

Balancing efficacy with space: public services in EU trade

Luigi Francesco Pedreschi*

ABSTRACT

The tensions created by public services in international trade agreements continue to stir academic interest whilst 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 paper examines the extent to which such agreements balance the efficacy of their core trade disciplines with space for the provision of public services by its member states. The agreements with regard to public services are examined in three respects: (1) their overarching scope; (2) the options available to limit the application to their core trade obligations; and, (3) the availability of justified exceptions. In undertaking this assessment, this paper's primary aim is to determine how the EU balances the efficacy of its trade disciplines and the freedom to provide public services. An additional aim is to consider whether the EU is now shifting away from its traditional treatment of public services in trade. Such questions remain largely unexplored in current academic discourse and have assumed particular importance given the EU's ongoing trade negotiations.

I. INTRODUCTION

The treatment of public services by international trade agreements is and continues to be a hotly debated issue. Largely, this can be attributed to conflicted aims. Generally, trade agreements can be said to pursue the promotion of transparency, stability and liberalisation.¹ Such aims are achieved by subjecting specific market sectors to disciplines which provide certainty and equivalence of treatment to foreign service-providers. Tensions arise as the application of such disciplines limits the actions and political choices of that national governments who are party to the agreement.² Within this context, the provision, funding or organisation of a public service arises as a particular issue. Public services seek to meet a particular societal need that market forces are unable to provide or that a particular community deems necessary. Such services will often frustrate the disciplines of a particular trade agreement as their its

* Ph.D. Researcher in Law (European University Institute), Diploma in Legal Practice and LL.M. in European Law with Distinction (University of Edinburgh), LL.B. in Law with Honours (University of Glasgow).

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), 111.

² Markus Krajewski, 'Democratic Legitimacy and Constitutional Perspective of WTO Law', (2001) *Journal of World Trade Law* 35(1) 168, 170.

provision will discriminate against foreign service-providers and, in doing so, undermine the primary aims of trade.

Typically trade agreements are centred on the strong application of their disciplines which relegates all other policies to the status of exemptions.³ This prioritises the efficacy of trade disciplines over other policies. But too great an emphasis on efficacy will fail to recognise that there are legitimate reasons for public service provision to meet societal needs or address instances of market failure. To reconcile the tensions that arise, trade agreements must balance the efficacy of their disciplines with space for public service provision. This is undertaken by exempting or excluding certain services from the application of the disciplines. The extent to which this is done demonstrates how the said balance has been struck.⁴ Taking its 'second generation'⁵ trade agreements as its focus, the purpose of this paper will be to examine the EU approach to balancing the efficacy of its agreements' disciplines with space for public service provision.

This paper's analysis will be undertaken in four sections. Section II sets out the framework for debate by first embarking on an enquiry into the concept of public services before outlining how such services frustrate the objectives of trade agreements. Finally, a brief overview is given of the agreements selected for discussion and the methodology adopted for their assessment. Thereafter, the main analysis is undertaken in a three-pronged manner. Section III examines the scope of the agreements with regard to their chapters on services and investment. Section IV will then look at the options available to limit the application of the agreements' core disciplines. This will focus on commitments methods available and their ability to carve-out space for public services in their schedules of commitments. The last stage of analysis will take place in section V which addresses the availability of justified exemptions and derogations within the agreements. Where relevant, reference is made to other international agreements or future trade agreements for comparative purposes. The main findings of the paper are then summarised in section VI. In addition to looking back over the contents of this paper, this section will look forward by considering the EU's agreements currently under negotiation and what this might mean for any future balance between efficacy and space for the provision of public services.

³ 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* (Bloomsbury Publishing: London, 2002), 4.

⁴ Amadeo Arena, 'The GATS Notion of Public Services as an Instance of Intergovernmental Agnosticism: Comparative Insights from EU Supranational Dialectic', (2011) *Journal of World Trade* 45(3) 489, 489.

⁵ The term 'second generation' is elaborated on further below and refers generally to those agreements concluded by the EU following the adoption of its Global Europe strategy.

II. FRAMEWORK FOR ANALYSIS

A. WHAT ARE PUBLIC SERVICES?

Though there is no universal definition, the concept of public services generally refers to services provided and regulated for non-commercial public interests on the basis of societal need and in a way the market cannot achieve.⁶ Typically, they are aimed at the provision of a particular service in a uniform or regulated manner at an affordable price.⁷ Such services tend to require some sort of ‘exceptional regime’ that provides them with special treatment or exemption from the general law.⁸ This is because the supply of such services on normal terms would be inefficient (e.g. at higher or uncompetitive rates) or not at all. The extent of special 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 different methods of designating public services. Common methods are on the basis of sectoral or functional definitions of the concept.⁹ The former focuses on the sector within which the public service is located and the legal regime governing it. By contrast, the latter considers services ‘special’ compared to other services by virtue of the aim or function they pursue and, as a result, is able to cover a wider range of services.

In determining whether a particular aim should be provided publicly two different rationales are commonly adopted by 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.¹⁰ For instance, universal access to telecommunications is a public good which requires some form special regulatory arrangement because it can be achieved only through collective coordination and not through wholly private means.¹¹ 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.¹² However, it is accepted in economic theory that such interventions are acceptable where there is a case of market failure as without interventions such public goods will not be provided.¹³ Accordingly, on this view public services are activities which pursue goals that society has an interest in having readily

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

⁷ Wolf Sauter, *Public Services in EU Law* (CUP: Cambridge, 2015), 11.

