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Universal Service in WTO and EU Law

Liberalisation and Social Regulation in Telecommunications

Olga Batura

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Series Information

The aim of the series *Legal Issues of Services of General Interest* is to sketch the framework for services of general interest in the EU and to explore the issues raised by developments related to these services. The Series encompasses, inter alia, analyses of EU internal market, competition law, legislation (such as the Services Directive), international economic law and national (economic) law from a comparative perspective. Sector-specific approaches will also be covered (health, social services). In essence, the present Series addresses the emergence of a European Social Model and will therefore raise issues of fundamental and theoretical interest in Europe and the global economy.

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Foreword

Universal service in telecommunications is a topic that over the years has stimulated a considerable body of literature, both practical and scholarly. This volume is a valuable addition to that literature: it both summarises a large amount of previous work and addresses the topic from new angles.

I have been continuously involved with universal service and related issues since 1989—first in the UK, later in Europe and now in a range of developing countries. As a consultant and consumer advocate, I have tried to keep abreast of relevant academic and policy debates. Most contributions reflect economic and/or social policy perspectives, and this author's legal perspective makes a welcome change.

Clearly, modern electronic communications are of immense and growing importance for societies around the world, indeed for mankind as a whole. I share the author's concern for careful thought about how far their provision is best left to market forces, and in what circumstances, and by what means, governments should intervene to achieve outcomes that seem beyond market forces—in particular, to ensure that communications services reach and include everyone.

By their very nature, electronic communications have the potential to boost social inclusion—despite concerns about data tracking, it remains largely true that on the Internet, nobody need know what you look like, what your abilities are or how you speak. And the facilities offer huge potential benefits—both personal and economic—to anyone who is connected. Ensuring that everyone eventually can be connected is a concern for practically all governments, whether or not they have anything that can be identified as a universal service policy.

This book offers a meticulous legal analysis of the motivations for, and the detailed provisions of, legal frameworks for universal service formulated by two international organisations—the World Trade Organisation (WTO) and the European Union (EU). The book's special value is in highlighting areas where those frameworks could be improved. In some cases this is because of loose or unfortunate initial drafting, which could perhaps be fixed with relative ease.

The main burden of the argument, however, is that both technology and markets have changed radically in the decades since the frameworks were first conceived,

and that they now need equally radical review. Review would apply both to the objectives of legislation, and to the legal provisions which aim to fulfil those objectives. Both these should be worded in the most future-proof ways possible, so as to remain useful at least for another decade or two. As the author stresses, reviews of this kind are already challenging at national level, and reaching international agreement (as will be necessary in each of the two case study organisations) will be even harder.

I believe that reviews are nonetheless worthwhile endeavours, and they may become indispensable if, as is not unlikely, the weaknesses highlighted in the book lead to growing problems. The book will be of great assistance to policy-makers, as well as to scholars and students of universal service and the information society more broadly.

I am naturally pleased that the idea of evolving objectives for universal service, which I put forward in an article published in 1998, has proved useful to the author. We are already seeing many of the changes in focus that the article mentioned, as well as many more that it overlooked. In particular, concerns for universal service policy are getting ever broader—moving both upwards and outwards from their traditional base of physical networks infrastructures. They are moving up logical hierarchies, to encompass service and content as well as physical infrastructures, and at the same time outwards, from network operators to service providers and other intermediaries, and ultimately to end users.

Without interest and competence on the part of end users, facilities will not be used to full effect. Sectors such as health and education must be involved for societies to achieve the potential offered by universal connectivity. Thus the book may be influential way beyond the rather specialist readership who are most likely to pick it up. I commend it to potential readers, whether thorough or casual.

