

Impact of the Transatlantic Trade and Investment Partnership (TTIP) on the Legal Framework for Public Services in Europe

*Markus Krajewski and Britta Kynast**

Friedrich-Alexander University Erlangen-Nürnberg

1 October 2014

Funded by the Hans-Böckler-Stiftung Markus Krajewski is professor of public law and international law at the Friedrich-Alexander University Erlangen-Nürnberg; Britta Kynast is a doctoral student there. We would like to thank Rolf Adlung, Martin Beckmann, Penny Clarke, Dominik Hellriegel, Rainer Plassmann, Oliver Prausmüller, Inge Reichert and Nikolai Soukup for their helpful comments.

Translated by James Patterson

Contents

Bibliography	4
List of abbreviations	7
I. Introduction	7
II. Fundamental issues	8
1. Background and course of the negotiations to date	8
2. Legal basis.....	9
(a) Negotiating mandate.....	9
(b) Course of the negotiations.....	10
(c) TTIP as a mixed agreement	10
3. Object of the negotiations	11
(a) Trade in services.....	11
(b) Public procurement and competition policy	12
(c) Investment protection	12
III. Legal basis and obligations of the EU with regard to negotiations on trade agreements affecting public services.....	13
1. General framework for public services in European law	13
2. Requirements concerning external action	14
IV. Basic elements of the legal impact of trade agreements on public services	15
1. Regulatory areas of a trade agreement affecting public services.....	15
(a) Obligations with regard to the liberalisation of trade in services and investments.....	15
(b) Regulatory issues, public procurement and investment protection	16
2. Structural elements of the protection of public services in trade agreements.....	16
(a) Objective and functional exception clauses.....	17
(b) Limitations of obligations	17
(c) Justifications.....	18
3. Analytical framework for the assessment of the impact of trade agreements on public services.....	19
(a) Objective scope	19
(b) Level of protection	22
(c) Relationship between scope and level of protection.....	23
V. Liberalisation of trade in services in the TTIP	24
1. Exception clause for services supplied in the exercise of governmental authority	24
2. Substantive obligations	24

(a) National treatment	25
(b) Market access	25
3. Scope of obligations	26
(a) The ‘public utilities’ clause	26
(b) Restriction to ‘privately funded’ services.....	27
4. Liberalisation obligations in the case of a negative list approach	28
(a) Function and significance of Annex I.....	29
(b) Function and significance of Annex II	30
5. Exceptions for existing measures at the municipal level.....	30
VI. Procurement, competition and energy	31
1. Public procurement	31
2. Energy	32
3. Competition and state aid	32
VII. Investment protection	33
VIII. Findings and legal policy recommendations.....	33
Annex	34
1. Examples of Annex I exceptions.....	34
(a) EU-wide exception	34
(b) Exception for a member state (Germany)	35
2. Examples of Annex II exceptions	35
a) EU-wide exceptions.....	35
(b) Exceptions for a member state (Germany).....	36

Contents

Bibliography.....	
List of abbreviations.....	
I. Introduction.....	
II. Fundamental issues.....	
1. Background and course of negotiations to date.....	
2. Legal basis.....	
(a) Negotiating mandate.....	
(b) Course of the negotiations.....	
(c) TTIP as a mixed agreement.....	
3. Object of the negotiations.....	
(a) Trade in services.....	
(b) Public procurement and competition policy.....	
(c) Investment protection.....	
III. Legal basis and obligations of the EU in respect of the negotiation of trade agreements on public services.....	
1. General framework for public services in European law.....	
2. Requirements concerning external action.....	
IV. Basis of the legal consequences of trade agreements with regard to public services.....	
1. Regulatory areas of a trade agreement affecting public services.....	
(a) Obligations concerning the liberalisation of trade in services and of investments.....	
(b) Regulatory issues, public procurement and investment protection.....	
2. Structural elements of the protection of public services in trade agreements.....	
(a) Substantive and instrumental exceptions.....	
(b) Limits of obligations.....	
(c) Justifications of relevance.....	
3. Analytical framework for evaluating the consequences of trade agreements for public services.....	
(a) Objective scope.....	
(1) Functional definitions.....	
(2) Sector-based categorisation.....	
(3) Hybrid approach: ‘public utilities’.....	
(4) Evaluation.....	
(b) Level of protection.....	
(1) Complete exclusion.....	
(2) Exceptions and limitations of specific concessions.....	
(3) Exceptions from other obligations.....	
(4) Evaluation.....	
(c) Relationship between scope and level of protection.....	
V. Liberalisation of services in TTIP.....	
1. Exception clause for services in the exercise of governmental authority.....	

2. Object of obligations	
(a) National treatment.....	
(b) Market access	
3. Extent of obligations.....	
(a) The ‘public utilities’ clause.....	
(b) Restriction to ‘privately funded’ services.....	
4. Liberalisation obligations under a negative-list approach.....	
(a) Function and significance of Annex I	
(b) Function and significance of Annex II	
5. Exceptions related to existing measures at local level.....	
VI. Procurement, competition and energy.....	
1. Public procurement.....	
2. Energy	
3. Law on competition and state aid.....	
VII. Investment protection.....	
VIII. Findings and legal policy requirements.....	
Annex.....	
1. Examples of Annex I derogations.....	
(a) EU-wide derogations.....	
(b) Derogations for a member state (Germany)	
2. Examples of Annex II derogations.....	
(a) EU-wide derogations.....	
(1) Horizontal derogations (‘public utilities’)	
(2) Sectoral derogations (water supply).....	
(b) Derogations for a member state (Germany)	

Bibliography

- Adlung, Rudolf: Public Services and the GATS, *Journal of International Economic Law* 2006, pp. 455–485.
- Arena, Amedeo: The GATS Notion of Public Services as an Instance of Intergovernmental Agnosticism: Comparative Insights from the EU Supranational Dialectic, *Journal of World Trade* 2011, pp. 489–528.
- Calliess, Christian/Ruffert, Martin: *EUV/AEUV – Kommentar* (München: C. H. Beck), 2011.
- Choudhury, Barnali: *Public Services and International Trade Liberalization – Human Rights and Gender Implications* (Cambridge: CUP), 2012.
- Cremer, Wolfgang/Ralf Poscher/Thomas Lange: *Bildungsdienstleistungen und GATS – unter besonderer Berücksichtigung der Grundschulen und der weiterführenden Schulen in Deutschland*, *Zeus* 2011, pp. 115–162.
- Diebold, Nicolas F.: *Non-Discrimination in International Trade in Services: 'likeness' in WTO/GATS* (Cambridge: CUP), 2010.
- Eeckhout, Piet: A normative basis for EU external relations? Protecting internal values beyond the Single Market, in: Markus Krajewski (ed.): *Beyond the Single Market – External and international dimensions of services of general interest in EU law* (Heidelberg: Springer), *forthcoming*.
- Fritz, Thomas: *TTIP vor Ort – Folgen der transatlantischen Handels- und Investitionspartnerschaft für Bundesländer und Kommunen*, im Auftrag von campact 2014, http://blog.campact.de/wp-content/uploads/2014/09/Campact_TTIP_vor_Ort.pdf

- Grabitz, Eberhard/Hilf, Meinhard/Nettesheim, Martin: Das Recht der Europäischen Union, 53. Ergänzungslieferung (München: C. H. Beck), 2014.
- Graham, Cosmo: Regulating public utilities – A constitutional approach, 2000,
- Hernekamp, Juliane: Die Liberalisierung von Gesundheitsdienstleistungen nach dem
Weltdienstleistungshandelsabkommen GATS – Auswirkungen auf das deutsche Gesundheitssystem (Berlin:
Duncker und Humblot), 2013.
- Houde, Marie-France/Akshay Kolshe-Patil/Sébastien Miroudot: The interaction between investment and services
chapters in selected Regional Trade Agreements: Key findings, OECD Trade Policy Working Paper No. 55,
2007.
- Kelsey, Jane: Serving whose interest? The political economic of trade in services agreements (Milton Park:
Cavendish), 2008.
- Krajewski, Markus: Public services and trade liberalization: mapping the legal framework, Journal of
International Economic Law 2003, pp. 341–367.

- : Grundstrukturen des Rechts öffentlicher Dienstleistungen (Heidelberg: Springer), 2011.
- : Public Services in Bilateral Free Trade Agreements of the EU, 2011, <http://ssrn.com/abstract=1964288>.
- : § 6 – Internationaler Dienstleistungsverkehr, in: Dirk Ehlers/Michael Fehling/Hermann Pünder (eds), *Besonderes Verwaltungsrecht – Band 1, Öffentliches Wirtschaftsrecht* (Heidelberg: C.F. Müller), 2012, pp. 147–170.
- : ‘GATS plus’: Öffentliche Dienstleistungen in Freihandels- und Investitionsabkommen der Europäischen Union, in: Oliver Prausmüller/Alice Wagner (eds), *Reclaim Public Services – Alternativen zur neoliberalen Privatisierungspolitik* (Hamburg: VSA), 2014, pp. 132–155.
- : Investment law and public services, in: Marc Bungenberg/Jörn Griebel/Stefan Hobe/August Reinisch (eds): *International investment law* (Baden-Baden: Nomos), *forthcoming*.
- Leroux, Eric: What is a ‘service supplied in the exercise of governmental authority’ under Article I:3(b) and (c) of the General Agreement on Trade in Services?, *Journal of World Trade* 2006, pp. 345–385.
- Mattoo, Aaditya/Sauvé, Pierre: Regionalism in services trade, in: Aaditya Mattoo/Robert M. Stern/Gianni Zanini (eds), *A handbook of international trade in services* (Oxford: OUP), 2008, pp. 221–286.
- Panagiotis, Delimatsis: *International trade in services and domestic regulations* (Oxford: OUP), 2007.
- Pigeon, Martin: Wasser: Rekommunalisierung eines lebensnotwendigen Bereichs, in: Oliver Prausmüller/Alice Wagner (eds), *Reclaim Public Services – Alternativen zur neoliberalen Privatisierungspolitik* (Hamburg: VSA), 2014, pp. 195–215.
- Pitschas, Christian: Die schrittweise Weiterentwicklung des ‘Agreement on Government Procurement’ (GPA 2012), *VergabeR* 2014, pp. 255–266.
- Reimold, Tobias: *Der Handel mit Bildungsdienstleistungen nach dem GATS* (Tübingen: Mohr Siebeck), 2010.
- Robertson, Viktoria H. S. E.: *Perspektiven für den grenzüberschreitenden Dienstleistungshandel* (Baden-Baden: Nomos), 2012.
- Schmidt, Stefan: *Die Auswirkungen des GATS auf den deutschen Gesundheitssektor* (Frankfurt: Peter Lang), 2010.
- Schwarze, Jürgen/Becker, Ulrich/Hatje, Armin/Schoo, Johann: *EU-Kommentar, 3rd edition*, (Baden-Baden: Nomos), 2012.
- Simon, Sven: *Liberalisierung von Dienstleistungen der Daseinsvorsorge im WTO- und EU-Recht* (Tübingen: Mohr Siebeck), 2009.
- Streinz, Rudolf: *EUV/AEUV – Kommentar, 2. Aufl.* (München: C. H. Beck), 2012.
- Stephenson, Sherry M.: Regional versus multilateral liberalisation of services, *World Trade Review* 2002, pp. 187–209.
- Van Duzer, Anthony: Health, education and social services in Canada: the impact of the GATS, in: J. M. Curtis/D. Ciuriak (eds), *Trade Policy Research* 2004, pp. 287–518.
- : NAFTA’s approach to protecting public services: fragmentary, asymmetrical, rigid and limited, in: Markus Krajewski (ed.): *Beyond the single market – external and international dimensions of services of general interest in EU law* (Heidelberg: Springer), *forthcoming*.
- Wolfrum, Rüdiger/Stoll, Peter-Tobias/Feinägle, Clements (eds): *WTO – Trade in Services – Max Planck Commentaries on International Trade Law – Vol. 6* (Leiden: Nijhoff), 2008.

List of abbreviations

TFEU	Treaty on the Functioning of the European Union
CETA	Comprehensive Economic and Trade Agreement (Canada and EU)
SGI	Services of general interest
SGEI	Services of general economic interest
TEU	Treaty on European Union
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GPA	General Procurement Agreement
INTA	European Parliament's Committee on International Trade
ISDS	Investor-state dispute settlement
NAFTA	North American Free Trade Agreement
TiSA	Trade in Services Agreement
TTIP	Transatlantic Trade and Investment Partnership (USA and EU)
WHG	Wasserhaushaltsgesetz (Germany's Water resources act)
WTO	World Trade Organization

I. Introduction

Since July 2013 the European Union and the United States are negotiating a Transatlantic Trade and Investment Partnership (TTIP). These negotiations have been the object of considerable public debate and criticised or even rejected by various political actors. The criticisms focus on the negotiating procedure and three particularly controversial substantive areas of the planned agreement. The procedure is generally criticised as being opaque, especially because official negotiating documents have been published only selectively, if at all, which hinders critical examination of the current state of negotiations. Substantive matters which are under discussion include in particular the planned chapter on investment protection, including the possibility of so-called 'investor-state dispute settlement' (ISDS), the ramifications of the intended regulatory convergence with regard to environmental and consumer standards, as well as product approval regulations, and the possible effects of TTIP on the provision, funding and organisation of public services (services of general interest).¹

Concerning this last matter there is a fear, in particular among central municipal organisations, public sector organisations and public sector trade unions, but also in civil society, that tried and tested models of municipal services or forms of non-commercial provision could be adversely affected.² Another fear is that the decision-making leeway and organisational autonomy of local providers of public services could be constrained. Attention needs to be paid here not only to liberalisation of services in the strict sense and a possible obligation to abolish public monopolies, but also regarding the requirements concerning public procurement and so-called 'disciplines' on subsidies. The effects of a possible chapter on investment protection should also be considered.

¹ In what follows the term 'public services' will be used, which also encompasses the EU legal categories of 'services of general economic interest' (SGEI) and 'services of general interest' (SGI). In so far as it is necessary to differentiate between economic and non-economic services, we shall make use of this distinction. Generally on terminology, Krajewski, Grundstrukturen des Rechts Öffentlicher Dienstleistungen, 2011, pp. 3 ff and 77 ff.

