestic regulation and service trade liberalization. World Bank Publications, Washington, pp 57–81
Zdouc W (1999) WTO dispute settlement practice relating to the GATS. J Int Econ Law 2(2):295–346