London, July 2015 Claire Milne

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Contents

Abbreviations

APEC	Asia-Pacific Economic Cooperation
ATC	Average Total Costs
AVC	Average Variable Costs
BEREC	Body of European Regulators for Electronic Communications
BTA	Agreement on Basic Telecommunications
CEPT	European Conference for Post and Telecommunications Administrations
COCOM	Communications Committee
CPC	UN Central Product Classification
EC	European Communities
ECFR	Charter of Fundamental Rights of the European Union
ECJ	European Court of Justice
ETSI	European Telecommunications Standards Institute
EU	European Union
FCC	US Federal Communications Commission
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GNI	Gross National Income
ICT	Information and Communications Technology
INTUG	International Telecommunications Users Group
ISDN	Integrated Services Digital Network
ITU	International Telecommunications Union
MIIT	Ministry of Information Industries and Technology of China
NGBT	Negotiating Group on Basic Telecommunications
NGN	New Generation Network
NGO	Non-governmental Organisation
NRA	National Regulatory Authority
OECD	Organisation for Economic Co-operation and Development
ONP	Open Network Provision

PSTN	Public Switched Telephone Network
PTT	General reference to government agencies responsible for the provision of post, telephone and telegraph services
RP	Reference Paper on regulatory principles
SGEI	Services in General Economic Interest
SOGT	Senior Officials Group on Telecommunications
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UNICE	Union of Industrial and Employers' Confederations of Europe
USA	United States of America
USD	Universal Service Directive
USO	Universal Service Obligations
VoIP	Voice over Internet Protocol
WTO	World Trade Organisation

Chapter 1
Introduction

Abstract This theoretical chapter explores the general necessity for the regulation of telecommunications services markets with a focus on the universal service instrument. It argues that telecommunications has always been a service of public interest and this status has required some special regulatory arrangements. Testing this assumption, first, the notion of services of public interest is investigated, in particular what this public interest consists of, as well as what kinds of regulation have been employed in relation to such services and why. To explain this last point, the theory of the social embeddedness of markets by *Karl Polanyi* is employed. Second, the theoretical framework of services of public interest to telecommunications services is applied in order to establish whether they can indeed be classified as such. Third, the nature and special features of telecommunications services are described that are useful for understanding their uniqueness among other commercial services, and to justify particularities of their provision and regulation. This allows one to present telecommunications services and the specifics of their regulation in terms of *Polanyian* theory.

Keywords Telecommunications service · Universal service · Service of public interest · Regulation · Social embeddedness of markets · Commercial services · Polanyi · Polanyian theory

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1.1 Introduction

The possibility of communication has always been decisive for human beings: as "social animals" they are dependent on communication with others in all their activities. Without communication with others, development and personal growth are impossible: all information, knowledge and skills are received by way of communicating with other people. Communication as a natural activity of people has been so highly valued by society that any deprivation or restriction of the possibility to communicate has always been considered as a form of punishment.

Although communication within a very small societal unit might be the kind we cherish the most, the nature of the process—and the way of life—together with advances in the means and techniques of communication (starting with the development of language and then writing) allows for contacts with people far away. Due to technological developments and globalisation, which is partially caused by them, the importance of communication has been growing in the last few decades as never before. The growing geographical scale of the commercial activities of legal persons and the migration of natural persons require that communication over very large distances is stable, fast and occurs in real time; it also should be as close to individual contact as possible thus substituting for travelling, which, therefore, requires broad communication channels, ideally allowing for video-telephony or video-conferencing.

Services provided to enable and support our communication needs have often been subject to a specific set of rules and/or restrictions. In some societies the means of communication were even sacred (drums in sub-Saharan Africa) or could be used only by the aristocracy or holy men (Maya civilisation). These restrictions have, obviously, loosened with time. Yet, this does not mean that all people have equal access to means of communication. Disparities in this regard exist not only between countries, but also within nation states. Precisely such issues—providing access to the means of communication for all who are willing—are supposed to be addressed by a special regulatory instrument, namely universal service, which shall be comprehensively analysed in this book.

While telecommunications regulation began on a national scale, it has been constantly expanding due to the network nature of telecommunications and its use to communicate over ever longer distances. Therefore, when it goes beyond national borders, cooperation and co-regulation are required between states in order to keep the flow of communication secure, stable and undisturbed. The acute necessity of international cooperation in communication questions is evident in the International Telecommunication Union (further ITU) which is one of the oldest international organisations (founded in 1865). While the ITU's activity remains fundamental for keeping the world communicating, other international organisations have gained importance for the regulation of telecommunications provision due to the liberalisation of services markets. The legal regimes of two of those organisations, whose primary economic objectives include the promotion of free trade in (telecommunications) services, will be the subject of legal analysis in this book.

