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NUCLEUS FOR A *SOCIAL* EUROPEAN PRIVATE LAW

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*Universal Services:
Nucleus for a Social European Private Law*

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Abstract

The paper is intended to develop the idea that the growing number of rules on universal services allows for the introduction of a debate about whether these rules contain the nucleus of a new social European private law. This all the more important as the European Community will change the social character of consumer law by means of full harmonization¹.

Keywords

Universal services, services of general economic interests, services of general interest, health care, education, social security, citizen-consumer, hybridisation, public/private law divide, constitutionalisation, established markets.

¹ The paper will be published in the series of the Academy of European Law, European University Institute.

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1. The Hypothesis

I would like to develop the hypothesis that the EC rules on universal services contain the nucleus of an emerging social European private law.² The rise of universal services is strongly connected to the fall of consumer protection. The European Community has deprived and is going to deprive consumer law more and more of its former protective elements. It must be recalled that consumer law in the 1970s was predominantly understood as protecting the weaker party in the market.³ The *Leitbild* of the early consumer policy was certainly not the circumspect, well-informed and responsible consumer as developed by the ECJ in unfair commercial practices law.⁴ Consumer law, at least in Europe, contained a strong social dimension to take care of those consumers who are not well-informed and lack orientation in the market. When the EC took over consumer law in the 1980s it gradually changed its outlook.⁵ The high watermark of this development is the fight over whether EC secondary legislation shall aim at full harmonisation which would preclude Member States from taking measures going beyond the EC-defined level of protection or whether Member States shall retain exactly these powers.⁶ The European Commission has already half succeeded and it might well be that full harmonisation will become the rule in the core areas of EC consumer law – internet sales and services. Elsewhere, I have developed the rapidly changing paradigm of consumer law – from protection of the weaker party, over the circumspect and well-informed consumer to the consumer-shopper in the internet.⁷

Whilst EC consumer law has downgraded the consumer to his or her buying activities, EC law on universal services has and is yielding a new social policy orientated consumer *Leitbild* – the protection of the vulnerable consumer. This development derives from the privatisation policy of former state monopolies as initiated by the European Commission in the aftermath of its policy to complete the Internal Market. Setting up markets for energy supply, for telecommunication and postal services, for transport and waste disposal, maybe even for health care, education and social security, cannot set aside that these services meet basic needs of the *citizens*.⁸ Being cut off from the market of these services could be equated with social exclusion. It was precisely in this context that the concept of universal services arose. It is meant to guarantee the supply of these services to those who lack the resources to buy them at the market price. There is an overwhelming literature on public services, on how far the European Commission can go in privatising former state monopolies.⁹ Much of the debate turns around the demarcation line between EU and Member States' competences, as enshrined in the relationship between Art. 86(2) ET and Art. 16, and the distinction between services of general interests, services of non-economic interests and services of economic interests. In this vein, the European Commission tends to enlarge the notion of economic services, which comes under its competences against the Member States which remain competent for all non-economic services. Much less attention has been paid to the impact of the privatisation of state monopolies via primary and

² The paper contains a number of references to EC documents. I have put into italics what is of prime importance for the context of the analysis throughout the text. In my research I benefitted from a seminar Fabrizio Cafaggi and myself had organised at the EUI in 2008/2009. I am grateful to their input.

³ See von Hippel, 1986 and Reich/Tonner/Wegener, 1976.

⁴ See Weatherill, in Micklitz (ed), 1996.

⁵ See for an analysis Rösler, 2004.

⁶ See Micklitz/Reich, 2009, 471.

⁷ Micklitz, in Howells/Schulze (eds), 2009; Krämer, in Schulthess et. al 2006.

⁸ See for a chronological analysis Damjanovic/de Witte, EUI Working Paper, 2008/34.

⁹ Neergard, in Neergard/Nielsen/Roseberg (eds), 2008.

secondary community law on private law matters.¹⁰ The following analysis must be located here. I deliberately take a private law perspective. Therefore, I will look into the rules governing the contractual relationship between the user of the privatised public services and the company which is providing the service.

My intention is to demonstrate that the existing EC law, primary community law as well as the numerous pieces of secondary community law, intended to privatise former state monopolies, yield elements of a new European private law, one which is designed to protect the economically and socially disadvantaged citizen. Understood in this way, universal services form an integral part of the European Social Model.¹¹ I will develop my argument in three steps. The second part will analyse the legal distinctions as conceptual differences. From a private law perspective, *mutatis mutandis*, this part deals with the possible scope of the law on universal services.¹² The third part looks into the hybridisation of the public/private law divide in universal services. The traditional bilateral concept of private law relations does not work in universal services. It is far more of a triangular relationship where national and European regulatory agencies/networks intervene as intermediaries into the former citizen state relationship which now becomes a citizen-consumer relationship. The fourth part looks at the constitutionalisation process of universal rights via the economic freedoms and the fundamental basic rights enshrined in the Treaty. It is suggested that constitutionalisation allows for the development of constitutive principles of the law on universal services. The fifth and last part formulates possible perspective of the law on universal services, its possibilities of generalisations in the field of regulated markets as well as in the non-economic sector of public services where the impact of privatisation is still virulent.

2. Legal Distinctions as Conceptual Differences or the Bumpy Road to a European Concept of Universal Services

The underlying perspective whence the conceptual differences are characterised stems from the EC law on regulated markets, in particular from EC secondary law on electricity, gas, telecommunication, postal services, railway, air passenger, ship and bus transport. The law of the regulated markets can largely be equated with services of general *economic* interest. Setting aside transport, where Art. 71 ET applies, all other Directives are based on Art. 95 ET. Competence conflicts show up, when and where the European Commission claims regulatory power in the grey zone¹³ of education, health care, research and social security. Private law comes in only as far as the European Community has privatised or will privatise former national state monopolies or statutory activities. However, behind the question of how far the community competences reach, the much more difficult issue arises of how to define the conceptual differences between public services, services of general interests, services of economic and non-economic interests as well as universal services.

2.1. National Public Services and European SGEIs

Primary EC law does not know the category of '*public services*'. This seems to be very much a French category,¹⁴ in contrast to German law which speaks of *Daseinsvorsorge*. More or less all Member

¹⁰ With a few exceptions, Wilhelmsson, in Rickett/Telfer (eds), 2003; Rott, 2005; same author, 2007; Willett, in Yearbook of Consumer Law 2008 edited by Twigg-Flesner/Parry/Howells/Nordhausen, 2008; Reich, in The Yearbook of Consumer Law, 2009, edited by Parry/Nordhausen/Howells/Twigg-Flesner, 2009.

¹¹ Scharpf, 2002; Damjanovic/de Witte, 2008.

¹² See Teubner, in Wilhelmsson/Hurri (eds), 2001, 51.

¹³ Neergard, 2008, 88; see ECJ, 5.3.2009 Case C-350/07 Kattner v. Maschinenbau 2009 ECR I-nyr.

¹⁴ See for details Schweitzer, 2001/2002; Garcia, in Freedland/Sciarra (eds), 1998, 57 for a comparative analysis of the French, German and Spanish approach, as well as Amato, in Freedland/Sciarra (eds), 145 for the different origins of

States, at least the old ones, are familiar with particular types of services which are provided by the state or by state-owned companies whatever the concrete legal category might be. These services are deeply rooted in national legal cultures and traditions.¹⁵ Whenever the ECJ intervenes, whenever the European Commission takes action, it must be clear from the outset that privatisation of former state-owned monopolies or even below such ambitious political projects, restricting or reshaping national public services, is more than just changing the legal structure from public into private. Privatisation bears a strong societal dimension. National state monopolies were often involved in sponsor activities at the local community level. They were socially perceived not only as the provider of basic services but as donors who financed all sorts of societal tasks such as refurbishing schools and universities, constructing sports arenas and public swimming pools. National statutory monopolies in particular in countries like France, Germany and Italy functioned like a state in the state, they were – and to some extent still are – interwoven into the local community at the social and political level. It will have to be shown that due to their very particular character ‘public services’ cannot be totally disconnected from the public domain, despite all privatisation rhetoric.¹⁶

The Treaty of Rome already contained the concept of ‘*services of general economic interests*’ in Art. 86 (2) empowering the Commission to exercise control on state monopolies under the competition rules. This Article remained dormant until after the Single European Act. Since then the European Commission has attacked national statutory monopolies directly via the competition and indirectly via the state aid rules and received strong support from the ECJ at least in the beginning.¹⁷ The European Commission and the ECJ thereby gave shape to what might be understood as ‘services of general economic interests’. Both were driven by the spirit that statutory activities should be put in the hands of private competitors as these were suggested to be better equipped than the state to offer high quality services at competitive prices. The ideological ground for the privatisation of public services was well prepared. The United States and the United Kingdom had demonstrated in the eighties that transforming public services into competitive markets may produce better results for the market and for the citizen, i.e., consumers. In continental Europe there was increasing pressure on Member State governments to follow the US and UK example in due course.¹⁸ The legal argument with which the ECJ managed to open Pandora’s box was the distinction between the economic nature of the statutory activity and the public underlying interests.¹⁹ The ECJ has used a similar legal construction in the field of intellectual property rights to overcome the boundaries of Art. 295 ET.²⁰ Thereby, the legitimacy of national public services remained unaffected, but the activities the public services undertook could be submitted to control under the Treaty provided they were ‘economic’. The ECJ transferred the economic/non-economic divide developed in the field of the market freedoms into competition and state aids law.²¹ Two consequences of this approach were relatively easy to forestall: that the ECJ and the European Commission would run into problems of where to define the borderline between economic and non-economic and more deeply that the economic/non-economic divide does not take

(Contd.) _____

public services in the common law and the continental law, as well as Neergard, 2008, 69 with further references from the literature.

¹⁵ Neergard, 2008, 71 with references.

¹⁶ This is the major findings of our analysis of the implementation and enforcement of the EC directives on electricity, gas, telecommunication and rail transport in a selected number of Member States, Keßler/Micklitz, 2008.

¹⁷ See in particular the contribution of Schweitzer/Harvey in the forthcoming volume of the Academy of European Law.

¹⁸ In Germany, the Max-Planck-Institut in Hamburg and its former Director E.-J. Mestmäcker certainly played a key role; see Mestmäcker, 2006.

¹⁹ See Sauter, 2008, 167 at 181. Harlow, in Freedland/Sciara (eds), 49, 50 referring to the functional approach of treating public services as activity in contrast to the institutional approach.

²⁰ See van Erp, 2006.

²¹ Which does not mean that the notion of economic activities in both areas market freedoms and competition is the same, e.g. Schweitzer, EUI Working Papers, 2007, 3.

the triangular relation into account.²² The consequences become virulent the deeper the European Commission and the ECJ in tandem approached the grey areas – health care, education and social security. The introduction of Art. 16 by the Treaty of Amsterdam was clearly meant to strengthen the role of the Member States in order to be able properly to perform and execute services of general interests in a spirit of social and territorial cohesion. The role and function of Art. 16 have provoked academic controversy. In the case-law of the ECJ, Art. 16 does not (yet) play a directly visible role, although it might have indirectly influenced the Commission and Court's position on the further privatisation of national public services.

Two types of conflicts must be distinguished: first, how far the ECJ would go in paving the way for further privatisation even in sensitive areas like health care, education, research etc. by reference to Art. 86 (2) and second, whether and to what extent the ECJ and the European Commission would apply the EC rules on state subsidies to services, which have been public services before, and are now privatised but need financial support to function in a public services dimension.

