

Balancing Efficacy with Policy Space: the Treatment of Public Services in EU Trade Agreements

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ABSTRACT

The tensions created by public services in international trade agreements continue to stir academic interest while remaining highly controversial. This is attributable to their incongruent aims that require careful balancing. Taking the European Union's (EU) 'second generation' trade agreements as its focus, this article examines the extent to which such agreements balance the efficacy of their core trade disciplines with space for public service provision. The agreements are examined in three respects: (i) exclusions to overarching scope; (ii) options for limiting the application of core disciplines; and (iii) the availability of exceptions. This article's primary aim is to determine how the EU balances the efficacy of its trade disciplines with space for the provision of public services. This remains largely unexplored in current academic discourse and has assumed importance given the EU's ongoing trade negotiations.

INTRODUCTION

The treatment of public services by free trade agreements (FTAs) has received widespread academic attention¹ and continues to be a highly contentious issue within the public domain.² This interest stems from the tension that arises from their seemingly

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1 Anthony J. VanDuzer, 'NAFTA's Approach to Protecting Public Services: Fragmentary, Asymmetrical, Rigid and Limited', in Markus Krajewski (ed.), *Services of General Interest Beyond the Single Market: External and International Law Dimensions* (The Hague: T.M.C. Asser Press, 2015); Amadeo Arena, 'The GATS Notion of Public Services as an Instance of Intergovernmental Agnosticism: Comparative Insights from EU Supranational Dialectic', 45(3) *Journal of World Trade* 489 (2011); Rudolf Adlung, 'Public Services and the GATS', 9(2) *Journal of International Economic Law* 455 (2006); and Markus Krajewski, 'Public Services and Trade Liberalization: Mapping the Legal Framework', 6(2) *Journal of International Economic Law* 341 (2003).

2 Described by various civil society groups as having 'profound', 'disastrous' and 'enormous' negative consequences for public services, respectively see: 'TTIP, CETA and TISA—what you need to know about EU trade agreements', *A UNISON Briefing* (2015) 2; 'The Transatlantic Trade and Investment Partnership (TTIP): How the EU-US deal threatens people and planet', *Global Justice Now: Campaign Briefing* (2016), 5; and, 'Public Services Under Attack: TTIP, CETA and the secretive collusion between business lobbyist and trade negotiators', *Report by Corporate Europe Observatory et al.*, (2015) 45.

incongruent aims. The aim of trade agreements in services is the removal of non-tariff barriers to promote transparency, stability, and liberalization.³ This is achieved by subjecting selected market sectors to trade disciplines that provide certainty and equivalence of treatment to foreign service-providers. The application of such disciplines serves to limit the actions and political choices of national governments.⁴ Within this context, the provision of public services arises as a particularly sensitive issue. Public services seek to meet a societal need that market forces are unable to provide or that a community considers necessary. The provision of such services can frustrate or undermine the aims of trade as they will often discriminate against foreign service-providers. This produces tensions between the two.

Typically, trade agreements are centred on the strong application of their disciplines that relegates all other policies to the status of exemptions.⁵ This prioritizes the efficacy of trade disciplines over other policies. However, too great an emphasis on efficacy will fail to recognize that there are legitimate reasons for trade disciplines to take a backseat. One such scenario is to allow for public services that meet societal needs or market failures. While this can be achieved through non-discriminatory forms of public service provision, on many occasions it will require the preferential treatment of a particular provider to the detriment of foreign service-providers and in contravention of trade disciplines. Accordingly, trade agreements must balance the efficacy of their disciplines with space for public service provision by exempting or excluding certain market sectors or types of service. The extent to which this is undertaken will determine how the said balance has been struck. Taking its 'second generation' trade agreements as its focus, the purpose of this article is to examine the approach of the EU to balancing the efficacy of its agreements' disciplines with space for public service provision.

This article's examination will be undertaken in four sections. Section I constructs the necessary framework for its subsequent analysis. It begins by considering the concept of public services before outlining how such services can frustrate the objectives of trade agreements. Finally, a brief overview is given of the selected agreements for discussion and the methodology adopted for their assessment. The bulk of analysis is then undertaken in a three-pronged manner. Section II examines the overarching scope of the selected agreements and the implications this has for public services. This demands consideration of the different exclusionary clauses found in the agreements. Section III proceeds to look at the options available to limit the application of the agreements' core disciplines. This focuses on the scheduling techniques used by the EU to create space for public services. The last stage of analysis takes place in section IV which addresses the availability of justified exceptions within the

3 Sherry Stephenson, 'Regional Versus Multilateral Liberalization of Services', 1(2) *World Trade Review* 187, 189 (2002); Michael Trebilcock and Robert Howse, *The Regulation of International Trade*, 3rd ed. (London: Routledge, 2005) 477; and Brian Copeland and Aaditya Mattoo, 'The Basic Economics of Services Trade', in Mattoo et al., *A Handbook of International Trade in Services* (Oxford: OUP, 2008) 103.

4 Markus Krajewski, 'Democratic Legitimacy and Constitutional Perspective of WTO Law', 35(1) *Journal of World Trade Law* 168, 170 (2001).

5 Grainne de Búrca and Joanne Scott, 'The Impact of the WTO on EU Decision-making', in Grainne de Búrca and Joanne Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (London: Bloomsbury Publishing, 2002) 4.

agreements. Where relevant, reference is made to other international agreements or future trade agreements for comparative purposes. The main findings of the article are then summarized in section V. In addition to looking back over the contents of this article, this section will look forward by considering briefly the EU's more recent agreements together with those currently under negotiation and what this might mean for any future balance between efficacy and space for the provision of public services.

I. FRAMEWORK FOR ANALYSIS

A. What are public services?

The concept of public services has no universal definition. What constitutes such a service depends on the needs and priorities of a society at a specific time. Broadly, the concept can be said to refer to those services provided and regulated for non-commercial public interests on the basis of societal need and in a way the market cannot achieve.⁶ As the supply of such services on normal terms would be inefficient or not at all, they require an 'exceptional regime' that exempts their provision from the general law and its rules.⁷ The extent of exceptional treatment allowed by a particular regime will directly affect their general law exposure and, in turn, the amount of space available for their provision. Different legal systems employ alternative methods to carve out space for services that are provided publicly. Common methods are based on sectoral or functional definitions of public services.⁸ The former focuses on the sector within which the service is located and the legal regime governing it. In contrast, the latter concentrates on the aim or function pursued by that service.

In determining whether a particular aim should be provided publicly two different rationales are commonly adopted by national governments. The first is based on the economic concept of *public goods*. This is a service that will not be produced privately in the free market due to unprofitability or because its price cannot be effectively fixed even though it is in society's interest to have such a service available.⁹ For instance, universal access to telecommunications is a public good which requires some form of special regulatory arrangement because it can be achieved only through collective coordination and not through wholly private means.¹⁰ The problem with such governmental interventions is that they run counter to the general consensus that the market and private enterprise are the drivers of a successful economy.¹¹

6 Markus Krajewski, 'Investment Law and Public Services: Clashes of Interests or Peaceful Coexistence', *Investment Treaty News* (18 July 2012).

7 Elisenda Malaret Garcia, 'Public Service, Public Functions, and Guarantees of the Rights of Citizens: Unchanging Needs in a Changed Context', in Mark Freedland and Silvana Sciarra (eds), *Public Services and Citizenship in European Law: Public and Labour Law Perspectives* (Oxford: OUP, 1998) 66.

8 Carol Harlow, 'Public Service, Market Ideology, and Citizenship', in Freedland and Sciarra, *ibid.*, at 49–50.

9 Erik Andre Andersen and Birgit Lindsnaes, 'Public Goods—Concept, Definition and Method', in Erik Andre Anderson and Birgit Lindsnaes (eds), *Towards New Global Strategies: Public Goods and Human Rights* (Leiden: Martinus Nijhoff Publishers, 2007) 34–35.