⁸ 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* (OUP: Oxford, 1998), 66.

⁹ Carol Harlow, ‘Public Service, Market Ideology, and Citizenship’, in Freedland and Sciarra (1998), 49-50

¹⁰ Erik Andre Andersen and Birgit Lindsnaes, ‘Public Goods – Concept, Definition and Method’ in Erik Andre Andersen and Birgit Lindsnaes (eds.), *Towards New Global Strategies: Public Goods and Human Rights* (Martinus Nijhoff Publishers: Leiden, 2007), 34-35.

¹¹ Olga Batura, *Universal Service in WTO and EU Law: Liberalisation and Social Regulation in Telecommunications* (T.M.C. Asser Press: The Hague, 2015), 1.

¹² Joseph Stiglitz, *Economics of the Public Sector*, 3rd Edition (W. W. Norton & Company: New York, 2000), 6.

¹³ Robert Haveman, *The Economics of the Public Sector* (Wiley: Santa Barbara, 1976), 41.

available but cannot be provided, to the extent deemed necessary, through the market and consequently require some sort of governmental involvement.¹⁴

The second view is based on a broader political understanding of the concept. This considers public services as those services provided in the common or general interest. This rationale is traceable to the common law doctrines of ‘common callings’¹⁵ and is also comparable to the French and German doctrines of *service public* and *Daseinversorge*.¹⁶ 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.¹⁷ In this respect, their goals are distinguishable from private ones which justifies their special treatment.¹⁸ Once a particular collective need is determined, intervention through the use of a public service can be undertaken.¹⁹ This is both fact and value dependent and as such will be determined by the context of a specific society at a particular time. Subsequently, the aims pursued by public services constantly evolve as society does so as a result of social, cultural and political factors which vary over time.²⁰

The evolutionary nature of public services is demonstrated by the trends of privatisation and deregulation of public services since the 1980s.²¹ Today, public services do not need to be publicly owned or operated and are often provided by private entities.²² Nonetheless, the provision of such services remain *public* so long as their goals, activities and responsibilities continue to be in the public interest and it is the government which is ultimately responsible for their provision.²³ Thus, so long as this link continues between the government and public aims and the activity in question it can be viewed as public (even where the latter is performed by private entities). That said, such trends make the link between government and its public services more difficult to identify. It is in this context, where many different forms for public service provision are undertaken, that tensions arise with international trade agreements.

¹⁴ Léon Duguit, *Law in the Modern State* (Allen & Irwin: London, 1921), 48.

¹⁵ Dawn Oliver, *Common Values and the Public Private Divide* (Butterworths: London, 1999), 201-205.

¹⁶ 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* (OUP: Oxford, 2011).

¹⁷ UN High Commissioner on Human Rights, *Human Rights, Trade and Investment* (2003), 13.

¹⁸ Garcia (1998), 81.

¹⁹ 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* (Edward Elgar Publishing: Cheltenham, 2010), 3.

²⁰ UNCTAD Secretariat, *Universal Access to Services – Note by the UNCTAD Secretariat* (2006), TD/B/COM, 3.

²¹ For an overview of such processes, see: Antenor Hallo de Wolf, *Reconciling Privatization with Human Rights* (Intersentia: Cambridge 2012).

²² Cremona (2011), 3.

²³ Mark Freedland, ‘Law, Public Services, and Citizenship – New Domains, New Regimes?’, in Freedland and Sciarra (1998), 3.

B. CONFLICTING AIMS: THE NEED FOR BALANCE

Before assessing the selected agreements, it is important to consider why tensions can arise between trade disciplines and the provision of public services. The underlying rationale of trade liberalisation 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 beneficial to them which leads to the most efficient allocation of labour.²⁵ As stated, the common aims of international trade agreements are the promotion of transparency, stability and trade liberalisation. In services, this is achieved by subjecting specific market sectors to trade disciplines. As with most trade agreements, the EU's are centred around the core disciplines of national treatment and market access, and to a lesser extent the principle of Most Favoured Nation ('MFN'). Other common disciplines include those on Domestic Regulation, Subsidies, Transparency and State-Owned Monopolies. The purpose of such rules is to 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. The remainder of this sub-section will outline how the application of the core disciplines and the provision of public services gives rises tensions that must be balanced.

A universal feature of the EU's agreements 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, subsidisation 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 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 in order to achieve a public good. But such regimes are likely to

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

²⁵ David Ricardo, *On the Principles of Political Economy and Taxation* (CUP: Cambridge, 1983), 133-134; For an explanation of Ricardo's theory, see: Giancarlo Gandolfo, *International Economics* (Springer: Verlag Berlin Heidelberg, 2014), 11-14.

²⁶ Eric Leroux, 'Systemic Issues in GATS Adjudication', in Marion Panizzon, Nicole Pohl and Pierre Suavé, *GATS and the Regulation of International Trade in Service* (CUP: Cambridge, 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* (Trade and Development Series: Washington, 2003), 198.