The first variant covers constellations where private competitors in a follow-on action refer to the new legal space the European Commission has opened up by way of an infringement procedure against a national state monopoly to challenge the privileged position of public service providers or the cartel like functioning of public and semi-public associations. In the late eighties and the early nineties the ECJ did not take a consistent position and nourished the hope of private parties that EC competition law might become a tool to split up statutory monopolies even in the so-called grey areas. However, gradually the ECJ defined a more sophisticated approach. In a series of judgments from the nineties the ECJ underlined that genuine state activity may be organised in public law form and that Art. 86 (2) does not allow for cherry-picking of one profitable service by a private provider.²³ The overall lesson to be taken from nearly twenty years of litigation of Art. 86 (2) might be that it is difficult if not impossible for the ECJ to define in case-law a genuine concept of 'services of general economic interests'. By and large the ECJ shied away from the most sensitive issues of health care and social security.²⁴ It was left for the EC legislator – if not the Treaty – to deregulate and privatise former national state monopolies, to define the categories of economic services which are of general interest and to decide to what extent the most sensitive grey areas of public services may be submitted to EC law.

The second variant deals with conflicts between the former public incumbents and the new competitor or between the respective Member States and private parties on which particular burdens are imposed to guarantee the supply of public services. Largely in compliance with the case-law on Art. 86 (2) the ECJ took a hard line against all sorts of state subsidies which prevented private parties from getting access to a market where public competitors (usually the former incumbent) hold a strong market position. The *Ferring*²⁵ case of 2001 is regarded as the turning point. The ECJ followed AG *Tizzano*²⁶ who strongly emphasized that neither Art. 86 (2) (by then Art. 90 (2)) nor Art. 87 (then Art. 92) had to be applied in cases in which the benefit given to those undertakings did not exceed what was 'strictly necessary to compensate the additional net costs which they incur in performing the public service obligations imposed on them.' In *Altmark*²⁷ which concerned the admissibility of state aids for a

²² See for the difficulties of where to define the demarcation line, Sauter, 2008; Neergard, 2008, and for the triangular relationship under 3.1.

²³ For a summary of the ECJ case law, Reich, 2005, 160 et seq., at last ECJ, 5.3.2009 Case C-350/07 *Kattner v. Maschinenbau* 2009 ECR I-nyr at 84 and 90; Szyszczak, 2001, 71 'cream skimming'.

²⁴ The solution to the question is the concept of undertaking which excludes 'pure' social services, ECJ 16.3. 2004 C-264/01 et al., *AOK Bundesverband*, 2004 ECR I-2493; ECJ, 5.3.2009 Case C-350/07 *Kattner v. Maschinenbau* 2009 ECR I-nyr.

²⁵ ECJ, 22.11.2001, Case C-53/00 2001 (ECR) I-9067, at 32.

²⁶ At. 63.

²⁷ ECJ, 24.7.2003 C-280/00, *Altmark Trans v. Nahverkehrsgesellschaft*, 2003 ECR I-7747.

private company for the execution of public service obligations, the ECJ confirmed its approach. The ECJ held that public subsidies intended to enable the operation of urban, suburban or regional scheduled transport services are not caught by Art. 87 if subsidies are to be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations. Four criteria must be met:²⁸ (1) the recipient undertaking is actually required by law to discharge public service obligations and those obligations have been clearly defined; (2) the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner; (3) the compensation does not exceed that necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations; and (4) where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well-run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

There seems to be a link between Art. 16 introduced in 1999 and the turning point of the ECJ in *Ferring* and *Altmark* in 2001 and 2003. The ECJ considerably increased the leeway of Member States to use state subsidies to guarantee public services even if they are provided by private companies. Such an understanding would even become clearer if the new wording of Art. 16 foreseen in the Lisbon Treaty would become true. Here the words ‘particularly economic and financial conditions’ will be integrated.²⁹ Read together with the ECJ case-law on Art. 86 (2) the situation today seems to be that Member States by and large had to accept that the EC competition rules apply in the core area of services of general economic interests but they benefit from a large leeway to subsidise either suppliers or consumers – provided they respect the four *Altmark* criteria. The interplay between the two sets of rules demonstrates the hybrid nature of public services where the economic/non-economic respectively the public/private law divide does not fully cover the complexity of the relationship.

There are by and large two major concepts which have to be fine-tuned against each other – the *national concept of public services* which is not coherent in its scope and density as it depends on the national cultural background and the national traditions and the *European concept of services of general economic interests*. The former is larger as it covers economic and non-economic services of general interests. However, beyond these rather banal findings there is ample room for all sorts of policy options, two of them deserve further investigation, (1) the sharpening of the demarcation line between economic and non-economic and (2) the more ambitious project to develop a genuine European concept of public services. The recent reform debate provides evidence in both directions.

2.2. The Distinction Between Economic/Non-Economic Services of General Interests

In the current political debate on the revision of the Treaty the Member States redoubled their efforts to build an ever thicker wall between their competences and those of the European Community. The protocol to the Lisbon Treaty mentions for the first time ‘non-economic services of general interests’ and confirms the Member States’ competence. It reads as follows:

Art. 2

The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interests.

One might argue that such a ruling should be integrated into the Treaty and not just be down-graded to a protocol. However, even if the Member States would be or would have been prepared to go down

²⁸ Mostly clearly in the tenor of the judgment.

²⁹ See Damjanovic/de Witte, 26 under reference to Winterstein, 2007, 645, 658.

that road, such a new Treaty provision would not really help to clarify where the borderline is situated. It would remain for the ECJ to contrast the economic services of general interests laid down in Art. 86 (2) and reflected in Art. 87 with the new rule in the protocol – even the Treaty – that Member States retain competence for non-economic services of general interests. The added value of such a new rule would obviously be rather limited. There is even a risk enshrined in the Protocol as it would overrule the case-law of the ECJ on equal access of non-national EU citizens to public employment and on the mobility rights of EU students.³⁰ One might wonder whether this really was the intention of the drafters.

The last ten years are marked by an increasing political influence of the Member States on where to draw the line between EC and national competences which is largely reflected in EC law. However, none of the documents had clarified what might be understood by public services, or by services of economic – or by non-economic of general interests.

The European Commission too stayed away from giving clear form to the different concepts. Since 2003 the European Commission has published a number of communications, none of them is really helpful with regard to the clarification of conceptual issues and none of them makes an effort to define the current state of development under existing EC law. *Sauter*³¹ enlisted largely in line with the common understanding of the academia³² the following services whilst stressing that the enlisted services should not be regarded as economic services of general interests in all Member States:

“River port operations, establishing and operating a public telecommunication network, water distribution, recruitment, basic postal services, maintaining postal service network in rural areas, regional policy, port services, waste management, ambulance services, and basic health insurance”.

From a constitutional point of view, it would make sense simply to list the areas in which the Community and/or the Member States have competence. The Member States are not prepared to go down that road and the European Commission intends to avoid setting in stone the areas of competences. Paradigmatic for the European Commission is the statement in the 2003 Green Paper on Services of General Interest, where it seeks the solution for conflicting concepts in the dynamics of the market and technology.³³

The range for services that can be provided on a given market is subject to technological, economic and societal change and has evolved over time (...). Given that the distinction is not static in time (...) it would neither be feasible nor desirable to provide a definite a priori list of all services of general interest that are to be considered non-economic’.

The undertone of the statement is telling. The European Commission relies on first technological, second economic and third societal change. Technological change like in the telecommunication sector might set aside the need to guarantee accessibility to a public phone. But what is the alternative? Technological change might overcome physical accessibility to public phones through mobile phones, but technological change cannot solve the second element enshrined in accessibility, that citizen-consumers need to have the resource to buy a mobile phone and pay the tariffs.³⁴ Economic change has ties to both to the technological and the societal change. Replacing public via mobile phones implies a change in the market structure. Linking economic to societal change refers to the understanding of the kind of market in which we want to trade. Should the market alone guarantee access to these services or are there additional rules that out to be elaborated by the state? Does

³⁰ Damjanovic/de Witte, 2008, 29; see for a full account of the development in a historical perspective Elsmore/Starup, 2007, 57.

³¹ 2008, 167, in particular Fn. 22.

³² See Neergard, 2008.

³³ COM (2003) 270 final, p. 14.

³⁴ For a clarification what is meant by citizen-consumer see under 3.

societal change imply that social exclusion becomes acceptable? This is certainly not in line with the long term EU policy as set out in the Lisbon Council 2000.³⁵ Competition and social exclusion are strongly interrelated.

2.3. *The Universality of the Concept of Universal Services*

The European Commission obviously intends to avoid the slippery constitutional i.e. competence ground of distinguishing economic from non-economic services of general interests. For a fully fledged federal United States of Europe such a clarification would be urgently needed. For a European Community which stands on unstable constitutional – if any – ground, it seems indeed more realistic and from an integrationist perspective more promising to seek the solution bottom up in the typical incremental approach³⁶ the European Commission has developed in bringing together the rules of the Treaty, the case-law of the ECJ and secondary Community law where the European Commission has not only gained competence but has laid down elements of a new legal concept which can be generalised far beyond its relatively narrow concrete context.

The key to understanding the approach of the European Commission can be found in the 2003 communication which contains a whole chapter on ‘universal service’. Again it is telling to look into the context of the analysis. The overall heading of the chapter is ‘Towards a Community Concept of Services of General Interests’, not economic services but all sorts of services. The first sub-chapter then deals with ‘universal service’ and provides for the following account:³⁷

It is probably neither desirable nor possible to develop a single comprehensive European definition of the content of services of general interest. However, existing Community legislation on services of general economic interest contains a number of common elements that can be drawn on to define a useful Community concept of services of general economic interest. These elements include in particular: universal service, continuity, quality of service, affordability, as well as user and consumer protection. These common elements identify Community values and goals. They have been transposed into obligations in the respective legislations and aim to ensure objectives such as economic efficiency, social or territorial cohesion and safety and security for all citizens. They can also be complemented by more specific obligations depending on the characteristics of the sector concerned. Developed in particular for certain network industries they could also be relevant for social service.

The European Commission seems to contradict itself. On the one hand, universal services are said to constitute a mere element of SGEIs. This is true in so far as the different categories mentioned ‘continuity, quality affordability, consumer protection (!)’ have been developed in secondary Community law dealing with network industries.³⁸ This, however, is only half the truth. The key message is found in the heading to the chapter and the last sentence of the quotation. Both suggest that these common elements are of importance far beyond the distinction of economic *versus* non-economic services of general interest. The European Commission is developing a new concept in an area where it has gained competences and then generalises the common elements, thereby intruding into areas where it lacks competences or where the competence of the EU is at least doubtful. The message is clearly said and though it might remain unnoticed, ‘they could also be relevant for social service’. The European Commission turns universal services into a general concept which might be extended to non-economic services of general interests.

³⁵ OJ C 137, 8.6.2002, 2.

³⁶ Weiler, 1991, 2403 and 1999.

³⁷ COM (2003) 270 final, No. 49 at p. 15.

³⁸ Directive 2002/22 on telecommunications, OJ L 108, 24.4.2002, 51; Directive 2003/54 on electricity, OJ L 176, 15.7.2003, 37; Directive 2003/55 on gas, OJ L 176, 15.7.2003, 57; Directive 2008/6 on Postal Services OJ L 52, 27.2.2008, 3.