10 Olga Batura, *Universal Service in WTO and EU Law: Liberalisation and Social Regulation in Telecommunications* (The Hague: T.M.C. Asser Press, 2015) 1.

11 Joseph Stiglitz, *Economics of the Public Sector*, 3rd ed. (W. W. Norton & Company: New York, 2000) 6.

However, in economic theory it is accepted that such interventions are acceptable where there is a case of market failure as without intervention such public goods will not be provided.¹² On this view, public services are activities which pursue goals that society has an interest in having readily available but cannot be provided, to the extent deemed necessary, through the market and consequently require governmental involvement.¹³

The second view is grounded in a broader political understanding of the concept. This considers public services as those provided in the common or general interest. This rationale is traceable to the common law doctrines of ‘common callings’¹⁴ and is comparable to the French and German doctrines of *service public* and *Daseinsvorsorge*.¹⁵ On this view, their provision is often linked to the fulfilment of individuals’ fundamental rights in that they seek to achieve a particular relatable goal, e.g. universal healthcare.¹⁶ In this respect, their goals are distinguishable from private ones which justifies their special treatment.¹⁷ Once a particular collective need is identified, intervention through the use of a public service can be undertaken.¹⁸ This is both fact and value dependent and will be determined by the context of a society at a particular time.

Different societies will be persuaded differently by each rationale. The result is that not all societies will provide the same service publicly or will do so in diverse ways. Moreover, as society’s priorities evolve over time, due to social, cultural and political changes so too will what services it deems necessary to provide publicly.¹⁹ Previous trends of privatization and deregulation beginning in the 1980s demonstrate society’s capacity to change what is considered a public service.²⁰ So while it remains uncontroversial to describe certain services as public, in the future it is likely that something different will take their place.²¹ Today, public services do not need to be publicly owned or operated and are often provided by private entities.²² The provision of such services remain public so long as their goals and activities are in the public interest and it is national governments that are ultimately responsible.²³

12 Robert Haveman, *The Economics of the Public Sector* (Santa Barbara: Wiley, 1976) 41.

13 Léon Duguit, *Law in the Modern State* (London: Allen & Irwin, 1921) 48.

14 Dawn Oliver, *Common Values and the Public Private Divide* (London: Butterworths, 1999) 201–5.

15 For a comparative overview, see: Heike Schweitzer, ‘Services of General Economic Interest: European Law’s Impact on the Role of Markets and Member States’, in Marise Cremona (ed.), *Market Integration and Public Services and in the European Union* (Oxford: OUP, 2011).

16 UN High Commissioner on Human Rights, *Human Rights, Trade and Investment* (2003) 13.

17 Garcia in Freedland and Sciarra, above n 7, at 81.

18 Hellmut Wollmann and Gérard Marcou, ‘Introduction’, in Hellmut Wollmann and Gérard Marcou (eds), *The Provision of Public Services in Europe: Between State, Local Government and Market* (Cheltenham: Edward Elgar Publishing, 2010) 3.

19 UNCTAD Secretariat, *Universal Access to Services—Note by the UNCTAD Secretariat* (2006), TD/B/COM, 3.

20 For an overview of such processes, see: Antenor Hallo de Wolf, *Reconciling Privatization with Human Rights* (Cambridge: Intersentia, 2012).

21 It is not beyond the realms of possibility to imagine universal access to free Wi-Fi as a future public service: EU Commission, *Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) No 1316/2013 and (EU) No 283/2014 as regards the promotion of Internet connectivity in local communities* (2016).

22 Marise Cremona, ‘Introduction’, in Cremona, above n 15, at 3.

23 Mark Freedland, ‘Law, Public Services, and Citizenship—New Domains, New Regimes?’, in Freedland and Sciarra, above n 7, at 3.

Provided this link continues, the activity in question can be viewed as public even where the service is provided by a private entity.

B. Conflicting aims: the need for balance

It is important to consider why tensions can arise between FTAs and the provision of public services. The underlying rationale of trade liberalization is that greater integration leads to increased trade which can result in welfare-enhancement for its members.²⁴ Based on the theory of comparative advantage, beneficial effects are generated by each country naturally devoting its capital and labour to that which is most advantageous.²⁵ As stated, the common purpose of international trade agreements is the promotion of transparency, stability, and trade liberalization. In services, this is achieved by subjecting selected market sectors to trade disciplines aimed at the removal of non-tariff barriers. The EU's trade agreements are centred around the *core disciplines* of national treatment and market access, and to a lesser extent the principle of Most Favoured Nation (MFN). These rules provide certainty and equivalences of treatment to service-providers from different countries. However, the provision of public services can hinder the aims of such rules. This subsection outlines how the application of these core disciplines and the provision of public services can give rise to tensions that must be balanced.

A universal feature of the EU trade agreements in services is their use of national treatment and market access. The former requires members to accord to services and service suppliers of any other member treatment, *in law* and *in fact*, no less favourable than that which it gives to its own like services and service suppliers.²⁶ Often, this will be compromised by public service provision. For example, subsidization is an important element in the provision of public services but would likely constitute discrimination and offend the national treatment principle if the same subsidy was not given to foreign service-providers.²⁷ From a regulatory perspective, national treatment can also create difficulties: if the regulation of a public service diverges regionally within a country with one area having stricter regulation, a foreign service-provider or investor could demand the less stringent of the two regulations.²⁸ The latter requires members to refrain from applying measures that place quantitative restrictions as well as limitations on forms of legal entity and the participation of foreign capital.²⁹ It is common for national or local governments to grant special or exclusive rights to a particular provider to achieve a public good. But such regimes

24 For an overview of economic integration: Alfred Tovas, 'A Survey of the Theory of Economic Integration', 15(1) *Journal of European Integration* 5 (1991).

25 David Ricardo, *On the Principles of Political Economy and Taxation* (Cambridge: CUP, 1983) 133–34; For an explanation of Ricardo's theory, see: Giancarlo Gandolfo, *International Economics* (Berlin Heidelberg: Springer, 2014) 11–14.

26 Eric Leroux, 'Systemic Issue in GATS Adjudication', in Marion Panizzon, Nicole Pohl and Pierre Suavé (eds), *GATS and the Regulation of International Trade in Service* (Cambridge: CUP, 2008) 254.

27 David Luff, 'Regulation of Health Services and International Trade Law', in Aaditya Mattoo and Pierre Suavé (eds), *Domestic Regulation and Services Trade Liberalization* (Washington: Trade and Development Series, 2003) 198.

28 Andrew Lang, 'The GATS and Regulatory Autonomy: A Case Study of Social Regulation of the Water Industry', 7(4) *Journal of International Economic Law* 801, 812 (2004).

29 General Agreement on Trade in Services (1994) (GATS), Article XVI.

are likely to fall foul of the market access principle in that they limit the number of providers in a sector and, consequently, hinder access for possible investors.³⁰

The principle of MFN features sporadically in the EU's agreements.³¹ It requires each member to accord to services and service suppliers of any other member treatment no less favourable than it accords to like services and service suppliers of any other country. In essence: trade advantages given to one party must also be given to all other parties.³² It has been argued that its effect on public service provision is likely to be minimal.³³ This negligible effect is likely to continue provided foreign service-providers are subject to non-discriminatory treatment. However, in certain case trade participants may wish to enter reciprocity-based agreements to support public services.³⁴ A possible example could be to enable health professionals from one country to more easily practice in another country to support a national health service. MFN would constrain the ability of members to enter these types of arrangements. Outwith the core disciplines, the agreements also incorporate rules on Transparency,³⁵ Domestic Regulation,³⁶ and Procurement³⁷ that may also impact public service provision.