1.2 Objectives

This book is to contribute to the general debate on the social regulation[1] of liberalised markets for services in the form of universal service. It focuses on the questions (1) whether universal service is a proper concept for the social embeddedness of telecommunications markets and (2) whether legal and regulatory arrangements for its provision are still up-to-date.

For this purpose, the book analyses transnational markets governed by the legal frameworks of the World Trade Organisation (further the WTO) and the European Union (further the EU) and unique universal service rules developed in both organisations. The term "transnational" is used as a generic description to mean both the (intended) European Single Market, which shall emerge as the result of an amalgamation of the national markets of the Member States, and the sum of national markets subject to the application of the WTO rules. In the latter case one cannot speak of the existence of an integrated global market, but of a combination of multiple open national markets that potentially may develop into one. The transnational level is chosen in order to test an assumption that markets are essentially products of society and shall therefore be connected to it at the level where they emerged.[2] Regulation in the form of universal service is seen as a means for such connection. Transnational solutions for social embeddedness shall be compared and evaluated in the light of the societal changes which are occurring.

The telecommunications services market is selected as a case study because it is one of the most transnationally developed and because its liberalisation and regulation were claimed to be such a great success that the experience shall become a basis for similar processes in other network industries.

1.3 Setting the Context

Telecommunications policy and regulation used to be a rather dull subject to research when telecommunications services were provided by PTTs. This has changed with the technological developments of the 1970s and the subsequent efforts to liberalise the sector. Political, economic and legal papers in the 1980s discussed enthusiastically the pros and cons of a liberalised market and the regulation which was necessary to break the former monopoly.

At about this time, universal service came within the sights of scholars. The large-scale liberalisation attempt caused a defensive reaction from the telecommunications monopolies belonging to or controlled by states. Unwilling to lose their

[1] "Social regulation" is understood as the regulation of a market in order to protect and promote social welfare and public interest.

[2] See Polanyi 2001, Chap. 5; see also Sect. 2.1.1.3 of this book.

exclusive position, they had to justify it—and used a notion of universal service to back their position. The PTTs' argumentation was based on the presumption that the pursuit of social objectives—e.g. the provision of a telephone service for the poor—was not commercially profitable and, thus, required subsidies. Within a monopolistic structure cross-subsidisation was a well-established practice: the revenues from more profitable, but also overpriced, telecommunications services were used to subsidise the unprofitable. It was claimed that by opening markets to competition one would destroy this prevalent scheme because rivals would be attracted by precisely those areas and customers which are most profitable and neglect the unprofitable. Such "cream skimming" would reduce the revenues of the PTTs which they used for cross-subsidies. In this context, scholarly research dealt extensively with the economics of telecommunications, with possible schemes of socially fair provision of telecommunications services in competitive markets and with possible translations into law of such schemes.[3]

Progress in transnational liberalisation negotiations and the actual adoption of liberalising rules and regulations for universal service provision resulted in widespread discussion and critical appraisal of the WTO and EU frameworks, as well as their implementation in the national legislation of their Members.[4]

Two seminal publications on the origins and evolution of universal service appeared in the 1990s—Amy Friedlander (1995) and Milton Mueller (1997)—dismantling the myth of universal service as an inherently socially-oriented policy instrument and presenting it as a rather flexible concept.

About this time the research in various aspects of universal service provision intensified, supposedly due to full market liberalisation in 1998, continuous and intense technological innovations and changes, especially technological convergence, as well as due to rapid and at times radical market developments, like the constant development of new products and services, and the emergence and convergence of markets. A justification for universal service regulation has been keeping scientists' minds busy, as regulation represents a form of state intervention in the competitive market and is admissible only on certain grounds.[5] A great deal of scholarly attention is given to the design questions of the provision of universal service, especially methods for the designation of universal service providers[6] and financing.[7]

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[3]See Aronson and Cowley 1988; Compaine 1986; Hills 1989; Horwitz 1997; Noam 1987; Stone 1991.