What was politics in 2003 became law soon afterwards. The European Commission got support for the adoption of the diverse telecommunication directives in 2002³⁹ and the energy directives in 2003.⁴⁰ Contrary to the 2003 Green Paper, the European Commission could base its 2007 Green Paper⁴¹ on relatively solid legal ground. The concept of universal services shows up in the respective directives and regulations dealing with network industries. Whilst the language is far from being clear, secondary EC law tends to use 'public services' and 'services of general interests' interchangeably, thereby mixing up general European interests and national public interests.⁴² The concept of universal services or, more generally speaking, the idea that privatisation of network industries has to go hand-in-hand with obligations imposed on Member States to guarantee the availability of these former public services to each and every citizen has been, since then, relatively well established. The purpose of the 2007 Green Paper is therefore different. In light of the failure to integrate in particular health care services into the Directive 2006/123/EC⁴³ on Services the European Commission uses the Protocol of the Lisbon Treaty⁴⁴ and the concept of universal services to pave the ground for further action in the field social services as well.⁴⁵ The language is rather tight and firm:⁴⁶

The capacity to combine the provision of services of general interest with the development of a European single market is particularly well illustrated by the series of sector-specific policies developed since the early 1990s for network industries such as telecommunications, energy, transport and postal services, which today represent more than 7% of the GDP and 5% of total employment in the EU. The gradual opening up of these sectors to competition went hand in hand with the definition of a number of *public service obligations for each sector, covering aspects such as universal service, consumer and user rights and health and safety concerns.*

More particularly on the role of universal services:⁴⁷

Ensuring equal treatment and promoting universal access: Access to services of general economic interest is recognised as a right in the EU Charter on Fundamental Rights. This includes ensuring equal treatment between women and men and combating all forms of discrimination in accessing services of general economic interest. *Where an EU sectorspecific rule is based on the concept of universal service, it should establish the right of everyone to access certain services considered as essential and impose obligations on service providers to offer defined services according to specified conditions, including complete territorial coverage and at an affordable price.* Universal service provides for a minimum set of rights and obligations, which as a general rule can be further developed at national level. *It is a dynamic concept, which needs to be updated regularly sector by sector.* Promoting access throughout the territory of the Union is essential for the promotion of territorial cohesion in the EU, as mentioned above in the case of social services. Territories with a geographical or natural handicap such as outermost regions, islands, mountains, sparsely populated areas and external borders, often face challenges in terms of access to services of general interest, due to the remoteness from major markets or the increased cost for connection. These specific needs must be taken into account.

The European Commission accepts that the concept of universal services rules are so much tied to the relevant sector that each sector has to be studied separately. This seems to be in line with the ECJ

³⁹ Directive 2002/22 on telecommunications, OJ L 108, 24.4.2002, 51 (the universal services directive).

⁴⁰ Directive 2003/54 on electricity, OJ L 176, 15.7.2003, 37; Directive 2003/55 on gas, OJ L 176, 15.7.2003, 57.

⁴¹ COM (2007) 725 final.

⁴² Neergard, 2008, at 73.

⁴³ OJ L 376, 12.12.2006, 36.

⁴⁴ See in more details under 4.3.

⁴⁵ See the headlines of the Communication (2007) 725 final.

⁴⁶ COM (2007) 725 final p. 8.

⁴⁷ COM (2007) 725 final, p. 10.

which does not start from a universal concept of public services.⁴⁸ On the other hand universal services rules are so variable that they present general ideas even beyond the relevant sectors. They could become constitutive for all efforts to liberalise economic and maybe even non-economic services of general interests. They could turn into a new concept with far-reaching implications for private law.

In the light of such a long term perspective, the envisaged revision of Art. 16 in the Lisbon Treaty gains importance. On the surface Art. 16 para. (2) – if it will ever enter into force – will introduce a new competence concurrent to Art. 86 (3). The Draft, one might argue, would only codify what has become practice already. As the European Commission is currently very reluctant to make use of its power under Art. 86 (3) and, if it does so, integrates European Parliament into law-making on an informal basis, the new competence basis in Art. 16 (2) does not seem to bring about major changes. However, Art. 16 (2) might legitimate the attempt of the European Parliament to push the European Commission to propose a framework directive on economic services of general interests.⁴⁹ Such a framework directive would provide the opportunity to discuss contract law parameters of universal services in more depth. However, the European Commission used the uncertain future of the Lisbon Treaty as pretext to suspend any further initiative for the time being.

3. The Hybridisation of the Public/Private Law Divide in the Public Services Sector

In the high days of the welfare state, there was a clear distinction between the public sector = politics and the private sector = economics.⁵⁰ The reconstruction of the way from national public services to European made universal services demonstrates that the distinction in EU law between economic and non-economic does not fully catch the issues which are behind that distinction. In the sectors at stake it is simply a dead end to try to distinguish between non-economic and economic, notwithstanding the legal means chosen, be they EU constitutional law or merely policy-making tools. What is really needed is openly to address the hybrid character of the public/private law divide in order to be able to determine the particularities of the sector which shape and influence the relationship between all parties concerned.⁵¹ Only in this way it is possible understand the constitutive elements of that new area of law to find out whether the concept of universal services bears elements which can be generalised beyond the field of network industries – what the European Commission would like to do – or what are the relationships between the ‘new’ law on universal services and the ‘old’ consumer law. Hybridisation of the public services sector yields the concept of the citizen-consumer who is no longer merely a citizen due to the extension of the entrepreneurial statutory activities, but likewise not really a consumer due to the fact that the state remains involved in regulation of the public sector even after privatisation.⁵² From now on I will call the consumer, the citizen-consumer which demonstrates his or her hybrid status. Customer, quite to the contrary refers to the intermediary status which relates from the now vanishing particular relationship between the entrepreneurial state and its citizens.

3.1. From Bilateral to a Triangular Relationship

Traditional private law relationships are bilateral. Ideally the parties negotiate the content of the contract as they wish, within the boundaries set to the misuse of private autonomy in common law and civil law countries. Traditional bilateral private law making is anchored in economics. Consumer law

⁴⁸ See ECJ, 19.5.1993, Case C-320/91 Corbeau, 1993 ECR I-2563 versus ECJ, 27.4.1994 Commune d’Almelo Case C-393/92 1994 ECR I-1508 and Szyszczak, 2001, at 74.

⁴⁹ See for a short re-construction of the initiative which goes back to 1998, Neergard, 2008, 112 et seq.

⁵⁰ See for a deeper analysis of the impact of the expanding entrepreneurial state activities on the relationship between the state and the society Picard, in Freedland/Sciarra (eds), 1998, 83.

⁵¹ Scott, 2000, 310 develops a regulatory model which takes the conflicting values into consideration.

⁵² Picard, in Freedland/Sciarra (eds), 1998, 94; Amata, in Freedland/Sciarra (eds), 1998, 153; Everson/Joerges, 2008, 154.

led to the introduction of more and more mandatory standards which limit the parties' freedom to contract.⁵³ Structurally speaking the state, i.e., the European Community, intervened into private law relationships, in order to correct market failures. Private law as consumer law enters politics via economics. The regulatory state, be it the nation state and/or the European Community does not systematically monitor compliance with mandatory standards. This was and is left in principle to the private parties. There is, however, a growing tendency not only in the control of unfair contract terms,⁵⁴ to involve statutory agencies in the enforcement dimension.⁵⁵

Universal service relations are not bilateral. Privatisation suggests that a former field of activities belonging to politics is shifted to economics. So ideally privatisation would have to turn down the former bilateral customer-state monopoly public law relationship into a bilateral citizen-consumer-supplier private law relationship. However, universal services lie between economics and politics, in the private/public law divide. The EC-privatised public services combine economics and politics. Teubner calls it a triangular relationship.⁵⁶ For our purposes, it is important to look at the new actors which enter the scene in universal services. Before privatisation the customer was provided public services via the state directly or via statutory entities supervised and controlled by the state. After privatisation, the customer is faced with a completely new regulatory environment.

The universal service provider might still be the well-established incumbent, but the former incumbent has become at the same time a competitor in the market. The state and/or the government stay outside the market deliberately distanced from the former customer. The potential addressees for the customer of universal services in case of dissatisfaction are the national regulatory agencies. The bilateral relationship has turned into a triangular relationship. The tensions between economics and politics which seemed to be overcome when these services were put into the hands of the state (politics) a century ago, are re-imported via privatisation (economics) into the field of universal services. The simple fact that privatisation of public services yields universal services suffices to show that the state cannot get rid of the problems enshrined in public services by outsourcing them to private entities.⁵⁷ All sorts of new and old mismatches occur.

Seen from a private law perspective, the relationship between the customer and the state monopoly fell into the category of public law. There was no contractual freedom. The incumbent had to conclude the contract with each and every customer. The contractual relations were submitted to public law rules. The price was guaranteed and often a political price, highly subsidised via taxes. In turn the statutory monopoly benefitted from privileges from tight restrictions on liability for injuries and damages.⁵⁸ Privatisation may lead to a competitive market, but in this market not all competitors and customers are treated alike. The selected universal service provider is legally obliged to conclude a contract if a citizen-consumer so requests provided the citizen-consumer meets the necessary legal requirements to which the mandatory provision of the service is bound.⁵⁹

The law on universal services is status related at both ends, at the supplier and the customer side. After privatisation two levels of contractual relations could in theory stand side-by-side in the former public sector; the citizen-consumer-supplier relation on the competitive market of former public services

⁵³ See for a rather traditional view, Basedow, 2008, 901.

⁵⁴ See Collins (ed), 2008.

⁵⁵ Cafaggi/Micklitz, 2008, 391.

⁵⁶ In Wilhelmsson/Hurr (eds), 2001, 59.

⁵⁷ Garcia, in Freedland/Sciarra (eds), 1998, at 61: "all the elements of the debate are still present in the current context".

⁵⁸ See Rott/Butters, 1999, 75 (Teil 1) and 107 (Teil 2); Butters, 2003; Magnus/Micklitz, 2006.

