The study is organized in three main parts: Section II will provide a short overview of the current model of the European Union towards public services in trade and investment agreements and will explain its legal consequences. Subsequently, section III will analyse the main flaws of this approach and will develop arguments why the complete exclusion of public services from trade and investment agreements could be seen as a “golden standard” for safeguarding the provision and organization of public services in the EU. The main part of this study, section IV will then develop a model clause for the exclusion of public services. It will be shown that the major challenge is the definition of the notion of public services in a manner that does not preclude the future development of new public services and new models of providing or organizing them. The last section, section V, will address potential challenges and criticism of the proposed model clauses and will briefly assess alternatives to the proposed model clauses.

II. The current EU model of protecting public services in trade agreements

Since the conclusion of the GATS in 1994 and in all subsequent trade agreements the EU has followed a specific model of protecting public services. The model combines a general exemption of services supplied in the exercise of governmental or official authority with various instruments which limit the impact of specific commitments. The latter include the so-called “public utilities”-clause.

1. Exclusion of services supplied and activities carried out in the exercise of governmental authority

GATS and many free trade agreements signed by the EU contain a clause which excludes services supplied in the exercise of governmental authority from the scope of the chapter on trade in services. Similarly, activities carried out in the exercise of governmental authority are excluded from the chapters on investment liberalisation. These activities are therefore neither subject to specific commitments nor to general obligations of the respective chapters. All public services which are not covered by this exemption clause are subject to all obligations of the respective agreement or chapter.

The most prominent example is Art. I:3 (b) GATS which excludes services supplied in the exercise of governmental authority from the notion of “services” in the meaning of the agreement and therefore from the application of GATS. The term service “supplied in the exercise of governmental authority” is defined as “any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers” (see e. g. Art. I:3 (c) GATS). CETA, the EU-Singapore Free Trade Agreement and a draft of the EU proposal for the TiSA core text also contain these exception clauses.

The term services supplied in the exercise of governmental authority is usually understood in a narrow sense (Leroux 2006: 352). 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” (WTO 1998). It is generally agreed that the term only covers those governmental activities which are considered as core sovereign functions (Arena 2011:505). Services which are supplied for any form of remuneration or by more than one service supplier could potentially be regarded as supplied on a commercial basis or in competition with one or more service suppliers. Consequently, many public services, including social, health, educational services as well as network-based and universal services are not covered by this exemption clause.

2. Limitation of commitments in certain sectors

The second element of the EU approach protecting public services are limitations of sector-specific commitments. For example, the EU did not submit drinking water services to the GATS obligations of market access and national treatment and therefore excluded these services from the scope of these obligations. Similarly, the EU included drinking water services in its Annex II reservations of the CETA which also excludes commitments in this sector. It should be noted, however, that a limitation of commitment does not preclude the application of the investment protection part of the agreement to the sectors not covered by the commitments. In other words, investor protection applies regardless of the scope of the specific commitments.

Another technique used by the EU in this context are limitations of the scope of the commitments to privately funded activities. Prominently, the EU used this technique concerning education and health services. In earlier trade agreements such as GATS, the EU did not further define the notion “privately financed” which gave rise to a number of questions including the percentage of public or private financing which was required to exclude the service from the scope of commitments. In recent agreements including CETA the EU’s commitments contained a clarification by referring to “services which receive public funding or State support in any form, and are therefore not considered to be privately funded.” 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. However, some uncertainties remain: For example, could services financed through mandatory public insurance schemes such as health services be considered as publicly funded?

Excluding publicly-funded services from specific commitments is a public service exception clause of an intermediate level of protection. It applies to national treatment and market access obligations and therefore offers a lower level of protection than the exception for services in the exercise of governmental authority which applies to all provisions of an agreement. At the same time, it offers a higher level of protection than the “public utilities”-clause which only applies to parts of the market access obligation.

3. “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 (European Commission 2015). According to this clause “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 only applies to commercial presence and covers only parts of the market access obligation, in particular the prohibition of monopolies and exclusive service suppliers.

The clause was first used in the EC’s GATS schedule in 1994 and has been used in free trade agreements of the EU ever since. The EU also used this clause in its Annex II reservations in the CETA with Canada and in the schedules of the EU-Singapore FTA. In the latter agreement an explanatory 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. Interestingly, education services are not marked with a reference to the “public utilities”-clause.

The term “public utilities” has no specific meaning in international trade or EU law. The ordinary meaning of the term public utilities is unclear and requires additional means of interpretation to determine its contents. It is therefore understandable that the European Commission considered the term “public utilities” as ambiguous in its “Reflections Paper on Services of General Interest in Bilateral FTAs” published in February 2011 (European Commission 2011: 4).¹

III. Key challenges of the current EU model

The current EU model for the protection of public services in trade agreements as described above is subject to a number of challenges which will be discussed in this section. It should be noted, however, that despite these challenges there have been no concrete disputes or actual legal challenges to the provision of public services on the basis of the GATS or bilateral trade agreements following the GATS structure. Yet, this is not necessarily an indication of the quality of the model.

1. Exclusion of investment protection from the model

The current EU model for the protection of public services was developed in the context of trade agreements and only applies to the trade in services and investment liberalization chapters of trade agreements, but not to investment protection. Specifically, the model limits the impact of liberalization commitments including market access and non-discrimination, but does not exclude public services from investment protection including investor-state-dispute settlement.

¹ For a critical assessment of that paper see Krajewski (2011).