[4]For the WTO see Allen 1998; Blouin 2000; Bronckers 2000; Bronckers and Larouche 1997; Drake and Noam 1997; Fredebeul-Krein and Freytag 1997 and 1999; Langenfurth 2000; McLarty 1999; Satola 1997; Tarjanne 1999; for the EU see Bauer 1999; Hart 1998; Hulsink 1999; Klein 2000; Sandholtz 1993, 1998; Schmidt 1998; Schweitzer 2001/2002; Scott 2000; Ungerer 2001; Woodrow and Sauvé 1994.

[5]For example, the market failure explanation in Bozemen 2002; Gómez Barroso and Martínez 2003; public good qualities of telecommunications, Gómez Barroso and Martínez 2004; public interest theory, Birke 2009; Blackman 2007; Krajewski 2011.

[6]Milgrom 1996; Nett 1998; Wallsten 2008; Weller 1999.

[7]Choné et al. 2002; Castelli et al. 2000; Gasman 1998; Jaag and Trinkner 2009; Levin 2010; Peha 1999.

In addition to the mentioned changes in markets and technology, the perception of an increased role for telecommunications services in society and the onset of the so-called information society are jointly responsible for scientific speculations on amendments to the scope or concept of universal service. Both broadband and mobile telecommunications have been suggested as elements of an up-to-date universal service,[8] while currently access to the communications network is debated as a feasible candidate due to, primarily, technological convergence and the development of New Generation Networks (further NGNs) and the information society.[9]

1.4 Outline of the Book

To achieve the objectives outlined in Sect. 1.2, an interdisciplinary approach was chosen where legal doctrine is complemented and enriched by the findings and insights from communications and political sciences, economics and sociology.

This theoretical chapter explores the general necessity for the regulation of telecommunications services markets with a focus on the universal service instrument. It argues that telecommunications has always been a service of public interest and this status has required some special regulatory arrangements. Testing this assumption, first, the notion of services of public interest is investigated, in particular what this public interest consists of, as well as what kinds of regulation have been employed in relation to such services and why. To explain this last point, the theory of the social embeddedness of markets by *Karl Polanyi* is employed. Second, the theoretical framework of services of public interest to telecommunications services is applied in order to establish whether they can indeed be classified as such. Third, the nature and special features of telecommunications services are described that are useful for understanding their uniqueness among other commercial services, and to justify particularities of their provision and regulation. This allows one to present telecommunications services and the specifics of their regulation in terms of *Polanyian* theory.

The second part of Chap. 2 studies the regulatory instruments employed to socially embed competitive markets for telecommunications services. This study is organised historically because universal service has appeared to be a non-holistic concept which has changed considerably over time. After an investigation into the history of universal service in the USA—the country which is traditionally considered to be its homeland, the chapter turns to the EU where similar concepts of telecommunications services regulation were known under different names and

[8]Bohlin and Teppayayon 2009; Burkart 2007; Feijóo González et al. 2005; Goggin 2008; Pau 2009.

[9]Alampay 2006; Burgelman 2000; Falch and Henten 2009; Kirsch and von Hirschhausen 2008; Lie 2007; Mueller 1997; Sawhney and Jayakar 2005, 2007; Xavier 1997, 2008.

where, during market liberalisation, a one-of-a-kind fully-fledged transnational concept of universal service was created. To provide for a full picture, and considering that the WTO is within the scope of the research, the chapter considers generalised concepts of universal service existing around the world. This historically and geographically broadly based survey allows one to draw a conclusion about the flexibility and adjustability of universal service as a regulatory instrument.