⁵⁹ See for an attempt to overcome the dichotomy between public services and private services by way of developing new forms of public private partnership, Rincken, 2008.

where due to privatisation the existing body of mandatory consumer law now fully applies⁶⁰ and the citizen-consumer universal service supplier relation which is bound to even stricter requirements on the freedom to contract and the freedom to shape contractual relations (*Abschlussfreiheit* und *Gestaltungsfreiheit*). The level of protection in universal services is higher than in citizen-consumer-supplier relations on the competitive market as it reaches beyond the limits set to the freedom of contract via standard terms legislation. Let us recall the clear cut statement of the European Commission:

“Where an EU sector specific rule is based on the concept of universal service, it should establish the right of everyone to access certain services considered as essential and impose obligations on service providers to offer defined services according to specified conditions, including complete territorial coverage and at an affordable price.”⁶¹

Obviously the addressees of the two sets of rules differ: on the one hand there is the ‘normal’ citizen-consumer who chooses from the now privatised service sector the most appropriate and mainly the cheapest provider. On the other hand, there are the addressees of the universal services, which may be strictly speaking broken down into two different categories, those who are uncoupled from the territorial coverage, but have the necessary resources and those who are not able to pay the market price for the requested services independent of their domicile. Theoretically both sets of legal relations could be kept separated from each other. However, new mismatches arise whatever the regulatory approach might be, a split concept differentiating between the two types of consumers or a unified concept, or a one fits all approach which treats all addressees alike. In line with EC terminology I will call the solvent consumer, the circumspect consumer⁶² and the consumer which is endangered to social exclusion, the vulnerable consumer.⁶³

The circumspect consumer will claim to be treated as the vulnerable consumer. He or she may favour a maximisation strategy, under which new and old consumer expectations generated in the field of public services are aggregated. Under the former state monopolies old expectations relate to low service and bad complaint management but high standards of equality, accessibility, continuity, after privatisation new expectations associate better service and better quality at lower prices on top of the level already achieved during the old times.⁶⁴ *Wilhelmsson*⁶⁵ raised the question whether these maximised expectations are legitimate⁶⁶ in the sense that they need to be respected in the decision of whether the legal standards of universal services can be generalised even beyond its proper scope of application within the regulated market. However, if the standards generated with regard to universal services become the rule independent from the potential addressee, the circumspect and/or the vulnerable consumer, tensions arise with regard to the degree to which the invisible hand of the market shall decide over the price and the quality of the former public services. In the field of universal services they are subject to statutory regulation as a visible expression of the statutory responsibility to avoid social exclusion. Exactly this type of intervention constituted the primary target of privatisation

⁶⁰ See the references to Directive 93/13 on unfair terms in Directives 2003/54 on electricity and 55 on gas Annex A and Directive 2002/22 on telecommunications Art. 20 (1).

⁶¹ COM (2007) 725 final at p. 10.

⁶² See with regard to its origins, Weatherill, in Micklitz (ed), 1996, at 430.

⁶³ See with regard to this concept the Directive 2005/29 on unfair commercial practices, OJ L 149, 11.6.2005, 22; *Wilhelmsson*, in *Howells/Micklitz/Wilhelmsson*, 2006, chapter 4 f) at 111.

⁶⁴ See Peraldi-Leneuf, in *Service Public et communauté européenne entre l'intérêt général et le marché* eds, Kovar/Simon, Tome II: Approche transversal et conclusions, Actes du colloque de Strasbourg 17-19 October 1996. La documentation française (1998), Travaux de la CEDECE, who underlines that the notion of ‘consommateur’ bears an element of collectivity (l'intérêt collectif des consommateurs) juste au contraire de la notion ‘client’.

⁶⁵ See *Wilhelmsson*, 00 and later under 5. where I will study the question in more detail.

⁶⁶ See on the concept of legitimate expectations Micklitz, in *Krämer/Micklitz/Tonner* (eds./Hrsg.), 1997, 245-278; the same 1999/2000, 167-204.

at least with regard to those areas where the market forces are said to be the appropriate, if not the better means to guarantee better services at lower prices. These mismatches are enshrined in the privatisation process. They demonstrate the hybrid character of the privatised public services. It does not suffice to look into the bilateral relationship between the citizen-consumer and the now privatised supplier, it is necessary to look more closely into the triangular relationship. Otherwise it is not possible to design the new law on universal services.

3.2. *Interactions Between the Citizen-Consumer, Universal Service-Provider, State Relationship*

The shift from a bilateral citizen-state monopoly to a triangular relation between the citizen-consumer, the provider of universal service and the state affects and transforms the social and economic environment between the citizen-consumer, the supplier and the state concerned. *Freedland* discusses the marketisation of public services and distinguishes between *consumerisation*, *marginalisation* and *economisation*,⁶⁷ a distinction which does not yet cover the relationship between the citizen-consumer and the public agencies which have to control and monitor the markets. In so far a fourth category is needed, which I term *substitutionalisation*.

Consumerisation of citizen-consumer/universal service provider relationship leads to individualisation of former collective relationships between state-owned public service providers and citizens. This is the consequence of the 'degeneration of collectivism into centralised corporatism' which legitimated the privatisation of public services.⁶⁸ *Szyszczak*⁶⁹ has demonstrated that the privatisation of public services affects the social behaviour of citizen consumers and uncouples him or her from his or her local community. Citizen-consumers should no longer look and feel bound to the local supplier whom they know and who might be involved in a number of local sponsoring activities, they should look for the cheapest supplier wherever he is located in his home country or from an EC perspective even from other Member States. *Consumerisation* is pushed to extremes in the recent proposal for a Directive on Consumer Rights,⁷⁰ but elements of the shopper consumer can also be found in each and every piece of regulatory EC law where the consumer is instrumentalised for the realisation of the internal market or more particularly for the establishment of sectoral markets. The citizen-consumer is compensated for the loss of collective relationships in his or her community by being granted subjective rights.⁷¹ This is the general response of EC law to the decoupling of the 'subject (the natural and the legal person)' of its own legal and social environment. However, the former collective relationship was a forced one, resulting from the lack of choice. Privatisation does not hinder citizen-consumers from getting together and organising themselves. Self-organisation is now left to civil society. The question, however, remains to what extent incentives, legal and economic, are needed to initiate self organisation in and for representing citizen-consumer interests.

Marginalisation of the citizen-consumer/state relationship is a direct result of privatisation. The baseline is the citizen-consumer/SGEI relationship, constructed as a market relationship. The changing relationship shows up in the new language, where EC and national ministerial documents are no longer referring to the government/citizen but to the government/consumer relationship.⁷² The outsourcing of public services into the private arena, i.e., the delegation of statutory tasks to private actors, however, cannot be fully achieved due to the Member States' obligation or right, depending on

⁶⁷ Freedland, in Crouch/Eder/Tambini (eds), 2001, 90.

⁶⁸ Harlow, in Freedland/Sciara, 1998, 55.

⁶⁹ 2001, 47 and same author, 2007.

⁷⁰ COM (2008) 614 final, 8.10.2008, see Micklitz/Reich, 2009, 471 and the same in Howells/Schulze (eds), 2009.

⁷¹ See Reich, 1999.

⁷² See already Teubner, in Wilhelmsson/Hurri, 2001, at 63; Szyszczak, 2001, at 65.

the regulated market at stake,⁷³ to establish a universal service provider. Via the selection and approval procedure which might even end up in granting exclusive rights, the universal service provider is much closer connected to the state. From the citizen-consumer perspective, the distinction between normal competitors and the universal service provider which might be at the same time a competitor is hard to overlook. The marginalisation process is further enhanced by the Europeanisation process. The nation state is no longer the true actor in regulated markets. Since the late eighties, after the adoption of the White Paper on the Completion of the Internal Market,⁷⁴ law-making and frame-setting with regard to network industries lies in the hands of the European Community. Member States are not much more than mere implementers and enforcers of EU law rather than political actors which shape the policy in the respective sectoral market. This does not mean that there is no leeway left to them. Secondary EC law sets only rather vague minimum standards.⁷⁵ Despite the strong European legal background citizen-consumers may nevertheless tend to hold the state responsible and politically accountable, even for those actions where the State has given competences away to the EU. Legally the nation state remains mainly conceivable if it decides to equip the citizen-consumer with the necessary resources to pay for the services he or she could otherwise not afford.

Substitutionalisation refers to the independent regulatory agencies which serve as an intermediary between the citizen-consumer and the state. These regulatory agencies are a by-product of the EU-initiated privatisation process. Before privatisation, the state not only held the monopoly, it also controlled the activities of its own monopoly mostly via the competent ministries. After privatisation, when the state withdrew from the market, supervision and monitoring had to be re-organised. Over time, EC law has put increasing pressure on Member States to establish independent agencies, which are in no way connected and bound to the competent ministries or the government.⁷⁶ The EC reacted hereby to the reluctance of Member States to give up political control over former incumbents. EC law, however, leaves it to the Member States to decide whether the monitoring and supervision should be entrusted to the competition authorities or to newly established independent regulatory agencies.⁷⁷ The majority of the Member States voted in favour of an independent separate regulatory agency mainly due to the different tasks. Regulatory agencies had to establish a market for electricity or for telecommunication, competition authorities have to fight down distortions of competition in a workable market. In theory citizen-consumers could develop close and direct ties to 'their' competent national agency. Consumer-agency relations would then substitute citizen-government relations. This would presuppose that the regulatory agency establishes firm participation structures in the decision-making,⁷⁸ accepts responsibility for the individual rights of citizen-consumers and not only for the workability of the respective sectoral market.⁷⁹ Even if these ties were established and even if societal relations could be established, the problem remains that the national regulatory agencies are integrated into the European regulatory networks. The 'formal' decisions are still taken at Member State level, in that the regulatory agency accepts or refuses to deal with individual consumer complaints or more generally with individual consumer protection issues (the rights dimension of the marginalisation), but

⁷³ Member States are obliged in the telecommunication sector, Art. 3 (1) Directive 2002/22, in the postal sector Directive 3 (1) Directive 2008/6 and electricity sector, Art. 3 (3) Directive 2003/54, they may do so in the gas sector, Art. 3 (2) Directive 2003/55.

⁷⁴ COM (1985) 310 final.

⁷⁵ See recital 26 Directive 2003/54 on electricity and recitals 13/27 of Directive 2003/55 on gas, Art. 1 (2) of Directive 2002/22 on telecommunications; recitals 20/42; Art. 3 (1) and (6) of Directive 2008/6 on postal services; for a deeper analysis on this issue, Rott, 2005, at 329; Szyszczak, 2001, at 58.

⁷⁶ See Thatcher/Coen, 2008.

⁷⁷ Cameron, 2007 and Keßler/Micklitz, 2008.

⁷⁸ See Harlow, in Freedland/Sciarrà (eds), 1998, at 55.

⁷⁹ See J. Keßler/H.-W. Micklitz, 2008.

'the material' basis of these decisions quite often results from a complicated co-ordination process of conflicting interests.⁸⁰

Economisation means the relationship between the universal service provider and the state. After privatisation, the service providers are subjected to financial accountability. As *Teubner* demonstrated that is the field where economic rationality should dominate, however, due to the universal service dimension, the market mechanisms are partly suspended. If the EC imposes via the Member States an obligation on service providers to contract with disadvantaged citizen-consumers, a mechanism is needed by which these providers are compensated for the economic loss which results from the fact that the citizen-consumer might not be able to pay the market price. Before and even during privatisation national state monopolies used cross-subsidisation⁸¹ to balance out the gap between economically viable and inviable economic services. With the establishment of a competitive market structure, cross-subsidisation vanishes, but not the problem behind it. EC secondary community law leaves the Member States a large set of options of how to overcome the discrepancies between economic and social rationality. The more general choice to be made is whether Member States want to subsidise the service providers or the citizen-consumer. If the Member States choose the first variant they must observe EC rules on state aids. The second variant is exempted from EC state aids.⁸² Much of the competence struggle at the EC level goes back to the Member States intention to be freed from too narrow legal constraints on using socially motivated state aids as a policy instrument in the field of public services.⁸³ Economics vote in favour of subsidising citizen-consumers as a less intrusive intervention into the market.⁸⁴ If Member States are unwilling or unable to subsidise either the service provider or the citizen-consumer, they might still impose obligations of the respective business sector concerned to provide funds out of which the service provider who accepts universal service obligations is compensated. This can be done via levies imposed on these companies,⁸⁵ although this form of taxation might have to face constitutional constraints as the principle of equal treatment is affected.⁸⁶ Such a mechanism might be regarded as a substitute for former cross-subsidisation through the incumbent. There is not much knowledge available on how the Member States are financing the universal services obligation. The Member States must report to the European Commission on the progress in privatisation, but with regard to financing, the European Commission remains conspicuously reluctant.⁸⁷ The choice heavily affects the role and function of the citizen-consumer. If the latter is directly subsidised, the citizen dimension dominates, if the companies operating in the market must finance the disadvantaged citizen-consumer via a compensation fund (*Ausgleichsfonds*) the consumer dimension prevails. Similar effects could be achieved via state aids granted to companies. However, EC law on state subsidies sets narrow boundaries.