It is clear that tensions can arise between international trade disciplines and public services. Earlier it was suggested that a balance should be struck between the efficacy of the core disciplines and the provision of public services. The justification for balancing is two-fold. First, there are limits to the effectiveness of trade liberalization. In the case of public goods, it is the failure of certain markets to operate efficiently because of natural monopolies, positive or negative externalities and information deficits. Such markets lend themselves to monopoly power or pursue public goods that cannot be provided by the market sufficiently due to their unprofitability. Secondly, a society may determine that a service should be provided publicly. In such circumstances, public services are those services that society has a common interest in having widely available. Such arguments have resonance for the EU whose own constitutional structure recognizes the need, both internally and externally, to strike balance between economic and non-economic objectives.³⁸

30 Barnali Choudhury, *Public Services and International Trade Liberalization: Human Rights and Gender Implications* (Cambridge: CUP, 2012) 78.

31 Free Trade Agreement between European Union and the Republic of Korea (2011) (EU-Korea), Article 7.14; Economic Partnership Agreement between the CARIFORUM States and the European Community (2008) (EC-CARIFORUM), Article 70. It is also a firm fixture of in its more recent agreements: Transatlantic Trade and Investment Partnership (TTIP), *Trade in Services, Investment and E-commerce*, Articles 2–4 (Investment) and 3–4 (Services); and, Comprehensive Economic Trade Agreement (CETA), Articles 8.7 (Investment), and 9.5 (Services). Notably, it is omitted from the Free Trade Agreement between the European Union and the Republic of Singapore (2015) (EU-Singapore).

32 Matthias Herdegen, *Principles of International Economic Law* (Oxford: OUP, 2016) 213.

33 Adlung, above n 1, at 467.

34 Amadeo Arena, 'Revisiting the Impact of GATS on Public Services', in Krajewski, above n 1, at 18.

35 EU-Korea, Chapter 12; Trade Agreement between the European Union and Colombia, Peru and Ecuador (2016) (EU-Colombia, Peru and Ecuador), Article 130; and, Agreement establishing an association between Central America and the European Union (2012) (EU-Central America), Article 178.

36 EU-Korea, Article 7.23; and, EU-Columbia, Peru and Ecuador, Article 131.

37 EU-Korea, Chapter 9; EU-Columbia, Peru and Ecuador, Article 172; and, EU-Central America, Article 209.

38 Treaty on the Functioning of the European Union (TFEU), Article 14; for an ambitious reading, see: Malcolm Ross, 'Art.16 E.C. and Services of General Interest: from Derogation To Obligation?', 25(1) *European Law Review* 22 (2000); for an external perspective, see: Piet Eeckhout, 'A Normative Basis for EU External Relations? Protecting Internal Values beyond the Internal Market' in Krajewski, above n 1.

C. Assessing the EU's agreements

As part of its Global Europe strategy, the EU has an ambitious agenda to conclude a series of deep and comprehensive trade agreements.³⁹ It is currently party to a number of bilateral and regional agreements and is in the process of negotiating more extensive trade agreements. This includes the ongoing negotiations of the much publicized TTIP and CETA agreements together with those with Singapore and Japan.⁴⁰ While these have stolen the headlines, the focus of this article is the EU's *second generation* agreements which mark a departure point from its previous agreements by incorporating comprehensive services and investment chapters.⁴¹ The agreements falling within the scope of the term second generation are those concluded with Korea, Columbia, Peru, and Ecuador,⁴² the CARIFORUM and Central America countries (hereafter 'the agreements'). It is important to note that within this sample there are different types of FTA. While the agreements with Korea and Columbia, Peru and Ecuador can be viewed as classic FTAs, the others are of a different sort. The EC-CARIFORUM agreement is an Economic Partnership Agreement which is a WTO-compatible agreement aimed, through trade and investment, at sustainable development and poverty reduction.⁴³ The EU-Central American Association Agreement contains a significant trade component but also creates a framework for cooperation. As FTAs, the agreements go beyond what is currently provided for under WTO law and can be contrasted with those that preceded them.⁴⁴ Other useful analytical counterweights are the GATS and North American Free Trade Agreement (NAFTA) which serve as the templates for most trade agreements in services.⁴⁵

The primary objective of EU trade, to create expanded markets for services and eliminate barriers to trade and investment, is often balanced with the acknowledgement that

39 European Commission, *Global Europe—Competing in the World, A Contribution to the EU's Growth and Jobs Strategy* (2006); see also: European Commission, *Trade for All: Towards a more Responsible Trade and Investment Policy* (2014).

40 The state of play of each varies: negotiations for TTIP have stalled; CETA was ratified by the EU Parliament on 17 February 2017 but must be approved by national parliaments before taking full effect; the EU-Singapore agreement is yet to be formally approved and was the recent subject of a highly publicised European Court of Justice judgment in *Opinion 2/15*; and, the Proposed Economic Partnership Agreement between the European Union and Japan (EU-Japan) appears, at present, to be moving forward quickly: EU Commission, *24th EU-Japan Summit Joint Statement* (Brussels, 2017): available at http://europa.eu/rapid/press-release_STATEMENT-17-1920_en.htm (visited 10 July 2017).

41 Markus Krajewski, 'Public Services in EU Trade and Investment Agreements', *Paper Presented at the Conference 'Beyond the Single Market—External and International Dimensions of Services of General Interest in EU Law'*, Erlangen 18 and 19 September 2013, 7.

42 Ecuador has now acceded to the previous EU-Columbia and Peru agreement: Council Decision of 11 November 2016 on the Protocol of Accession to Trade Agreement between European Union and Columbia and Peru, *Official Journal of the European Union*, L356/1.

43 European Commission, *Economic Partnership Agreements*, Explanatory Document (February 2017), available at http://trade.ec.europa.eu/doclib/docs/2017/february/tradoc_155300.pdf (visited 7 July 2017).

44 Billy A. Melo Araujo, *The EU Deep Trade Agenda* (Oxford: OUP, 2016) 6–8.

45 Patrice Latrille and Juneyoung Lee, 'Services Rules in Regional Trade Agreements: How Diverse and How Creative as Compared to the GATS Multilateral Rules?', *World Trade Organization: Economic Research and Statistics Division*, Staff Working Paper ERSD-2012-19 (2012), 1, available at: <http://www.econstor.eu/bitstream/10419/80081/1/729501507.pdf> (visited 3 August 2017). Marie-France Houde et al., 'The Interaction between Investment and Services Chapters in Regional Trade Agreements: Key Findings', in *International Investment Law: Understanding Concepts and Tracking Innovations* (Paris: OECD Publishing, 2008), 242.

national governments retain the right to adopt measures pursuing legitimate policy objectives.⁴⁶ Such references make clear that the EU is aware of the need to strike a balance between the efficacy of its trade disciplines with space for public services. Overall, the EU's agreements have followed a GATS-like approach to the balancing of public services.⁴⁷ This is focused on the strong application of the core disciplines which relegates all other policies to the status of exemptions to be argued for within relatively narrow terms.⁴⁸ The problem with this is that when exceptions are granted to public services they are unlikely to take account of the diverse and evolving nature of public services. In failing to do so, they are likely to produce an overly rigid set of rules and, as a result, fix the type of permitted public service provision at a particular time. This in turn will restrict the ability of its member states to meet legitimate policy objectives.

This article examines the selected agreements' rules on services and establishment in three respects: (i) exclusions to overarching scope; (ii) options for limiting the application of core disciplines through the scheduling of specific commitments; and (iii) the application of their exceptions. At each stage, the balance which has been struck can be assessed by reference to three terms of assessment: the diversity of public services that fall within them; the extent to which those are protected; and their flexibility to accommodate future forms of public services. The first point of examination can be determined through consideration of their public service exclusion clauses. These are the provisions of each agreement that determine which services fall in and out of their respective provisions on services and investment. The second relates to the scheduling practice of the EU and the extent to which it has used this to carve out space for public services. The third concerns the availability of the exceptions found in the agreements. In this final respect, establishing their likely application is also necessary which can be determined through consideration of relevant dispute resolution decisions of the WTO.

