Chapter 10
Universal Service Provisions in International Agreements of the EU: From Derogation to Obligation?

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Abstract The EU is aware that international trade agreements such as the WTO and the GATS may affect the internal EU response to trade in public services and the Commission has publicly stated that international trade agreements should not impede the EU capability to pursue its policies on public services. *Markus Krajewski* adopts a different approach and asks the question: to what extent can the international agreements signed by the EC/EU reflect, or even advance, a *positive* understanding of public services? This is an important perspective now that the Treaty of Lisbon 2009 places external relations policy in a larger value, and principle, driven framework. *Krajewski* also examines the role of the WTO and in particular the GATS. The telecom sector is the focus of attention because telecom provides an important model for liberalisation and the development of universal service obligations which are mirrored in other sectors opened up to competition. Two case studies follow, first the EC–Chile bilateral association agreement and second, the EU–CARIFORUM Economic Partnership Agreement which is of particular interest in that it contains positive universal service obligations. *Krajewski* also examines a number of agreements which are currently under discussion to determine if there is an emerging trend to include and define PSO and USO in the external agreements of the EU. Underlying this approach is a quest to determine whether in its external role the EU is continuing internal trends of seeing public services not only as exemptions and derogations from EU law, but also as a positive requirement.

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> *As we pursue social justice and cohesion at home, we should also seek to promote our values, including social and environmental standards and cultural diversity, around the world (European Commission 2006, p. 5).*

10.1 Introduction

The debate about services of general interest in European law has focussed so far on internal law, that is, fundamental freedoms, internal market, competition, state aid and procurement law. The impact and the role of external EU law, as laid down in the international agreements to which the EU is a party, has not been at the centre of attention. If external aspects have been addressed, the discussions mostly concerned the potential limitation and restrictions of the provisions of the General Agreement on Trade in Services (GATS) on the provision and organisation of public services.[1] This issue also informed the debate about services of general interest in the EU as reflected in the *White Paper of the European Commission on Services of General*

[1] Adlung 2006, p. 455; Krajewski 2008a, pp. 173–213.

Interest. Under the heading 'Reflecting our internal policies in our international trade policy' the Commission argued that 'international trade agreements should not go beyond the positions agreed within the European Union'.[2]

The present contribution takes a different approach. Instead of asking whether and how much international law impedes on the EU's capability to pursue its ideas of public services, this contribution discusses to which extent the international agreements signed by the EC/EU reflect or even advance a positive understanding of public services. The background of this approach can be found in the current trade policy of the EU and at a more general level in the provisions on the external relations in the Treaty of Lisbon 2009 which seek to place the external relations of the EU in a larger value and principle-driven framework. As indicated by the quote at the beginning of this contribution, which is taken from the agenda-setting trade policy document 'Gobal Europe' of 2006, the EU seeks to promote similar, if not the same, values in its external relations which it seeks internally. This internal value-driven approach is also reflected in the common normative framework for the Union's external relations established by the Treaty of Lisbon. All EU external policies, including the common commercial policy are subject to the overall goals and objectives of the Union's external relations as laid down in Article 21 TEU.[3] According to Paragraph 2 of that provision the Union shall define and pursue its external policies and actions, inter alia, to 'safeguard its values, fundamental interests, security, independence and integrity'.

As stated in Article 14 TFEU and the Protocol on Services of General Interest, the functioning of services of general interest ranks highly among the values of the Union and its Member States.[4] The present contribution attempts to link the value-driven EU's external policies with the values underlying the organisation and supply of services of general interest by asking whether the EU's external policies aim at protecting and promoting the values of services of general interest. The analysis will be focused on public/universal service obligations as a prominent manifestation of these values. Hence, the contribution will analyse whether and to which extent the EU incorporated such obligations in its international agreements.

The analysis of the paper will proceed in four broad steps: Section 10.2 will briefly outline the notion and function of public/universal service obligations and explain why they can be seen as an exemplification of the values underlying services of general interest. Section 10.3 addresses the WTO's General Agreement on Trade in Services (GATS), in particular its regime on telecommunications. Specifically, the section analyses two important provisions addressing public/universal service obligations in the GATS telecommunications regime, because they served as a template for subsequent agreements. The section will also mention

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[2] European Commission, *White Paper on Services of General Interest,* COM (2004) 374 final, 20.

[3] Dimopoulos 2010, p. 164 et seq.