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

²⁹ GATS, Article XVI.

fall foul of the market access principle in that they limit the number of providers in a particular sector and, consequently, hinder access.³⁰

The principle of MFN features sporadically in the agreements.³¹ This 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. It has been argued that its effect on public service provision is likely to be minimal.³² From a traditional comprehension of public services, there is weight to this argument in that such services are normally provided by domestic monopolies in a top-down fashion with little room for foreign providers. But, as illustrated above, the scope for foreign service providers to become involved in public service provision has increased. Where suppliers of another member are involved, the application of the MFN principle allows them to demand the same treatment as other foreign service providers operating within the same sector. The agreements also incorporate rules on Transparency³³, Domestic Regulation³⁴ and Procurement³⁵ which, to a lesser extent, may impact public services.

From the above discussion, it is evidenced that tensions arise between international trade agreements and public services. In this context it is important that a balance is struck between the efficacy of their core disciplines and the provision of public services. The justification for balance is twofold and relates directly to the two arguments for public services outlined in the sub-section above. Firstly, there are inherent limits to the effectiveness of trade liberalisation. In the case of public goods, it is the failure of the market to operate efficiently by reason 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.³⁶ Secondly, at a particular moment in time a society may determine that a particular service should be provided publicly. In such circumstances, public services are those services that society has a common interest in having widely available for consumption.³⁷ As highlighted elsewhere, this involves the value judgments of a society which vary over time and space.³⁸ It is clear that it is necessary to balance the efficacy of the core disciplines with space for public service provision. Both internally and externally, the EU recognises the

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

³¹ EU-Korea, Article 7.14; EC-CARIFORUM, Article 70.

³² Rudolf Adlung, 'Public Services and the GATS', (2006) *Journal of International Economic Law* 9(2) 455, 467.

³³ EU-Korea, Chapter 12; EU-Columbia and Peru, Article 130; and, EU-Central America, Article 178.

³⁴ EU-Korea, Article 7.23; and, EU-Columbia and Peru, Article 131.

³⁵ EU-Korea, Chapter 9; EU-Columbia and Peru, Article 172; and, EU-Central America, Article 209.

³⁶ Amadeo Arena, 'The GATS Notion of Public Services as an Instance of Intergovernmental Agnosticism: Comparative Insights from EU Supranational Dialectic', (2011) *Journal of World Trade* 45(3) 489, 490-491.

³⁷ Choudhury (2012), 47.

³⁸ Markus Krajewski, 'Public Services and Trade Liberalization: Mapping the Legal Framework', (2003) *Journal of International Economic Law* 6(2) 341, 344-345.

need to strike such a balance³⁹; how this is struck will affect the amount of space available to member states to provide public services.

C. ASSESSING THE EU'S AGREEMENTS

The EU has an ambitious agenda to conclude a series of deep and comprehensive trade agreements.⁴⁰ It is currently party to a number of bilateral agreements and is in on-going negotiations regarding a series of more extensive trade agreements. This includes the on-going negotiations of the much publicised TTIP and the provisional CETA with Canada. Whilst these have stolen recent headlines, the focus of this essay are the EU's *second generation* agreements which mark a departure point from its traditional agreements by incorporating comprehensive services and investment chapters.⁴¹ For the purpose of this essay, the agreements which fall within the scope of the term second generation are those concluded with Korea, Ecuador, Columbia and Peru, the CARIFORUM and Central America countries ('the agreements'). These will form the bulk of analysis of this paper. The approach taken in the agreements can be contrasted and compared with those considered as 'traditional'.⁴² Other useful analytical counterweights are the GATS and NAFTA. These are widely accepted to form the template of most service agreements⁴³ with the NAFTA viewed as taking a more restrictive⁴⁴ and rigid⁴⁵ approach to public services.

Whilst the primary objective of EU trade agreements is to create expanded markets for services and eliminate barriers to trade and investment this is often balanced with the acknowledgement that members retain the right to adopt measures pursuing legitimate policy objectives.⁴⁶ Such references make clear that the EU is well 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

³⁹ TFEU, Article 14; for an ambitious reading, see: Malcolm Ross, 'Art.16 E.C. and services of general interest: from derogation to obligation?', (2000) *European Law Review* 25(1) 22; for an external perspective, see: Piet Eeckhout, 'A Normative Basis for EU External Relations? Protecting Internal Values beyond the Internal Market' in Krajewski (2015).

⁴⁰ 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).

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 Examples include the agreements with South Africa, Mexico and Chile.

⁴³ See: 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* (2012), Staff Working Paper ERSD-2012-19, 1; Marie-France Houde et al, 'The interaction between investment and services chapters in Regional Trade Agreements: Key Findings', *International Investment Law: Understanding Concepts and Tracking Innovations* (OECD, 2008), 242.

⁴⁴ Elaine Bernard, 'What's wrong with the NAFTA?', (1994) *New Politics* 16 80, 88.

⁴⁵ Anthony J. VanDuzer, 'NAFTA's Approach to Protecting Public Services: Fragmentary, Asymmetrical, Rigid and Limited', in Krajewski (2015), 111.

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

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 dynamic and constantly 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.