² See, for example, Deutscher Städtetag (German Association of Cities and Towns), Auswirkungen weltweiter Handelsabkommen auf die kommunale Daseinsvorsorge (Effects of global trade agreements on municipal services), resolution of the central committee at its 209th meeting on 12 February 2014 in Munich, available online at: <http://www.staedtetag.de/fachinformationen/wirtschaft/068853/>; the Federal Public Services Association's position paper on TTIP, 6 June 2014, available online at: <http://www.bvoed.de/pm-bvöd-ttip-verhandlungen.html>; and ver.di's Lower Saxony-Bremen district organisation's opinion on the planned free trade agreement between the European Union and the United States, February 2014, available online at: <http://nds-bremen.verdi.de/themen/nachrichten/++co++805640e6-b99a-11e3-af91-52540059119e>; as well as Fritz, TTIP vor Ort (TTIP on the ground), available online at: http://blog.campact.de/wp-content/uploads/2014/09/Campact_TTIP_vor_Ort.pdf.

In July 2014 the European Commission published an opinion in which it responded expressly to criticisms of the effects of TTIP on public services.³ Essentially the Commission aims to accompany liberalisation obligations in free trade agreements with safeguards that give member states sufficient leeway to shape their own public services. However, the Commission also points out that trade agreements are extremely complex and often include technical terms that are not easy to understand. There can be no quarrel with that. The European Commission's assertion that the terms in question are sufficiently precise, however, is dubious and must be examined more closely. Finally, there can be no general answer to the question of whether the obligations laid down in a free trade agreement put public services under too tight a rein, because it depends on the precise scope of the liberalisation obligations, the regulatory structure and the other rules of the agreement, for example, on public procurement and competition policy.

The aim of the present study, based on what we know about the state of the negotiations up to mid-2014 and on the publically or semi-publically⁴ available documents, is to evaluate the potential effects of TTIP on public services. On this basis policy recommendations will be made in order to ensure that the decision-making leeway with regard to public services whose existence is proclaimed by the European Commission is real. Because the negotiation process has not yet been concluded some of the findings of this study are based on conjectures about possible outcomes. The TTIP negotiations are being conducted on the basis of other free trade agreements of the EU and the United States, however, which means that analysis can draw on existing terminology and regulatory techniques that in all likelihood will also play an important role in TTIP.

The study is structured as follows. In Section II we shall first provide a general overview of the basis of TTIP and its current state. We shall also explain the European Commission's negotiating guidelines with regard to TTIP. We shall then examine the EU's legal basis with regard to the negotiation of free trade agreements concerning public services (Section III). By the Lisbon Treaty both the TFEU's provisions on the EU's external relations and common commercial policy were modified and the status of services of general interest under the Treaty was strengthened, which also affected the normative framework of EU negotiations on free trade agreements. Section IV presents an analytical model which can be used to evaluate the effects of service liberalisation obligations in free trade agreements on public services. This model is then applied to the TTIP negotiations and the currently known state of negotiations in the area of service liberalisation (Section V). As already mentioned, however, the obligations with regard to service liberalisation are not the only elements of TTIP that could affect public services. Thus in the following sections we examine what effects the planned TTIP chapter on public procurement, competition and energy could have on public services (Section VI) and what special features may arise in connection with the planned chapter on investment protection for public services (Section VII). We conclude the study with a summary of its key findings and relevant legal policy recommendations (Section VIII).

II. Fundamental issues

1. Background and course of the negotiations to date

The idea of a free trade agreement between the United States and the EU has been under discussion since the 1990s but has been pursued seriously at the political level only since 2011. At the EU–US summit meeting in November 2011, as a first step, a High Level Working Group on Jobs and Growth was set up. Its purpose was to work out strategies for increasing trade and investments between the EU and the United States in order to promote job creation, international competitiveness and economic growth.⁵

Already in its preliminary report the Working Group came to the conclusion that a comprehensive transatlantic trade and investment agreement would be the option with the most potential to create jobs and to boost economic growth and competitiveness in order to achieve the goals that had been laid down on the two sides of the Atlantic. In the final report of 11 February 2013 this assessment, based, among other things, on consultations with representatives of various interests, was reaffirmed and it was recommended that negotiations commence on a free trade agreement that, besides traditional trade issues, should also cover investment protection and

³ European Commission, Protecting public services in TTIP and other EU trade agreements, 4 July 2014, available online at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1115>.

⁴ 'Semi-public' documents, although not published officially, come to light through so-called 'leaks' and are highly likely to be authentic. Given the incompleteness of such leaks, however, one cannot be sure whether one is looking at the latest version of a particular document.

⁵ European Commission, EU–US High Level Working Group on Jobs and Growth, available online at: http://ec.europa.eu/enterprise/policies/international/cooperating-governments/usa/jobs-growth/index_en.htm.

regulatory aspects.⁶ Two days after publication of this report US President Barack Obama, President of the European Council Herman Van Rompuy and the European Commission President José Manuel Barroso announced that, based on the Working Group's recommendations, preparations would begin on getting negotiations under way.

On 12 March 2013 the European Commission presented the draft of the negotiating guidelines for a free trade agreement between the EU and the United States. The Council adopted the guidelines for the TTIP negotiations (negotiating mandate) on 17 June 2013.⁷ The first negotiations commenced shortly thereafter. The negotiations on TTIP to date have taken place in three rounds in 2013 and a further three rounds in 2014. While in the first three rounds primarily general issues were discussed, in the fourth round for the first time there were negotiations on the basis of specific texts.

In the negotiation round from 14 to 18 July 2014 there were also negotiations on concrete texts for a chapter on services and mutual proposals on services liberalisation.⁸ A draft of the corresponding EU proposal of 26 May 2014 was made public and is available online.⁹ The negotiations on a chapter on investment protection were suspended in January 2014 because a public consultation was under way on the issue and the decision on further negotiations on investment protection depended on the evaluation of the findings of the consultation.

At present, negotiations are taking place every two months alternately in Brussels and the United States, although the negotiators are in regular contact between meetings. It is unclear when the negotiations will be concluded, but it seems fair to assume that this will not be before 2016.

2. Legal basis

The European-law basis for the TTIP negotiations is provided by Art. 206 and 207 TFEU, as well as by Art. 218 TFEU. In addition, there are the general provisions on the EU's foreign relations in TEU.

(a) Negotiating mandate

The European Commission plays a key role in common commercial policy. It proposes to the Council the commencement of negotiations and the Council empowers the European Commission to conduct negotiations in the name of the EU. If it is already certain at the outset of negotiations that the potential agreement will also impinge on member states' competences, or at least that this is probable, the representatives of the member states gathered together in the Council will also periodically empower the Commission to negotiate in the name of the member states. With regard to TTIP this empowerment was conferred at the same time as the empowerment to negotiate in the name of the EU.¹⁰ Representatives of the member states thus do not participate formally in the negotiations.

The Council's decision to start negotiations, the empowerment of the Commission to negotiate also in the name of the member states and the Council's negotiating directives are termed 'mandate' in the public debate. The mandate contains assertions concerning the aims of an agreement, but also details on individual planned chapters. The publication of these directives was not envisaged in the beginning of the negotiations. However, the directives for TTIP were leaked to the public and made available online.¹¹ In the meantime, the Council also decided to officially release the negotiating directives.¹² The European Parliament is not involved in the conferring of the mandate. However, in accordance with the inter-institutional framework agreement between

⁶ European Commission, Final Report High Level Working Group on Jobs and Growth, available online at: http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf.

⁷ Council of the European Union, Guidelines for the negotiations on the Transatlantic Trade and Investment Partnership between the European Union and the United States, 17 June 2013, 11103/13.

⁸ European Commission, State of Play of TTIP negotiations after the 6th round, 29 July 2014, available online at: http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152699.pdf.

⁹ See: http://www.bilaterals.org/IMG/pdf/reconstructed-draft_eu_ttipp_offer_for_trade_in_services.pdf and <http://www.epsu.org/a/10558>.

¹⁰ Press release, 'Council gives the green light to launch free-trade talks with the United States', available online at: www.consilium.europa.eu/homepage/showfocus?lang=en&focusID=94186.

¹¹ The leaked English version of the mandate can be found at: <http://www.s2bnetwork.org/fileadmin/dateien/downloads/EU-TTIP-Mandate-from-bfimtj-June17-2013.pdf>.

¹² Available at <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf>

the Commission and the Parliament, it must be consulted at all stages of the negotiations, ‘including the determination of negotiating guidelines’.¹³

(b) Course of the negotiations

The European Commission is conducting negotiations through a group of its officials.¹⁴ The Directorate General for Trade takes the lead in this, although expertise in individual areas is obtained from the Commission as a whole.

During the negotiations the Commission consults with the Trade Policy Committee (TPC) of the Council, which comprises officials responsible for trade-policy issues from the relevant national ministries. Because the negotiations are to be conducted in accordance with Art. 207 para 3 subpara 3 TFEU in consultation with this committee the Commission regularly coordinates with the committee and acts in agreement with it.¹⁵

The European Parliament is consulted on the negotiations. This obligation, embedded in TFEU, is specified in the inter-institutional framework agreement to the effect that it must take place ‘promptly and comprehensively’ at all stages of the negotiations.¹⁶ As a rule, this takes place through the relevant Parliamentary committee, which in the case of TTIP is the Committee on International Trade (INTA), although in case of need the plenum is also involved. Confidential information is provided through ‘appropriate’ procedures,¹⁷ because in principle it is forbidden in particular to pass on information to unauthorised third parties.¹⁸

The procedure for concluding trade agreements is laid down in Articles 207 and 218 TFEU. In accordance with Art. 207 para 4 TFEU the Council takes the decision to conclude an agreement, generally by a qualified majority. By contrast, a unanimous Council decision is provided for if an agreement covers trade in cultural and audiovisual services and if, as a result of it, the Union’s cultural and linguistic diversity might be infringed. Unanimity is also necessary if the agreement concerns trade in social, educational and health services and could seriously impinge on the organisation of such services in individual states or on the responsibility of member states for their provision. All the terms used in these exception clauses are vague and legally almost incomprehensible.¹⁹ There has been no clarification to date by the European Court of Justice (ECJ). In practice, the provision is thus likely to be legally inapplicable.²⁰ It must thus be assumed that, in the event of a dispute, unanimity will be sought in the Council, if the ECJ does not help to clarify the issues. In any case only on the basis of the final text will it be possible to judge whether the areas dealt with in TTIP trigger the unanimity rule.

In most instances, the European Parliament must consent to a decision of the Council to conclude an agreement. With regard to TTIP there is an obligation to obtain such approval from the Parliament in accordance with Art. 218 para 6 subpara 2 a) v) TFEU.

(c) TTIP as a mixed agreement

Even though the Lisbon Treaty extended the EU’s competences in common commercial policy to cover trade in services, aspects of intellectual property and foreign direct investment it is still possible that the substance of TTIP will exceed those competences and rather lie within the jurisdiction of the member states. In this case the agreement must be concluded by the EU and the member states (‘mixed agreement’). It is already sufficient if there is no competence on the part of the European Union for an individual part of an agreement.²¹ A mixed agreement must be ratified by all the member states in accordance with their respective constitutional law provisions.

¹³ No. 23, framework agreement on relations between the European Parliament and the European Commission, ABl. L 304/47, 20.11.2010.

¹⁴ A list of the chief negotiators is available at: http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151668.pdf.

¹⁵ Nettesheim/Duvigneau in: Streinz, EUV/AEUV, 2. Aufl., 2012, C. H. Beck, Artikel 207, Rn. 50.

¹⁶ No. 23 of the framework agreement (Fn. 13).

¹⁷ No. 24 framework agreement (Fn. 13).

¹⁸ See, for example, Annex II to the framework agreement (Fn. 13), subitem 5.2.

¹⁹ Weiß in: Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, , 2014, C. H. Beck, Art. 207 TFEU, No. 103 et seq..

²⁰ M. Krajewski, The Reform of the Common Commercial Policy in: Biondi/Eeckhout (eds), European Union Law after the Treaty of Lisbon, 2012, pp. 292 ff.

²¹ AG Kokott, Case C-13/07, Opinion of 26.03.2009, para 121: ‘Just as a little drop of pastis can cloud a glass of water, so too individual provisions, however minor, can trigger the obligation to conclude a mixed agreement.’

In principle, it can only be determined if the TTIP is a mixed agreement once the final text of the agreement is made public. The German government currently takes the position that TTIP will constitute a mixed agreement and to its knowledge all the other member states concur.²²

In accordance with Art. 218 para 11 TFEU an expert opinion can be sought from the European Court of Justice on the compatibility of an agreement with the European treaties by a member state, the European Parliament, the Council or the Commission. Trade Commissioner De Gucht intends, according to press reports,²³ via this route to seek a judicial decision on the question of whether a mixed agreement is at issue. Because expert opinions can only refer to agreements whose basic features are already known, however,²⁴ only an opinion on the free trade agreement negotiated between the EU and Canada, CETA, would be possible.

3. Object of the negotiations

The objective of the TTIP negotiations is a comprehensive trade and investment agreement covering a number of areas. Provisional assessments of the object of the negotiations and the potential substance of TTIP are possible based on the position papers published by the European Commission and the Council's negotiating guidelines. With regard to public services the position papers on public procurement²⁵ and on raw materials and energy²⁶ are particularly important.

From the first general paragraphs of the negotiating guidelines it follows, first, that the Transatlantic Trade and Investment Partnership 'is based on common values, including the protection and promotion of human rights and international security'. At the same time, the agreement is intended to be 'ambitious, comprehensive, balanced'. The aim is an 'effective opening of each others markets'. The obligations arising from the agreement shall be 'binding on all levels of government'. In Germany this includes, besides the federal and *Land* levels, also the municipal authorities, which play a decisive role in the provision of public services within the framework of services of general interest.

(a) Trade in services

With regard to trade in services paragraph 15 of the negotiating directives declares that the aim to be pursued is 'to bind the existing autonomous level of liberalisation of both Parties at the highest level of liberalisation captured in existing FTAs'. That means that the autonomous level of liberalisation based, for example, on single market liberalisations, is to be made binding by the agreement. This also corresponds to the EU's approach in negotiations on free trade agreements: typically, internal liberalisations are supposed to be safeguarded against external encroachment and thus enshrined. By no means are new provisions to fall short of obligations arising from already concluded free trade agreements. This applies to all liberalisation obligations of both parties from past agreements. Thus 'substantially all sectors and all modes of supply' are to be covered and at the same time 'new market access' is to be achieved 'by tackling remaining long-standing market access barriers, recognising the sensitive nature of certain sectors'. It is not specified which sectors are understood in the last phrase.

