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.