Whilst the agreements in question do differ significantly, this paper asserts that their rules on services and establishment can be examined in three aspects: (1) their overall scope with regard to public services; (2) their options for limiting the application of core disciplines through their schedules of commitments; and, (3) the application of their exceptions. At each stage, the balance which has been struck can be assessed by reference to the following terms of assessment: the diversity of forms of public service that fall within them; the extent to which those are protected; and, their flexibility to accommodate future forms of public services. The first area of comparison 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 area relates to the schedule 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 and derogations of each agreement. In this final respect, establishing their likely application is also relevant which can be determined from relevant dispute resolution interpretation of the WTO.

⁴⁷ For various accounts of the GATS approach, see: Krajewski (2003); Adlung (2006); and, Amadeo Arena, 'Revisiting the Impact of GATS on Public Services', in Krajewski (2015), 40.

⁴⁸ de Búrca and Scott (2002), 4.

III. 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 explicitly defined but instead are distilled into two modes of supply: cross-border trade (mode 1) and foreign consumption (mode 2).⁴⁹ Notably, 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 a separate chapters on establishment⁵¹ and most a chapter on the temporary presence of natural persons for business purposes⁵² which would cover the modes 3 and 4 respectively. They follow a positive-list structure which divides their trade disciplines into two categories and renders the application of certain disciplines, such as national treatment and market access, conditional on their inclusion in the schedules. The focus of this section is the first set of obligations which apply generally to all service sectors and usually this refers to the application of MFN and the additional disciplines stated in the previous section. In considering 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 adopted a range of strategies in its agreements each of which are examined below.

B. SECTORAL EXEMPTIONS

In each of the agreements there are five sectors that are always excluded from its disciplines on services and establishment, specifically: (1) mining, manufacturing and processing nuclear weapons; (2) production of trade or trade in arms, munitions and war materials; (3) audio-visual services; (4) national maritime cabotage; and, (5) domestic and international air transport services.⁵³ Notably, the first two of these are exempted only in relation to establishment and not the cross-border trade of services. The EU has also exempted similar services in its traditional⁵⁴ and newer agreements.⁵⁵ The significance of the exemptions listed here are that any sector listed here is exempted in whole from the obligations of the agreements. By implication, this means that such services are considered as special in some manner, i.e.

⁴⁹ EU-Korea, Article 7.4(3)(a); EU-Columbia and Peru, 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 and Peru, Article 110; EC-CARIFORUM, Article 65; and, EU-Central America, Article 162.

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

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

⁵⁴ EC-Chile, Article 95.

⁵⁵ EU-Singapore, Articles 8.1 and 8.8; EU-Vietnam, General Provisions on Services and Article 1 of Investment Chapter; and, CETA, Article X-01.

unlikely to be provided by the market or deemed politically to require public provision, and therefore are worthy of exemption.

Regarding what inferences may be made regarding how the EU balances efficacy of its disciplines with space for public services, several observations can be made with reference to the terms of assessment. Firstly, the diversity of public services which are covered is narrow with only a few specific sectors being granted exception. The services covered are those generally considered as services fulfilling a sovereign function of the state that clearly involve a high level of governmental action⁵⁶: military power, nuclear weapons etc. In contrast to the GATS, whilst similar exemptions for the sectors of air transport services and maritime transport are present⁵⁷, the agreements exempt a broader range of sectors which suggests a more favourable balance has been struck. Secondly, the level of space granted to such sectors is total, i.e. there is complete exemption. Like the GATS, these are total and unqualified exemptions which it has been argued are exempted on the basis that they constitute important public services in certain countries.⁵⁸ Accordingly, member states have total freedom in such areas. The first two points indicate that for sovereign services such as those exempted, which require clear and significant governmental involvement, the EU will provide a high level of exemption. Finally, in adopting a sectoral approach in determining which services are to be covered the scope of the exemption is fixed in time. This produces a rigid exemptive scope that is unable to accommodate future policy changes which may be desired by a member state.

C. FUNCTIONAL EXEMPTIONS

In addition to sectoral exemptions, the agreements also make use of functional exemption clauses. In this regard, the EU makes use of the GATS Article I:3(b) exemption for *services supplied under governmental authority* in both its second generation⁵⁹ and newer agreements.⁶⁰ To date, this has yet to form the subject of dispute settlement in the WTO and, as a consequence, its precise meaning and scope lacks clarity. It is accompanied by a supplementary definition which clarifies that the limitation applies to services provided neither on a *commercial basis* nor *in competition with one or more suppliers*.⁶¹ The EU has frequently incorporated this supplementary definition into its agreements.⁶² The two conditions are cumulative so that failure to satisfy one leads to application of the GATS. Close examination of the sub-

⁵⁶ Etienne Picard, 'Citizenship, Fundamental Rights, and Public Services', in Freedland and Sciarra (1998), 89.

⁵⁷ GATS, Annex on Air Transport Services, Article 2 and Annex on Negotiations on Negotiations on Maritime Transport Service, Article 1.

⁵⁸ Arena (2011), 505-507.

⁵⁹ EU-Korea, Articles 7.4(3)(b) and 7.9(c); EU-Columbia and Peru, Article 108; EC-CARIFORUM, Article 75(2)(b); and, EU-Central America, Article 169(2)(b).

⁶⁰ EU-Singapore, Article 8.1(2)(b); EU-Vietnam, General Provisions on Services; and, CETA, Article X-01(2)(a).

⁶¹ GATS, Article I:3(c).

