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 of 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