IV. Model clauses for the exclusion of public services

As shown above, the EU model can be criticized, because it does not apply to investment protection, because it relies on unclear terminology and because it does not protect all public services in the same manner. A model clause for the full and legally safe protection of public services therefore needs to avoid those flaws.

1. Core elements

Model clauses for the protection of public services in EU trade and investment agreement need to be built on three core elements: First, they require a clear definition of the concept of public services in a manner which encompasses the variety of models for these services which exist throughout Europe and taking into account the “diversity between various services” and “the differences in the needs and preferences of users that may result from different geographical, social or cultural situations” as mentioned in Protocol No. 26 on Services of General Interest. The definition of the notion of public services determines the substantial scope of the model clause.

Second, model clauses need to provide an adequate level of protection. As seen above, a model clause should not just apply to core trade liberalization obligations or only parts thereof, but to the entire chapter on services and investment or the entire agreement. At least, they should exclude investor-state dispute settlement from applying to disputes arising in the context of public services.

Third, model clauses need to be of a sufficiently binding legal quality. They should not be mere interpretative guidelines and therefore leave the determination of the scope of the agreement or its chapters in the hands of trade or investment tribunals deciding a specific dispute. For example, a provision like Art. 1201.3 NAFTA which holds that “[n]othing 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” is not an exception from the substantive obligations, but serves as context for interpreting these obligations (VanDuzer 2015: 118). Similarly, Article 2 of the EU’s proposal on investment protection for TTIP stating that “[t]he provisions of this section shall not affect the right of the Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives” is also not a clear carve-out for regulations in the public interest, but could be understood as an interpretative guideline. Contrary to this, clauses which specifically state that (the provisions of) a chapter do not apply to certain activities or functions are legally binding and unambiguous exemptions.

Model clauses should also avoid terms and language which would allow treaty interpreters to insert their own value judgements, for example the notion of “necessary” (see also Van Harten 2015:7). Furthermore, they should not relate to the notion of interpretation, e. g. “Nothing shall be interpreted as” as suggested by the Social Platform (2015). Provisions like these do not provide sufficient legal clarity as they only refer to the interpretation of norms, but not to the norms themselves.

2 The concepts of substantive scope and level of protection are further developed in Krajewski 2011, 2015b.
2. Definition of public services

The greatest challenge for any model clause protecting public services is a clear and comprehensive definition of the notion of public services. There is no generally accepted definition of this concept in EU or international law or in any national legal system. While there is usually agreement that certain services such as health, social, education, energy distribution, electronic and postal communication, public transportation, waste collection, and water distribution are public services, definitions which rely on specific existing public services risk excluding certain activities which may be considered a public service in some legal systems. Furthermore, such definitions only reflect a specific historic understanding of public services and are hence likely to be static. However, the concept of public services is dynamic: Its contents vary of time and space (Krajewski 2003).

In a similar way, definitions such as Article 1:3 (c) GATS which relies on the modalities of the provision of services (“on a commercial basis”; “in competition with one or more service suppliers”) are also problematic, because they assume that a certain model of providing public services is the only model worth protecting. Such definitions can therefore also lead to a static understanding of the concept of public services.

The debate about services of general (economic) interest in the EU and the interpretation of that term by the European Commission and the European Court of Justice revealed similar problems with defining the exact scope of the notion of services of general interest or services of general economic interest. In EU law, it is now generally accepted that the Member States determine whether an activity qualifies as a service of general interest and the EU organs only assess if the Member State’s determination was based on a manifest error (European Commission 2013:24). The key factor in determining whether an activity is considered to be a service of general economic interest is therefore the determination of that activity as an activity in the general interest by a Member State.

This approach coincides with Article 1 of Protocol No. 26 on Services of General Interest. Accordingly, one of the values of the EU with regards to services of general economic interest is “the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users”.

The determination of an activity as a service of general interest usually requires an official act or a deliberate choice of the respective government or governmental unit and the imposition of special obligations in the public interest for example universal service obligations or the obligation to offer a contract to everyone by the competent authority. This would also be the case if the service is supplied by the government itself based on public interest considerations. It is suggested that a model clause protecting public services in EU trade and investment agreements is built on this concept.
3. Proposals for model clauses

Based on the above, a model clause for protecting public services could read as follows:

“This agreement (this chapter) does not apply to public services and to measures regulating, providing or financing public services.

Public services are activities 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.

Special regulatory regimes or special obligations include, but are not limited to, universal service or universal access obligations, mandatory contracting schemes, fixed prices or price caps, the limitation of the number or services or service suppliers through monopolies, exclusive service suppliers including concessions, quotas, economic needs tests or other quantitative or qualitative restrictions and regulations aiming at high level of quality, safety and affordability as well as equal treatment of users.”

Alternatively, the scope of application of a trade in services and investment chapter could define “services” or “investment” in such a way that it excludes activities considered to be public services in the above meaning.

4. Explanation

a) Definition of public services

The key element of the proposed model clause is the definition of the term public services. The definition does not rely on a sectoral or functional approach, but defers the determination of public services to the competent authorities of the Member States at all government levels. As explained above, this approach allows for greater flexibility and encompasses different approaches towards public services in the Member States.