⁶² EU-Korea, Articles 7.4(3)(c) and 7.9(c); EU-Columbia and Peru, 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).

concepts supports the view that a narrow functional approach⁶³ is more inherent which puts non-commercial services provided for reasons other than profit outside the scope of the agreement.⁶⁴ However, when compared to the above sectoral approach it can allow for broader coverage and greater flexibility.

In relation to the first 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 jurisprudence of the 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 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.⁷¹ The common view is that this should embody some form of substitutability between ‘like’ and ‘directly competitive substitutable products’. 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 limitation, a service supplier must not operate with a view to competing with other service suppliers.⁷³ On this basis, ‘in competition’ refers to the situation when a service

⁶³ Rudolf Adlung and Antonia Carzaniga, ‘Health Services under the General Agreement on Trade Services’, (2001) *Bulletin of the World Health Organization* 79(4) 352, 359; Rudolf Adlung, ‘The GATS Negotiations: Implications for Health and Social Services’, (2003) *Intereconomics* 147, 150; notably, this interpretation is supported by some WTO members also, see: Report of the Meeting held on 14 October 1998, *Note by the Secretariat*, 12 November 1998.

⁶⁴ Rupa Chanda, ‘Social Services and The GATS: Key Issues and Concerns’, (2003) *World Development* 31(12) 1997, 2004.

⁶⁵ See: Rashad Cassim and Ian Steuart, ‘Public Services and the GATS’, (2005) *ICTSD Policy Paper on Trade in Services and Sustainable Development* (3) 1, 12; Krajewski (2003), 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?’, (2006) *Journal of World Trade* 40(3) 345, 349.

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.

⁶⁸ Adlung (2006), 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 (2006), 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* (International Trade Canada: Ottawa, 2004), 412.

provider acts competitively by ‘striving for custom against other suppliers’.⁷⁴ Such an approach can cause practical difficulties in application 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 on what is occurring in the marketplace rather than the *identity* of the service supplier or the sector in which it operates.⁷⁶ Thus, the mere fact that there is a governmental involvement does not affect a determination of whether competition exists. This is perhaps unsurprising given the GATS explicitly contemplates the possibility of competition between public and private entities.⁷⁷ Again, this supports a functional approach to public services as it is the activity and context in which the service provision is carried out that matters rather than the identity of the provider.

For this paper’s purpose, the above discussion reveals a number of important points. Despite assertions to the contrary⁷⁸, the supplementary definitions do not consider the level of governmental involvement as determinative for their exemptive scope. Rather, by adopting a functional approach to exemption it is the service itself and its impact in the market that is relevant. For the terms of assessment this is significant. Firstly, no service sector is *per se* excluded from exemption. Its potential breadth is therefore significantly greater than that of the above sectoral approach. That said, the potential services that could satisfy the cumulative conditions are relatively few. In reality, only state monopoly service providers or private entities endowed with exclusive rights with no external competition will qualify. Whilst it is broad in terms of sectors covered, it is narrow with regard to the functions permitted. Secondly, if covered the level protection is total. Thirdly, by adopting a functional approach, its ability to exempt is not restricted to a particular sector in time. In this respect, it can more easily accommodate future public services in different sectors provided they meet the criteria.

D. HYBRIDS

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*. Though observable only sporadically it is included in traditional, 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 as constituting social services: health, statutory and complementary social security schemes and other essential services provided

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

⁷⁵ Arena (2015), 31.

⁷⁶ Leroux (2006), 361.

⁷⁷ GATS, Article VIII and IX; and also, Annex on Financial Services, Article 1(b).

⁷⁸ Werner Zdouc, ‘WTO Dispute Settlement Practice in relation to the GATS’, (1999) *Journal of International Economic Law* 295, 321; VanDuzer (2004), 401.

⁷⁹ EC-Chile, Article 135(2); EC-Mexico, Article 27(3); EU-Columbia and Peru, Article 167(2); EC-CARIFORUM, Article 224(2); and, EU-Vietnam, Chapter VII, General Exceptions, Paragraph 2.

directly to individuals.⁸⁰ *Social security schemes* are defined as those covering the main risks of 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 exemption 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 particular sector but to an action or aim and, thus, 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. In terms of scope, the first part is rooted in what sectors have been previously stated as considered covered. In contrast, although previous 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 whilst the latter is not restricted to a sector but to a function. As with the other clauses considered, the level exemption here is total. With regard to the final term of assessment, it 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 exempts only a narrow range of sectors. The second layer makes use of GATS Article I:3(b) which through its functional approach is able to cover a wider range of services. Nevertheless, analysis of the GATS demonstrates that while a functional approach is inherent it is very likely that this will be interpreted narrowly. The final approach is the hybrid which combines both the sectoral and functional approach. The sectoral aspect of this clause covers services more commonly associated with public services but is limited to those predetermined as falling within them. The functional aspect less so but it is limited. Where the separate layers apply it is clear they provide a high level of exemption but their overall scope is generally narrow. Occasionally, EU agreements have adopted all three layers⁸³ and where done so a more favourable balance has been struck as compared with other international trade agreements.

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* (CUP: Cambridge, 2010), 482.

⁸³ As done in: EU-Columbia and Peru; EC-CARIFORUM; and, EU-Vietnam.

