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.