II. OVERARCHING SCOPE

A. Determining scope

The agreements have broad coverage applying to all government measures *affecting trade in services* which covers measures by all levels of government: central, regional, and local. Services are not defined but instead are distilled into two modes of supply: cross-border trade (mode 1) and foreign consumption (mode 2).⁴⁹ The GATS definition of trade in services is somewhat broader including the additional modes of supply of commercial presence (mode 3) and movement of natural persons (mode 4).⁵⁰ This is explained by the fact that the agreements contain separate chapters on establishment⁵¹ and most a chapter on the temporary presence of natural persons

46 See: EU-Korea, Preamble and Article 7.1; EU-Columbia, Peru and Ecuador, Preamble and Article 107; EC-CARIFORUM, Preamble and Article 60; and, EU-Central America, Preamble and Article 159.

47 For various accounts of the GATS approach, see: Krajewski, above n 1; Adlung, above n 1; and, Arena, in Krajewski, above n 1, at 40.

48 de Búrca and Scott, above n 5, at 4.

49 EU-Korea, Article 7.4(3)(a); EU-Columbia, Peru and Ecuador, Article 117; EC-CARIFORUM, Article 75(2)(a); and, EU-Central America, Article 169(2)(a).

50 GATS, Article I(2).

51 EU-Korea, Article 7.9; EU-Columbia, Peru and Ecuador, Article 110; EC-CARIFORUM, Article 65; and, EU-Central America, Article 162.

for business purposes⁵² which would cover the modes 3 and 4. They follow a positive-list structure that divides their trade disciplines into two categories and renders the application of national treatment and market access conditional on their inclusion in the schedules. The focus of this section is those disciplines that apply generally to all service sectors which refers to the principle of MFN and the additional disciplines stated in the previous section. In examining the scope of a trade agreement, it is necessary to consider the approach it takes to determine whether other services fall within its overarching scope. In this respect, the EU has used sectoral, functional and hybrid carveouts in the agreements.

B. Sectoral

In each of the agreements there are five sectors that are always excluded from its disciplines on services and establishment, specifically: (i) mining, manufacturing, and processing nuclear weapons; (ii) production of trade or trade in arms, munitions, and war materials; (iii) audiovisual services; (iv) national maritime cabotage; and (v) domestic and international air transport services.⁵³ Notably, the first two sectors are excluded only in relation to establishment and not the cross-border trade of services. The EU has also excluded similar services in its previous⁵⁴ and newer agreements.⁵⁵ The effect is that any sector listed is excluded in whole from the obligations of the agreements.⁵⁶ By implication, the complete carve out of such sectors suggests that services operating within them are of a special nature.

With reference to our terms of assessment, several observations can be made. First, the diversity of public services covered by the sectoral exclusions are narrow with only a five sectors covered. The sectors listed are those generally considered as services fulfilling a sovereign function of the state that involve a high level of governmental involvement.⁵⁷ While similar exclusions for the sectors of air transport services and maritime transport are to be found in the GATS,⁵⁸ the agreements cover a broader range of sectors which suggests a more favourable balance has been struck. That said, common sectors associated with public services, such as health or education, are not covered by the exclusions. Secondly, the effect of an exclusion is to remove a covered sectors entirely from the agreements' provisions. Like the GATS, these are total exclusions which it has been argued are covered on the basis that they

52 EU-Columbia, Peru and Ecuador, Article 122; EC-CARIFORUM, Article 80; and, EU-Central America, Article 173.

53 EU-Korea, Articles 7.4 and 7.10; EU-Columbia, Peru and Ecuador, Articles 111 and 118; EC-CARIFORUM, Articles 66 and 75; and, EU-Central America, Articles 163 and 169.

54 Agreement establishing an association agreement between the European Community and the Republic of Chile (2002) (EC-Chile), Article 95.

55 EU-Singapore, Articles 8.1 and 8.8; Free Trade Agreement between the European Union and the Socialist Republic of Vietnam (2016) (EU-Vietnam), General Provisions on Services and Article 1 of Investment Chapter; and, CETA, Article X-01.

56 It should be noted that some parts of air transport services are not covered by the agreements' exclusion (such as repair and maintenance, selling and marketing, computer reservation systems, and other auxiliary services) as outlined in respective provisions above.

57 Such as national security and its related activities: Etienne Picard, 'Citizenship, Fundamental Rights, and Public Services', in Freedland and Sciarra, above n 7, at 89.

58 GATS, Annex on Air Transport Services, Article 2 and Annex on Negotiations on Negotiations on Maritime Transport Service, Article 1.

constitute important public services in certain countries.⁵⁹ Accordingly, member states have significant freedom in such areas. The first two points indicate that for sovereign services such as those excluded, which require clear and significant governmental involvement, the EU will provide a great deal of space. Finally, in adopting a sectoral approach in determining which services are to be covered the scope of the exclusions are fixed in time. This produces a rigid carveout that is unable to accommodate future public services in sectors outwith those listed.

C. Functional

The agreements also make use of functional exclusions. Referring back to section I.A, the descriptor 'functional' signifies that it is the aim or task of the service that determines if it falls within the scope of the exclusion. Consistently, the EU has replicated the GATS Article I:3(b) exclusion for *services supplied under governmental authority* in both its second generation⁶⁰ and newer agreements.⁶¹ To date, this has yet to form the subject of dispute settlement in the WTO and, as a consequence, both its meaning and scope lack clarity. It is accompanied by a supplementary definition which clarifies that the exclusion applies to services provided neither on a *commercial basis* nor *in competition with one or more suppliers*.⁶² The EU has incorporated this supplementary definition into its agreements.⁶³ The two conditions are cumulative so that failure to satisfy one leads to application of the agreements' rules of general application. Close examination of the sub-concepts, within the context of the GATS, supports a narrow functional interpretation of the exclusion.⁶⁴

In relation to the first sub-concept, it is commonly argued that *supplied on a commercial basis* means 'with a view to making a profit'.⁶⁵ Support for this can be taken from the jurisprudence of the General Agreement on Tariffs and Trade (GATT) where the Panel has considered 'commercial' to refer to the process of being 'engaged in commerce' and interested in 'financial return rather than artistry; likely

59 Arena, above n 1, at 505–7.

60 EU-Korea, Articles 7.4(3)(b) and 7.9(c); EU-Columbia, Peru and Ecuador, Article 108; EC-CARIFORUM, Article 75(2)(b); and, EU-Central America, Article 169(2)(b).

61 EU-Singapore, Article 8.1(2)(b); EU-Vietnam, General Provisions on Services; and, CETA, Article X-01(2)(a).

62 GATS, Article I:3(c).

63 EU-Korea, Articles 7.4(3)(c) and 7.9(c); EU-Columbia, Peru and Ecuador, Article 108; EC-CARIFORUM, Article 75(2)(c); and, EU-Central America, Article 169(2)(b). It is also identifiable in the newer agreements: EU-Singapore, Article 8.1(2)(b); EU-Vietnam, General Provisions on Services; and, CETA, Article X-01(2)(a).

64 Rudolf Adlung and Antonia Carzaniga, 'Health Services under the General Agreement on Trade Services', 79(4) *Bulletin of the World Health Organization* 352, 359 (2001); Rudolf Adlung, 'The GATS Negotiations: Implications for Health and Social Services', *Intereconomics* 147, 150 (2003). This interpretation is supported by some WTO members: WTO Council for Trade in Services, *Report of the Meeting held on 14 October 1998*, Note by the Secretariat, S/C/M/30, 12 November 1998; and, Rupa Chanda, 'Social Services and The GATS: Key Issues and Concerns', 31(12) *World Development* 1997, 2004 (2003).