Chapters 3 and 4 of the book are practical ones and are reserved for a comprehensive study of two examples of the use of the concept of universal service for the regulation of transnational markets for telecommunications services. The objective is, on the one hand, to test the validity of the *Polanyian* theory of the social embeddedness of markets at the transnational level and, on the other hand, to examine the effectiveness of the universal service instrument for this. For transnational approaches to market regulation, the specific interpretations of the universal service concept in the law of transnational organisations are to be studied in detail. An examination of both the WTO and the EU shall follow the same structure. First, a political science-inspired investigation of the liberalisation process is conducted in order to establish specific reasons for opening the market and liberalising trade and for introducing regulation in the form of universal service. Second, a legal analysis of the rules on universal service is carried out in order to learn about the specifics of transnational regulation in the WTO and the EU, and to be able to compare them later on, as well as to determine their shortcomings. Third, for reasons of limitations in the scope of the study, a brief and incomplete overview of the implementation of the universal service framework by Members of each organisation is provided. These short country studies can be conceived as evidence of the effectiveness and flexibility of the universal service instrument. Each study of transnational regulation is followed with a critical appraisal of its results, and Chap. 4 ends with a comparative consideration of two regimes in question.

Chapter 5 draws on the insights from the foregoing chapters, especially on the idea of the social embeddedness of markets. The underlying assumption is that if a market for services of public interest needs to be embedded in society, the regulation which ensures this embeddedness shall take into account the character and the needs of society. Chapter 5 starts by arguing that society has evolved considerably over the last decades, and describes the most significant changes. It then continues by looking at whether and how the existing WTO and EU frameworks cope with the challenges of the evolved surroundings. The central claim is, however, that the regulation of a technology-intensive, rapidly developing market is ill-equipped when using an instrument conceptualised decades ago for a very different market, technological and societal environment. Drawing on this, the chapter examines the general suitability of the universal service as a regulatory instrument for further application. In conclusion, a reform of the concept of universal service is suggested in line with the requirements of the changed communications environment and for reasons of better and more effective social embeddedness of the telecommunications service market.

The concluding Chap. 6 brings together the findings of the book.

Unless otherwise indicated, all the weblinks to electronically available sources used in this book were last checked on 15 May 2015.

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Chapter 2
Liberalisation of Telecommunications Services: Social Embedding of the Liberalised Market as a Regulatory Challenge

Abstract This chapter deals with the question what makes telecommunications services so particular so as to explain their special regulatory treatment. It studies why telecommunications services are considered to be services of public interest by identifying what characteristics or values are attached to these services so as to signify public interest in them. In this context, it further discusses traditional models for telecommunications provision and regulation. The chapter draws on the theory of social embeddedness of markets developed by Karl Polanyi and puts both the existence of markets and the necessity of their regulation in a broader political-economic context. The chapter focuses on the instrument of universal service that is widely used for social embeddedness of liberalised competitive markets for telecommunications services. It studies its history and development as a regulatory concept that is effective and flexible and can be used at different stages of technological and market development. Various forms of universal service bear witness to its responsiveness to various social needs in terms of *Polanyi*'s social embeddedness thesis. The capability of socially embedding the telecommunications market with the help of the universal service regulatory concept is further tested by studying whether and how it responds to social considerations.

Keywords Basic telecommunications · Electronic communications · Market failure · Network externalities · Public interest · Public service · Social embeddedness · Technological convergence · Universal access · Value-added telecommunications

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2.1 Telecommunications Services as Services of Public Interest

Telecommunications are considered by many to have a great and ever-growing influence and significance in their everyday lives. This is reflected in the fact that special legislative arrangements are often made in order to ensure the ubiquitous presence of telecommunications infrastructure and the possibility for it to be used by everybody. At the same time, such a regulatory distinction of telecommunications might seem puzzling: after all, more important goods like, for example, bread are not subject to a special regulatory regime. Therefore, a justified research question is what makes telecommunications so particular so as to explain their special regulatory treatment.

In order to answer this question, the notion of services of public interest shall be employed because telecommunications services are usually classified as such and their special regulation is justified by their belonging to this group. Following a brief outline on services of public interest, the general framework of their provision will be described. The general introductory part of this chapter ends with theoretical elaborations on the social embeddedness of markets drawing on the legacy of *Karl Polanyi*. This turn is perceived to be indispensable in order to put both the existence of markets and the necessity of their regulation in a broader political-economic context and to strengthen the argument for the regulation of markets in the societal interest.