3.3. *Implications for a Concept of Universal Services*

Hybridisation taken seriously implies that a legal concept of universal services would have to include the four dimensions of marketisation: consumerisation, marginalisation, substitutionalisation and economisation. Only such an all-embracing perspective allows for a full understanding of the implications the universal services concept for private law matters.

⁸⁰ See Lavrijssen/Hancher, 2009, 23; see also Thatcher/Coen, 2008, 31; same authors in reverse order 2008, 49; Hoffmann/Türk, 2007, 253.

⁸¹ ECJ, 19.5.1993, Case C-320/91 Corbeau, 1993 ECR I-2563.

⁸² See Art. 87 (2) a).

⁸³ Damjanovic/de Witte, 2008, 26 under reference to Winterstein, 2007 at 658.

⁸⁴ See Petretto, in Freedland/Sciarra (eds), 1998, 99; as well as Szyszczak, 2001, at 59.

⁸⁵ See in this regard Ferring, ECJ, 22.11.2001, Case C-53/00 2001 (ECR) I-9067.

⁸⁶ German Constitutional Court, 19. March 2003, 2 BvL 9/98 and 3. February 2009, 2 BvL 54/06 (CMA).

⁸⁷ See for an analysis of the practice of the Member States, Keßler/Micklitz, 2008.

Consumerisation is perhaps the field in which the development of law and policy is most advanced, with regard to the addressee of the subjective rights and the prospective content of the contractual relationship. The protocol to Art. 16 of the Lisbon Treaty addresses for the first time the needs and preferences of the *users* and promotes *user rights*. It thereby goes beyond chapter 3 of the 2003 Green Paper on universal services.⁸⁸ The Commission obviously intends to combine horizontal consumer protection rules and particular sectoral rules.

“In services of general interest, horizontal consumer protection rules apply as they do in other sectors of the economy. In addition, because of the particular economic and social importance of these services, specific measures have been adopted in sectoral Community legislation to address the specific concerns and needs of consumers and businesses, including their right to have access to high-quality international services.²⁷ Consumer and user rights are set out in sector-specific legislation on electronic communications, postal services, energy (electricity, gas), transport and broadcasting. The Commission’s consumer policy strategy 2002-2006⁸⁹ has identified services of general interest as one of the policy areas where action is needed to ensure a high common level of consumer protection.”

In the 2007 White Paper, different notions of citizens, consumers, users and customers are standing side-by-side. It seems as if the Commission starts from the premise that there are differences but it does not make any effort to tell what these differences are and where they result from.⁹⁰ It says: “*Upholding user rights*: Citizens, consumer and user rights should be specified, promoted and upheld.” This reads as if user rights cover citizen and consumer rights. In a sense such an interpretation is correct, as user rights might be granted also to non-citizens. But what is missing is the particular citizen dimension which results from the hybrid character of the former public services. The former citizen state relation comes clear in the obligation imposed via EC law on Member States to take appropriate measures to guarantee universal services and the bewildering mixture of citizen, consumer and user in the EC policy documents and sectoral directives. The European Commission does not discuss substitutes for the abolition of the communitarian element which was enshrined in the former citizen local or regional public service provider relationship, perhaps with the exception of the electricity market. Here customers might get together in a buying group to negotiate a better price with the supplier.⁹¹ This does not mean that there is no collective element at all in the EC consumer policy. However, it is shifted from *ex ante* influence to *ex post* monitoring and surveillance. The European Commission proposes collective actions for compensation of damages. The development is in an early stage and does not particularly refer to the consequences of privatisation in the public sector.⁹²

Marginalisation and *substitutionalisation* should be read together. The state citizen-consumer relationship might only matter in case the respective member state decides to subsidise the individual citizen-consumer so as to be able to pay for the market price he or she could otherwise not afford. The relationship gains an EU law dimension if the state is not willing to treat his or her citizens and EU or even non-EU citizens alike. The ECJ is going quite far in obliging Member States to subsidise EU citizens out of its budget.⁹³ Although to my knowledge no case-law exists on that issue,⁹⁴ the ECJ would probably challenge the compliance of national social aid rules meant to finance universal services which discriminate against EU nationals. Much more important are the changes brought about by the establishment of regulatory agencies as intermediaries between the citizen-consumer and his or

⁸⁸ P. 18.

⁸⁹ A similar statement can be found in the consumer strategy 2007-2012; COM (2007) 99 final, 13.3.2007, at 8, 11 and 12.

⁹⁰ COM (2007) 725 final, at p. 10.

⁹¹ Art. 3 (3) of Directive 2003/53 on electricity.

⁹² See COM (2008) 794 final 27.11.2008.

⁹³ See in particular the case law on transborder health care as well as on education E. Spaventa, 2004, 271; Dougan, 2005, 943.

⁹⁴ But see now ECJ, 04.06.2009, C-22/08 Vatsouras, nyr.

her state. In its 2007 White Paper the European Commission indicates the set of issues which have to be given shape:⁹⁵

“The capacity of consumers and users, including vulnerable or disabled persons; to take up their rights, especially their right of access, often requires the existence of independent regulators with appropriate staff and clearly defined powers and duties. These include powers of sanction, in particular the ability to monitor the transposition and enforcement of universal service provisions. These also require provisions for the representation and active participation of consumers and users in the definition and evaluation of services, the availability of appropriate redress and compensation mechanisms, and the existence of a review clause allowing requirements to be adapted over time to reflect new social, technological and economic developments. Regulators should also monitor market developments and provide data for evaluation purposes.”

One might read into this statement that the European Commission would like to see the regulatory agencies which are established via secondary Community law in the field of network services, not only as market supervision authorities but as ‘representatives’ of the citizen-consumer interest, in that they look after the individual citizen-consumer, their rights, that they adopt rules, be they mandatory or non-mandatory⁹⁶ and that they monitor the possibilities of enforcing their rights. However, secondary community law as far as it is dealing with regulatory agencies does not or not yet clearly impose on national regulatory agencies a legal obligation to look after the individual rights of the citizen-consumers.⁹⁷ There is a gradual movement of EC secondary law into that direction which might overcome in the long run the still existing discrepancies between the role and function of regulatory agencies in the Member States.⁹⁸ These can be divided largely into two groups, those where regulatory agencies are bound to supervise the market and reject any commitment towards individuals⁹⁹ and those where regulatory agencies are equally looking after the workability of the market and the rights of individuals.¹⁰⁰

The European Commission document contains strong language on the need to involve citizen-consumers in the decision-making process of the national regulatory agencies. This policy is in no way reflected in the secondary legislation dealing with privatisation of the public sector. Therefore the degree to which citizen-consumers are represented with the regulatory agencies is entirely left to the Member States. Again there are large differences between the Member States. Those national agencies which look after the individual rights of citizen-consumers are generally speaking more inclined to grant citizen-consumers a right to participation and a stable forum in which they raise their voice and defend their interests.¹⁰¹ What is entirely missing in all EU documents is the European level which lies behind the national regulatory bodies. Citizen-consumers have no right to participate in the ‘decision-making process’ of the European regulatory network. By and large they may be heard at the discretion of the respective committee established under the comitology procedure.¹⁰² However, the participation

⁹⁵ COM (2007) 725 final, at 10.

⁹⁶ See with regard to national agencies as regulatory in matters of private law, Keßler/Micklitz, 2008. They investigate the implementation of the respective EU directives in energy, telecommunication and railway transport, in France, Germany, Hungary, Italy, Sweden, Spain, United Kingdom under a common scheme. The books provide for a fuller account of the role of national agencies with regard to regulating directly or indirectly private law relations.

⁹⁷ See with regard to getting public authorities involved in collective complaints management Hodges, 2008, in particular chapter 9.

⁹⁸ Of particular importance is the so-called third package on electricity, gas and telecommunications.

⁹⁹ In particular Germany and France, see Keßler/Micklitz, 2008. There is a strong coincidence between the relationship of citizens towards the executive and the self-understanding of the executive, see with regard to the ways and means of citizens to get access to information they national administrations are holding back, Micklitz, 2009.

¹⁰⁰ In particular UK and the Nordic countries, see Keßler/Micklitz, 2008 and Micklitz, 2009.

¹⁰¹ See Keßler/Micklitz, 2008.

¹⁰² See Directive 99/468/EC, OJ L 184, 17.7.1999, 23; Micklitz, in Cafaggi/Muir Watt (eds), available as EUI Working Papers Law 2008/06.

of citizen-consumers is in no way institutionalised and legally ensured. The recent initiative of the European Commission to set up European regulatory agencies in the field of energy and telecommunication would have been an occasion to take the 2007 policy statement seriously. However, the third packages do not strengthen the rights of citizen-consumers at all.¹⁰³ So there is a large discrepancy between the announcement of measures in policy documents and the hard law which is then adopted.

The weakest and by far the least developed of the four parameters of privatisation is the *economisation* process in the service provider state/agency relationship. The afore-mentioned statement in the 2007 White Paper refers to the need for appropriate resources and staff to be able to monitor the transposition and enforcement of universal service provisions. However, the European Commission has not yet made any effort to develop a particular policy on the options of Member States of how to finance universal service obligations. The budget constraints might explain why European policy and European law is restricted to rather broad statements of what might and should be achieved by way of universal services. However, there is a clear tendency in the reform of the energy and the telecommunication sector by way of the third package to put more specific duties on the national regulatory agencies to report to the Commission on the way in which the universal service is organised and applied in the Member States. *U. Neergard*¹⁰⁴ has rightly proposed the use of the open method of co-ordination as a regulatory device to look more closely into the various ways and means Member States have developed to finance universal services.

4. Constitutionalisation of Universal Services

Universal services are embedded in the constitutionalisation process of private law relations.¹⁰⁵ Constitutionalisation means that the contractual relations between the supplier and the citizen-consumer are more firmly subject to constitutional law. Here, the rights rhetoric is clearly dominant. The triangular relationship must therefore be reconstructed in the category of 'rights'. Whether these rights are individually enforceable or whether they must be regarded much more as objectives which must be taken into account when interpreting the Treaty remains to be seen.¹⁰⁶ For the constitutionalisation process both models are equally important.

It is plain that basic rights/human rights rhetoric and thinking affect the shaping of the contractual relationship. Most of the current debate is focusing on the constitutionalisation of private law within the Member States.¹⁰⁷ There is much less analysis available on the affects of the Treaty being understood as a constitution on private law relations.¹⁰⁸ In the EU, constitutionalisation of universal services comes from two sides, from the impact of economic rights i.e., from the market freedoms, from competition law and state aids on universal services on the one hand and from social rights, from basic or human rights as enshrined in the Treaty or from the Fundamental Charter on the other. Both forces seem to work in different directions: the economic rights into the direction of private autonomy, the social rights, the basic and human rights into the direction of restriction and constraints. However, they have one thing in common, both contribute to the empowerment of the citizen-consumer.