65 Rashad Cassim and Ian Steuart, 'Public Services and the GATS', (3) ICTSD Policy Paper on Trade in Services and Sustainable Development 1, 12 (2005); Krajewski, above n 1, at 351; Eric 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?', 40(3) *Journal of World Trade* 345, 349 (2006).

to make a profit'.⁶⁶ It has been highlighted that the profit-seeking motive is not the sole criterion.⁶⁷ Rather, what is required is an element of strategic behaviour.⁶⁸ Support for this can also be found in further jurisprudence of the GATT that has stated that 'loss-making sales can be, and often are, a part of ordinary commercial activity'.⁶⁹ Additionally, the GATS includes *juridical persons* within its definition of commercial presence whose status is unaffected by whether they seek a profit or not.⁷⁰ It is clear that the focus of the concept is the nature of the service and the function it pursues.

Turning to the second concept, this requires that there are two or more service suppliers competing with one another in the same market. The common view is that this should embody some form of substitutability between 'like' and 'directly competitive substitutable products'.⁷¹ Previous GATT's Panels have confirmed that they will look to determine whether products are alternative ways of satisfying the same particular consumer need.⁷² Another view is that the concept of competition refers to 'one-way competition': to fall within the exclusion, a service supplier must not operate with a view to competing with other service suppliers.⁷³ Instead, 'in competition' refers to the situation where a service provider acts competitively by 'striving for custom against other suppliers'.⁷⁴ Such an approach can cause practical difficulties as it is unclear to what extent a service provider would need to be *not* acting in competition to come within the limitation.⁷⁵ What is evident is that the focus is what is occurring in the marketplace rather than the *identity* of the service supplier or the sector in which it operates.⁷⁶ This supports a functional approach to the exclusion's scope: it is the activity and context in which the service provision takes place that matters rather than the identity of or sector in which the provider operates.

The above examination reveals several notable points. Contrary to previous assertions,⁷⁷ the supplementary definitions do not consider the sector or service-provider relevant for coverage by the exclusion. Instead, by adopting a functional approach to exclusion it is the service itself and its impact in the marketplace that is determinative. Its effect is to place non-commercial services provided for reasons other than

66 *Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain*, Report of the Panel, 6 April 2004, WT/DS276/R, para. 6.84.

67 Markus Krajewski, 'Public Services and the Scope of the General Agreement on Trade in Services (GATS)', *A Research Paper: Written for Center for International Environmental Law* (Geneva, 2001) 11, available at: <http://www.ciel.org/Publications/PublicServicesScope.pdf> (visited 3 August 2017).

68 Adlung, above n 1, at 463.

69 *Canada—Certain Measures Affecting The Renewable Energy Generation Sector and Canada—Measures Relating To The Feed-In Tariff Program*, Report of the Panel, 19 December 2012, WT/DS412/R and WT/DS426/R, para. 7.151.

70 GATS, Article XXVIII (d) and (l).

71 Leroux, above n 65, at 384.

72 *Japan—Taxes on Alcoholic Beverages*, Report of the Panel, 11 July 1996, WT/DS8/R, para. 622.

73 Anthony VanDuzer, 'Health, Education and Social Service in Canada: The Impact of the GATS', in John Curtis and Dan Ciuriak (eds), *Trade Policy Research* (Ottawa: International Trade Canada, 2004) 412.

74 *Mexico—Measures Affecting Telecommunications Services*, Report of the Panel, 2 April 2004, T/DS204/R, para. 7.230.

75 Arena, above n 1, at 31.

76 Leroux, above n 65, at 361.

77 Werner Zdouc, 'WTO Dispute Settlement Practice in relation to the GATS', 2(2) *Journal of International Economic Law* 295, 321 (1999); VanDuzer, above n 73, at 401.

profit outside the scope of an agreement. For our terms of assessment this is significant. First, it means that no service sector is automatically included or excluded. Its potential breadth is therefore significantly greater than that of the previous sectoral exclusions. That said, the potential services that could satisfy the cumulative conditions are relatively few: state monopoly service-providers or private entities granted exclusive rights with little to no market-based competition will likely qualify. Entities endowed with the same rights in profitable sectors with higher numbers of private providers are unlikely to do so.⁷⁸ In sectors such as energy, health and education the latter scenario is now more prevalent. Secondly, if covered the level protection is high as the service is excluded wholly. Finally, by adopting a functional approach the exclusion can accommodate future forms of public services in different sectors provided they qualify. Consider the previous example of Wi-Fi as a potential future public service. Should a government wish to provide such a service it can do so provided the means of that provision meet the stipulated qualifications. Such flexibility is absent from sectoral exclusions.

D. Hybrid

A feature identifiable in several of the agreements is a paragraph contained in the general exclusion clauses stating that the rules on services and establishment do not apply to parties' 'social security systems' or to activities which are 'connected, even occasionally, with the exercise of official authority'. This is observable intermittently in the pre-Global Europe, second generation and newer agreements.⁷⁹ As there is no EU-wide definition of social security systems, the scope of the first part of the clause is unclear. Internally, the EU has provided guidance on the services it considers social services, namely: health, statutory and complementary social security schemes and other essential services provided directly to individuals.⁸⁰ Social security schemes are defined as those covering the main risks to life such as health, ageing, occupational accidents, unemployment, retirement, and disability.⁸¹ It appears that this is the limit of the first part of the exclusion and it is done so in a sectoral manner. The second part refers to activities connected with the exercise of official authority. This invites comparison with Article 51 TFEU which it has been argued extends to the armed forces or police and higher parts of the civil service or the judiciary.⁸² The phrase itself is not limited to a sector but to an action or aim and thereby takes a functional approach.

The combination of a sectoral and functional approach by the EU produces an interesting outcome when turning to the terms of assessment. The first part is rooted in what sectors have been previously stated as covered. In contrast, although previous

78 Panagiotis Delimatsis, 'Services of General Interest and the External Dimension of the EU Energy Policy', in Krajewski, above n 1, at 343–44.

79 EC-Chile, Article 135(2); Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and the United Mexican States (2000) (EC-Mexico), Article 27(3); EU-Columbia, Peru and Ecuador, Article 167(2); EC-CARIFORUM, Article 224(2); and, EU-Vietnam, Chapter VII, General Exceptions, para. 2.

80 EU Commission, *Implementing the Community Lisbon Programme: Social Services of General Interest in the European Union* (Brussels, 24 April 2006) 4.

81 *Ibid.*

82 Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Cases and Materials: Second Edition* (Cambridge: CUP, 2010) 482.

guidance has stated what official authority is the phrase is inherently functional. This produces a situation where one part can evolve and the other cannot: the first part of the clause can only accommodate services that are social security schemes while the latter is not restricted to a sector but to a function. As with the other clauses considered, the level exclusion here is total. Concerning the final term of assessment, it is the latter part which has the flexibility to accommodate future policy changes with the former being restricted.

E. Assessment

The above analysis reveals that the EU has used a varied approach to determining its overall scope in relation to public services. The first is sectoral which excludes only a narrow range of sectors. The second layer makes use of GATS Article I:3(b) and (c) which can, through its functional approach, cover a wider range of services. Nevertheless, analysis of the GATS demonstrates that only a narrow range of public services will fall within its scope. The final approach is a hybrid of sectoral and functional approaches. The sectoral aspect of this clause covers services more commonly associated with public services but is limited to those listed. The functional aspect less so but it is also limited by what is understood by 'official authority'. That said, the hybrid clause has been used rarely by the EU. Where the separate layers apply, it is clear they provide a high level of cover as any service covered is taken outwith the scope of the agreements entirely. On occasion, the EU has used all three layers.⁸³ In those circumstances, a more favourable balance can be said to have been struck when compared with other international trade agreements.

III. APPLICATION OF CORE DISCIPLINES

A. General practice

For most trade agreements, the core disciplines of market access and national treatment apply subject to specific commitments or reservations set out in schedules after the main provisions. There are two generally accepted practice options for the scheduling of commitments: positive and negative listing. The former entails that the disciplines of an agreement apply to an economic sector only when it has been listed in a party's schedule and subject to any reservations set out. The GATS uses this 'bottom-up' practice with regard to market access and national treatment. As a result, parties are able to decide the extent to which national treatment and market access apply in a specific sectors. The latter mandates that its disciplines apply unless members of the agreement have specifically opted out from their application. The NAFTA follows the 'top-down' application of its core disciplines of MFN, national treatment, and rules on quantitative restrictions.