After that, the present chapter will focus on telecommunications services in an attempt to identify what characteristics or values are attached to these services so as to signify public interest in them. For this, it is necessary to clarify in more detail the subject of the research, namely telecommunications services. Although it would be difficult to find a person in the industrialised world who has never used telecommunications services, the notion of what exactly they are is difficult to precisely define even for experts. Understanding telecommunications is complicated by rapid and constant technological developments in this field, as well as the evolution of the respective markets over the last couple of decades. After that, the traditional models for telecommunications provision and regulation will be discussed and a brief conclusion will be made on the main findings.

2.1.1 Services of Public Interest

Services of public interest are one of the topics which, although well researched in the scholarly literature, does not lose its popularity. Some of the obvious reasons for the steady flow of publications[1] are globalisation, the liberalisation of the provision of certain public services under the influence of international trade and the transfer of certain public interest obligations from the state to private actors and/or international organisations.

The present section does not intend to provide any new insights into the understanding of services of public interest and/or their provision and regulation, but aims at presenting a general theoretical framework for the subsequent conceptualisation of telecommunications services as services imbued with a public interest and for focused research into the regulation of their provision in liberalised markets.

2.1.1.1 Notion of Services of Public Interest

Many, if not all, national legal regimes developed special treatment for certain services singling them out among market-provided services. Although influenced by globalisation, regionalisation and the legislation of international organisations in various fields and by other processes, the legal, economic and social roles and functions of such services remain highly heterogeneous, reflecting the historical, cultural, economic and political traditions of different countries.[2] In his monograph, *Krajewski* characterised the situation with the definition of services of public interest in a more or less integrated European system as "terminologically varied, while the circumstances are comparable".[3] It can be safely assumed that the terminological variety worldwide is even greater, while the content of the terms and their regulation and circumstances of provision might still resemble each other.[4]

Due to terminological diversity and because of the concept of the present study, which limits itself to a comparison of only two legal frameworks for the regulation of services of public interest, it would be only logical to turn to European and WTO law in search for a more general definition. In the GATS the term, which is usually associated with services of public interest, is "services supplied in the exercise of governmental authority", and it is defined as "any service which is

[1]To the most recent publications belong van de Gronden 2009; Krajewski et al. 2009; Krajewski 2011; Szyszczak et al. 2011.

[2]Communication from the Commission to the Council and the European Parliament. Green Paper on Services of general interest COM (2003) 270 final, p. 6.

[3]See Krajewski 2011, p. 8.

[4]Zacharias 2008, p. 59.

supplied neither on a commercial basis, nor in competition with one or more service suppliers" (Article 1:3(b) and (c) GATS). The precise scope of the named provision remains contested among scholars as well as among government and some WTO officials as there has been no coherent WTO practise in this regard.[5]

Although interpretations of this clause are not very manifold, their study and discussion do not seem to be of much use for the present research. This section aims at understanding what kinds of services can be subject to a special regulation, while the definition provided by the GATS has a functional character and looks at the mode of service provision. Thus, the GATS leaves the choice of both services and of a special legal regime for them to its Members.

At the EU level, the terms "services of general economic interest" and "services of general interest" are employed.[6] Both the content of and the relation between these two terms have been studied extensively.[7] The findings can be summarised as follows: "Services of general economic interest", the term used but not defined in primary law, correspond in most instances to public services and other similar concepts of Member States, but refer in the first line to economic services. The term "services of general interest" seems to be introduced in Commission documents solely in order to account for both market and non-market services that are subject to special national regulation.[8] However, both terms are rather vague, based on a functional approach referring to modes of service provision, and are not clearly delineated from each other.[9] Therefore, European law definitions also cannot be considered satisfactory.

Extensive scholarly research offers a better framework for a holistic understanding of public services. In light of the fact that there is no uniform usage of terms in the scholarly literature, which can be explained by the above indicated diversity of legislative traditions as well as with difficulties in translating terminology,[10] the term "service of public interest" shall be employed in this study. It represents an attempt to cope with the terminological complications and

[5]The most thorough work on the interpretation of the term "services supplied in the exercise of governmental authority" has been done by Adlung 2006; Krajewski 2003, 2009; Leroux 2006; Zacharias 2008.