The key guidelines for public services are found in paragraphs 19 and 20 of the mandate. Paragraph 19 states: 'The high quality of the EU's public utilities should be preserved in accordance with the TFEU and in particular Protocol No. 26 on Services of General Interest, and taking into account the EU's commitment in this area, including GATS.' References to Protocol No. 26 have been found to date only in the TTIP and TiSA mandates. The term 'public utilities' makes it clear that in particular public provision of services in the areas of energy, waste disposal and water supply are to be included. The expression 'services of general interest' arises from European law and refers to services corresponding more or less to German public service provision. The

²² See, for example, the answers to the Kleinen Anfragen (written questions) BT-Drs. 17/14787 of 24.09.2013, Answer to Question No. 2, and 18/1118 of 10.04.2014, Answers to Questions Nos. 2, 4.

²³ See, for example, 'Nationale Parlamente ausschalten', taz, 29.04.2014, available online at: <http://www.taz.de/!137588/>; 'Tempolimit für Turboschweine', Süddeutsche Zeitung, 29.04.2014, available online at: <http://www.sueddeutsche.de/wirtschaft/geplantes-eu-freihandelsabkommen-mit-den-usa-tempolimit-fuer-turboschweine-1.1945592>.

²⁴ ECJ, Opinion 2/94, ECHR, ECR 1996 I-1759, para 10.

²⁵ European Commission, Public Procurement – Initial Position Paper, available online at: http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151623.pdf.

²⁶ European Commission, Raw materials and energy – Initial Position Paper, available online at: http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151624.pdf. 8

relevant formulation in the guidelines thus does not mean that services of general interest are excluded from the negotiations.

That also becomes evident if one compares the formulation in point 19 with the following paragraphs. Paragraph 20 of the mandate states that ‘services supplied in the exercise of governmental authority as defined by Article I.3 of GATS shall be excluded from these negotiations’. The provision of services ‘in the exercise of governmental authority’ referred to here is generally considered to be limited to tasks largely performed on a sovereign basis (administration, justice, police).²⁷ These tasks are fundamentally excluded from trade agreements. According to paragraph 21, audiovisual services are not covered by the chapter on services. This is in keeping with the mandate of EU practice hitherto, in accordance with which audiovisual services are not the object of negotiations. To that extent we can conclude that the mandate excludes only sovereign tasks and audiovisual services.

The European Commission, due to public pressure, has commented expressly on the role of public services in TTIP on several occasions. In December 2013 it published a document, available only in German, entitled ‘*Wasserversorgung – kein Bestandteil der TTIP-Verhandlungen*’ (Water supply – not part of the TTIP negotiations).²⁸ A text entitled ‘Protecting public services in TTIP and other EU trade agreements’²⁹ was published on the Commission’s homepage in July 2014. These texts do not contain substantive information that goes beyond what is available in the mandate or the position papers. Rather the documents refer to the various options for protecting public services in international trade agreements.³⁰

(b) Public procurement and competition policy

It is clear from both the negotiating guidelines and the position papers of the European Commission that TTIP is also to contain a chapter on public procurement and competition policy. According to paragraph 24 of the negotiating directives TTIP ‘shall aim for the maximum ambition’ also with regard to public procurement and go beyond the recently revised WTO agreement on public procurement (Government Procurement Agreement, GPA).

TTIP is to pursue the aim of ‘enhanced mutual access to public procurement markets at all administrative levels (national, regional and local), and in the fields of public utilities’. The expression ‘in the fields of public utilities’ makes it clear that the procurement processes of public utility companies, especially in energy, waste disposal and water supply, are to be covered.

It does not emerge from the guidelines and the position paper whether and to what extent service concessions are to become the object of negotiations. According to the *State of Play*, the Commission provided information on the new directive on awarding concessions in the sixth round of negotiations: there were questions from both sides on the other’s systems for concessions and public-private partnerships (PPPs).³¹

According to paragraph 36 of the negotiating directives TTIP is also supposed to contain provisions on competition policy, including state aid and regulations on state monopolies, state-owned companies and companies with special or exclusive rights. Public services are sometimes provided in the form of state monopolies (for example, waste management), state-owned companies (for example, special purpose associations for waste disposal) and companies with special or exclusive rights (for example, municipal public utilities with a concession to supply drinking water or operate supply networks), so they, too, can be relevant objects of TTIP.

(c) Investment protection

TTIP is intended to contain a chapter on investment protection and investor–state dispute settlement (ISDS). To this end the negotiating mandate contains express provisions on a chapter on investment protection. These provisions start with the assertion that in this area, too, the highest level of protection that the parties to the

²⁷ On this see below IV. 3 (a) (1).

²⁸ ‘Wasserversorgung – kein Bestandteil der TTIP-Verhandlungen’, available online at: http://trade.ec.europa.eu/doclib/docs/2013/december/tradoc_152029.pdf.

²⁹ Available online at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1115&serie=793&langId=en>

³⁰ For details on these instruments see below IV. 3 and V.

³¹ See footnote 8 above.

treaty have negotiated to date shall be the point of departure. Paragraph 23 of the mandate lays out a series of targets and protection standards that TTIP is supposed to contain.

Due to the strong criticisms levelled at this part of the agreement the negotiations on ISDS were officially halted and a public consultation held between March and July 2014. The Commission received almost 150,000 responses to the consultation. Most responses were from individuals, predominantly within the framework of coordinated action. Besides that, 569 organisations, including many NGOs, also responded.³² The first results of this consultation will be available at the end of 2014.³³

III. Legal basis and obligations of the EU with regard to negotiations on trade agreements affecting public services

1. General framework for public services in European law

The European legal framework for public services is to be found in European primary law, first and foremost in the provisions on services of general (economic) interest, especially in Article 14 and 106 para 2 TFEU, as well as Protocol 26 on services of general economic interest. In addition, Article 36 of the Charter of Fundamental Rights refers to services of general economic interest. It is not laid down in primary law what is to be understood by services of general economic interest, but Member States have considerable freedom to define what is a service of general economic interest.

From the standpoint of the European Commission the freedom to define means ‘that Member States are primarily responsible for defining what they regard as services of general economic interest on the basis of the specific features of the activities. ... In areas that are not specifically covered by Community regulation Member States enjoy a wide margin for shaping their policies, which can only be subject to control for manifest error. Whether a service is to be regarded as a service of general interest and how it should be operated are issues that are first and foremost decided locally.’³⁴

Services of general economic interest should be distinguished from non-economic services of general interest. The European Union has not direct competence over such services. To date the Commission is of the opinion that compulsory education and social security, as well as tasks of public authority performed by the state administration are examples of non-economic activities as well as services connected to national education systems and compulsory membership of basic social security schemes.³⁵

While services of general economic interest initially acquired importance on the basis of Article 106 para 2 TFEU, a new legislative competence was created by the Lisbon Treaty in Article 14 TFEU. Since the Lisbon Treaty, regional and local self-government have also been explicitly recognised in Article 14 para 1 TFEU and Article 3 TEU. Finally, Protocol 26 on services of general interest was added to the treaties, which according to Article 51 TEU has the rank of primary law.

Article 14 TFEU stresses ‘the place occupied by services of general economic interest in the shared values of the Union’. According to Protocol 26, the shared values of the Union within the meaning of Article 14 TFEU include ‘the essential role and 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 diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations’ and ‘a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights’.

³² European Commission, Preliminary report (statistical overview), Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), 18 July 2014, available online at: http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152693.pdf.

³³ Investment protection and ISDS in TTIP – EU starts reviewing survey results, 14 July 2014, available online at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1127>.

³⁴ European Commission, Communication on Services of General Interest in Europe, 20.09.2000, KOM (2000) 580 final, point 22.

³⁵ Services of General Interest in Europe, 2001, Official Journal of the European Communities C17 of 19.01.2001, pp. 4–23, point 29.

The equal status of Protocol 26 with the treaties and its genesis suggest that it not only describes the status quo before the Lisbon Treaty but is also important in its own right. In this connection it is significant that the negotiating directives for TTIP also refer to the Protocol. As mentioned, paragraph 19 of the negotiating mandate declares: ‘The high quality of the EU’s public utilities should be preserved in accordance with the TFEU and in particular Protocol No. 26 on Services of General Interest’. In particular the wide latitude bestowed on the national, regional and local levels regarding the provision and organisation of services of general economic interest emphasised in the Protocol is of crucial importance with regard to the fact that established structures of public services and their accustomed high quality can be preserved, even against the endeavours of a trade agreement. As a result of this reference in the negotiating mandate the values laid down in Protocol No. 26 – regardless of the jurisprudential debate on its nature – are to be recognised in the negotiations on TTIP.

In the wake of the Lisbon Treaty local and regional self-government have for the first time taken a prominent place in European primary law. The most important new provision is Article 4 para 2 sentence 1 TEU: ‘The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.’ This makes it clear that also municipal self-government is included in the imperative of respect under European law, which previously was disputed.³⁶ Because many public services are organised or provided within the framework of municipal self-government this treaty amendment is also significant within the framework of public services.

2. Requirements concerning external action

Article 205 TFEU states that the actions of the Union at the international level ‘shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union’. This reference relates to Articles 21 and 22 TEU. According to Article 207 para 1 sentence 2 TFEU common commercial policy is also shaped within the framework of the principles and objectives of the EU’s external action.

Article 21 TEU describes the EU’s principles and objectives with regard to external action. This also includes the principle of solidarity. In Articles 2 and 3 TEU, too, many of the principles mentioned in Article 21 TEU are cited, which suggests a synopsis of norms for interpretation.³⁷ While in Article 3 TEU the term ‘solidarity’ is used in the sense of solidarity between states (Art. 3 para 3 and 5 TEU). Article 2 TEU talks of values that are common to ‘a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail’. Given the fact that the concept of solidarity is related to ‘society’ here a narrow interpretation is not required. It is relevant that Title IV of the Charter of Fundamental Rights is titled ‘Solidarity’. In this Title, among other things, regulations on health services (Article 35 Charter of Fundamental Rights) and access to services of general economic interest are listed (Article 36 Charter of Fundamental Rights). This synopsis of provisions indicates that the fundamental right of solidarity can also be interpreted to mean that solidarity measures with regard to individual citizens, as well as services of general economic interest are intended.

Similarly in Article 21 TEU (para 2 subpara 1) reference is made to the fact that the EU seeks ‘in all fields of international relations’ to ‘safeguard its values’. Article 14 TFEU refers to the place of services of general economic interest among the shared values of the Union. Services of general economic interest are thereby recognised as a value of the Union.³⁸ Reference is also made in Protocol No. 26 on services of general interest to the ‘shared values of the Union in respect of services of general economic interest within the meaning of Article 14’. Thus safeguarding the special place of services of general interest can also be regarded as a value to be pursued within the framework of common commercial policy.

This is backed up by the obligation to maintain consistency in the negotiation of trade agreements in accordance with Article 207 para 3 sentence 2 TFEU. Under this Article the European Union must seek to maintain consistency between individual areas of external action and ‘its other policy areas’. The model of services of

³⁶ Hatje in: Schwarze/Becker/Hatje/Schoo, EU-Kommentar, 3. Auflage, 2012, Article 4 TEU, point 14.

³⁷ For details see Eeckhout, A normative basis for EU external relations? Protecting internal values beyond the Single Market, in: Krajewski (ed.), forthcoming. Along these lines see also Terhechte in: Schwarze/Becker/Hatje/Schoo, EU-Kommentar, 3. Aufl., 2012, Article 21 TEU, point 3.

³⁸ See, for example, Jung in: Calliess/Ruffert, EUV/AEUUV, 4. Aufl., 2011, Article 14 TFEU, point 7.

general interest at EU level is such a policy area. The EU is thus not completely free in the negotiation of free trade agreements that concern public services. This also appears to have been recognised in the negotiating guidelines for TTIP and CETA, which in particular refer to Protocol No. 26.

IV. Basic elements of the legal impact of trade agreements on public services

1. Regulatory areas of a trade agreement affecting public services

The impact of a free trade agreement on the legal framework concerning the provision, funding and organisation of public services depend, first and foremost, on the scope of the agreement. Taking previous practice of international trade agreements into account various regulatory areas that could have such an impact can be distinguished.

(a) Obligations with regard to the liberalisation of trade in services and investments

The first and most significant area concerns obligations to liberalise trade in services. In the most recent EU free trade agreements the corresponding chapter is titled ‘Trade in Services, Investment and E-Commerce’. Specific liberalisation obligations in the new EU agreements are divided into three modes of supply: ‘Investment’ (establishment of a foreign company in the country, corresponding to GATS Mode 3); ‘cross-border supply of services’ (demand for a service abroad, corresponding to GATS modes 1 and 2); and ‘temporary presence of natural persons for business purposes’ (residence of natural persons for business purposes, corresponding to GATS mode 4).

The liberalisation obligations apply to all levels of state activities. With regard to an EU free trade agreement this includes both EU measures and measures taken by member states at national, regional and local level. This already follows from general principles of international law. Relevant clarifications can be found in Art. I:3 (a) GATS and in EU free trade agreements, for example, Art. 160 (b) of the Free Trade Agreement between the EU and Central America.³⁹

The liberalisation obligations typically include the requirement of national treatment (non-discrimination between domestic and foreign providers and services) and the obligation of market access, which in particular requires the abolition of monopolies, exclusive rights (for example, concessions), ‘economic needs tests’ or other quantitative restrictions on access. Usually, these obligations do not apply without exception: Depending on the structure of the lists of obligations (negative or positive list approach) they apply either only to expressly named sectors (positive list approach) or to all sectors, with the exception of those measures and sectors specifically mentioned (negative list approach).⁴⁰ Apart from this, the lists can contain other sector-specific restrictions, but also lay down conditions and limitations that apply to all sectors (horizontal restrictions). In this context the payment of subsidies is often laid down as a limitation to the principle of national treatment, so that in the case of state subsidies equal treatment is not required between domestic and foreign firms.

In order to examine the potential impact of a free trade agreement on the legal framework concerning public services it is thus important to determine at the outset which sector is in question (for example, waste disposal, hospital services, public railways, etc.) in order to determine whether and under what conditions they are subject to the obligations concerning liberalisation. The concrete impact of a free trade agreement is not, initially, determined by whether the liberalisation obligations are formulated on the basis of a positive-list or a negative-list approach because in theory both approaches can prescribe the same obligations and limitations. However, a negative-list approach generally unleashes a dynamic favouring more far-reaching liberalisation obligations⁴¹ because regulatory approaches are perceived in the negotiations as trade barriers so that maintaining them is subject to pressure to provide specific justification. With a positive-list approach, by contrast, what matters most is whether the sector in question will really be exposed to international competition.