¹⁰³ Third package, telecommunication, COM (2007) 697 and 698 final, 13.11.2007; electricity COM (2007) 528 final, 19.9.2007 – here a Common Position had been reached on the 13.1.2009 nyr – and gas COM (2007) 529 final, 19.9.2007.

¹⁰⁴ Damjanovic/de Witte, 2008, at 24.

¹⁰⁵ See Ciacchi/Brüggemeier/Commandé (eds), 2009; Cherednychenko, 2008; Mak, 2008.

¹⁰⁶ With regard to the transformation of principles into rights see Picard, 1998, 90.

¹⁰⁷ See Cherednychenko, 2008; Mak, 2008; Ciacchi/Brüggemeier/Commandé (eds), 2009.

¹⁰⁸ See Steindorff, 1996; Grundmann (ed), 2008.

However, such a dichotomy does not really fit into the hybrid character of the universal services. The four market freedoms are of still of limited importance in the area of universal services.¹⁰⁹ So far only the freedom to provide health care services across the border has gained importance. In a series of judgments the ECJ has taken a clear stand against restrictions which oblige the citizen-consumer to use the national health care system for ambulatory treatment.¹¹⁰ The European Commission is currently trying to transform the case-law of the ECJ into a binding instrument of law.¹¹¹ The freedom to provide service works to the benefit of the patient, usually it is the other way round. Service providers invoke the market freedoms to their benefit. More important in our context are Treaty provisions on competition and state aids. These two set of rules do not work into one simple direction. The way in which they are construed requires a balancing of the rights of the new competitor, the old incumbent and the state who acts as a representative of the citizen's rights. In the third package on electricity, the European Commission has formulated its credo in the following words:¹¹² "... public services obligations are a necessary supplement to competition. If market forces alone do not meet society's needs, governments have the right – and sometimes the obligation – to intervene."

Hybridisation at the Treaty level means that the respective articles support the development of a legal concept of universal services which benefits from constitutional standing. A similar mixture of intertwined objectives might be found in the still rather weak sets of human rights and fundamental rights impacting universal services.

4.1. The Triangular Relationship in a Constitutional Perspective

If we look at the triangular relationship from a citizen-consumer rights perspective, we can distinguish three different areas and three different set of questions where the constitutionalisation process matters to a highly different degree, even if we understand by citizen-consumer rights individually enforceable rights as well as policy objectives.

The *consumerisation* of the citizen-consumer/universal service provider relationship is clearly the area where the constitutionalisation process is most visible. It will have to be shown that primary community law via economic and via basic/human rights is giving shape to the constitutive elements of universal services. This does not mean that these constitutive elements may be equated with individually enforceable rights. If anything, the old question rears its head, as to who is the addressee of this right. Here is not the place to discuss the horizontal dimension of economic and basic/human rights.¹¹³ What matters much more in our context is that constitutionalisation has already led to substantial results.

Marginalisation and *substitutionalisation* instead has at least in theory a much stronger and more easily implemented subjective rights' bias. The addressee of this process is the national regulatory agencies which would be regarded under EC law as a state entity, notwithstanding its independent regulatory status. Two different sets of rights might be discussed in that context, the right of the citizen-consumer or consumer organisations to participate in administrative actions and the right of the citizen-consumer to claim damages in case the competent regulatory agency has not or has taken insufficient action which harmed the citizen-consumer. Whilst the right to participate plays a prominent role in national and EC consumer policy programmes, this right has never reached the EU constitutional level. Art. 153 ensures the right of consumers to get together and to establish an

¹⁰⁹ For a more general understanding, Reich, 2007, 705.

¹¹⁰ See for a recent account of the case law under the patient's perspective, Benedict, 2008, 441; Spaventa, 2004.

¹¹¹ COM (2008) 414 final, 2.7.2008, thereto Benedict/Reich, 2008, 448.

¹¹² See COM (2007) 386 final, p. 3 (b).

¹¹³ See on this issue Reich, MS 2009 on file with the author.

association which represents their interests.¹¹⁴ But Art. 153 is of little support when it comes down to considering the existence of a general right to participate in administrative matters. Therefore, the position of the citizen-consumer largely depends on whether secondary community law is formulated in a such a way as to ensure that the regulatory agency in charge of the universal service is obliged under EC law to look after the interests of the individual citizen-consumers. *Peter Paul*¹¹⁵ has set high standards for citizen-consumers to overcome that threshold. The existing secondary law points into that direction, but it might need the adoption of the third package in energy and telecommunication¹¹⁶ to argue in favour of an individually enforceable right of citizen-consumers against the failing regulatory agency.

Economisation concerns the citizen-consumer in so far as the question arises whether he or she has a right to claim under EC law financial support from his or her nation state if he or she cannot afford to pay the market price of the universal services. There is definitely a constitutional dimension behind. Under EC law such a right could only be vested to the benefit of the citizen-consumer. The complicated question is whether EU law could establish a right to financial support to the benefit of the citizen-consumer who resides in a different Member State. This would be the case probably only in the limits of Art. 12 ET. The Treaty, the Protocol to the Lisbon Treaty and the EU secondary community law in particular on network industries is of little help here. These provisions cannot be read so as to grant a subjective right to the citizen-consumer.¹¹⁷

Therefore the constitutional dimension of universal services, reconstructed in the rights rhetoric has poor form. It seems much more promising to look into the competition law state aids rules on the one side and the social rights dimension as enshrined in the Protocol to the Lisbon Treaty and Art. 36 of the Fundamental Charter to distil out of primary community law in combination with secondary Community law a set of constitutive elements which govern the law on universal services, in particular with regard to the citizen-consumer service provider dimension. The triangular approach, however, will not go lost, as the particular character of the universal services still dominates the private law relations even if it is not possible to constitutionalise the three sides of the triangle to a similar degree.

4.2. Constitutive Elements in Competition and State Aids Law

In *BUPA*¹¹⁸ the CFI undertook a major effort to clarify under the rules on SGEIs under Art. 86 (2) and state aids the criteria which are constituent for the existence of universal services within SGEIs. *BUPA* still needs to be confirmed by the ECJ. So in a way the judgment stands alone, but the attempt of the CFI deserves close attention as this judgment has no counterpart so far in the case-law of the European courts. *BUPA* deals with the question whether and to what extent private health insurers which are the major competitors to the public health care regime may be submitted to contribute to the national risk compensation fund. Their obligation depends largely on the question whether the services offered by the private insurers may be regarded as universal services or not. The private law dimension behind the case is that the CFI is considerably widening the meaning of universal services far beyond the boundaries of its agreed core which is the area of SGEIs. *BUPA* might be, if it will be confirmed, of overwhelming importance for the scope of universal services.

1. The CFI uses the first *Altmark* criterion – that the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined – to draw a distinction between universal services in the strict sense – i.e., services which respond to a need of

¹¹⁴ Micklitz/Rott/Reich, 2009, at 26.

¹¹⁵ ECJ, 12.12.2004, Case 222/02 2004 I-9425.

¹¹⁶ Third packages telecommunication, electricity and gas.

¹¹⁷ See on this question Rott, 2005, at 342.

¹¹⁸ CFI, 12.2.2008, T-289/03 *BUPA v. European Commission*, nyr, at 165.

the whole population or to be supplied throughout the territory – and universal services in the large sense where the service provider withholds the autonomy to shape the substance and the price of the contract provided that he is obliged to offer certain services to all those citizens who request them.

By its distinction the CFI considerably enlarges the meaning of universal services. The already adopted Directives on network industries do not fit into that category. So far secondary Community law seems to be united in the idea that universal services are devoted to full geographical coverage, this is true with regard to electricity and the use of public cell phones. Enlarging the meaning bears risks and provides opportunities. The widening of the scope allows for bringing all sorts of services under the category of universal services thereby paving the way for a generalisation of constitutive standards. The risk is that material standards of protection might be watered down.

2. The *mandatory* character, i.e., the obligation to conclude a contract on request is said to be constitutive for the existence of an SGEI independent of whether it is ‘strict’ or ‘wide’. In contractual terms universal services limit the freedom of the service provider to conclude a contract.¹¹⁹ This not really new but what matters is that the CFI undermines the overwhelming importance of that rule for the existence of universal services.

(186) ... the concept of universal service, within the meaning of Community law, does not mean that the service in question must respond to a need common to the whole population or be supplied throughout a territory (see, in that regard, *Ahmed Saeed Flugreisen*, paragraph 181 above, paragraph 55; *Corsica Ferries France*, paragraph 97 above, paragraph 45; and *Olsen v. Commission*, paragraph 166 above, paragraph 186 et seq.). ...although those characteristics correspond to the classical type of SGEI, and the one most widely encountered in Member States, that does not preclude the existence of other, equally lawful, types of SGEIs which the Member States may validly choose to create in the exercise of their discretion.

(187) Accordingly, the fact that the SGEI obligations in question have only a limited territorial or material application or that the services concerned are enjoyed by only a relatively limited group of users does not necessarily call in question the universal nature of an SGEI mission within the meaning of Community law. ...

3. The CFI draws a distinction between exclusive rights and the obligation to provide the service without taking costs into consideration and situations where such a privileged status is missing. Here it might suffice that the provider is mandated to offer certain services¹²⁰ which the citizen may but must not request. This seems to reflect the different traditions in the Member States as to whether public services are provided by monopolies or whether they are provided by private companies which are put under statutory surveillance.¹²¹ There is no mutual obligation on behalf of the citizen and the service provider. Compulsory membership is not required. The CFI opens the door for the crucial question of what type of services may come under the definition where an obligation to provide services suffices to regard them as universal.

(188) From the point of view of the operator entrusted with an SGEI mission, that compulsory nature – which in itself is *contrary to business freedom and the principle of free competition* – may consist, inter alia, particularly in the case of the grant of an *exclusive or special right*, in an obligation to exercise a certain commercial activity independently of the costs associated with that activity (...). In such a case, that obligation constitutes the counterpart of the protection of the SGEI mission and of the associated market position by the act which entrusted the mission. *In the absence of an exclusive or special right*, the compulsory nature of an SGEI mission may lie in the obligation borne by the operator in question, and provided for by an act of a public authority, *to offer certain services* to every citizen requesting them.

¹¹⁹ ECJ, 14. June 2007, Case C-64/06 Cesky Telcom, 2007 ECR I-4887.

¹²⁰ In the German version „bestimmte Dienstleistungen“, 189.

¹²¹ Garcia, in Freedland/Sciarra, 1998, at 61, 66, 71 and Amato, in Freedland/Sciarra, 1998, at 147 and 150.

(195)... In effect, the universal and compulsory nature of the SGEI is not dependent on a reciprocal obligation to contract, that is to say, in this case, by compulsory ... membership. ... the *Albany* judgment, paragraph 101 above (paragraph 98 et seq.) permits of no other interpretation...

4. The services offered must not be determined in advance by the public authorities. The service provider may benefit from a certain leeway with regard to the content of the service and the price. Therefore mandatory universal services obligation may be limited to the definition of *minimum quality standards*. Universal services and competition are not mutually exclusive. There shall be competition beyond a certain platform. This goes hand-in-hand with the secondary community law on network industries. The deeper question is to what extent the minimum character of universal services bears a discriminatory element or to put it in different terms whether the recipient of universal services must be satisfied with the minimum standards. The more procedural aspect is whether the standards should be determined in advance. It is not entirely clear from the judgment whether this should be the case in order to meet the transparency requirements set out in the *Altmark* judgment.¹²²

(189) ...the compulsory nature of the SGEI mission does not preclude a certain latitude being left to the operator on the market, including in relation to the content and pricing of the services which it proposes to provide. In those circumstances, a minimum of freedom of action on the part of operators and, accordingly, of competition on the quality and content of the services in question is ensured, which is apt to limit, in the community interest, the scope of the restriction of competition which generally results from the attribution of an SGEI mission, without any effect on the objectives of that mission.