[6]See respectively Article 14, 106 para 2 TFEU, Article 36 ECFR and Communication from the Commission to the Council and the European Parliament. Services of General Interest in Europe, OJ C 281/3 of 26.09.1996; Communication from the Commission to the Council and the European Parliament. Services of General Interest in Europe, OJ C 17/4 of 19.01.2001; Communication from the Commission to the Council and the European Parliament. Green Paper on services of general interest. COM(2003) 270 final of 21.05.2003; Communication from the Commission to the Council and the European Parliament. White Paper on services of general interest. COM(2004) 374 final of 12.05.2004.

[7]To name just a few recent studies, Franzius 2009; van de Gronden 2009; Krajewski 2011.

[8]See Krajewski 2011, pp. 74–107.

[9]Communication from the Commission to the Council and the European Parliament. Green Paper on services of general interest. COM(2003) 270 final, No. 15–19.

[10]For a summary of terminological semantic complications see Krajewski 2011, pp. 9–10.

varieties. Moreover, it allows an abstraction from the context of a particular legal order and the placing of more emphasis on the commonalities between different legal orders.[11]

Despite different terminology, the services which fall under a special regulatory regime are largely the same: medical services, education, the provision of utilities (energy, water, sewage), social security and a few others. Natural questions therefore are why these particular services are singled out, and what features of these services justify their special treatment. Surprisingly, there is little research on this question.[12]

A starting point for the discussion can be the obvious statement that services of public interest, just as any other types of services, imply a legal relation of exchange between the provider and the recipient.[13] Another common feature of such services is that the necessity for their special status is recognised by the political process[14] and is based on a consideration of the kind of service involved.[15] Most commonly, the following theoretical approaches are used to justify the special legal status of certain services: public interest, public goods and merit goods.

In employing the concept of public interest in order to explain the distinctiveness of services imbued with a public interest, policymakers[16] assume that certain services are essential not solely for the counterparts involved in the legal relation of service provision, but for society as a whole due to a special interest attributed to them. Yet, the use of the term "public interest" does not bring us much closer to a solid definition of services of public interest, because the precise notion of public interest, which is so frequently used by the legislature and the judiciary, has been slipping away from scholars for decades. The consensus prevails that public interest depends on political, economic and ideological conditions[17] and at different times and in different countries different services were considered to be associated with it.[18] Therefore, an abstract definition of public interest is possible in the most vague terms as the interest of a community or of all relevant stakeholders, but a precise notion can only be provided on a case-by-case basis.[19]

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[11]For other reasons see Scott 2000, p. 313.

[12]Van de Walle 2008, p. 258.

[13]A concise discussion of the notion of service in the relevant context can be found in Krajewski 2011, pp. 120–121.

[14]Krajewski 2011, pp. 121–124.

[15]Stone 1991, p. 26; Scott 2000, p. 312.

[16]The term "policymakers" is chosen as a neutral description of whoever determines the public interest. Obviously, in different societies different groups may take this decision.

[17]See some of the accounts, trying to grasp the meaning and analysing the evolution of the term: Bozeman 2002; Hantke-Domas 2003; Uerpmann 1999; Viotto 2009.

[18]Exemplary for the development of the notion of public service in the UK and the USA is Stone 1991, pp. 27–38.

[19]Hantke-Domas 2003, p. 186; Viotto 2009, p. 47.