[4] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, *OJ* 2007 C 306/1. For a consolidated version see *OJ* 2010 C 83/1. The protocol on Services of General Interest can be found in 308.

the 2005 proposal on postal services of the EC which contains a reference to universal service obligations built on the telecommunications model. Section 10.4 analyses reference to universal service obligations in the 2002 bilateral association agreement between the EC and the Chile, the first major bilateral trade agreement of the EU. Section 10.5 discusses the EU–CARIFORUM Economic Partnership Agreement which is of special interest since it is the first agreement which contains positive universal service obligations. Section 10.6 will look at drafts of agreements and proposals for provisions of agreements currently under negotiation to determine whether there is an emerging trend regarding public services obligations in these agreements. The concluding section of the chapter will ask whether the different agreements reflect a development which moves from including justification and derogation clauses for public service obligations to positive requirements of such obligations. Such a move from derogation to obligation could be seen as a parallel movement to the development of the internal EU law on services of general interest.[5]

10.2 Notion and Function of Public Service Obligations

A commonly accepted and widely used definition of public service obligations refers to specific requirements that are imposed by public authorities on the provider of the service in order to ensure that certain public interest objectives are met.[6] This definition is also used in the literature.[7] Public service obligations can take different forms, they may have different scopes and they may apply at different government levels (that is, local, regional, national and supranational). Public service obligations normally aim at securing a certain quality of the service, general (if not universal) access and affordable prices. Often they are based on notions of solidarity or territorial cohesion. Public service obligations can be seen as a central element of the values of the EU and its Member States concerning services of general interest.[8] This proposition is also supported by the Protocol on services of general interest of the Lisbon Treaty. Article 1 of that Protocol contains a clear reference to public service obligations. It mentions 'a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights' as a crucial element of the values of the EU and its Members according to Article 14 TFEU.

[5] Ross 2000, pp. 22–37.

[6] *White Paper on Services of General Interest*, COM (2004) 374 final, 23.

[7] Neergaard 2009, p. 17; Houben 2008, p. 7(10). See also Chap. 7 of this book.

[8] Neergaard 2009, p. 17.

The terms public service obligations and universal service obligations are sometimes used interchangeably.[9] However, it seems more convincing to view universal service obligations as a subgroup of public service obligations, which specifically apply in electronic communications (telecommunications) and postal services. In this respect, Article 3(1) of Universal Service Directive of 2002 defines universal service as a certain set of services at a defined quality 'which is available to all users regardless of their geographical location and, in the light of specific national conditions, at an affordable price'.[10] Similarly, Article 3(1) of the Postal Internal Market Directive holds: 'Member States shall ensure that users enjoy the right to a universal service involving the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users'.[11]

In the context of energy services, EU legislation uses the term 'public service obligation' in a broader sense. Article 3(2) of the 2009 Directive on the internal market in electricity holds that.

> Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies, and environmental protection, including energy efficiency, energy from renewable sources and climate protection.[12]

An identical provision can be found in the 2009 internal market in natural gas directive.[13] Furthermore, EU Regulation 1370/2007 defines public service obligation with regard to public passenger transportation as 'a requirement defined or determined by a competent authority in order to ensure public passenger transport services in the general interest that an operator, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions without reward'.[14]

This short overview of the use of the term public service obligation or universal service obligation in EU secondary legislation shows that public service obligations typically aim at non-market objectives, that is, they seek to ensure an outcome which could not be provided by the market alone. As a consequence, they restrict the full application of free market principles and competition law in order to ensure societal values which would otherwise not be protected. Based on this conceptualisation of the notion of public service obligations it is now possible to analyse if and how the term has been used in international agreements concluded by the EU.

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[9] Houben 2008, p. 7(10). See also the other chapters of this book.

[10] Directive 2002/22/EC of 7 March 2002 (Universal Service Directive) [2002] *OJ* L 108, 51.

[11] Directive 97/67/EC of 15 December 1997 (Internal market of Community postal services) [1998] *OJ* L 15, 14.

[12] Directive 2009/72/EC of 13 July 2009 (Internal market in electricity) [2009] *OJ* L 211, 55.

[13] Ibid., 94.

[14] Regulation (EC) No. 1370/2007 of 23 October 2007 (Public passenger transport services) [2007] *OJ* L 315, 1.

10.3 Public Service as Derogation: The General Agreement on Trade in Services (GATS)

The WTO's General Agreement on Trade in Services (GATS) is the only multilateral framework for the liberalisation and regulation of trade in services. It went into force together with all other WTO agreements on 1 January 1995. The core of the GATS framework consists of rules which apply to all services sectors; it does not contain any sector-specific obligations. None of these general provisions, neither the obligations nor the exceptions, refer to public service obligations. However, the GATS also contains a special regime for telecommunication services which contains two references to public service obligations.[15]

10.3.1 Safeguarding Public Service Requirements on the Basis of the Annex on Telecommunications

The Annex on Telecommunications is an integral part of the GATS and aims to ensure that specific market access and national treatment commitments of WTO Members are not frustrated through the lack of access to and use of telecommunication services.[16] The main obligations of the Annex can be found in Paragraph 5. It requires WTO Members to ensure that 'access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions'.

However, Members may impose conditions on the access and use of public telecommunication transport networks and services which are necessary for the maintenance of public service obligations. In this regard, Article 5(e) of the Annex states:

> Each Member shall ensure that no condition is imposed on access to and use of public telecommunications transport networks and services other than as necessary: (i) to safeguard the public service responsibilities of suppliers of public telecommunications transport networks and services, in particular their ability to make their networks or services available to the public generally; to safeguard the public service responsibilities of suppliers of public telecommunications transport networks and services, in particular their ability to make their networks or services available to the public generally (…).