IV. APPLICATION OF CORE DISCIPLINES

A. GENERAL PRACTICE

For the majority of trade agreements, the core disciplines of market access and national treatment apply subject to specific commitments or reservations set out in schedules of commitments after the main provisions. There are two generally accepted practice options for the scheduling of commitments: positive and negative listing of commitments. The former means that the disciplines of an agreement only apply to a particular economic sector when committed 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, its members decide the extent to which national treatment and market access apply in specific sectors. The latter mandates that its disciplines apply unless members of the agreement have specifically opted out from their application. Conversely, 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 That said, recent negotiations suggest a shift away from this practice towards either a negative approach or a hybrid of the two practices.⁸⁵ This system of scheduling is based on the GATS’ four modes of supply. With respect to each, members states can make either horizontal commitments (across all sectors) or specific commitments (with respect to a particular sector) or none (where the member states 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 conditions qualifying national treatment.⁸⁷ With regard to public services, the EU has used two techniques to carve out space for such services. The first is use of its *public utilities* exemption and the second is how it defines certain service sectors. These are first examined following which the capacity of the schedules to change 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. Consequently, it applies to both the disciplines of national treatment and market access. This also means that it applies to the rules on temporary presence

⁸⁴ EU-Korea, Annexes 7-A-1 (Services), 7-A-2 (Establishment) and 7-C (MFN); EU-Columbia and Peru, Annexes VII, Section B (Establishment) and VIII, Section B (Services); EU-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 (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 FTA 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 et al, *The Regulation of International Trade*, 4th Edition (Routledge: London; New York, 2013), 485.

⁸⁷ *Ibid.*

of natural persons for business purposes. As a result, it restricts Modes 3 and 4 of supply. Whilst not always the same, generally 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.*⁸⁸

This is then 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.*⁸⁹

Or more recently:

*Public utilities exist in sectors such as related scientific and technical consulting services, R&D services on social services 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.*⁹⁰

As the term public utilities has no specific meaning in international trade or EU law⁹¹, the scope of this provision is not immediately clear.⁹² The terms themselves are suggestive of service or supply of network industries such as energy, water or transport. This is a point noted by the Commission who has previously equated it with the EU concept of *Services of General Economic Interest*.⁹³ The first supplementary footnote in itself does little to flesh out which services are covered. But where this is used further footnotes indicate that the *public utilities* can occur in a wide range of sectors.⁹⁴ The second appears to codify to an extent the first by providing a non-exhaustive list of sectors. Both the clause and its footnote 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. Whilst the list of indicative sectors is not

⁸⁸ EU-Korea, Annex 7-A-2; EU-Columbia and Peru, Annex VII, Section B; EU-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.

⁸⁹ Found in: EU-Korea, Annex 7-A-2, Footnote 6; EU-Columbia and Peru, Annex VII, Section B, Footnote 2; EU-Ecuador, Annex VII, Section B, Footnote 201; EC-CARIFORUM, Annex IV-A, Footnote 2; EU-Central America, Annex X, Section A, Footnote 169; EU-Singapore, Annex 8-A-2, Footnote 6.

⁹⁰ Draft EU-Vietnam, Schedule of Commitments on Establishment, Footnote 6. The same supplementary definition has been adopted in CETA, Annex II.

⁹¹ Krajewski (2013), 25.

⁹² As noted in: Austrian Federal Chamber of Labour, 'Services of General Interest in Bilateral Free Trade Agreements', (2007) *AK Position Paper*, 4.

⁹³ European Commission, *Reflections Paper on Services of General Interest in Bilateral FTAs (Applicable to both Positive and Negative Lists)* (Brussels, 28 February 2011), 2.

⁹⁴ 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.

exhaustive⁹⁵, the clause adopts a purely sectoral approach with regard to scope. In contrast, its effect is functional. Guidance on the clause makes clear that member states are free to decide what they consider to public utilities and in such sectors create monopolies, either through a single public provider or a private provider with exclusive rights.⁹⁶ Its ability to create space is to restrict the application of national treatment and market access with respect to establishment only for the creation of public or private monopolies.

C. SECTORAL DEFINITIONS

The second technique in the agreements is related to the definitions which it adopts regarding certain services sectors. Commitments in the agreements are defined according to a Service Sectoral Classification List⁹⁷ ('the W/120') prepared by the Uruguay Round participants on the basis of the UN's Provisional Central Product Classification.⁹⁸ The classification system is a comprehensive list of service sectors and sub-sectors covered and is generally used by GATS members. Its purpose is to ensure cross-country comparability and consistency in commitment adoption.⁹⁹ As with the GATS, there is no legal obligation on the EU or its member states to adopt this classification system but it has done consistently but tailored it in a specific way to carve-out space for public services.

In the sectors of Education and Health and Social Services, it has consistently, in its schedules on establishment and services, defined the sector as applying to *only privately funded services*. Frequently, the definition for Health and Social Services in the establishment schedules is supplemented by a footnote explaining that the sector is also covered by the public utilities exemption.¹⁰⁰ On the face of it, this definition suggests that all publicly-funded services in these sectors are outwith the application of the core disciplines. This approach has been criticised 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

⁹⁵ As is the case with the Social Services Reservation in NAFTA, Schedules to Annex II: Canada, Mexico and the United States.

⁹⁶ 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 (last accessed 25.08.2016).