In an attempt to overcome this criticism, *Krajewski* convincingly singles out one particular kind of public interest inherent in services of public interest: interest in the regulation of the quantity and quality of the services supply in the market.[20] However, interest in regulating the quantity and quality of a service by itself is too abstract and prone to arbitrary use because it does not relate to the type of service. It cannot account for the special status of telecommunications services as compared to accounting services or, to make a more elaborate example, the special status of voice telephony as compared to videoconferencing, which are both telecommunications services. *Krajewski* himself admits that public interest cannot be defined *ad abstractum* and rests upon a value judgment.[21] An additional criterion is necessary to render the said public interest more precise in order to enable a case-by-case examination. While in some countries the criteria for this circumstantial examination can be found in their national laws,[22] in other countries they were developed by the judiciary. For instance, the US courts examine cumulatively whether a service is requisite for the community's level of civilisation or necessary for its economic life, whether it has current or future widespread effects on the community and whether the free market would not provide the relevant service to significant segments of the community in sufficient quantity and quality.[23]

In the search for more generalised additional criteria, the economic literature where concepts of public goods and of merit goods were developed and used to justify services of public interest may be helpful.

The authorship of the public goods concept belongs to *Paul Samuelson* who described them as "collective consumption goods which all enjoy in common in the sense that each individual's consumption of such a good leads to no subtractions from any other individual's consumption of that good".[24] This feature of public goods is usually referred to as non-rivalry and it is complemented by non-excludability, meaning that it is impossible to exclude any individuals from consuming the good even if they have not paid for it.[25] This latter characteristic creates a free-rider problem that discourages private actors from providing public goods on the market in sufficient quantities (market failure). Therefore, for public goods to be provided and distributed efficiently government intervention is necessary in the form of either strict regulation or direct provision meaning that there is a public interest in correcting the market failure.[26]

The application of the public goods concept to justify special regulations for services of public interest was criticised on fundamental grounds.[27] It is built on

[20]Krajewski 2011, p. 130.

[21]Idem.

[22]For example, in Germany. See Viotto 2009, pp. 28–47.

[23]Stone 1991, pp. 31–32.

[24]Samuelson 1954, p. 387.

[25]Mankiw 2004, pp. 225–226.

[26]Samuelson 1954, pp. 387–389; Mankiw 2004, p. 226.

[27]Anton 2000, pp. 8–11; Krajewski 2003, pp. 343–344.

the assumption that some goods and services are inherently unmarketable and this quality cannot be reversed. Yet, this assumption proved to be rebuttable: many goods were converted from public to private as a result of technological developments and political decisions.[28] Therefore, the public goods concept may serve as a foundation for services of public interest only in very particular circumstances.

The concept of merit goods developed by *Richard Musgrave*[29] seems to offer a more profound economic framework for understanding of services imbued with a public interest; at the same time, it comes close to and complements the public interest theory. Merit goods are commodities which are judged by the political system of a society to be due to an individual or society on the basis of some concept of need, rather than an ability and a willingness to pay.[30] Merit goods should not be confused with public goods. A good is considered to be public or private because of its intrinsic characteristics (non-rivalry and non-excludability of consumption). Merit goods' special feature refers not to the particularities of their consumption, but to the value judgement attributed to these goods. Therefore, merit goods may be both private and public goods provided through government intervention in the market by a method or at a level which disregards the actual wishes of an individual consumer.[31]

The concept of merit goods interferes with the premises of the classical Western economic theory which builds upon the wishes and preferences of individual consumers. On the contrary, it justifies budgetary governmental action on behalf of the society in order to correct individual choices that may be distorted for some reason (e.g. due to imperfect information or unsatisfactory provision by the market).[32] This aspect provoked criticism of the concept as paternalising consumers and making illegitimate choices for them.[33] While *Musgrave* explained that interference with consumer sovereignty can be justified in certain cases in democratic societies (e.g., by a better informed, knowledgeable group (adults) for a worse informed one (minors) or by the interdependence of utilities),[34] his proponents strengthened his argument with an ethical component of economic thinking.[35]

In further developing his merit goods concept, *Musgrave* builds a bridge to philosophical-ethical categories linking the existence of these goods and public

[28]Krajewski 2003, p. 344.

[29]Musgrave introduced the concept of a merit good/merit want in: Musgrave 1956.

[30]Compare Pulsipher 2007, p. 153.

[31]Ver Eecke 2007, p. 331.

[32]Head 2007, p. 118.

[33]See, for example, McLure 2007, pp. 73–83.

[34]Musgrave 1956, pp. 37–38.

[35]Ver Eecke 2007, pp. 327–347.