However, it should be noted that the deference to Member States is not unconditioned. Member States cannot determine the scope of the agreement or its trade and investment chapter by simply labelling a particular activity as a public service. The determination of an activity as a public service requires specific regulations, a specific legal framework or special regime which includes the delivery of the service by a competent authority. Requiring specific regulatory activities of the Member States’ authorities prevents potential misuse of a broad public services exemption. It is also in line with a modern understanding of the concept of public services which relies on political and hence democratically accountable decisions of competent authorities and not on traditional concepts.

The regulatory regime required by the definition of public services suggested here needs to be imposed on services or service suppliers in the general interest. In other words, public service providers need to fulfil certain requirements imposed on them in order to meet certain predetermined public interests. The definition does not specify which interests need to be met, because these will depend on specific decision in the respective Member State. The general
interest includes the realization of basic rights such as the right to health or education, but the general interest cannot be limited to policies pursuing those rights.

In order to further clarify its concept, the proposed model clause also makes use of an illustrative list of potential regulations, regulatory instruments or goals. The list is not exhaustive and therefore allows for future and different regulatory approaches. The list refers to the most common public service obligations employed by Member States. It clarifies that the definition does not only rely on technical regulations or quality standards, but also includes market access restrictions such as public monopolies or other forms of limiting competition. Universal service or universal access obligations are requirements to supply a service or provide access to services in the same manner and at comparable conditions concerning quality and price throughout a geographic territory. Mandatory contracting schemes or price caps are regulatory instruments which limit the freedom of contract of the service providers. The limitation of the number or services or service suppliers through monopolies, exclusive service supplier schemes such as concessions, quotas, economic needs tests or other quantitative or qualitative restrictions are measures which would normally violate the market access requirements of a trade agreement. The express inclusion of concessions in this definition seems useful, because of the frequent use of these instruments in the organization of public services. Concessions are seen as one form of a regulatory regime of public services. Finally, the mode clause refers to regulations aiming at a high level of quality, safety and affordability as well as equal treatment of users. This is an explicit reference to Art. 1 of Protocol No. 26 on Services of General Interest. It indicates that the regulatory restrictions imposed on public service suppliers usually aim at one or all of these purposes.

The model clause not only covers public services, but also governmental measures aimed at regulating, providing or financing these services. This is important because many challenges of special governmental measures will be raised by or on behalf of commercial service providers who will argue that a particular measure discriminates against them or restricts their market access. For example, if a commercial provider of private education services would argue that special conditions which are given to public education providers are discriminatory, it might not be sufficient for the government defending that measure to argue that public education is not covered by the agreement, but that the specific measure is also not covered by the agreement.

b) Level of protection

The proposed model clause establishes a broad exclusion and applies to the entire agreement or at least to the entire chapter on investment and services. Depending on the structure of the agreement, the latter scope of the exclusion clause would not apply to government procurement and might also not extend to subsidies or domestic regulation if these are addressed in different chapters. This needs to be kept in mind when designing the specific clause.

The exclusion of public services in the proposed clause would be similar to the general exclusion of audiovisual services from the scope of the investment and services chapters in EU free trade agreements. However, the proposed clause would go beyond the audiovisual carve-out by also excluding measures regulating, providing and financing public services.
This seems necessary if the clause should also provide full protection against claims under an investment chapter. The exclusion of public services from the scope of the investment chapter means that an investor or investment does not fall under the ambit of the agreement if the investment concerns public services. For example, if a private investor would be awarded a concession to operate a regional bus line which contains requirements concerning routes, frequencies and price schemes, this concession could be considered a specific regulatory regime and would make the bus service a public service. Hence, the investment would be an investment in the field of public services which are not protected under the investment chapter.

Excluding public services from the investment chapter would not exclude claims from investors in other sectors which are related to public services. If, in the above example, a private bus operator not subject to the requirements of a concession would raise a claim against the granting of the concession, that claim would be unfounded, because it would be a claim against a governmental measure regulating, providing and financing public services because such a measure could not be attacked on the basis of the agreement.³

This would also apply to a claim invoking the so-called umbrella clause. Umbrella clauses extend the scope of the investment protection chapter to specific commitments of a state towards an investor. In practice, these commitments are usually contained in a state-investor contract covering a specific project. Sometimes this can also be part of a concession agreement. An investor relying on the umbrella clause claims a violation of the investor-state-contract as violation of the standards of the investment protection chapter. However, if the measure attacked by the investor would be a measure regulating, providing and financing public services it would not fall within the scope of the investment chapter. Consequently, the investor could not circumvent the exclusion of public services by relying on the umbrella clause, because the investment chapter would not be applicable in the first place.

V. Potential critique of the proposed model clauses and alternatives

The proposed model clause would substantially deviate from the existing EU model. It could be criticized based on two arguments which can, however, be rejected.

1. Unilateral determination of the scope of an international agreement

A first challenge to the model proposed here could be based on the argument that the model allows Member States to unilaterally determine the scope of the agreement by declaring an activity as public service. Arguably, this would be contrary to the general purpose and function of an international agreement: If states would be capable of excluding the application of an agreement through unilateral measures they could easily escape the disciplines of the agreement and therefore defeat its purpose.

³ It should be noted that excluding concessions from the definition of investment in an investment protection chapter of the treaty may not solve this problem. In the case discussed the investment is not the concession itself, but the physical infrastructure or the actual capital invested in the operation of the bus line. Hence an exclusion of concessions although useful in other contexts would not be a sufficient safeguard for public services.