³⁹ Agreement on the founding of an association between the European Union and its member states, on one hand, and Central America, on the other hand, OJ EU L 346, 15 December 2012.

⁴⁰ On this see Stephenson, Regional versus multilateral liberalisation of services, WTRev 2002, 187 (193 ff). In detail at V. 2. a).

⁴¹ Houde et al., The interaction between investment and services chapters in selected Regional Trade Agreements, 2007, p. 9; Robertson, Perspektiven für den grenzüberschreitenden Dienstleistungshandel, 2012, p. 231.

(b) Regulatory issues, public procurement and investment protection

One domain that is closely linked to obligations to liberalise services are provisions for sector-specific regulations. While in GATS such provisions exist only for telecommunications and financial services, more recent EU free trade agreements also contain regulatory frameworks for computer services, post and courier services, and also maritime transport services and sometimes also tourism services. The density of regulations varies. With the exception of telecommunications and postal services regulatory frameworks do not play a particularly big role for public services. In addition to sector-specific regulatory frameworks, general disciplines on domestic regulation need to be considered. These include obligations concerning transparency and justification of state regulations, the obligation not to retain any regulations that are disproportionate and the obligation to provide for options for legal remedies.⁴²

Besides the provisions on services liberalisation, free trade agreements can also contain provisions on public procurement, which can also have an effect on public services. Usually, the relevant chapter in a free trade agreement is based on the plurilateral Government Procurement Agreement (GPA), embedded in the WTO framework, although it applies only to some WTO members, including the EU and the United States. The GPA formulates guidelines for public procurement, although they apply only to certain public entities, certain services and to contracts above a certain threshold. Here, too, one has to be clear about which service is in question in order to determine what the consequences of a free trade agreement might be for tender processes in public services. The GPA was revised in 2012.⁴³ One result of this was the extension of the GPA's scope for the EU. Future free trade agreements between parties to the GPA that contain obligations concerning public procurement will probably extend the GPA level.

The Lisbon Treaty incorporated the competence to conclude trade agreements that include foreign direct investment in the common commercial policy. Thus the EU for the first time has competence in the area of investment protection. Previously, this was solely a member state competence, as a result of which trade agreements negotiated before 2009 do not contain chapters on investment protection. For the first time the EU–Canada free trade agreement (CETA) will incorporate an investment protection chapter in a trade agreement. Because the regulations on investment protection could also affect public services⁴⁴ they also need to be examined.

2. Structural elements of the protection of public services in trade agreements

The effects of international trade agreements on public services have been the subject of academic and public debate for more than ten years now. The focus has overwhelmingly been on the WTO's General Agreement on Trade in Services (GATS).⁴⁵ The consequences of bilateral and regional free trade agreements for public services have only recently come into view.⁴⁶ Because the contents, structure and function of free trade agreements are largely based on GATS and other WTO agreements the insights obtained from the debate on GATS and public services can also be applied in the analysis of bilateral free trade agreements, such as TTIP.

First, it should be noted that free trade agreements – irrespective of whether they are at multilateral or bilateral level – are oriented towards liberalisation of trade in services and perceive regulatory or quantitative restrictions on such trade as trade barriers that must be dismantled. Free trade agreements are thus not oriented towards protecting certain quality standards or organisational models of public services or making them binding. Rather free trade agreements typically contain provisions that seek to restrict the scope of state regulation, including with regard to public services. This yields the important insight that elements of free trade agreements ostensibly aimed at protecting public services are structurally defensive instruments. They as a rule do not impose positive state obligations concerning the provision and regulation of public services, but contain definitions of derogations and justifications. This is an important point because derogation and justification clauses are

⁴² For details, see Panagiotis, *International Trade in Services and Domestic Regulation*, 2007, pp. 93 ff.

⁴³ On this see Pitschas, *Die schrittweise Weiterentwicklung des 'Agreement on Government Procurement' (GPA 2012)*, *VergabeR* 2014, pp. 255 ff.

⁴⁴ Krajewski, *Investment Law and Public Services*, in: Bungenberg et al., forthcoming.

⁴⁵ Adlung, *Public Services and the GATS*, *JIEL* 2006, p. 455: 'The status of public services is one of the most hotly debated issues surrounding the General Agreement on Trade in Services (GATS).'

⁴⁶ Krajewski, 'GATS plus': *Öffentliche Dienstleistungen in Freihandels- und Investitionsabkommen der Europäischen Union*, in: Prausmüller/Wagner (eds), *Reclaim Public Services*, 2014, p. 132 (133).

generally interpreted strictly.⁴⁷ If a state invokes them it bears the burden of demonstration and proof that the regulations in question are relevant and can be applied.

Essentially, three different regulatory instruments can be distinguished in free trade agreements that can take account of the protection of public services: (i) objective and functional exception clauses, (ii) limitations on obligations and (iii) justifications.

(a) Objective and functional exception clauses

General, specific area-related exception clauses (objective exceptions) exclude certain public activities or service sectors from the scope of the agreement, either altogether or in individual areas. The best known clause of this kind is Art. I:3(b) GATS, which excludes from the scope of the term ‘services’ within the meaning of GATS those services that are supplied in the exercise of governmental authority.⁴⁸ To the extent that governmental services are not regarded as services GATS does not apply to them. Art. I:3(b) GATS refers to the specific area of governmental authority.

Similarly, other areas can be excluded from trade agreements or parts thereof. Thus, for example, the annex on air traffic services excludes air traffic rights and related services from GATS. According to Art. 163 and 169 of the EU–Central America free trade agreement the chapter on establishments and cross-border trade in services do not apply to audiovisual services.

Besides objective exception clauses certain state measures or instruments can also be excluded from the scope of application of an agreement or parts thereof (instrumental exceptions). They typically concern measures and instruments that play an important role in the funding, regulation and organisation of public services. However, the relevant exceptions apply not only to public, but to all services. In the EU’s free trade agreements such an instrumental exemption is generally found in relation to subsidies.⁴⁹ In GATS, for example, the area of public procurement is exempted from key obligations (Art. XIII GATS).

Objective and functional exception clauses are characterised first of all by the fact that the areas or state tasks they cover are not subject to the obligations of the relevant agreement from the outset. In contrast to norms concerning justification⁵⁰ there is thus no breach of the agreement that would have to be justified. In this way a potential illegality of the respective measure is excluded from the start. It is also important to note that objective and functional exception clauses apply equally to all parties to the agreement. For that reason they often use terms that have no specific meaning in any of the legal systems concerned. The terms used are necessarily more abstract. This can also hinder their application and sometimes even render them null and void.

However, in particular in the case of bilateral agreements it is also conceivable that objective scope of application can be specified in relation to particular parties to the agreement and thus apply only to the EU, while for the other party to the agreement another exception applies. In the EU–Canada free trade agreement (CETA) there is, for example, an exception in favour of ‘cultural industries’ that applies only to Canada.

(b) Limitations of obligations

Agreements on the liberalisation of trade in services as a rule enable the parties to the agreement to limit obligations to certain sectors or to exclude certain sectors or specific measures from individual obligations. In contrast to the objective exception clauses outlined above limitations of obligations apply only to the relevant party to the agreement. In the case of a positive-list approach limitations of obligations are usually laid down in such a way that no obligations are imposed on certain service sectors or parts thereof. Besides that, horizontal limitations are used that apply to all sectors. In the case of a negative-list approach, by contrast, the sectors and the obligations that are not to apply to those sectors are mentioned explicitly in one or more annexes to the agreement.

⁴⁷ In this sense the view was also taken at one session of the GATS Council that Art. I:3(b) should be interpreted narrowly. S. Council for Trade in Services, Report of the Meeting Held on 14 October 1998, S/C/M/30, Abs. 22 (b): ‘[T]he exceptions provided in Article I:3 of the Agreement need[ed] to be interpreted narrowly.’

⁴⁸ See below for more details on this.

⁴⁹ Cf. Art. 159 free trade agreement EU–Central America.

⁵⁰ On this see (c) below.

As examples of limitations of obligations in the case of positive-list approaches we might mention the EU obligations in GATS and in bilateral free trade agreements. In general the EU excludes services that it designates 'public utilities' from certain market access obligations in its free trade agreements and limits, for example, concessions in the area of education services to privately funded education services.⁵¹ An example of limitations of obligations in the case of a negative-list approach is the derogation for social services that Canada included in its NAFTA Annex II. According to this, non-discrimination obligations pertaining to national treatment and most-favoured nation status do not apply to certain services that were established or maintained for a public purpose.⁵²

Limitations of obligations are characterised by the fact that they apply only to that party to the agreement which used them. Thus the parties can use this instrument to respond more closely to their own regulatory peculiarities and are not dependent on whether the public services protected by them have to fall within the scope of a general exception clause. For EU free trade agreements this regulatory technique provides additional flexibility because systems of organisation, funding and provision differ among Member States.⁵³ To the extent that the EU, besides EU-wide limitations, can formulate different limitations for individual Member States it can respond better to national peculiarities.

The scope and reach of limitations of obligations are determined in accordance with the obligations or aspects thereof to which they refer and in accordance with the services to which they apply. They can also be formulated with greater precision. If terms are used that derive from a certain legal order explanations or indicative lists are required. In the EU context it is also important that limitations of obligations differ in scope in individual Member States. Setting limits on obligations is thus extremely complex and possible only through close cooperation between the European Commission and the competent national ministries.

It should also be noted that limitations of obligations may come under pressure in future negotiating rounds or in negotiations on new bilateral or plurilateral free trade agreements because they indicate to the other negotiating partners where restrictions still exist. Consequently, their abolition can be demanded within the framework of the negotiations.⁵⁴ Limitations of obligations thus prove to be fundamentally precarious: they can only ensure permanent protection of public services if they are not relinquished in subsequent negotiation rounds or agreements.

(c) Justifications

One instrument of protection for public services that, to date, has barely been used in free trade agreements is the general justification clause. Such clauses make it possible to justify state measures that initially violate an obligation arising from an agreement if they are in pursuit of certain public interests and policy aims and if the measures do not appear disproportionate. General justifications can be found, for example, in Art. XIV GATS and comparable provisions in free trade agreements. In contrast to exception clauses or limitations of obligations justifications apply if a state measure violates obligations arising from a free trade agreement. In such a case justification clauses make it possible for the measure to be declared legal. Functionally, they lead to a balance between obligations concerning trade liberalisation and the pursuit of certain public interests with means that would otherwise violate these obligations.⁵⁵ As a result, the application of such justifications usually involves a means-end impact assessment.

In previous practice justification clauses refer first of all to measures for the protection of public order and morals or for the protection of the life and health of human beings, animals and plants. Special justifications for the protection of public services have, in practice, not been used so far, however. Such an exception clause could therefore be used only if the purpose of a particular public service was, for example, the protection of human health. This is of course likely to be the case in the area of health services, water supply and waste and

⁵¹ For details see Section V below.

⁵² 'Canada reserves the right to adopt or maintain any measure with respect to the provision of public law enforcement and correctional services, and the following services to the extent that they are social services established or maintained for a public purpose: income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care.'

⁵³ See, for example, Krajewski, Grundstrukturen des Rechts öffentlicher Dienstleistungen, § 3.

⁵⁴ Mattoo/Sauvé, Regionalism in Services Trade, in: Mattoo et al. (eds), Handbook of International Trade in Services, p. 255.

⁵⁵ Cottier/Delimitis/Diebold, Art. XIV GATS, point 2, in: Wolfrum et al. (eds), WTO – Trade in Services, 2008.

waste management.⁵⁶ With regard to education services, however, an exception clause along the lines of Art. XIV GATS, by contrast, cannot be applied.⁵⁷ To a certain degree, a justification clause can also be found in the clause for financial market supervisory measures on protecting the integrity and stability of the financial system ('prudential regulation carve-out'), which, for example, is embedded in the GATS Annex on Financial Services or in Art. 195 of the EU–Central America Free Trade Agreement.⁵⁸ Thus it could be argued that the maintenance of certain elements of a public banking system can also be justified on the grounds listed there.

As a further example, we might mention Art. 1201 (3) NAFTA. According to this, the agreement cannot be interpreted in such a way that it hinders a party from providing a service or performing a task in the areas of law enforcement and the penal system, social security and social insurance, as well as public education, health care and child care, as long as this takes place in a manner conforming with the treaty. Although the legal value of the mentioned clause is considerably restricted by the last-mentioned qualification,⁵⁹ structurally such a clause can be construed as a justification of relevance.⁶⁰

It can be noted, however, that justifications for the benefit of public services have hitherto played virtually no role in the practice of services liberalisation agreements. It is conceivable, however, that this structural element can be inserted in an agreement specifically for the protection of public services. One possible formulation is: 'Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: that are required in order to ensure the provision, funding and organisation of public services'.

3. Analytical framework for the assessment of the impact of trade agreements on public services

In order to evaluate the potential of the structural elements outlined above with regard to the protection of public services and thus to be able to analyse the effects of a free trade agreement on public services two factors need to be taken into consideration.⁶¹

The first factor concerns the objective scope of a certain provision, the second the relevant level of protection for public services.⁶² In order to determine the substantive objective scope of the provision it has to be determined which activities and services are covered by said provision. The level of protection concerns the questions of which obligations of the trade agreement are covered by the provision and whether it excludes public services from all or only from certain parts of the obligations.

(a) Objective scope

As already mentioned, free trade agreements as a rule contain exception clauses or limitations on obligations that refer to particular service sectors or activities. These can be differentiated in terms of whether they use functional or sector-based definitions or rely on hybrid conceptions.

(1) Functional definitions

The traditional exception clause for activities connected to the exercise of governmental authority (for example, Art. I:3 (b) GATS) is the best known example of such a functional definition. The clause contains a functional

⁵⁶ See, to that effect, also Simon, *Liberalisierung von Dienstleistungen der Daseinsvorsorge im WTO- und EU- Recht*, 2009, p. 142 and Hernekamp, *Liberalisierung von Gesundheitsleistungen*, 2013, p. 314.

⁵⁷ Reimold, *Der Handel mit Bildungsdienstleistungen nach dem GATS*, 2010, p. 99.

⁵⁸ On this see von Bogdandy/Windsor, *Annex on Financial Services*, para 22. In: Wolfrum et al. (eds), *Trade in Services*, 2008.

⁵⁹ Van Duzer, *NAFTA's Approach to Protecting Public Services: Fragmentary, Asymmetrical, Rigid and Limited*, in Krajewski, forthcoming.

