The study will therefore not discuss model clauses or other options which could be used to limit the impact of trade and investment agreements or certain provisions of these agreements to public services. Comprehensive analyses of all legal instruments protecting public services in trade agreements can be found in previous studies (Krajewski 2015b and Krajewski 2011).

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