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 I: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.