⁶⁰ For a manifestly different view, see Choudhury, *Public Services and International Trade Liberalization*, 2012, p. 90, who compares this clause with Art. I:3 GATS.

⁶¹ Thus also Arena, *The GATS Notion of Public Services as an Instance of Intergovernmental Agnosticism*, *JWT* 2011, 489 (495).

⁶² The following remarks are based on Krajewski, *Public Services in Bilateral Free Trade Agreements of the EU*, 2011 as well as on Krajewski, 'GATS plus': *Öffentliche Dienstleistungen in Freihandels- und Investitionsabkommen der Europäischen Union*, in: Prausmüller/Wagner (eds), *Reclaim Public Services*, pp. 141 ff.

description of public services. It refers to a specific public activity (exercise of governmental authority) and does not lay down which sector is to be covered by the exception clause. Usually, activities such as public administration, administration of justice, the penal system as well as police and military activities are understood under the term ‘exercise of governmental authority’. It is also imaginable, however, that other activities may be covered by this, in particular if they are exercised only by the state (public education, state railway companies, state employment agency).

The ambiguity of the term ‘governmental authority’ may have been the reason why the term was defined in more detail in GATS (‘neither on a commercial basis, nor in competition with one or more service suppliers’). Art. I:3 GATS has not yet been interpreted in more detail by the WTO’s dispute settlement bodies. In the literature, some take the view that a service provided on a commercial basis is to be understood as being performed for the purpose of making a profit.⁶³ Others consider the fact that a service is charged for is sufficient, even if the service provider operates on a non-profit basis.⁶⁴ Confusion also persists in relation to interpretation of the phrase ‘in competition with one or more service providers’.⁶⁵ Such competition would not exist, for example, if the service in question is provided by a monopolist because competition requires several service providers who offer their services on an existing market to the same service consumers and are in a relationship of competition with one another.⁶⁶ It is questionable, however, what criteria are to be adduced to determine the relevant market and a possible relationship of competition.⁶⁷ In particular it is questionable whether public and private establishments, such as schools or hospitals, ‘compete’ with one another.⁶⁸

Regardless of any legal clarification of these terms the formulations ‘on a commercial basis’ or ‘in competition’ are in any case likely to mean that services provided in a market-like environment or in a strictly regulated market will not fall under the exception clause. In the more recent technical literature and negotiating practice a consensus seems to be forming according to which functional access that refers to governmental authority – whether with additional definitions or not – covers only those state activities that form the core of state sovereignty.⁶⁹ That means that most public services, including social and health care, education and network-based services and universal services, such as postal or telecommunications services, are not covered by the exception clause.⁷⁰

It is also not entirely clear whether waste management in Germany, although defined as a sovereign task within the meaning of Section 56 of the German Water Act (Wasserhaushaltsgesetz, WHG), falls within this scope. On one hand, waste management is carried out on the basis of special charges that can be understood in a broader sense as commercial payment. On the other hand, ‘only’ 90 per cent of waste management is carried out by public-bodies and enterprises or by companies controlled by municipalities,⁷¹ so that in a small portion of the market competitive provision does appear possible.

There is an interesting novelty in the EU–Central America Free Trade Agreement. According to Art. 162 of this agreement activities carried out in the exercise of governmental authority are defined as follows: ‘for example, activities performed neither on a commercial basis nor in competition with one or more economic operators’. Due to the addition of the words ‘for example’ the parties to the agreement have freed themselves from the narrow definition laid down in GATS and have chosen a broader definition that can also contain other approaches than a functional understanding. This variant has not been included in CETA, however.

⁶³ Leroux, What is a ‘Service Supplied in the Exercise of Governmental Authority’ under Article I:3(b) and (c) of the General Agreement on Trade in Services?, *JWT* 2006, 345 (360); Van Duzer, Health, Education and Social Services in Canada: The Impact of the GATS, in: Curtis/Ciuriak (eds), *Trade Policy Research* 2004, 2004, 287 (378 ff.); Krajewski, Public Services and Trade Liberalization, *JIEL* 2003, 341 (351). In detail also Simon, *Liberalisierung von Dienstleistungen der Daseinsvorsorge im WTO- und EU-Recht*, 2009, pp. 159ff.

⁶⁴ Adlung, *Public Services and the GATS*, *JIEL* 2006, 455 (462).

⁶⁵ See also Kelsey, *Serving Whose Interest?*, 2008, pp. 124 f.

⁶⁶ Krajewski, *Public Services and Trade Liberalization*, *JIEL* 2003, 341 (352f.); E. Leroux, What is a ‘Service Supplied in the Exercise of Governmental Authority’ under Article I:3(b) and (c) of the General Agreement on Trade in Services?, *JWT* 2006, 345 (362 ff.).

⁶⁷ Adlung, *Public Services and the GATS*, *JIEL* 2006, 455 (463 ff.).

⁶⁸ By contrast, see Van Duzer, *Health, Education and Social Services in Canada: The Impact of the GATS*, in: Curtis/Ciuriak (eds), *Trade Policy Research* 2004, 2004, 287 (395); as well as Reimold, *Der Handel mit Bildungsdienstleistungen nach dem GATS*, 2010, S. 207 ff; and Cremer et al., *Bildungsdienstleistungen und GATS*, *Zeus* 2011, p. 141 for elementary and secondary schools in Germany. On the applicability of the clause to health services see Hernekamp, *Liberalisierung von Gesundheitsleistungen*, 2013, p. 177 and Schmidt, *Die Auswirkungen des GATS auf den deutschen Gesundheitssektor*, 2010, p. 100 ff.

⁶⁹ Choudhury, *Public Services and International Trade Liberalization*, 2012, pp. 67 ff. Arena, *The GATS Notion of Public Services as an Instance of Intergovernmental Agnosticism*, *JWT* 2011, 505; Leroux, What is a ‘Service Supplied in the Exercise of Governmental Authority’ under Article I:3(b) and (c) of the General Agreement on Trade in Services?, *JWT* 2006, 345 (352).

⁷⁰ Simon, *Liberalisierung von Dienstleistungen der Daseinsvorsorge im WTO- und EU-Recht*, 2009, p. 101.

⁷¹ Figure according to the Allianz für öffentliche Wasserwirtschaft (AöW), available online at: <http://aoew.de/pages/themen.php>

Nevertheless, the question thus arises of whether such deviations from GATS are permissible. Their practical effectiveness will in any case be reduced by a possible further GATS definition.

(2) Sector-based categorisation

A second approach to formulating exceptions for public services is based on sectoral categorisations. As already mentioned, there are certain clauses in NAFTA that refer to law enforcement, the penal system, social services, public education, health care and child care. In contrast to the functional approach a sector-based exception clause for public services leads to more clarity concerning what activities are covered. For example, public education and health care are clearly covered by the above-mentioned provisions. At first glance it thus appears that these clauses have broader scope than the exception clauses based on governmental authority. However, these sectors, too, can also be controversial with regard to their exact limits. Ultimately, it is thus not clear whether the scope of a sector-based exception clause is really more precise than the above-mentioned functional approaches.

Furthermore, sector-based exception clauses based on an exhaustive list of sectors could be too static to adapt to changes in service provision and to take into account that conceptions and understandings of 'public services' change over time. Sector-specific approaches based on a non-exhaustive list enable more flexibility and thus a dynamic understanding of their scope.

(3) Hybrid approach: 'public utilities'

In its GATS commitments and bilateral free trade agreements the EU takes a hybrid approach that combines elements of the functional and sectoral definitions. The best known approach is the so-called 'public utilities clause'. The text used by the EU as a rule is: 'In all EU Member States, services considered to be public utilities at a national or local level may be subject to public monopolies or to exclusive rights granted to private operators.' Accordingly, in all EU member states services that are regarded as 'public utilities' at national or local level can be the object of public monopolies or exclusive rights. In a supplementary footnote it is asserted that 'public utilities' exist in a number of sectors, including environmental services, health services or transport services.⁷² This makes it clear that no exhaustive description of what is understood by 'public utilities' is to follow.

The term 'public utilities' does not have a clear meaning in either international commercial law or EU law. In English legal practice 'public utilities' primarily includes supply services – electricity, water and gas supply – postal and (at least sometimes) telecommunications services, as well as public transport.⁷³ This meaning to a certain extent contradicts the specification of the term 'public utilities' in a footnote in the list of specific concessions: 'public utilities' exist, according to that, in certain research and development services, in technical testing, environmental services, health services and transport services. The lack of conceptual clarity is exacerbated by the French and Spanish versions of the list of concessions, which, although not binding, are, as official WTO languages, likely to exert a certain influence. In these versions 'public utilities' are translated '*services publics*' and '*servicios públicos*'. Thus the term 'public utilities' is to be understood more broadly than its usual meaning. Besides utilities, post and telecommunications, as well as transport, other services are covered by the exceptions in the list of specific commitments. Above all the consulting, research and testing services, as well as health services expressly mentioned in the footnote all fall under the exception clause. Because the enumeration of the various services in the footnote is not exhaustive other public services can also be covered by the term 'public utilities'. From the formulation that the corresponding services are regarded as 'utilities ... by the national or local authorities' it can thus be concluded that the decision of a national or local authority will thus be crucial in determining whether a service is to benefit from an exemption in the list of specific concessions as a public utility.

In general, 'public utilities' are energy and water suppliers or public transport operators that are socially necessary, are usually controlled by a state or private monopoly and thus tend to be subject to special state regulation. This understanding of the term refers to large, network industries, in particular energy and water

⁷² 'Public utilities exist in sectors such as related scientific and technical consulting services, R&D services on social sciences and humanities, technical testing and analysis services, environmental services, health services, transport services and services auxiliary to all modes of transport. Exclusive rights on such services are often granted to private operators, for instance operators with concessions from public authorities, subject to specific service obligations. Given that public utilities often also exist at the sub-central level, detailed and exhaustive sector-specific scheduling is not practical. This reservation does not apply to telecommunications and to computer and related services.'

⁷³ Graham, *Regulating Public Utilities – A Constitutional approach*, 2000, p. 1.

supply, as well as transport. It is more precise than the description in the above-mentioned footnote, which also includes research, development and health care services. The general understanding of the term ‘public utilities’ implies some notion of a social need. This aspect can also be adduced for the interpretation of the term. ‘Public utilities’ are, accordingly, all services that are necessary for society because they meet a public need.

(4) Assessment

The key challenge with regard to definitions of public services in trade agreements concerns the dynamic and changeable nature of the concept itself. Public services are defined by a certain society in a certain historical, social and economic context and based on the relevant values of society. This implies social and political value judgements that can vary in different parts of the world and at different historical moments. The variety and changeability are thus key features of the notion of public services. Thus numerous services traditionally considered public services have in recent years been subjected to liberalisation and privatisation processes, thereby diminishing the conceptual scope of public services. Most recently, by contrast, in many countries there has been a tendency towards remunicipalisation, which could result in the near future in the term being expanded once again and its scope enlarged. Exception clauses for public services in trade agreements must thus be flexible and open enough to be able to adapt to any changes undergone by their object; at the same time, however, they must also be precise enough to ensure that they really exclude those sectors and services from the scope of application of trade agreements that count as public services.

Exception clauses for public services based on closed lists may be precise and transparent, but they lack the required flexibility. Functional approaches, such as Art. I:3 (b) GATS, may be flexible enough, but their scope of application changes depending on how the provision of a certain service is organised. As soon as commercial or competitive elements are introduced into provision of the service the corresponding activity is no longer in the scope of application.

(b) Level of protection

Besides the objective area encompassed by a norm their reach is decisive for their protective effects for the benefit of public services.

(1) Complete exclusion

Exception provisions for public services, such as Art. I:3 (b) GATS, apply to all provisions of an agreement and exclude the services and activities they list from the trade agreement as a whole. These provisions are typically found in the framework agreement. They have the furthest-reaching scope of application. They are not restricted to market access and national treatment, but also apply to all other obligations. Services and activities that are encompassed by the exception clauses are excluded from the trade agreement in its entirety. The rationale behind these general exceptions in the framework agreement is that the activities encompassed by the clause generally do not count as economic or commercial activities that should or could be liberalised. An exception clause for public services in the framework agreement applies to all parties to the agreement equally because the framework agreement – in contrast to specific lists – binds all members.

(2) Exemptions and limitations of specific commitments

Besides the exception clauses for public services in the framework agreement there are also exception clauses – as already mentioned – in the lists of commitments of individual countries. These clauses apply only to the particular country that makes use of them and only in relation to the disciplines that are subject to specific commitments and limitations. According to GATS’s traditional positive list approach this applies only to market access and national treatment.

Exemptions for public services can be embedded in the horizontal part of a list of commitments based on the positive list approach. In this case the exemption applies to all sectors with specific commitments. Similarly, exemptions can apply to all sectors of a list of reservations based on the negative list approach. Besides that, exception clauses for public services can be integrated in sector-specific commitments or limitations. According to this approach the application of the specific commitments of a trade agreement are excluded or restricted in the context of sector-specific commitments. Instead of regulating the scope of application of their commitments at a horizontal level, countries exclude those parts of a service that they consider to be public services at the sectoral level.

An example of this is the already mentioned ‘public utilities’ clause used by the EU in many trade agreements. This clause excludes public services from the application of the disciplines of market access, although only in relation to monopolies and exclusive rights of service providers. Furthermore, this applies only for GATS mode 3 (commercial presence). The exception clause for public services is a key part of the current EU standard model for the purpose of excluding the application of certain market access obligations to public services. This exception clause encompasses all monopolies and exclusive rights, regardless of when they were introduced. Member States can thus reintroduce monopolies into those services they consider to be public services because the measures that count as public services in such sectors are not covered by their specific obligations.

Sector-specific exemptions apply only to the relevant sector. Examples of this kind of exemption include the already mentioned specific GATS commitments of the EU that are restricted to privately-funded education services. The difference between public and private funding of services was also introduced as a criterion in recent trade negotiations. Reference to this criterion may appear attractive at first sight, because it means that only privately-funded services are the object of liberalisation obligations. However, the devil is in the details: first, it must be defined whether ‘public funding’ means 100 per cent public funding or whether it is enough that more than 50 per cent of the funding is public. Secondly, it has to be established on what basis the distinction is being made. Is the basis the – publically funded – university or a certain course of studies financed by contributions from students and private sponsors? Some of these problems can be avoided if the exception clause refers to services ‘that in whatever form always receive public funding or state aid’ as in the recently published CETA commitments because this would in any case include institutions funded either wholly or in part by the state.