⁹⁷ WTO Secretariat, *Services Sectoral Classification List*, Note by the WTO Secretariat, 10 July 1991 MTN.GNS/W/120.

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* (Springer: Verlag Berlin Heidelberg, 2013), 17.

¹⁰⁰ EU-Columbia and Peru, Annex VII, Section B (Establishment), Footnote 4; and; EU-Ecuador, Annexes VII, Section B (Establishment), Footnote 246; 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 (2015), 264.

differently from foreign-based providers.¹⁰² Overall, the utility 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 level of protection whilst being total 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 EU has no such option.¹⁰³ For a GATS member to make change 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 are free to modify their commitments at any time albeit it is very difficult (if not impossible) to effect modifications.¹⁰⁵ This can serve to bind current liberalisation 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 greater extent with regarding to the agreements: member states can carve-out space on accession as can the EU but no framework for future modification is provided (even one as difficult as the GATS’). This supports the view that the agreements are not accommodating to future forms of public services. This argument can be made with greater force as in its most recent agreements it has begun to include provisions which restrict the ability of members to adopt more discriminatory measures in the future.¹⁰⁷ This is a relatively 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.¹⁰⁹ Moreover, it is illustrative that commitments undertaken cannot be easily modified to take account of the dynamic nature of public services.

¹⁰² 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 (last accessed 25.08.2016).

¹⁰³ GATS, Article XXI.

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

¹⁰⁵ Robert Howse and Elisabeth Tuerk, ‘The WTO negotiations on services: The regulatory state up for grabs’, (2002) *Canada Watch* 9(1-2) 3, 5.

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

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

¹⁰⁸ EU-Columbia and Peru, 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 The scheduling system in NAFTA, which is followed by the CETA, is arguably more restrictive depending on which Annex is used.

E. ASSESSMENT

Whilst 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 a great deal of flexibility in determining the extent to which the conditional disciplines apply.¹¹⁰ However, and with reference to the terms of assessment, it can be stated that the techniques used in the agreements have a narrow scope and their application is not entirely evident. The scope of the public utilities exemption is unclear and has been criticised as such previously. 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.

¹¹⁰ OECD, 'Open Services Markets Matter', *Policy Brief*(2001), 5.

V. JUSTIFIED EXCEPTIONS

A. GENERAL EXCEPTIONS: ADOPTING THE GATS TEMPLATE

Consistently, the agreements have included a series of general exceptions which provide total relief from their disciplines so long as the measure in question meets the stipulated conditions. Whilst these can vary in content, they replicate to a significant extent the approach adopted in the GATS. In the latter context, it has been argued that they are sufficient to address legitimate policy interests¹¹¹ while others have maintained the view that their recognition of public services is only to a limited extent and is therefore of little practical value.¹¹² The purpose of this final section is to examine where the reality is between the two views above and thereafter draw inferences as to what this means regarding the balance between efficacy and space.

The inclusion of particular clauses providing for justified exceptions from an agreement's disciplines is not a novel innovation. In a number of its traditional trade agreements it has made use of such clauses.¹¹³ The range of possible general exceptions available in earlier agreements cover the same ground as the those in the GATS¹¹⁴ but also a number of additional matters.¹¹⁵ The exceptions which are identifiable in all EU agreements along with the GATS are those necessary: (1) to protect public morals or public order; (2) to protect human, animal or plant life; and, (3) to secure compliance with laws and or regulations not inconsistent with the provisions of that particular agreement.¹¹⁶ In this respect, the EU's agreements can be seen as adopting a more favourable balance than other trade agreements such as the NAFTA which does not provide for parallel exceptions for measures that relate to cross-border services.¹¹⁷

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.¹¹⁸ 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 its CARIFORUM agreement, this footnote is replaced with the explanation that measures taken to combat

¹¹¹ WTO Secretariat (2005), 48.

¹¹² Arena (2015), 40.

¹¹³ EC-Chile, Article 91; EU-Mexico, Article 5; and, EC-South Africa, Article 27.

¹¹⁴ GATS, Article XIV.

¹¹⁵ 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.

¹¹⁶ Such exceptions can be identified in: EU-Korea, Article 7.50; EU-Columbia and Peru, 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).

¹¹⁷ Chapter 21 provides some general exceptions that apply to the members' obligations but these do not apply to the services obligations found in Chapter 12.

¹¹⁸ EU-Korea, Article 7.50(a), Footnote 43; and, EU-Singapore, Article 8.62(a), Footnote 29.

child labour would fall within the scope of the exceptions of public morals or measures necessary for the protection of health.¹¹⁹

B. APPLICATION OF THE TEMPLATE

Having considered the possible exceptions available, this section will now consider how they may be potentially used to create space for public service provision. From this perspective, the most relevant exceptions are those that allow members states to adopt measures necessary to protect public morals or maintain public order and to protect human, animal or plant life health. Whilst 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.¹²⁰

WTO jurisprudence has made clear that a two-tier analysis is envisaged for the assessment of whether a national measure should be exempted. Firstly, 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; i.e. it must be necessary.¹²¹ 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'.¹²² It can be viewed as maintaining a balance between the right of members to utilise the exemptions to protect legitimate policies and interests and the substantive rights of other.¹²³

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.¹²⁴ 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

¹¹⁹ EC-CARIFORUM, Article 224(1)(a), Footnote 1.