5. It is common ground that universal services do not require regulated prices. All the Member States must guarantee under the respective directives and regulation in line with the policy statements of the European Commission are that vulnerable consumers can afford the universal services. The CFI goes rather far in granting precedence of competition over regulated prices without real discussion of the affordability issue. This again is of utmost relevance for possible generalisations of the concept of universal services.¹²³ The key point would be the universal character not so much the calculation of the price. Each and every citizen-consumer might be able to cover the costs for a bank account, but he or she might not have access to it. The judgment should not be overestimated. It might be that in that particular market segment which gave rise to the litigation, 'unaffordable prices' did not really matter. But such a statement should not be generalised.

(202) ... the fact that the prices of (the) services are neither regulated nor subject to a ceiling does not affect their universal nature either. .. Owing to that uniformity of rates (prices) and to competition on rates (prices) between the different ... insurers subject to (..) obligations, to the advantage of all insured persons, the risk of an excessive rate, which would be *economically unaffordable* for certain groups of persons, (...), seems to be very limited in practice. On the contrary, (..) community rating permits a *cross-subsidy of premiums* to the advantage of the most vulnerable insured persons, in particular the elderly and the sick, and ensures that they have easier access to (...) services, whereas such access would potentially be impeded, or indeed excluded, in a market in which rates were risk-based.

6. There is a link between the affordability and the anti-discrimination issue. Both form an integral part of the EC policy and the secondary law on network industries. The key question is whether the citizen-consumer suffers from discrimination if he or she cannot afford to pay for the service. The point then is whether and to what extent economic discrimination within universal services is permitted or not. The issue is well-known and has been widely discussed in the field of financial services.¹²⁴ The directives and regulations on secondary community law do not provide much

¹²² ECJ, 24.7.2003 C-280/00, *Altmark Trans v. Nahverkehrsgesellschaft*, 2003 ECR I-7747.

¹²³ See under VIII.

¹²⁴ In particular with regard to the question of whether there is a category such as social force majeure which the consumer may raise in order to fight down his or her insolvency, see Wilhelmsson, 1992.

guidance on this issue.¹²⁵ The CFI analyses affordability and non-discrimination as two separate issues. With regard to non-discrimination it takes a very formal stand. Anti-discrimination means that the same service is offered at uniform and non-discriminatory rates. Such a reading of the anti-discrimination principle rejects any efforts to materialise the principle. However, it is to be recalled that the ECJ took a similar perspective in labour law relations.¹²⁶

(203) ...The fact that certain potential users do not have the necessary financial resources to take advantage of all the (services) available on the market, in particular 'luxury' cover, does not undermine its universal nature provided that the service in question is offered at uniform and non-discriminatory rates and on similar quality conditions for all customers (see, to that effect, *Corbeau*, paragraph 131 above, paragraph 15; *Almelo*, paragraph 97 above, paragraph 48; and Case C-475/99 *Ambulanz Glöckner* (2001) ECR I-8089, paragraph 55).

7. *BUPA* may be read as an attempt of the CFI to develop certain constitutive elements within the boundaries of SGEIs. This is particularly true with regard to *universal services in a wide sense*.¹²⁷ The demarcation line between universal services relations and the 'normal' contractual relations is the obligation of the service provider to be legally obliged to conclude a contract. The mandatory character of the service is crucial, in so far as the private autonomy, the autonomy to decide with whom to conclude a contract is limited. However, even such a restriction must not necessarily be imposed on each and every service provider. The respective Member States may select under different providers the one which shall be obliged to provide *certain services* – on request. The CFI confirms the universal service obligations are status related. The legislation and the contractual obligations affect only those companies or the only company which is in charge of providing certain services. This broad understanding leaves a lot of room for possible generalisations beyond the field of network industries. It might indeed become the basic unit for a new social European private law.¹²⁸

The criteria the CFI is developing beyond and outside the obligation to conclude a contract are more problematic. The CFI seems to have in mind a model of contractual relations where mandatory minimum quality standards limit the freedom to shape a contract. The minimum character leaves room for market forces and competition beyond that minimum level – with regard to the quality of the service. The CFI, however, is very generous with regard to the question whether and to what extent the price of services is subject to control beyond the market forces. It neither explores the meaning of affordability nor anti-discrimination. Both belong to the core of the universal services regulation, in policy and in secondary community law. One way to look at the judgment is to stress its context. The broad reading of universal services allowed the CFI to admit that Ireland may impose an obligation on private insurers to contribute to the compensation funds which serves to balance out the bad and the good risks. In so far the CFI is in line with the ECJ which does not allow cherry picking where only those services are privatised which are economically viable whereas the non-economically viable services are left to the remaining public institutions.¹²⁹

The regulatory technique of minimum standards is still the prevailing technique in consumer contract law directives. It is interesting to see that the European Commission intends to eliminate minimum standards in the revision of the consumer *acquis*,¹³⁰ thereby arguing that only a fully harmonised set of rules raises the consumers' confidence, whereas the European courts, in particular in non-harmonised markets, defend a totally different concept, one where regulation is restricted to minimum standards to

¹²⁵ In fact the so called network directives do not touch the issue at all.

¹²⁶ At least in so far as the ECJ rejected efforts to up level the standards of protection, see Micklitz, 2005, at 247 under reference to *Smith v. Advel* Case C-408/2 1994 ECR I-4435 at 4443.

¹²⁷ *BUPA* at 186.

¹²⁸ See under 5.1.

¹²⁹ See Reich, 2005, 160 et seq already under 2.1.

¹³⁰ See COM (2007) 614 final.

leave room for competition. Universal services follow a different regulatory approach. It is hard to imagine that the European Commission would propose a maximum approach on universal services relations. If the European Commission were to go down that road, it could only be limited to the area within the same market segment where the law on universal services does not apply. Such a policy would enhance possible mismatches between a status bound law on universal services and those areas where the then fully harmonised consumer law applies, within the market on energy and telecommunications.

4.3. Constitutive Elements in Fundamental and Human Rights

The EU legal order does not provide much input on fundamental and human rights which have an obvious and direct impact on universal services. I will limit my analysis to those rules which are of direct relevance in our context, the Protocol to Art. 16 ET and Art. 36 of the Charter on Fundamental Rights. The rights rhetoric is of limited doctrinal value, as both seem to lay down principles rather than individually enforceable rights. The future of the Lisbon Treaty is uncertain. And even if it finds the consent of all Member States, the protocol may only be used as a means to interpret the law. The situation is slightly more optimistic with regard to the Charter. It seems as if the ECJ is willing to take the Charter into consideration, although it does not (yet) form part of the Treaty.¹³¹ The key question would then be whether and to what extent secondary community law refers to fundamental rights. The more recent directives generally contain such a reference¹³² which suggests that the European Commission, the Parliament and the Council have checked the respective piece of law whether it is in compliance with the Charter on Fundamental Rights; quite to the contrary of the third package on telecommunication, electricity, gas as well as the EU Charter on the Rights of the Energy Consumers.¹³³

1. The Protocol to Article 16 which was adopted in June 2007 and added to the Treaty contains a telling message which condenses the major findings of secondary EU law on network industries. The constitutionalisation passes different steps, from policy-making to transformation into secondary Community law, from there into a protocol and may be sometimes even upgraded into the European Treaty. This is the European variant of ‘constitutional law passes by, administrative law remains’.¹³⁴ The Protocol reflects to a large extent what has become existing secondary Community law since a couple of years.

Art. 1

The shared values of the Union in respect of services of general economic interests within the meaning of Article 16 EC Treaty include in particular:

The essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interests as closely as possible to the *needs* of the users,

The diversity between the various services of general economic interest and the differences in the needs and preferences of users that may result from different *geographical, social or cultural situations*,

A high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights’.

¹³¹ ECJ, 29.1.2008, Case C-275/06 Promusica 2008 I-271 at 61 et seq.

¹³² See e.g. the proposal of the Commission on a Directive on Consumer Rights, COM (2008) 614 final at p. 19 recital 66: “This Directive respects the fundamental rights and observes the principles recognised, in particular by the Charter of Fundamental Rights of the European Union.

¹³³ See COM (2007) 386 final, Damjanovic/de Witte, 2008, at 24.

¹³⁴ Mayer, 1924, Vorwort; see for an analysis in the development of a right to consumer safety, Micklitz, in Cassese/Clapham/Weiler (eds) 1991, 53-110.

The introductory sentence contains a far-reaching message as it underlines that the Protocol expresses shared values of the Union. SGEIs are upgraded from a mere defence in Art. 86 (2) to a value which is shared by the Union as a whole by the Member States and the EU. In so far the Protocol may one day be understood as key element of an emerging European social model.¹³⁵ Does this entail direct effect of Art. 86 (2) ET?

The Protocol explicitly recognises the prevailing diversity in the Member States. It inserts a new spirit into the relationship between Member States and the European Commission. So far the relationship is very much influenced by a clear definition of particular roles attributed to both sides. The European Commission is said to attack the Member States' sovereignty in trying to cut back national public services, the Member States have resisted for more than 10 years to defend national public services perhaps outside the established field of SGEIs. The European Commission seems the aggressor the Member States seem the defender. In fact the role of the Member States is often ambivalent as they instrumentalise the European Commission for initiating national privatisation via the European level. Shared values and recognition of diversity unites the different positions in a new perspective.

2. The scope of the addressed services oscillates between SGEIs and universal services. The introductory sentence as well as the first two bullet points refer to SGEIs, the third mentions explicitly universal services. The two concepts are neither explained nor is there any help provided for drawing a line between the two. In light of the existing experience the SGEIs may be broader but also narrower as the concept of universal services.¹³⁶ All three references are to some extent enshrined in the *Altmark* criteria. However, quite different from *Altmark* the Protocol lays down values which are shared by the Union as a whole. *Altmark* must be read much more as an attempt of the ECJ to strengthen the position of the Member States against an intruding EU law. The Protocol bears a different tone, one of a joint spirit.
3. The *first* bullet point refers to the '*needs of the consumers*'. Private law theory heavily discussed in the eighties and nineties of the 20th century whether and to what extent private law should be shaped so as to meet the needs of the citizens in market transactions, in particular in transactions between business and consumer.¹³⁷ One of the corner stones of the debate had been over-indebtedness of consumers and the possible remedies to bring the over-indebted consumer back to business and back to social life.¹³⁸

The *second* bullet point embeds the services of general economic interests into the debate of whether and to what extent geographical, social and cultural diversity matters. The protocol confirms the case-law of the ECJ at least with regard to cultural and social requirements¹³⁹ and pays tribute to the growing resistance against a unified European legal order which leaves no room for Member States' *geographical, social and cultural particularities*.¹⁴⁰ *Geographical* particularities refer to the differences between rural areas and dense populations in big city agglomerates, but also differences between flat lands near to the sea and mountains. Geographical particularities are related to the accessibility of services. *Social* particularities might allude to the different concepts of social welfare states in Europe¹⁴¹ and the consequences which result from the leeway granted to Member States to define what SGEIs are and how to shape universal services in

¹³⁵ See Damjanovic/de Witte, 2008, 28.