(3) Exemptions from other obligations

In addition to the exemptions for public services in the relevant lists of commitments that apply only to specific obligations sectors trade agreements can also contain exception clauses that apply to other obligations. For example, such clauses can reduce the application of certain general regulations of a trade agreement, such as disciplines for subsidies or procurement. These clauses thus do not have the effect of exemptions from the agreement as a whole, but only from certain obligations. Finally, specific clauses, especially in the context of lists of commitments or reservations, can provide that certain internal state regulations, such as public service obligations, must be complied with. In these cases the focus is not on exempting a certain discipline from the trade agreement, but on maintaining compliance with a certain measure, regardless of what obligations of the trade agreement could thereby be infringed.

(4) Assessment

The levels at which the parties to a free trade agreement introduce exception clauses for public services are of decisive significance for the scope of application of these clauses. Exception clauses in the core agreement apply to all parts of the agreement and thus exclude public services, to the extent that they are covered by the clause, from the agreement as a whole. It follows from this that an exception clause at this level confers on public services the broadest protection from the effects of the relevant trade agreement. In contrast, exception clauses at the level of the lists of commitments and reservations shall apply only to certain disciplines, typically to national treatment, market access and most-favoured nation status. Other obligations in the trade agreement, such as disciplines concerning internal state regulation, subsidies and procurement, continue to apply to the extent that they generally apply to services. Sector-specific exemptions for public services in list of commitments and reservations apply only to the specific sector and in general have no effects on other public services in other sectors. Exemptions in sector-specific annexes apply mainly to the agreement as a whole and not only to certain obligations. They are limited to the sector to which they refer, however.

(c) Relationship between scope and level of protection

The practice of previous free trade agreements is based on an inverse correlation between the objective scope and the level of protection for public services. While general exemptions, such as Art. I:3 (b) GATS, guarantee the highest level of protection, because they signify complete exemption, their substantive scope of application is narrow and thus their consequences are minor with regard to the protection of public services. Sectoral exemptions, which restrict specific obligations to privately-funded services, have broader scope of application because they aim to protect all activities in the relevant sector that count as publically financed. However, their level of protection is lower because they exclude only the applicability of key disciplines, for example, market

access and national treatment. Finally, ‘public utilities’ clauses have the broadest objective scope of application. However, to date they have applied only to two types of restriction on market access and thus have only narrow scope.

V. Liberalisation of trade in services in the TTIP

Because no draft text is available for TTIP a comprehensive analysis based on the existing model is not possible. Instead, elements that are sure or highly likely to appear in the agreement, based on current information, shall be examined with regard to their effects on public services. To that end the general analytical elements that have been developed in the preceding sections shall be used in specific cases.

1. Exception clause for services supplied in the exercise of governmental authority

It is almost certain that the TTIP will contain an exception clause for services supplied in the exercise of governmental authority along the lines of Art. I:3 (b) GATS. As already mentioned, the European Commission’s negotiating mandate contains the remark: ‘services within the meaning of Article I para 3 of the GATS agreement, which are provided in the exercise of governmental authority, are excluded from the negotiations’.⁷⁴ Because this exemption is to be found in all EU free trade agreements, including CETA, we must assume that it will also be found in TTIP. The exception clause is likely to refer to both investments (establishment, GATS mode 3) and cross-border service provision (GATS modes 1 and 2).

We can also assume that the term ‘services supplied in the exercise of governmental authority’ will not be defined differently from in GATS and in other EU free trade agreements, including CETA. Accordingly, only services that are provided ‘neither for commercial purposes nor in competition with one or more service providers’ will be covered by the exception clause. The qualification ‘for example’ used in the EU–Central America free trade agreement was evidently not adopted in CETA. It is thus probable that it will also be missing from TTIP.

Thus the objective scope of application of the exception clause for public services in the exercise of governmental authority in TTIP is likely to be as narrow as in GATS and in other EU free trade agreements. Because the definition of the term services supplied in the exercise of governmental authority refers cumulatively to the non-commercial basis and the exclusion of competition this clause would also cover only the core area of sovereign state activities such as police, justice, administration, the penal system and public safety.⁷⁵ Services of general economic interest or services of general interest that are partly provided commercially or in competition with private operators would definitely not be excluded.

Given this clear finding it is also not surprising that the exception clause for services in the exercise of governmental authority plays no special role with regard to the protection of public services in TTIP, from the European Commission’s standpoint. In an online contribution entitled ‘Protecting public services in TTIP and other EU trade agreements’ of July 2014 the European Commission details several mechanisms with which the high standard of European public services can be safeguarded within the framework of the negotiations.⁷⁶ It does not deal with the exception clause for governmental authority. This makes it clear that no special value is attributed to this clause with regard to public services.

2. Substantive obligations

Most agreements on trade in services contain certain standard obligations, which are also found in GATS. The most important are the principles of non-discrimination (most favoured nation status and national treatment) and market access obligations.

⁷⁴ No. 20 Negotiating guidelines (Fn. 7).

⁷⁵ On this see above IV.3.a) (1).

⁷⁶ Article X.6 (2) CETA Chapter on Investment.

(a) National treatment

The principle of national treatment requires that foreign services and service providers are not treated less favourable than national services and service providers. This obligation prohibits, first and foremost, any direct discrimination between foreign and national services and their providers. By direct discrimination are meant measures that are aimed directly at the ‘origin’ of a service or of a service provider.⁷⁷

For this reason all regulatory and financial measures that give preference to national companies compare to foreign service suppliers are incompatible with the principle of national treatment. Subsidies reserved solely for national companies or paid only for the consumption of national services are covered by this, as is the exclusion of foreign companies from the provision of a service.

There is a particular problem with regard to more favourable treatment of a service provider or service in a subcentral entity (region, province, *Land*) in comparison with another subcentral entity in the same member state. If, for example, foreign private education providers in Hamburg are treated better than in Bavaria this could constitute a violation of national treatment. A foreign service provider could invoke the better treatment in Hamburg against Bavaria because the treaty refers to the Federal Republic as a whole (not to the individual states). In order to prevent this the principle of national treatment could be specified for such constellations such that in these cases it refers only to treatment by the respective regional entity. Such a provision is found in the text of CETA, which provides a basis for TTIP.⁷⁸

Furthermore, the principle of national treatment also covers indirect or disguised discrimination. This is deemed to exist when a formally neutral measure in fact imposes a heavier burden on foreign enterprises than on domestic ones.⁷⁹

The principle of national treatment can, on one hand, come into conflict with the provision and regulation of services if the competent decision-makers prefer local or regional service providers to ensure that the services are made available ‘as closely as possible to the needs of the users’ (Article 1, Protocol No. 26 on services of general interest). Moreover, financial aid to public service providers is often given in such a way that a domestic service provider benefits.

(b) Market access

The obligation of market access in free trade agreements as a rule prohibits a number of quantitative and qualitative market access restrictions if no specific limitations exist. Most free trade agreements take their bearings from Art. XVI:2 GATS.⁸⁰ Accordingly, market access restrictions include public monopolies, exclusive rights granted to private service providers (so-called exclusivity rights) and economic needs tests. Economic needs tests restrict the number of service providers on the basis of needs in order to prevent ruinous competition that could endanger the security and quality of services.

Typically, formal legal requirements or restrictions are considered to be market access restrictions. If only certain forms of company are authorised to operate in a certain sector or certain forms of company are excluded

⁷⁷ Diebold, *Non-discrimination in International Trade in Services*, 2010, p. 35.

⁷⁸ European Commission, *Public consultation on modalities for investment protection and ISDS in TTIP*, Consultation Document, Art. X.1, p 20, available online at: http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf

⁷⁹ Diebold, *Non-discrimination in International Trade in Services*, 2010, p. 38.

⁸⁰ ‘In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

(a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;

(b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;

(c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;

(d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;

(e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and

(f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.’

this would be regarded as a market access restriction. A law that, for example, provides for municipal water supply and waste management only in the form of a municipal company, an AöR (*Anstalt des öffentlichen Rechts*: institution under public law) or GmbH (limited liability company) and, for example, excludes AGs (Aktiengesellschaft: company limited by shares), could be regarded as a restriction of market access.

To the extent that market access obligations prohibit monopolies, exclusivity rights, economic needs tests and formal legal requirements they are directed against traditional means of providing and regulating public services. States that wish to maintain such instruments or to introduce or re-introduce them face pressure to justify themselves and have to ensure that the relevant measures are included in the lists of limitations. Although monopolies and other market access restrictions continue to be possible if the lists are drawn up in the right way public authorities could be prompted to transfer the provision of the services in question to the most 'efficient' provider within the framework of a competitive tender procedure, which will not necessarily lead to the highest quality service.

Because market access obligations can also restrict a state's regulatory autonomy a free trade agreement can declare certain regulatory measures to be compatible with market access obligations. In CETA, for example, municipal planning guidelines concerning the development and use of land or measures that provide for ownership unbundling by separating ownership of the network infrastructure from the provision of services on this network or whose purpose is to protect natural resources were recognised as compatible with the market access obligation.⁸¹ However, there is no general recognition of this kind with regard to local measures for protecting public services. However, they could be integrated in a market access obligation.

A key question with regard to the provision of public services in Germany is whether the market access obligation also encompasses local public monopolies or whether only national and regional monopolies come within the scope of application of the obligation. With regard to Art. XVI:2 GATS this question remains controversial because this talks only about measures at national and regional level. In other agreements – such as CETA – by contrast it is expressly clarified that the prohibition on specific market access restrictions also applies to the local level.⁸² If TTIP contains the same formulation that would mean that a monopoly established at municipal level would be compatible with TTIP only if a corresponding exception was formulated or that no commitments had been made in the relevant sector. In CETA a partial exemption exists: Article X.14 (1) of the CETA chapter on investment states that the market access obligation does not apply to an existing measure maintained at the level of a local government. However, this does not cover future measures of local governments or changes of an existing measure.

Given these consequences of market access obligations the corresponding commitments or exceptions for public services are of particular importance. In the EU's draft offer of 26 May 2014, for example, a market access obligation in mode 3 (commercial presence) for waste water services, as well as all other environmental services, is proposed. Models of public waste water services would thus be protected only if they fell under the public utilities clause. This offer would thus go further than the obligations under CETA. The draft of the TTIP offer grants almost unlimited market access for privately-funded education services in most member states. With regard to health and social services the TTIP offer is limited to privately-funded services to which market access is granted. Some Member States, however, have excluded these commitments, in particular for ambulance services. The commitments for social services are limited to old people's and care homes in most member states.

3. Scope of obligations

(a) The 'public utilities' clause

The EU is also taking the approach of protecting public services with the so-called 'public utilities' clause within the framework of the TTIP negotiations. This clause is, as a rule, included as a restriction in the horizontal part of market access obligations and also used for an Annex II exemption⁸³ in CETA.⁸⁴ It is also

⁸¹ Article X.4 CETA Chapter on Investment

⁸² 'Neither Party shall adopt or maintain with regard to market access through establishment by an investor of a Party, either on the basis of its entire territory or on the basis of the territory of a national, provincial, territorial, regional or local level of government, measures that ...'

⁸³ On the function of Annex II exemptions see 4. b).

⁸⁴ Cf. the text of the exemption in the Annex of this study at 2. a) (1).

found in the EU's offer within the framework of the plurilateral agreement on trade in services (TiSA)⁸⁵ currently being negotiated by the EU, the United States and 20 other WTO members. The 'public utilities' clause is also used within the framework of the offer for the TTIP negotiations. In that connection in all instances it goes no further than a restriction of the clause to the market access obligation and here applies specifically to monopolies and exclusive service providers.

On the DG Trade website devoted to the relationship between TTIP and public services the 'public utilities' clause is characterised as an important element of the guarantee for public services.⁸⁶ The European Commission explains the clause as follows: 'EU governments are free to decide what they consider to be public "utilities" or services. If they wish, EU governments can organise these services so that just one supplier provides the service – what economists call a "monopoly". This single provider can be publicly owned ("public monopoly") [or] a private firm which has the right to offer a particular service ("exclusive rights").'

As already mentioned the precise content of the term 'public utilities' is not clear. Thus the objective scope of the corresponding clause is also unclear, which evidently leads to irritations on the part of the EU negotiating partners. The European Commission, too, was not always sure about the term. In an earlier phase of the negotiations with Canada, at least, consideration was given to replacing the term in CETA with terminology more in keeping with European law (such as services of general economic interest).⁸⁷ However, in the final version of CETA this, in any case, not unproblematic approach⁸⁸ was not developed further. Instead, the term 'public utilities' continued to be used. This is probably due to the fact that the use of European-law terminology would not have brought about greater clarity.

More significant than precise determination of the objective scope of the term 'public utilities' is the fact that the clause, in its usual usage, refers only to the obligation to provide market access and concerns only two restrictions on market access, namely monopolies and exclusive service providers. Other restrictions, such as quotas or economic needs tests, are not covered and could thus not be protected by means of the 'public utilities' clause. Apart from that, discriminatory measures, such as subsidising local companies, could not be safeguarded by this clause. Thus the 'public utilities' clause turns out to be an effective instrument of protection only with regard to monopolies and exclusive service suppliers.

(b) Restriction to 'privately funded' services

Besides the 'public utilities' clause the EU uses another approach to the protection of public services in its free trade agreements. Thus the commitments with regard to educational, social and health services apply only if the corresponding service is 'privately funded'. The restriction has also been used by the EU – as well as by other OECD states⁸⁹ – in its GATS concessions in the area of education. In more recent free trade agreements this qualification was also carried over to social and health services. This restriction, like the 'public utilities' clause, is regarded by the European Commission as an essential element of the protection of public services in free trade agreements.⁹⁰

In the GATS commitments the term 'privately funded' is not further defined. Thus it is not clear whether complete private funding is required or whether mixed funding from both private and public resources can be regarded as 'privately funded'.⁹¹ In more recent agreements the EU has tried to make the term 'private funding' more precise. For example, in the EU's lists in CETA it says that 'educational services which receive public funding or State support in any form ... *are therefore not considered to be privately funded*'.⁹² One can

⁸⁵ European Commission, The EU initial offer (November 2013), available online at: http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152689.pdf.

⁸⁶ European Commission, Protecting public services in TTIP and other EU trade agreements (Fn. 3).