¹²⁰ 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.

¹²¹ *Ibid*, para.292.

¹²² Klamert, (2015), 33.

¹²³ Marise Cremona, 'Neutrality of discrimination? The WTO, the EU and External Trade', in de Búrca and Scott (2001), 156.

¹²⁴ Markus Krajewski, *National Regulation and Trade Liberalization in Services* (Kluwer Law International: The Hague, 2003), 157.

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.¹²⁵

It has been accepted that the aims of protecting human, animal and plant life health take priority over trade liberalisation commitments so long as they are deemed necessary.¹²⁶ Both exceptions contain the ‘necessity’ test which is determined through a ‘weighing and balancing of a series of factors’.¹²⁷ This requires consideration of the contribution of the measure to the realisation of the ends it pursues and also the restrictive impact of the measures on international commerce.¹²⁸ This has been interpreted by the Appellate Body must as requiring a balance between members’ intervention ‘rights’ and liberalisation ‘duties’.¹²⁹ In this exercise, the validity of the level of protection a member considers appropriate must not be questioned.¹³⁰ This exercise will involve an understanding of the relevant domestic values and principles together with an evaluative judgment of their relative importance.¹³¹ This is highly suggestive of a functional approach as it mandates some form of value judgment of the measure and the conditions it requires so as 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.¹³²

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.¹³³ 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.¹³⁴ 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.¹³⁵ 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 particular

¹²⁵ *European Communities – Measures affecting Asbestos and Asbestos-containing products*, Report of the Appellate Body, 12 March 2001, WTO/DS135/AB/R, para.168.

¹²⁶ *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, Report of the Panel, 7 November 1990, DS10/R - 37S/200, para.73.

¹²⁷ *Korea – Various Measures on Beef*, Report of the Appellate Body, 11 December 2000, WT/DS161/AB/R and WT/DS169/AB/R, para.164.

¹²⁸ *United States – Gambling*, 2005, para.306; *European Communities – Asbestos*, 2001, para.172.

¹²⁹ *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, 12 October 1998, WT/DS58/AB/R, para.156.

¹³⁰ *Ibid*, para.168.

¹³¹ Markus Krajewski, ‘Comment: *Quis custodiet necessitatem?* Adjudicating necessity in multilevel systems and the importance of judicial dialogue’, in Panizzon et al. (2008), 400.

¹³² *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.

¹³³ *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, 29 April 1996, WT/DS2/AB/R, 22.

¹³⁴ *United States – Gambling*, 2005, para.357.

¹³⁵ Krajewski (2003), 161.

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 praise for this balance should be tempered. Despite including a wide range of possible exemptions, 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 exemption 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 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.¹³⁶ This is of significance as it suggests that the exceptions of the GATS 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.

¹³⁶ Eric Leroux, 'Eleven years of the GATS case law: What have we learned?', (2007) *Journal of International Economic Law* 10(4) 749, 789.

VI. CONCLUSIONS

Whilst 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 liberalisation through the application of their core disciplines, namely the principles of MFN, national treatment and market access. The aims of the two must be balanced and the purpose of this paper has been to assess how the EU's second generation balance the efficacy of their core trade disciplines with space for the provision of public services.

To this end, this paper has undertaken a three-pronged examination looking at the agreements': (1) overarching scope; (2) limitations applicable to their core trade obligations; and, (3) the availability of justified exceptions. At each stage, the balance struck by the EU has been determined by reference to the terms of assessment laid out in section II. From this a number of conclusions can be drawn. Firstly, 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 produces a somewhat fragmented approach that makes it unclear as to the precise extent to which it has struck the above balance. 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 identifiable at each stage of examination. 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 commitments and by including (or attempting to do so) investor-state dispute mechanisms.¹³⁷ It is submitted that should the EU follow the same tripartite approach examined here in future agreements with such characteristics then it would, in turn, be striking a less favourable balance than has done in the past.

¹³⁷ Observable in TTIP and CETA.

Trade abbreviations

CETA	Draft Comprehensive Economic and Trade Agreement (2016)
EC- South Africa	Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other (1999)
EC-CARIFORUM	Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part (2008)
EC-Chile	Agreement establishing an association agreement between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part (2002)
EC-Mexico	Decision No 2/2001 of the EU-Mexico Joint Council of 27 February 2001 implementing Articles 6, 9, 12(2)(b) and 50 of the Economic Partnership, Political Coordination and Cooperation Agreement (2001)
EU-Central America	Agreement establishing an association between Central America, on the one hand, and the European Union and its Member States, on the other (2012)
EU-Columbia and Peru	Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part (2012)
EU-Ecuador	Draft Annotations to Trade Agreement between Peru, Colombia and Ecuador, of the one part, and the European Union and its Member States, of the other part (2015)
EU-Korea	Free Trade Agreement between European Union and its Member States, of the one part, and the Republic of Korea, of the other part (2011)
EU-Singapore	Free Trade Agreement between the European Union and the Republic of Singapore (2015)
EU-Vietnam	Free Trade Agreement between the European Union and the Socialist Republic of Vietnam (2016)
GATS	General Agreement on Trade in Services (1994)
GATT	General Agreement on Tariffs and Trade
NAFTA	North American Free Trade Agreement (1994)
TTIP	Transatlantic Trade and Investment Partnership (1994)

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