¹³⁶ See already under 2.3.

¹³⁷ See Wilhelmsson, 1992.

¹³⁸ See e.g. Reifner, in Wilhelmsson et al. (eds) 2007, 325.

¹³⁹ ECJ, 9.9.2000 C-220/98 Lifting 2000 ECR I-117 at 29: "social, cultural or linguistic factors".

¹⁴⁰ Wilhelmsson (ed), 2007.

¹⁴¹ See Wilhelmsson, 2004, 712.

line with *Altmark* and maybe even *BUPA*. The Protocol recognises the existence of multi-level welfare states.¹⁴² The question remains to what extent ‘*culture*’ affects the concept of SGEIs and universal services. But what does it really mean? This is certainly not meant to become a gateway for all sorts of Member State measures designed to slow down privatisation under the disguised need to protect cultural differences.

The *third* bullet point goes even further in that it refers to ‘principles’ which govern universal services in EU politics and in secondary community law on network industries. These ‘principles’ are well-known from secondary Community law. The Protocol gives them a quasi-constitutional outlook. There is a link between the needs of the citizen-consumers and the principles set out in the third bullet point. Citizen-consumers *need* services at *affordable* prices. Needs cannot be separated from economic resources. Read this way, the Protocol is hardly in compliance with the interpretation given to affordability in the *BUPA* judgment.¹⁴³ Taking citizen-consumer needs into consideration sheds light on a new understanding of the principle of equal treatment. Affordability and equal treatment combined allows to turn economic resources into a criterion for interpreting existing EC law.

4. The concept of SGEI found its way into Art. 36 of the Charter on Fundamental Rights (proclaimed in December 2000) under the heading of solidarity, as follows:

The Union recognizes and respects *access to services* of general economic interests as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the *social and territorial cohesion* of the Union.

Art. 36 of the Charter remains less specific than the protocol. Art. 36 of the Charter is certainly not meant to grant individual rights, at least not according to the majoritarian academic opinion.¹⁴⁴ On the other hand Art. 36 adds further elements to the constitutional dimension of services of general economic interests: *access* as well as *social and territorial cohesion*. Art. 36 even goes beyond the Protocol in that it stresses solidarity¹⁴⁵ in SGEIs more clearly. Social and territorial cohesion is linked to the social and cultural particularities of EU Member States. The EU and the Member States – the shared values doctrine – will have to decide how much weight they will grant to social and territorial cohesion and how much to competition and utilitarian thinking. Neither the Protocol nor Art. 36 not even in combination with secondary EU law allow so far for giving shape to the concept of social cohesion and solidarity.

The more concrete limb of Art. 36 is certainly ‘*access*’. Access contains a threefold dimension: a technical, an economic and a social. The technical side is enshrined in the geographical dimension. Access remains an empty tool, if those who should have access are barred from requesting the respective universal services, due to lack of resources. To this extent, access is linked to affordability and affordability is linked to continuity. A materialised understanding does not prohibit, but considerably reduces the possibility of simply disconnecting the vulnerable citizen-consumer from the net if he or she has not paid the bill.¹⁴⁶ The social element refers to the group of those citizen-consumers who suffer from social exclusion. These are mainly the vulnerable citizen-consumers. Contrary to the rules in the Protocol on social and territorial cohesion, access under Art. 36 read together with the respective rules in secondary community law constitute

¹⁴² See Neergard, 2008, at 103 and the various contributions in *Sozialer Fortschritt, Unabhängige Zeitschrift für Sozialpolitik*, 1997; Rieger/Leibfried, 2003; Obinger/Leibfried/Bogedan/Starke/Gin-dulis/Moser, to be published.

¹⁴³ See at 202.

¹⁴⁴ Regarding the interpretation of this provision and its doctrinal qualification, Baquero Cruz, in de Burca (ed) 2005, 169, 178.

¹⁴⁵ See Wunder, 2008.

¹⁴⁶ See on the overarching importance of access, affordability and continuity in the new Member States, Bartl, to be published.

subjective enforceable rights. In *Sabatauskas*¹⁴⁷ the ECJ did not decide on the right of access to consumers.¹⁴⁸ Although the ECJ leaves it for the Member States to decide whether the supplier as a right to access under Art. 20 of the Directive, the AG General and the ECJ seemed inclined to go further if the right of the citizen-consumer is at stake.

5. Generalisations

The emerging law on universal services shows elements which differ considerably from the existing body of consumer law. The key difference is indeed, as the CFI in BUPA clearly stated that the respective universal services supplier is obliged to conclude a contract with the vulnerable citizen-consumer. However, not only the freedom to contract is limited, but also the freedom to shape the rights and duties in the contract. The key difference between mandatory consumer law on the one side and the law on universal services seems to be avoidance of economic discrimination. This concept comes clear in the notion of access, affordability and anti-discrimination. Economic discrimination is status related; it is limited to the vulnerable consumer and it ties only the universal services provider.

Questions of generalisations emerge in different directions, with regard to the possible extension of the universal services into the grey areas of SGEIs, with regard to the extension beyond the grey area into the field of services which are traditionally seen at market governed, but where the vulnerable consumer is equally dependent on the access to the services and last but not least with regard to the interaction between the law on universal services and traditional consumer law. Most of the existing writings discuss the question whether consumer law might penetrate into the law on universal services. However, it might well be the other way around.

5.1. *Beyond the Core of SGEIs – Universal Services in Health Care, Education, Social Security*

It might be recalled that the Member States' position on the privatisation of the grey areas – to use the terminology of *U. Neergaard* – is ambiguous. Whilst they are united in the rejection of EU intrusion into public services, they are divided in the extent to which they introduce competitive elements into health care, education, research and even social security. Some of them like Germany and the UK have gone relatively far in particular with regard to the health care system. The established regulatory mechanisms show a clear resemblance to the universal services approach. Service providers are obliged to conclude contracts. This is the dividing line between the free and the universal services. Once the way is paved, the three parameters of marketisation in the words of Freedland come to bear. Consumerisation may be found in the national privatisation laws which introduce binding minimum standards on certain services, on the top of which competition might work, in terms of quality and in terms of price.¹⁴⁹ They all encourage citizen-consumers' choice and they are united in the *Leitbild* of the circumspect citizen-consumer who has to set incentives by using the new opportunities the emerging markets are offering. Marginalisation is about to take place. Clear tendencies can be observed in the health care sector, in education and research. What is missing so far is substitutionalisation. Member States have not yet or are not yet discussing the establishment of new regulatory agencies in these emerging 'markets'. Economisation is the necessary consequence of consumerisation. Its effects are already becoming clear to a varying degree in the grey zone, in particular in privatisation of education.

¹⁴⁷ See on the right to access under Art. 20 of Directive 2003/54 in particular with regard to the right of access to universal services, ECJ, 9.12.2008 – C-239/07 Julius Sabatauskas, at 47, AG Kokott at 35, 38, nyr, see Pirstner-Ebner, 2009, 15, 16 under 4.

¹⁴⁸ See Rott, 2005 at 342.

¹⁴⁹ See with regard to Health Care in Germany, Micklitz with notes from Becker, Oehler, Pirokowsky, Reisch, 2008.

The more the Member States move in the direction of marketisation the more shaky their resistance against EU intervention in the grey area becomes. Marketisation will enhance transborder services. It is here where the EU might first intervene, as the recent draft on patient rights in transborder services shows. This directive may become a blueprint for transborder education or transborder research as well. Seen from such a perspective, the European Commission seems indeed well-advised not to set this development into stone and to rely on the further drift towards marketisation.

5.2. *Beyond the Core and the Grey Zone – Universal Services in Established Markets*

The widening of the universal services, even an intrusion into the grey areas, is still governed by the privatisation ideology. Former state monopolies, former state services are gradually transformed into market services, where competition rules apply, but where the market forces must be tamed and counterbalanced via the introduction of universal services. Stretching the law on universal services beyond these boundaries and applying the constitutive rules in established markets would open up the possibility for the good and for the bad – depending on the viewpoint – whether such a new system of social private law is needed outside the core areas of universal services on the one hand and the traditional consumer law on the other.

A prime candidate or maybe even a test candidate is the field of financial services, more particular the question of whether the private banking sector is or shall be legally obliged to grant all citizens access to a private bank account.¹⁵⁰ This issue has been and still is widely discussed in the Member States and has now reached the EU level. The reason why the financial service sector is to come into the limelight of the universal service doctrine may be found in its history. Public and private banks were standing and are standing side-by-side. The effects of an ever stronger marketisation as promoted by the European Commission are most visible. It is here where consumerisation is most developed, where substitutionalisation is effectively operating, but where economisation produces social exclusion. The key question is whether financial services are or can be legally obliged – under EC law – to conclude contracts with vulnerable consumers. It has been argued extensively that the citizen-consumer needs a bank account to be able to participate in the market and in the society. Access then gains a constitutional dimension. Art. 36 of the Charter is of little help as it mentions SGEIs only. The next candidates in that line of argument are the provider of the new information technologies. Access to internet becomes more and more important. If citizen-consumers are barred from getting access, they are socially excluded.¹⁵¹

5.3. *The New Law on Universal Services and the Old Consumer Law*

Will the new law on universal services, a law which might intervene into the grey areas and might even intrude services in established markets, will this new law become a safety net for vulnerable consumers who are no longer the addressees of the modernised EU consumer law which entirely relies on the consumer shopper to set incentives for the further integration of the Internal Market? Or will the new law on universal services affect the old consumer law, thereby introducing into the existing body of consumer law a more ‘social’ element?

The cornerstone in the ongoing debate on the future of the consumer *acquis* will be whether the new sets of fully harmonised consumer law directives will provide for particular rules on the protection of the vulnerable consumer. So far such a double-headed approach has only been realised in the Directive on Unfair Commercial Practices. But none of the Directives which have been revised during the last couple of years in clear cut areas of contract law and which strive for full harmonisation, neither the

¹⁵⁰ Already Scott, 2000, 313.

¹⁵¹ In that direction already, Szyszczak, 2001, at 63 (public banks) and 71 (internet); Wilhelmsson, 2006 at 154 and Micklitz/Oehler, 2007.

Directive 2002/65 on distance selling, nor the Directive 2008/48 on consumer credit, nor the Directive 2008/122 on time sharing, nor the Proposal on Consumer Rights targets the vulnerable consumer. Seen this way, it seems indeed that the consumer law is dying, at least the consumer law of the 1970s which was meant to protect the weaker party. The law on universal services could theoretically fill that gap. A word of caution, however, is needed. Consumer law in the EU played a role as long as it was needed to open up and complete the Internal Market. The instrumental device became abundantly clear in *COS.MET*,¹⁵² where the market freedoms prevail over consumer safety. A similar scenario is imaginable in the law on universal services which could be regarded as a by-product or alibi for the economisation of statutory entrepreneurial activities. The law on universal services, this is the lesson to be learned from consumer law, can only become an integral part of a genuine European Social Model if it can be somewhat dissociated from the privatisation logic and if the European Commission and the Member States recognize their joint responsibility for the vulnerable citizen-consumer.

¹⁵² ECJ, 17.4.2007 Case C-470/03 A.G.M.-COS.MET (2007) ECR I-2749 with note Reich, 2008, 85.

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