⁸⁷ European Commission, Reflections Paper on Services of General Interest in Bilateral FTAs (Applicable to both Positive and Negative Lists), 28 February 2011, available online at:

http://www.s2bnetwork.org/fileadmin/dateien/downloads/EUC_Reflection_Paper_Services_of_General_Interest.doc; European Commission, Commission Proposal for the Modernisation of the Treatment of Public Services in EU Trade Agreements, 26 October 2011, available online at: http://www.epsu.org/IMG/pdf/154b-11_EC_paper_on_public_services_.pdf.

⁸⁸ On this see Krajewski, Public services in the Draft Canada-European Union Economic and Trade Agreement (CETA), available online at: http://www.epsu.org/IMG/pdf/Public_services_in_the_CETA.pdf

⁸⁹ Choudhury, Public Services and International Trade Liberalization, 2012, p. 201.

⁹⁰ European Commission, Protecting public services in TTIP and other EU trade agreements (Fn. 3).

⁹¹ Cremer et al., Bildungsdienstleistungen im GATS, ZeuS 2011, p. 159.

⁹² Author's emphasis. A comparable definition is so far not discernible in the draft of the EU's TTIP offer of 26 May 2014.

conclude from this that partial public funding or state aid would mean that the subsector in question is not to be covered by the obligations of the free trade agreement.

If this means that exclusive public funding is not required the question nevertheless arises of what ‘public funding’ means. The funding of services from the general budget is likely to be considered ‘public funding’ without further ado. But it is less clear how specific fees, such as waste collection fees, are to be evaluated. Given that such fees are paid by the recipient of the service it could be argued that fees represent a form of private funding. On the other hand, in light of the fact that these fees are imposed by the authorities and are based on an obligation to contract they could be considered to come under ‘state support in any form’. As far as can be seen, there is no clarity on this issue.

There is a comparable problem with health and education services– that are partly funded with compulsory co-payments from the service recipients. Can, for example, tuition fees paid by students to a university be characterised as ‘public funding’? Do contributions to a statutory health insurance scheme count as ‘public funding’? Here, too, there continue to be considerable uncertainties.

Clarification of the term ‘privately funded’ also makes it clear that one must have regard to the funding of the service, not to that of the service provider. If a publically funded service provider provides a service that is exclusively privately funded – that is, by the recipient of the service – the restriction does not apply. If a state university, for example, offers a further training course whose costs are fully covered by student fees this course could be regarded as a privately funded education service.

If a service is not ‘privately funded’ it is still subject to the general obligations of the free trade agreement, such as the most favoured nation principle and the transparency principle. The obligations concerning market access and non-discrimination do not apply, however. Thus the restriction of these specific commitments on privately-funded services represent a further level of protection⁹³ than the ‘public utilities’ clause. However, the objective scope of application of exemptions for publically funded services is likely to be narrower than that of the ‘public utilities’ clause because the latter also covers privately-funded services and service providers.

4. Liberalisation obligations in the case of a negative list approach

Whether and in what way the abovementioned obligations apply to certain sectors also depends on the structure of the liberalisation obligations, in particular the question of whether the relevant agreement employs a positive list or a negative list approach. GATS and all EU agreements that have come into force to date are based on a positive list approach. CETA, negotiated with Canada, by contrast, is a negative list agreement. The plurilateral agreement currently being negotiated on trade in services, TiSA, is to take a hybrid approach, that contains both negative and positive list elements.

The structure of liberalisation obligations in the area of trade in services has not yet been established for TTIP. It is very likely that the United States – as in almost all negotiations on bilateral free trade agreements – have formulated an offer based on a negative list. The EU’s offer has a hybrid character: while the offer concerning national treatment follows a negative approach,⁹⁴ the commitments concerning market access use a positive list approach. Thus the structure of the EU offer corresponds to the TiSA offer. It is doubtful whether this approach will be maintained. Although the European Parliament in a resolution of 2011 demanded that the negative list approach in CETA ‘should be seen as a mere exception and not serve as a precedent for future negotiations’,⁹⁵ it may be doubted that the European Commission, after already negotiating with Canada on the basis of a negative list approach, will in the negotiations with the United States, whose free trade agreements are all based on a negative list approach, insist on a positive list approach. On the other hand, the EU could, with reference to previous practice, and perhaps the demands of the European Parliament, initially insist on a positive list approach and abandon it only against further concessions.

It can be assumed, in any case, that the question of which approach TTIP will be based on is the object of negotiations and that the EU, in its own strategic interest, will not be willing to give up its positive list approach

⁹³ On this see above IV.3.b).

⁹⁴ The exceptions are not formulated in the annexes (Annex I and Annex II), however, but in Part A and Part B of a list, which is inserted in the table format of a positive list. In fact, despite this format, a negative list approach is taken.

⁹⁵ European Parliament, European Parliament resolution of 8 June 2011 on EU-Canada trade relations, P7_TA(2011)0257, para 5.

from the outset. Because a purely negative list approach is a more difficult undertaking for the EU than for the United States the EU will try to obtain concessions in case it has to switch to a purely negative list approach.

(a) Function and significance of Annex I

If TTIP is based on a negative list approach we can assume that the limitations of liberalisation obligations will be in line with the approach typical of such agreements: Hence, existing measures which are not in conformity with one or more obligations of TTIP can be maintained only if they are expressly listed in Annex I of the agreement. In this Annex all existing measures (=laws or administrative practices) are listed that could infringe the agreement (so-called 'existing non-conforming measures'). These measures may then be retained. All measures that are not listed and which infringe the obligations shall be revoked ('List it or lose it').⁹⁶

As a rule, the structure of an Annex I exception consists of several elements. First, a description of the relevant sector or subsector is needed based on a recognised product classification, such as the Central Product Classification (CPC).⁹⁷ Furthermore, the specific obligation (or obligations) with regard to which the exception is established (most favoured nation status, national treatment, market access and so on) has to be mentioned. These two elements (sector description and obligation) determine the scope of the specific exception. Finally, the measure to which the exception is to apply has to be cited. This is done first and foremost by referring to the relevant law or the relevant provisions and then by describing the measure. Furthermore, Annex I exceptions often also contain a reference to whether and if the measure is to be revoked.⁹⁸ If the relevant measure refers to several sectors an Annex I exception can also be formulated as a horizontal exception. In this case a precise description of the sectors is omitted.

In the case of EU free trade agreements it is important to emphasise that, besides exceptions and commitments that apply to the EU as a whole, all member states can formulate exceptions and commitments. Thus in the case of an agreement with a negative list approach, both EU and member state measures can be found in Annex I. Similar structures of Annex I exceptions are also found in Canadian and US free trade agreements because here both national and provincial or federal-state measures are listed.

Measures listed in an Annex I are, as a rule, also subject to the so-called 'ratchet clause'. This states that a change in the measures listed in Annex I is permitted only if it is less restrictive than the relevant measure immediately before its amendment. As a result of this legally complex construction, once a measure listed in Annex I has been liberalised, that liberalisation cannot be revoked. Thus if an existing monopoly for public services was listed in Annex I it may be retained even if it infringes market access obligations. However, if the monopoly is subsequently abolished within the framework of a national liberalisation policy it can no longer be re-introduced at a later date, even though it is listed in Annex I.

The methodology of this approach can be illustrated using the specific example of an Annex I exception for postal services.⁹⁹ According to Art. 5 and 6 of the Directive on common rules for the development of the internal market of Community postal services and the improvement of quality of service 97/67/EC¹⁰⁰ the Member States are obliged to ensure the provision of certain universal services. To that end measures can also be taken that partly limit competition. According to Art. 8 of the Postal Services Directive Member States can regulate the siting of letter boxes on public roads, the issue of postage stamps and the delivery of registered mail within the framework of court or administrative proceedings to the exclusion of competition. The corresponding measures can infringe elements of the market access obligation and must thus be declared in Annex I as exceptions. If the EU were to revoke the cited restrictions on competition in the course of a further liberalisation of postal services and would open up all postal services to unlimited competition it would be committed to this unilateral liberalisation. It could not restore this opening up to competition to the level laid down in Annex I because this would lead to a more restrictive level than existed immediately before the further amendment.

It therefore appears that the ratchet clause can have a negative effect on state autonomy concerning the provision of public services. Within the framework of the most recent reforms in the area of public services

⁹⁶ Mattoo / Sauvé, Regionalism in Services Trade, in: Mattoo u.a. (Hrsg.), Handbook of International Trade in Services, p. 251.

⁹⁷ For example, 'Sector: Environmental Services – Sub-sector: Processing and recycling of used batteries and accumulators, waste oils, old cars and waste from electrical and electronic equipment – Industry classification: part of CPC 9402'.

⁹⁸ Examples of Annex I exceptions are given in the Annex of the present study.

⁹⁹ On this see also the example in the annex of the present study.

¹⁰⁰ OJ EU no. L 015 of 21.1.1998, p. 14.

renationalisations or remunicipalisations took place in some EU member states, in which liberalisation was de facto reversed.¹⁰¹ Such measures could be prevented in principle using a ratchet clause. Thus in particular with regard to reforms that are likely to lead to less competition this can have a restrictive effect.

The EU's draft offer for the TTIP negotiations does not contain any EU-wide or sector-specific exceptions for the so-called Annex I. There are only horizontal, that is, cross-sectoral exceptions for different member states. This can be explained by the fact that the EU's draft offer in the TTIP negotiations pursues a negative list approach only in relation to the obligation of national treatment and Annex I contains only existing measures. Clearly the European Commission is assuming that both at the EU level and in the member states there are no sector-specific, discriminatory measures.

(b) Function and significance of Annex II

Annex II to a free trade agreement based on the negative list approach, like Annex I, contains measures that contradict the central liberalisation obligations. However, Annex II contains not only existing measures but also all measures that will be retained or newly introduced by the respective parties. Thus Annex II also covers future measures. The ratchet clause does not apply in this context. Thus it is clear that states have significant autonomy only in relation to public services that are listed in Annex II. In order to ensure that autonomy concerning the provision and organisation of public services is not restricted by the liberalisation obligations of TTIP these would have to be listed in Annex II.

Similar to exceptions in Annex I, in Annex II the relevant sector and the provision of the agreement that is to be deviated from have to be cited. Besides that, a verbal description of the exception is required. Specifically affected measures can be cited. Because the Annex II exceptions have their effect primarily in the future, however, there is usually no reference to existing measures in the exceptions.

Public services can be referred to in Annex II either with a horizontal exception for public services or with sector-specific exceptions. A horizontal exception concerns measures or areas that apply across all sectors to all public services. In this case it must be ensured that the term used in the horizontal exception covers all relevant services. This is not unproblematic, for example, in relation to the term 'public utilities'.¹⁰²

In the case of sector-specific exceptions in Annex II, by contrast, it has to be borne in mind that there is the danger that protection refers to a static conception of public services.¹⁰³ Against this background a combination of horizontal and sector-specific entries in Annex II ensures the greatest protection for public services. The EU also seems to have taken this approach in CETA, which both contains the exception clause for 'public utilities' typical of EU agreements and EU-wide and member state-specific exceptions for various public services. The same applies to the draft of the EU's offer for the TTIP negotiations. Here there are sector-specific exceptions for environmental services, as well as publically funded education, health and social services, although they refer only to national treatment. The EU thereby makes it clear that it will reserve the right to enact discriminatory measures in future.

5. Exceptions for existing measures at the municipal level

With regard to services of general interest in Germany the question arises in particular of how municipal measures, such as local monopolies or local economic needs tests, are to be dealt with in connection with Annex I and Annex II and whether the ratchet clause applies only to national or regional level or whether municipal measures, too, are covered by it.

As already mentioned, free trade agreements in principle also encompass the municipal level. Thus municipal administrations are also bound to the obligations arising from the agreement. In the case of an agreement based on the negative list approach, therefore, municipal measures that are not in line with the obligations and are supposed to be retained have to be inserted in Annex I lists. Because this is scarcely practicable and would impose a severe technical challenge on both chief negotiators and municipal administrations existing local

¹⁰¹ See, for example, Pigeon, Wasser: Rekommunalisierung eines lebensnotwendigen Bereichs, in: Prausmüller/Wagner (eds), *Reclaim Public Services*, 2014, pp. 195 f.

¹⁰² On this see above V. 4. a).

¹⁰³ On this see above IV. 3. a) (2).

measures are already largely treated as exceptions in negative list agreements.¹⁰⁴ Local measures are thus treated as if they were mentioned in the Annex I list. However, that applies only to existing and not to future measures. CETA will also contain a corresponding general exception for existing local measures. We can assume that TTIP will not differ in this respect.

A separate question from the general exception for existing local measures is whether the ratchet clause also applies to these measures. Establishing an exception from this is also conceivable. In the practice of free trade agreements, however, this is not usually the case. Thus a liberalisation at local level also generally entails that local trade barriers existing when the agreement comes into force cannot be re-introduced if the exceptions are only listed in Annex I. As the ratchet clause also applies to remunicipalisations it depends, on one hand, on how the remunicipalisation is carried out and on the other hand, on how far-reaching the free trade agreement's liberalisation obligations are. If the remunicipalisation leads to a de facto monopoly and no exception is foreseen for this the measure could infringe the market access obligation.

Exceptions in Annex II cover all state measures, without restriction to the central state level. The regulatory leeway and scope for action protected by the Annex II exceptions thus encompass the local level, too. That also means, however, that for sectors for which there are no Annex II exceptions there is no possibility even at local level to deviate from the obligations of the agreement. Thus the negotiators must ensure, on behalf of municipal administrations and local decision-makers, on a fiduciary basis, that the sectors relevant for municipalities are mentioned in Annex II.

Germany has laid down a corresponding exception in Annex II of CETA with regard to waste management. Accordingly, Germany reserves the right to adopt or maintain any measure related to the designation, establishment, expansion or operation of monopolies or exclusive services suppliers providing waste management services.¹⁰⁵ In this way the tasks of waste management, which in Germany are overwhelmingly carried out at municipal level, are exempted from parts of the obligation concerning market access. As far as can be seen, there is no comparable restriction of the market access offer in the draft of the TTIP offer of 26 May 2014. Rather an unrestricted market access offer is ceded.

VI. Procurement, competition and energy

The obligations with regard to service liberalisation are not the only areas of TTIP that could affect public services. Regulations on public procurement, competition and energy could also have consequences for the provision and organisation of public services.