Most EU agreements have followed the positive listing approach of the GATS.⁸⁴ However, recent negotiations do suggest a shift away from this practice towards

83 EU-Columbia, Peru and Ecuador; EC-CARIFORUM; and, EU-Vietnam.

84 EU-Korea, Annexes 7-A-1 (Services), 7-A-2 (Establishment) and 7-C (MFN); EU-Columbia, Peru and Ecuador, Annexes VII, Section B (Establishment) and VIII, Section B (Services); EC-CARIFORUM, Annexes IV-A (Establishment) and IV-B (Services); EU-Central America, Annexes X, Section A

either a negative approach or a hybrid of the two.⁸⁵ This system of scheduling is based on the GATS' four modes of supply. With respect to each, Member States can make either horizontal commitments (across all scheduled sectors) or specific commitments (with respect to a particular sector) or none (where the Member State lists itself as 'unbound').⁸⁶ Either horizontal or specific commitments with respect to each mode of supply may be subject to conditions and limitations on market access or national treatment. With regard to public services, the EU has used two scheduling techniques to create space. The first is its *public utilities* exemption and the second is how it defines certain service sectors relevant to public services. These are separately examined following which the flexibility of the EU's scheduling practice to accommodate future forms of public services is considered.

B. The public utilities exemption

The EU has used the same horizontal public utilities clause widely in its schedules of commitments on the establishment rules of a service-provider. It applies to both the disciplines of national treatment and market access. This also means that it applies to the rules on temporary presence of natural persons for business purposes. Consequently, it restricts both modes 3 and 4 of supply. While not always the same, commonly it reads as follows:

Economic activities considered as public utilities at a national or local level may be subject to public monopolies or to exclusive rights granted to private providers.⁸⁷

This is supplemented with an explanatory footnote that reads:

Given that public utilities often exist at sub-central level, detailed and exhaustive sector-specific listing is not practical. To facilitate comprehension, specific footnotes in this list of commitments will indicate in an illustrative and non-exhaustive way those sectors where public utilities play a major role.⁸⁸

Or more recently:

Public utilities exist in sectors such as scientific and technical consulting services, R&D services on social services and humanities, technical testing and

(Establishment) and XI, Section A (Services); Draft EU-Vietnam, Schedule of Commitments on Establishment and Services; and, EU-Singapore, Annexes 8-A-1 (Services) and 8-A-2 (Establishment).

85 CETA is based on a negative list approach which may be followed in the EU-Japan or a hybrid as proposed in the EU-China bilateral investment treaty, see: EU Commission, *Services and Investment in EU Trade Deals: Using 'positive' and 'negative' Lists* (Brussels, April 2016) 5.

86 Michael Trebilcock and Robert Howse, *The Regulation of International Trade*, 4th ed. (London; New York: Routledge, 2013) 485.

87 EU-Korea, Annex 7-A-2; EU-Columbia, Peru and Ecuador, Annex VII, Section B; EC-CARIFORUM, Annex IV-A; EU-Central America, Annex X, Section A; Draft EU-Vietnam, Schedule of Commitments on Establishment; EU-Singapore, Annex 8-A-2; and, CETA, Annex II.

88 Found in: EU-Korea, Annex 7-A-2, Footnote 6; EU-Columbia, Peru and Ecuador, Annex VII, Section B, Footnote 2; EC-CARIFORUM, Annex IV-A, Footnote 2; EU-Central America, Annex X, Section A, Footnote 169; EU-Singapore, Annex 8-A-2, Footnote 6.

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.⁸⁹

As the term public utilities has no exact meaning in international trade or EU law, the scope of this provision is not immediately clear.⁹⁰ It is suggestive of the service or supply of network industries such as energy, water, or transport. This is a point noted by the Commission which has previously equated it with the EU concept of *Services of General Economic Interest*.⁹¹ The first supplementary footnote in itself does little to flesh out which services are covered. But where this is used further footnotes indicate that public utilities are found in a wide range of sectors.⁹² The second footnote appears to codify the first by providing a non-exhaustive list of sectors covered by the clause. Both the clause and its footnotes indicate that the determinative criterion for scope is whether the economic activity in question falls into a sector that can be considered a public utility. While the list of indicative sectors is not exhaustive,⁹³ the clause adopts a purely sectoral approach with regard to scope but its effect is functional. Guidance on the clause makes clear that Member States are free to decide what they consider public utilities to be and to create monopolies through a single public provider or a private provider with exclusive rights in relevant sectors.⁹⁴ It is able to create space to restrict the application of national treatment and market access with respect to establishment only for the creation of public or private monopolies. Notably, the clause restricts only the agreements' establishment rules. This may reflect the EU's awareness that these rules are more likely to affect typical public utilities sectors such as electricity and gas.⁹⁵

C. Sectoral definitions

The second technique in the agreements is related to the definitions that are adopted regarding certain services sectors. Specific commitments are defined according to a Service Sectoral Classification List⁹⁶ ('the W/120') prepared by the GATT Secretariat at the request of Uruguay Round participants.⁹⁷ Each sector contained on

89 Draft EU-Vietnam, Schedule of Commitments on Establishment, Footnote 6. The same supplementary definition has been adopted in CETA, Annex II.

90 As noted in elsewhere: Austrian Federal Chamber of Labour, 'Services of General Interest in Bilateral Free Trade Agreements', (2007) *AK Position Paper*, 4.

91 European Commission, *Reflections Paper on Services of General Interest in Bilateral FTAs (Applicable to both Positive and Negative Lists)* (Brussels, 28 February 2011) 2.

92 For instance, in EU-Korea a total of 27 further footnotes are used to indicate specifically which sectors and aspects thereof are covered by the exemption. This ranges from health, environmental services to many forms of transport.

93 As is the case with the Social Services Reservation in NAFTA, Schedules to Annex II: Canada, Mexico, and the United States.

94 EU Commission, *Protecting Public Services in TTIP and other EU trade agreements* (Brussels, June 2015), available at http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153614.pdf (visited 10 July 2017).

95 UNCTAD, *IIA Issues Note: International Investment Agreements* No. 1 (May 2017) 3.

96 WTO Secretariat, *Services Sectoral Classification List*, Note by the WTO Secretariat, 10 July 1991 MTN.GNS/W/120.

97 Leroux, in Panizzon et al., above n 26, at 245.

the list is identified by reference to the UN's Provisional Central Product Classification.⁹⁸ This is a comprehensive list of service sectors and sub-sectors that is commonly used by GATS members. Its purpose is to ensure cross-country comparability and consistency in specific commitment adoption.⁹⁹ Although there is no legal obligation on the EU or its Member States to adopt this classification system, it has done consistently but tailored it in a specific way to create space for public services.

In its schedules on establishment and services, the EU has consistently defined the sectors of education and health and social services as applying to *only privately funded services*. The definition for health and social services in the establishment schedules is supplemented frequently by a footnote explaining that the sector is also covered by the public utilities exemption.¹⁰⁰ At first glance, use of this technique suggests that all publicly-funded services in these sectors are outwith the application of the core disciplines. However, this approach has been criticized elsewhere on the basis that it is unclear whether this would exempt services with any sort of public funding or only those that were 100% or predominantly publicly funded.¹⁰¹ For the EU's part, it argues that this allows Member States the space to regulate certain services in whatever way they choose, even if it means treating EU suppliers or investors differently from foreign-based providers.¹⁰² Overall, the usefulness of this technique is relatively limited. It has a narrow scope being restricted to two sensitive sectors and so cannot cover a diverse range of public services. In addition, the extent of protection is also unclear as the level of public funding required is not stated.

