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).  

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.

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1 For a critical assessment of that paper see Krajewski (2011).
Neither the CETA chapter on investment protection nor the EU’s proposal for an investment protection chapter in TTIP contain any special references to public services, services supplied in the exercise of governmental authority, public utilities or publicly financed services. For example, the exclusion of “activities carried out in the exercise of governmental authority” in the CETA chapter on investment is limited to the sections on establishment of investments and non-discriminatory treatment, but does not extend to the section on investment protection. It is hence safe to conclude that the current EU model offers no protection for public services with regards to investment protection.

This can be explained with the limited experience of the EU regarding investment protection agreements. The EU’s competence in this field was only established by the Treaty of Lisbon in 2009. CETA, the EU-Singapore FTA and TTIP are hence the first trade agreements which contain an investment protection chapter. In addition, the potential negative impact of investment protection agreements has not yet been discussed and analysed extensively. However, there have already been some investor-state dispute settlement cases which related to investments in the field of public services (Krajewski 2015a).

2. Ambiguous terminology

The current EU model relies on various terms whose meaning is either unclear or too narrow to effectively protect public services. It combines functional, sectoral and hybrid definitions and uses terms which are not necessarily linked with each other. This leads to uncertainties when determining the exact scope of the different provisions. While the term “services supplied in the exercise of public authority” is comparatively easy to interpret and understand, the notion of “public utilities” and the concept of “publicly financed” are less clear as explained above. They have no specific meaning in international law and no equivalent term in EU law. Even though there seems to be a relatively large overlap between public utilities and services of general economic interest (SGEI) in the meaning of Article 106 para 2 TFEU the exact relationship remains unclear. It should also be noted that the term SGEI is itself not entirely clear in EU law. This ambiguity has been partly solved in EU law though, because it is generally accepted that the Member States determine if a service is considered a service of general economic interest (see below IV.2.).

In addition to the unclear meanings of key terms used by the EU in its model for the protection of public services, the relationship of the different terms is unclear. In particular, it is unclear if the term “public utilities” and “publicly financed services” may overlap as suggested by the EU schedule of the EU-Singapore free trade agreement.

3. Different levels of protection of public services

The EU’s current approach towards public services in trade agreements is not based on a coherent functional model. While the underlying concept of the different layers of protection allows the EU and its Member States to distinguish between different activities and rationales for protecting them from parts or the whole of a trade agreement, the concrete application of the model is problematic. For example, it exempts certain services which are publicly financed from market access and national treatment obligation, but excludes public utilities only from the application of the prohibition of monopolies and exclusive service suppliers.
Consequently, different public services are subject to different obligations and commitments of a trade agreement. This does not provide sufficient regulatory space and flexibility from the domestic regulation perspective.

4. Twenty years of a successful model?

The EU Commission claims that its model offered “20 years of protection that works” (European Commission 2015). It argues that the approach protected public services in the EU for the last 20 years and that since 1995 when the EU signed the GATS and in light of the subsequent trade agreements of the EU Member States have been able to run services like hospitals, schools or water distribution, in the just the same way as before the EU signed these agreements (European Commission 2015).

It is correct to state that so far trade agreements have not formally prevented Member States from providing public services or from organizing them in certain ways. Furthermore, no concrete dispute in this area was ever filed in the WTO or any other dispute settlement forum. However, the often discussed regulatory chill of trade agreements does not necessarily require concrete cases. In addition, if governments engage in policy reforms for public services, they may take their trade obligations into consideration without officially acknowledging this. It can therefore not entirely be excluded that the trade commitments of the EU may have limited the policy choices of Member States concerning public services despite the EU’s approach of protecting public services.

Furthermore, and even more importantly, the fact that the model seems to have been “successful” so far does not guarantee that this will remain the case in the future. It should be kept in mind that the GATS commitments of 1995 de facto reflect at most the status quo regulation and liberalization of public services in the early 1990s. However, the reality of public services has changed significantly since then and the GATS commitments do not reflect the current situation. It is hence not surprising that the GATS commitments which were in fact limited in many cases did not cause any noticeable conflict.

In addition, the trade agreements signed by the EU since 1995 were agreements with developing countries and emerging markets (e.g., Mexico, Chile, South Korea, Peru etc). There are no significant commercial suppliers of public services with a market access interest in the EU in these countries. To the contrary, EU suppliers of public services were interested in market access in these countries. Hence, the EU commitments and the model protecting public services was never put to a real test.

This may change significantly with the signature of CETA and even more so TTIP or TiSA. It is conceivable that commercial suppliers of health, education, transportation or environmental services may have a real market access interest. Consequently, it remains to be seen whether the EU model really protects Member State’s autonomy in regulating, providing and financing public services. Neither the EU nor its Member States should therefore lean back and rely on a model which was developed more than twenty years ago and was never seriously tested.