1. Public procurement

According to paragraph 24 of the negotiating directives the TTIP agreement 'shall aim for the maximum ambition' with regard to public procurement. To that extent it should go beyond the recently revised General Procurement Agreement (GPA) and 'aim at enhanced mutual access to public procurement markets at all administrative levels (national, regional and local)'. The European Commission position paper on the issue of public procurement confirms that a GPA-plus approach is to be pursued in TTIP.¹⁰⁶ Within the framework of the GPA the EU has committed, among other things, public transport services, financial services and telecommunications services, as well as waste and sewage management and other disposal services to the disciplines of the GPA. Thus TTIP is likely to aim, among other things, at 'enhanced mutual access' to 'procurement markets' in 'utilities'. Because the negotiating partners have also raised the issue of public-private partnerships (PPPs) it is obvious that public companies with private shareholders could be the aim of such new measures for enhanced market access.

¹⁰⁴ See, for example, Art. 1108 (1) (a) (iii) and 1206 (1) (a) (iii) NAFTA, which, however, only refer to discriminatory measures. A different mechanism applies for the removal of market access restrictions.

¹⁰⁵ See the formulation of the exception in the annex of the present study.

¹⁰⁶ European Commission, Public Procurement, Initial Position Paper, 16 July 2013, available online at: http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151623.pdf

The GPA does not include any service concessions of the kind used, for example, for the organisation of drinking water supply by municipal companies. It is thus conceivable that ‘ambitious’ regulations in TTIP are also to encompass the area of concessions. According to the State of Play document¹⁰⁷ the EU informed the US in one negotiating round about the new directive on the award of concession contracts and answered questions about concessions. Besides concessions other issues could feature in the negotiations. The EU position paper mentions, for example, state-owned enterprises, other public undertakings and companies with special and exclusive rights. Thus municipal companies and companies could be covered that are entrusted with special public service obligations and thus can claim certain special rights.

The establishment of new threshold values with regard to public procurement is always difficult, both in the European and the international context, and thus a change in the threshold values for tenders in TTIP would seem improbable. On the other hand, enhanced access to procurement markets at all levels¹⁰⁸ – that is, also at local level – is to be striven for.

In particular, procurement at local level and for SMEs is sometimes characterised by low order volume and thus would have to be put out to tender on a transatlantic basis with lower threshold values. The discussions on public procurement must thus be monitored in view of the possibility of changes in threshold values.

In order to protect public services it must be ensured, within the framework of the chapter on public procurement, that in critical areas such as services concessions or public companies no disciplines are agreed that restrict organisational autonomy for public services. It must also be ensured that tried and tested forms of inter-municipal cooperation on the provision of public services are respected or that no additional tender obligations are imposed on such cooperation compared with current EU law.

2. Energy

In its published position paper on energy and raw materials the European Commission identified several possible aspects of competition on which TTIP could impose regulations.¹⁰⁹ In particular, price setting for the domestic market for industrial users is to be restricted and other special regulations for state-owned companies and companies with special rights are to be discussed. In a leaked Non-Paper on raw materials and energy¹¹⁰ regulations are proposed on domestic price regulation and in the area of renewable energy. Municipal energy suppliers face particular challenges, especially in view of the impending ‘energy transition’ in Germany. Switching to the use of renewable energies is not only an ideological question, but also requires long-term and substantial financial planning. In particular the discussion about the compliance of Germany’s Renewable Energy Act and its reform with EU law has shown that municipal companies usually have to plan financially well in advance. Regulations that restrict domestic price regulation and regulatory policy measures to support the renewable energy market could thus be particularly sensitive. Developments with regard to energy and raw materials should thus be closely monitored not only with regard to environmental protection considerations so that the switch to renewable energies) also remains economically sustainable.

3. Competition and state aid

According to the State of Play document there was the first exchange of views on state-owned companies and state aid at the sixth negotiating round on the subject of competition. There is already an elaborate system of regulations in the realm of both law on state aid and law on the provision of public services by public companies at both national and European level, which is supposed to prevent distortions of competition, for example, the ban on cross-subsidisation with regard to state aid for services of general economic interest.¹¹¹

¹⁰⁷ State of Play of 29.06.2014, available online at: http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152666.pdf

¹⁰⁸ See No. 24 of the negotiating directives.

¹⁰⁹ Initial Position Paper ‘Raw Materials and Energy’, available online at: http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151624.pdf.

¹¹⁰ Non-paper on energy and raw materials of 20.09.2013, available online at:

<http://big.assets.huffingtonpost.com/TTIPNonPaper.pdf>.

¹¹¹ See Commission Resolution of 20 December 2011 on the application of Article 106 para 2 TFEU on state aid in the form of compensatory payments to certain companies entrusted with the provision of services of general economic interest, Article 5 para 3 lit.b.

An unpublished negotiating document on competition rules also reveals that the EU may include competition rules in TTIP that refer to state-owned enterprises and companies with special and exclusive rights. These companies are to be subjected to the general competition rules, according to the EU proposals.

VII. Investment protection

The planned TTIP chapter on investment protection and on investor-state dispute settlement has given rise to particular public criticism. The effects of investment protection on public services are distinct from the effects of a pure trade agreement. On one hand, the chapters on investment protection do not compel market opening. This would apply to foreign investments only if the investment takes place in the host country ('post establishment'). However, some fundamental standards of investment protection, such as the principle of 'fair and equitable treatment', or the obligation to compensate indirect expropriations, restrict the scope of regulation with regard to public services.¹¹²

Thus a regulation that imposes public service obligations on foreign investors could be regarded as a violation of fair and equitable treatment. Similarly, the establishment of a price ceiling could be considered to be indirect expropriation if it substantially reduced the value of a foreign investment. It is thus important to ensure that the chapters on investment protection do not restrict the right to regulate. This is all the more important because investment agreements usually do not contain exception clauses on public services, such as Article I:3 (b) GATS; nor do they contain general justification norms.

Investor-state dispute settlement (ISDS) would give private investors the possibility to challenge a state measure before an ad hoc international investment arbitration tribunal without having first to go through the national legal system. This striking element of international investment agreements is the basis for the dynamic development of international investment law.

Numerous investor-state disputes that have already been decided concern public services, especially water and energy supply. For example, a few years ago several investment protection proceedings were instigated against Argentina and Tanzania after the previous privatisation of water supply had been reversed and concessions that had been bestowed on foreign investors were revoked.¹¹³ Two other cases concerned actions brought by a Dutch company against health sector reforms in Slovakia.¹¹⁴ Despite these cases comprehensive and systematic arbitration practice is still lacking with regard to public services and investment protection.

Within the framework of consultations on the investment protection chapter in TTIP the European Commission has posed several questions concerning the structuring of the chapter and has presented its own conception. However, nothing specific was said about the effects of TTIP on public services in this framework. The proposals concerning specification of the terms 'indirect expropriation' and 'fair and equitable treatment' contained no particular formulations concerning the protection of public services.

VIII. Findings and legal policy recommendations

The foregoing remarks have shown that TTIP is likely to affect public services in multiple ways. The effectiveness of approaches to public services available in current EU practice with regard to free trade agreements is only limited: on one hand, they lack legal and conceptual clarity, while on the other hand they do not appear sufficiently flexible to be able to adapt to a transformation of public services.

In general, the existing provisions do not offer public services adequate protection against the effects of obligations arising from trade agreements. Every reform proposal must therefore attempt to strike a balance between the requisite level of legal clarity and the necessary legal flexibility.

¹¹² Krajewski, *Investment Law and Public Services*, in: Bungenberg et al., forthcoming.

¹¹³ See, for example, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A./Argentine Republic*, ARB/97/3; *Azurix Corp./Argentine Republic*, ARB/01/12; *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A./Argentine Republic*, ARB/03/17 and *Biwater Gauff (Tanzania) Limited/United Republic of Tanzania*, ARB/05/22.

¹¹⁴ *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (formerly *Eureko B.V. v. The Slovak Republic*) and *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2013-12.

As shown above, an exception clause, of the kind used in GATS, is problematic because it contains an ambiguous definition of the term ‘governmental authority’, which strengthens neither the substantive scope of application nor the level of protection. It would thus be conceivable to delete the additional definition and simply exclude the application of trade agreements from those activities and services that ‘count in the jurisprudence of the relevant party/member as the exercise of governmental authority’. Such a provision would make it clear that core state functions, as defined in the legal system of the relevant country, are excluded from the scope of application of the trade agreement.

For the remaining large area of public services that come within the scope of application of the agreement the EU and its member states should use the term ‘public services’ and define them as ‘services subject to specific regulatory regimes or characterised by specific obligations that are imposed on service providers at national, regional or local level in terms of the public interest’. This definition would reflect an understanding of public services in line with that of most countries in the world and, at the same time, avoid the ambiguity of the term ‘public utilities’.

On this basis exceptions could be made to all obligations arising from the principle of market access and national treatment. Within the framework of a positive list approach this can be done by means of a horizontal restriction. Compared with the EU’s current ‘public utilities’ clause such a broader restriction with regard to public services would result in more legal certainty because it avoids the ambiguous term ‘public utilities’. Furthermore, it would not concentrate on only two aspects of the obligation of market access (monopolies and exclusivity rights). In the context of a negative list approach an exception clause for public services would have to apply to all sectors and reservations with regard to existing and future measures (Annex II). Such a reservation could be formulated as follows: ‘With regard to public services the party shall reserve the right to restrict the number of services and service providers, to impose specific obligations on service providers and to regulate the provision of these services in the general interest’. It should be stated explicitly in this connection that this refers to market access and national treatment.

Finally, the EU and the member states should formulate sector-specific exceptions in Annex II. This can apply, for example, to water supply and waste management, but also to other sectors, such as education, health care and social services. If a differentiation is to be maintained between privately and publically funded services this should be defined precisely.

Within the framework of other chapters of TTIP, in particular on procurement, energy and competition, care should be taken to ensure that no restrictions are applied to particular forms of provision (state-owned companies, service concessions, PPPs or municipal cooperation).

Annex

Remark: The following examples come from the EU’s Annex I and Annex II lists for CETA in the version of 4 August 2014.¹¹⁵

1. Examples of Annex I exceptions

(a) EU-wide exception

Sector:	Communications services
Sub-sector:	Postal services
Industry classification:	part of CPC 751, part of CPC 71235, part of CPC 73210
Type of reservation:	Market access
Measures:	Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market

¹¹⁵ The Annex I and II lists were – along with other CETA documents – leaked by Tagesschau, see: <http://www.tagesschau.de/wirtschaft/ceta-101.html>

Description:	<p>of Community postal services and the improvement of quality of service, as amended by Directive 2002/39/EC and Directive 2008/06/EC</p> <p>Cross-Border Services and Investment</p> <p>In the EU, the organisation of the siting of letter boxes on the public highway, the issuing of postage stamps, and the provision of the registered mail service used in the course of judicial or administrative procedures may be restricted in accordance with national legislation.</p> <p>Licensing systems may be established for those services for which a general Universal Service Obligation exists. These licences may be subject to particular universal service obligations and/or a financial contribution to a compensation fund.</p>
Phase-out:	None

(b) Exception for a member state (Germany)

Sector:	Business services
Sub-sector:	Medical and dental services, midwives services, services provided by nurses
Industry classification:	CPC 9312, CPC 93191
Type of reservation:	National treatment, market access
Level of government:	National and sub-federal
Measures:	<p>Federal Medical Code, Act on practicing dental medicine, Act on the professions of psychological psychotherapists and child and adolescent psychotherapists, Act on the professional practice of medicine without a licence, Act on the profession of midwife and male midwife, Act on nursing professions, § 7 para 3</p> <p>Professional Code of Conduct for Physicians, §§ 95, 99, 291b SGB V, Act on the health profession chamber of the <i>Land</i> Baden-Württemberg (...) ¹¹⁶</p>
Description:	<p>Cross-border services and investment</p> <p>Geographical restrictions may be imposed on professional registration, which apply to nationals and non-nationals alike. Doctors (including psychologists, psychotherapists, and dentists) need to register with the regional associations of statutory health insurance physicians/ dentists (<i>kassenärztliche/zahnärztliche Vereinigungen</i>), if they wish to treat patients insured by the statutory sickness funds. This registration can be subject to quantitative restrictions based on the regional distribution of doctors. For dentists this restriction does not apply. Registration is necessary only for doctors participating in the public health scheme. Non-discriminatory restrictions on the legal form of establishment required to provide these services may exist (§ 95 SGB V).</p> <p>For medical, dental and midwives services, access is restricted to natural persons only.</p> <p>Establishment requirements may apply.</p> <p>Telemedicine may only be provided in the context of a primary treatment involving the prior physical presence of a doctor.</p> <p>The number of ICT-service providers may be limited to guarantee interoperability, compatibility and necessary safety standards. This is applied in a non-discriminatory way.</p>
Phase-out:	None

2. Examples of Annex II exceptions

a) EU-wide exceptions

(1) Horizontal exception ('public utilities)

¹¹⁶ Other *Land* laws and provisions could be mentioned, but there is no room here for their inclusion.

Sector: All sectors
 Sub-sector:
 Industry classification:
 Type of reservation: Market access
 Description: Investment
 In all EU Member States, services considered as public utilities at a national or local level may be subject to public monopolies or to exclusive rights granted to private operators.
 Public utilities exist in sectors such as related scientific and technical consulting services, R&D services on social sciences and humanities, technical testing and analysis services, environmental services, health services, transport services and services auxiliary to all modes of transport. Exclusive rights on such services are often granted to private operators, for instance operators with concessions from public authorities, subject to specific service obligations. Given that public utilities often also exist at the sub-central level, detailed and exhaustive sector- specific scheduling is not practical.
 This reservation does not apply to telecommunications and to computer and related services.

Existing Measures:

(2) Sectoral exception (water supply)

Sector: Collection, purification and distribution of water
 Sub-sector:
 Industry classification: ISIC rev. 3.1: 41
 Type of reservation: Market access
 National treatment
 Description: Cross-border services and investment
 The EU reserves the right to adopt or maintain any measure with respect to the provision of services relating to the collection, purification and distribution of water to household, industrial, commercial or other users, including the provision of drinking water, and water management.

Existing measures:

(b) Exceptions for a member state (Germany)

Sector: Environmental services
 Sub-sector: Waste management: sewage, refuse disposal, and sanitation services
 Industry classification: CPC 9401, CPC 9402, CPC 9403
 Type of reservation: Market access
 Description: Cross-border services and investment
 Germany reserves the right to maintain or adopt or maintain any measure prohibiting the cross-border provision of services and requiring establishment with respect to the supply of waste management services, other than advisory services.
 Germany reserves the right to adopt or maintain any measure relating to the designation, establishment, expansion, or operation of monopolies or exclusive services suppliers providing waste management services.