D. Flexibility to change

The flexibility that is afforded through the above techniques is tempered by the limited options for Member States or the EU to modify and change their commitments. Unlike the GATS which has a specific framework for the modifying or withdrawing commitments the agreements' have no such option.¹⁰³ For a GATS member to make changes it needs to negotiate compensation with other affected members which must consist of more liberal commitments elsewhere that 'endeavour to maintain the general level of mutually advantageous commitments not less favourable to trade' than what existed before.¹⁰⁴ So, on paper, members could modify their commitments at any time albeit it is very difficult (if not impossible) to effect such

98 UN Department of International Economic and Social Affairs, *Provisional Central Product Classification* (1991). This was superseded in 2002, however the WTO's version remains based on the 1991 classification system.

99 Rolf Weber and Mira Burri, *Classification of Services in the Digital Economy* (Berlin Heidelberg: Springer, 2013) 17.

100 EU-Columbia, Peru and Ecuador, Annex VII, Section B (Establishment), Footnote 4; EC-CARIFORUM, Annex IV-A (Establishment), Footnote 1; EU-Central America, Annex X, Section A (Establishment), Footnote 216; and, EU-Singapore, Annex8-A-2 (Establishment), Footnote 59.

101 Markus Krajewski, 'Public Services Exemptions in EU Free Trade and Investments Agreements', in Krajewski, above n 1, at 264.

102 EU Commission, *Protecting Public Services* (2015).

103 GATS, Article XXI.

104 Marcus Klamert, *Services Liberalization in the EU and the WTO* (Cambridge: CUP, 2015) 26.

amendments.¹⁰⁵ This can serve to bind current liberalization levels preventing the expansion of future policy space for public service provision.¹⁰⁶ Notably, the operation of this framework does not affect a member's ability to flexibly carve out public service space on accession. However, it does demonstrate that the GATS is not accommodating to future developments regarding its members' committed sectors.

The same arguments can be made to a greater extent regarding the agreements: Member States can carve out space on an agreement's conclusion as can the EU but no framework for future modification is provided. This supports the view that the agreements are not accommodating to future forms of public services. This perspective is strengthened further in relation to the EU's most recent agreements where it has begun to include provisions which restrict the ability of members to adopt more discriminatory measures in the future.¹⁰⁷ This is a new innovation which was omitted from previous trade agreements.¹⁰⁸ The shift suggests a rebalancing of the position of public services within its agreements and move towards a less accommodating approach more reminiscent of the NAFTA. Moreover, it is illustrative that commitments undertaken cannot be easily modified to take account of the dynamic nature of public services.

E. Assessment

While the agreements follow a positive list approach that affords Member States considerable space, the techniques outlined have their limitations. When scheduling commitments or listing restrictions, Member States are under no obligation to state the goal they pursue. Like the GATS, the EU agreements can be praised for allowing its Member States flexibility on accession to determine the extent to which the core disciplines apply.¹⁰⁹ However, and with reference to the terms of assessment, it can be stated that the techniques used in the agreements have a narrow scope with their practical effect remaining unclear. The scope of the public utilities exemption is unclear and has been criticized as such previously. However, it does attempt to restrict the agreements' establishment rules that have the potential to bite traditional public utilities more so than service rules. The definitional technique adopted also lacks clarity and has a narrow sectoral scope applying only to education and health and social services. Finally, the agreements when contrasted with GATS fail to provide any options for accommodating future policy changes.

IV. JUSTIFIED EXCEPTIONS

A. General exceptions: the GATS template

The agreements contain a series of general exceptions which provide total relief from their disciplines so long as the measure in question meets the stipulated conditions.

105 Robert Howse and Elisabeth Tuerk, 'The WTO Negotiations on Services: The Regulatory State up for Grabs', 9(1-2) *Canada Watch* 3, 5 (2002).

106 Scott Sinclair, 'Trade Agreements, the new constitutionalism and public services', in Stephen Gill and Claire Cutler (eds), *New Constitutionalism and World Order* (Cambridge: CUP, 2015) 183.

107 EU-Korea, Articles 7.7 and 7.13; and, EU-Singapore, Articles 8.7 and 8.12.

108 EU-Columbia, Peru and Ecuador, Articles 114 and 121; EC-CARIFORUM, Articles 69 and 78; EU-Central America, Article 166 and 172; and, Draft EU-Vietnam, Chapter II, Article 5 and Chapter III, Article 5.

109 OECD, 'Open Services Markets Matter', Policy Brief 5 (2001).

While these can vary in content, they replicate to a significant extent the approach adopted in the GATS. Although it has been argued that they are sufficient to address legitimate policy interests,¹¹⁰ others have maintained the view that their recognition of public services is only to a limited extent and is therefore of little practical value.¹¹¹ The purpose of this final section is to examine where the reality lies between the two views and thereafter draw inferences as to what this means regarding the balance between efficacy and space.

The inclusion of clauses providing for justified exceptions from an agreement's disciplines is not a novel innovation. In a number of its pre-Global Europe agreements the EU has made use of such clauses.¹¹² The range of possible general exceptions available in earlier agreements cover the same ground as the those in the GATS¹¹³ but also a number of additional matters.¹¹⁴ The exceptions which are identifiable in all EU agreements along with the GATS are those necessary: (i) to protect public morals or public order; (ii) to protect human, animal, or plant life; and (iii) to secure compliance with laws or regulations not inconsistent with the provisions of that particular agreement.¹¹⁵ In this respect, the EU's agreements can be seen as adopting a more favourable balance than other trade agreements that do not provide parallel exceptions for measures related to cross-border services.¹¹⁶

As with the GATS, such clauses apply generally and are available provided they do not constitute 'arbitrary or unjustified discrimination' or a 'disguised restriction of trade'. In more recent agreements, the EU has followed the GATS template by including the explanatory footnote with regard to the first exception above.¹¹⁷ This limits its use to situations where there is a 'genuine and sufficiently serious threat posed'. In other ways, the EU has departed from the GATS template. For instance, in the EC-CARIFORUM agreement this footnote is replaced with the explanation that measures taken to combat child labour would fall within the scope of the exceptions of public morals or measures necessary for the protection of health.¹¹⁸

B. Application

Having considered the possible exceptions available, this section will now consider how they may be used to create space for public service provision. From this perspective, the most relevant exceptions are those that allow Members States to adopt

110 WTO Secretariat, 'A Handbook on the GATS Agreement', *A WTO Secretariat Publication* (Cambridge: CUP, 2005) 48.

111 Arena, above n 1, at 40.

112 EC-Chile, Article 91; EC-Mexico, Article 5; and, Agreement on Trade, Development and Cooperation between the European Community and the Republic of South Africa (1999), Article 27.

113 GATS, Article XIV.

114 Including matters related to: the importation or exportation of gold or silver; the protection of national treasures or artistic, historic or archaeological value; the conservation of natural resources; and, the products of prison labour.

115 Such exceptions can be identified in: EU-Korea, Article 7.50; EU-Columbia, Peru and Ecuador, Article 167; EC-CARIFORUM, Article 224; EU-Central America, Article 203; EU-Singapore, Article 8.62; EU-Vietnam, Chapter VII, General Exceptions, Paragraph 1; and, CETA, Article X.02(2).

116 Such as the NAFTA. Chapter 21 does provide some general exceptions that apply to the members' obligations but these do not apply to the services obligations found in Chapter 12.

117 EU-Korea, Article 7.50(a), Footnote 43; and, EU-Singapore, Article 8.62(a), Footnote 29.

118 EC-CARIFORUM, Article 224(1)(a), Footnote 1.

measures necessary to protect public morals or maintain public order and to protect human, animal, or plant life health. While these have yet to be interpreted by the EU, their almost exact replication of the GATS suggests the intention that they should be interpreted in the same manner as the WTO. In the context of the latter, it has been confirmed that Panel and Appellate Body reports in relation to the GATT can be used to interpret the different elements of the justified exceptions.¹¹⁹

WTO jurisprudence has made clear that a two-tier analysis is envisaged for the assessment of whether a national measure should be exempted. First, it should be determined whether the measure falls within the scope of the specified exemption. This requires a 'degree of connection' between the measure and the interest pursued.¹²⁰ Alternatively put: it must be necessary. Secondly, it must be determined whether the measure 'constitutes a means of arbitrary or unjustifiable discrimination' or 'a disguised restriction on trade in services'. This requirement, described as the *chapeau*, has been interpreted as requiring the measure to be 'reasonable'.¹²¹ It can be viewed as maintaining a balance between the right of members to utilize the exemptions to protect legitimate policies and interests and the substantive rights of other.¹²²

As noted, exception one applies to the protection of public morals or to the maintenance of public order with its footnote explaining that it 'may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society'. This has been interpreted as narrowing the scope of this provision to the notion of public policy or *ordre public* which refers to the laws and standards of fundamental concern to the state or the whole of society.¹²³ It is difficult to envisage a situation where many public services would fall within the scope of this exception. It is more likely that exception two, justifying measures necessary to protect human, animal or plant life or health, will be of use in terms of public services. WTO case law suggests that Member States have a broad margin of discretion in defining what constitutes health and their desired level of protection.¹²⁴

It has been accepted that the aims of protecting human, animal, and plant life health take priority over trade liberalization commitments so long as they are deemed necessary.¹²⁵ Both exceptions contain the 'necessity' test which is determined through a 'weighing and balancing of a series of factors'.¹²⁶ This requires consideration of the contribution of the measure to the realization of the ends it pursues

119 The Appellate Body made clear that the interpretation of Article XIV GATS can be equated to Article XX GATT; see, *United States—Measures affecting the Cross-border Supply of Gambling and Betting Services*, Report of the Appellate Body, 7 April 2005, WT/DS285/AB/R, para. 291.

120 Ibid, para. 292.

121 Klamert, above n 104, at 33.

122 Marise Cremona, 'Neutrality of discrimination? The WTO, the EU and External Trade', in de Búrca and Scott, above n 5, at 156.

123 Markus Krajewski, *National Regulation and Trade Liberalization in Services* (The Hague: Kluwer Law International, 2003) 157.

124 *European Communities—Measures Affecting Asbestos and Asbestos-containing Products*, Report of the Appellate Body, 12 March 2001, WTO/DS135/AB/R, para. 168.

125 *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, Report of the Panel, 7 November 1990, DS10/R—37S/200, para. 73.

126 *Korea—Various Measures on Beef*, Report of the Appellate Body, 11 December 2000, WT/DS161/AB/R and WT/DS169/AB/R, para. 164.

and also the restrictive impact of the measures on international commerce.¹²⁷ This has been interpreted by the Appellate Body as requiring a balance between members' intervention 'rights' and liberalization 'duties'.¹²⁸ In this exercise, the validity of the level of protection a member considers appropriate must not be questioned.¹²⁹ This exercise will involve an understanding of the relevant domestic values and principles together with an evaluative judgment of their relative importance.¹³⁰ This is highly suggestive of a functional approach as it mandates some form of value judgment of the measure and the conditions it requires to achieve its goals. However, it is noted that previous opinions suggest that what is considered necessary will be interpreted narrowly and in light of whether there are alternative less restrictive measures available which a member could reasonably be expected to adopt.¹³¹

The chapeau establishes three standards of treatment that must not be contravened. These concern the manner of application of the measure as opposed to its specific content.¹³² The focus of the Panel in examining whether a measure is arbitrary or unjustifiable will be the difference in treatment afforded to domestic and foreign providers.¹³³ An unjustifiable measure is one that fails to provide a certain degree of flexibility between domestic and foreign providers while an arbitrary is one that requires other countries to adopt the same enforcement practices without consideration of their conditions.¹³⁴ Absent is the weighing and balancing assessment contained within the necessity test. It is therefore less clear that a functional approach to service designation is adopted as the aim which is pursued by a public service will not be considered. Neither is it sectoral as the chapeau remains silent on the identity of the provider or the economic area in which it operates.

C. Assessment

From the above discussion, it is clear that by following the GATS-template, the EU's agreements can be viewed as adopting a favourable balance towards public services when compared to the NAFTA which provides for such only in the context of its investment rules. Again, comparison with the terms of assessment suggests that praise for this balance should be tempered. Despite including a wide range of possible exceptions, the actual practical scope of these is very narrow. In reality, there is only one exception that is of possible use and this is in a sector that is already exempted to a significant extent by the above-noted scheduling practices. The effect of the exception is potent and would provide a covered service with a high level of protection. In terms of flexibility, it adopts a purely function approach indicating its ability to

127 *United States—Gambling*, 2005, para. 306; *European Communities—Asbestos*, 2001, para. 172.

128 *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, 12 October 1998, WT/DS58/AB/R, para. 156.

129 *Ibid.*, para. 168.

130 Markus Krajewski, 'Comment: *Quis custodiet necessitatem?* Adjudicating necessity in multilevel systems and the importance of judicial dialogue', in Panizzon et al., above n 26, at 400.

131 *United States—Section 337 of the Tariff Act of 1930*, Report of the Panel, 7 November 1989, L/6439—36S/345, para.5.25; *Thailand—Restrictions*, 1990, para.75; *Korea—Various Measures*, 2000, para. 166.

132 *United States—Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, 29 April 1996, WT/DS2/AB/R, 22.

133 *United States—Gambling*, 2005, para. 357.

134 Krajewski, above n 1, at 161.

accommodate future forms of public services. Consideration of the WTO jurisprudence supports this. This reveals that a certain level of deference towards domestic regulators and flexibility in the application of the 'necessity' test.¹³⁵ This is significant as it suggests that the exceptions will be applied in a manner that is conscious of the goals pursued by a particular public service and will, where 'necessary', restrict the efficacy of its core disciplines.

V. CONCLUSIONS

While accepting that public services do not have a universal definition and remain inherently difficult to define, such services typically pursue aims society has an interest in having readily available but which cannot be provided under normal market conditions. As a result, they require some form of special treatment in the form of exemption from the normal rules. This can create tensions with trade agreements that seek to provide transparency, stability, and liberalization through the application of their core disciplines: MFN, national treatment, and market access. The aims of the two must be balanced and the purpose of this article has been to assess how the EU's second-generation agreements balance the efficacy of their core trade disciplines with space for the provision of public services.

To this end, this article has undertaken a three-pronged examination looking at the agreements': (i) exclusions to overarching scope; (ii) options to limit the application of core trade obligations; and (iii) the availability of justified exceptions. At each stage, the balance struck by the EU has been determined by reference to three terms of assessment. This examination allows for a few conclusions to be drawn. First, and perhaps most obviously, the EU does not have an overarching exemption for public services. Rather, it has adopted a piecemeal approach at different junctures of its agreements which fluctuate in scope due to their sectoral or functional character. This has produced a fragmented landscape where it is unclear as to how the above balance has been struck. What is observable at each stage is that the level of protection provided is high but the scope is narrow. This suggests only small range of public services qualify but those that do will be afforded a high level of protection.

Secondly, the approach adopted by the agreements is reminiscent of the GATS. This has been highlighted at several stages of this article. Generally, the GATS can be said to strike a more favourable balance than that of the NAFTA and in this regard the EU can be praised. That said, ongoing negotiations suggest that the EU is changing track by moving from the positive to negative listing of specific commitments and by including (or attempting to do so) investor-state dispute mechanisms. If the EU maintains its approach to public services examined here in future agreements with these characteristics, it will be striking a less favourable balance than it has in the past.

135 Eric Leroux, 'Eleven Years of the GATS Case Law: What Have We Learned?', 10(4) *Journal of International Economic Law* 749, 789 (2007).