Based on Article 5(e)(i) of the Annex, public service responsibilities can be used as a justification for deviations from the requirements of the Annex. In the telecommunications sector such responsibilities typically consist of universal service obligations which is why Article 5(e) of the Annex is understood to be a

[15] For a detailed analysis of the GATS telecommunications regime see Bronckers and Larouche 2008, pp. 319–379.

[16] Roseman 2003.

justification for restrictions imposed on service providers to ensure universal service.[17] For example, if a Member imposes discriminatory access rates or rates which are not deemed reasonable, because they are very high, it may be possible to justify such charges on the basis that they are necessary to safeguard universal service obligations.

To benefit from Article 5(e)(i) of the Annex, public service obligation conditions must adhere to that necessary to meet the Members policy goals. The notion of 'necessary' has been interpreted in a number of key decisions of the WTO dispute settlement organs and has been subject to controversial debates in the literature. Generally, a measure is considered necessary under WTO law if there is 'no alternative measure less restrictive of trade which may be reasonably available to a member to achieve the same policy goals'.[18] It is also generally agreed that the term 'necessary' can have different meanings in different contexts. In the 2004 *Mexico—Telecommunication Services* (*Telmex*) case the Panel held:

> The term "necessary" in Sect. 5(e) describes the relationship between a "condition" of access to and use of a public telecommunications transport networks and services, and one of the three listed policy goals. What may be "necessary" with respect to one policy goal may not be with respect to another.[19]

However, the Panel did not clearly decide on which standard to use in the context of Article 5(e) of the Annex. While the Panel rejected a narrow approach which would only regard measures which are indispensable to reach the policy objectives of Article 5(e)(i) of the Annex, it left open the question of which other standard should be applied. The Panel seemed to favour an approach which would assume measures as necessary as long as they make a contribution to the objectives of Article 5(e)(i) of the Annex.[20]

In the meantime, the *Mexico—Telecommunications* Report was issued in 2004 and the case law of the WTO Appellate Body has evolved further. In particular, in *Korea—Beef*, the Appellate Body held that 'necessary' involves 'in every case a process of weighing and balancing a series of factors which prominently include… the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports'.[21] Taken literally this could mean that a WTO panel or the Appellate Body would put itself in a position to assess the importance of the public service obligation of a particular WTO Member. This would raise difficult questions of competence and legitimacy of the WTO dispute settlement system regarding such

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[17] Batura forthcoming, p. 258.

[18] *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, Report of the Panel, adopted on 7 November 1990, BISD 37S/200, para 74.

[19] *Mexico—Measures Affecting Telecommunication Services*, Report of the Panel, WT/DS204/R, 2 April 2004, para 7.338.

[20] *Mexico—Measures Affecting Telecommunication Services*, para. 7.342.

[21] *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161/AB/R, WT/DS169/AB/R, Report of the Appellate Body*, paras 164–166.

issues which are a key aspect of country's regulatory autonomy.[22] It should be noted, however, that despite its emphasis on weighing and balancing, the Appellate Body has never actually engaged in such an exercise.[23] Instead, it has usually accepted the policy choices and level of protection of the respective Member.

In this context, it is worth noting that Article 5(e)(i) of the Annex can be seen as functionally equivalent to Article 106(2) TFEU [ex Article 86(2) EC] which can also serve as an exception from competition law principles for public service obligations.[24] It is beyond the scope of the present contribution to conduct of full comparative study of the ECJ's jurisprudence on Article 106(2) TFEU [ex Article 86(2) EC] with regard to public service obligations and the WTO's dispute settlement practice regarding the elements of Article 5(e)(i),[25] but it is suggested that any future panel or the Appellate Body could reflect the ECJ's case law and the idea of judicial self-restraint when they evaluate fundamental policy choices of the WTO Members with regard to public service obligations.

10.3.2 Universal Service Obligations in the Reference Paper on Telecommunications

The second element of the GATS telecommunications regime which addresses public service obligations can be found in the so-called Reference Paper on Telecommunications.[26] The Reference Paper contains additional pro-competitive regulatory requirements of WTO Members in telecommunication services. It was agreed by the Negotiating Group on Basic Telecommunications and published in April 1996. The additional requirements of the Reference Paper do not apply to all WTO Members but do become binding if a WTO member explicitly includes the Reference Paper or parts thereof in its schedule of commitments: 69 of the 154 Members of the WTO have done so. The purpose of the Reference Paper is to ensure that a so-called major supplier dominating the market does not use its market power to the detriment of new market entrants and where, often, the major supplier in a national market is the former public monopoly operator. Paragraph 1 of the Reference Paper obliges WTO Members to prevent major suppliers from engaging in or continuing anti-competitive practices. In particular, the Reference Paper prohibits anti-competitive cross-subsidisation, the use of information

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[22] Krajewski 2008, pp. 397–404.

[23] Regan 2007, pp. 347–369.

[24] See Chap. 4 by Bekkedal.

[25] So far, the *Mexico—Telecommunications* case is the only decision which discusses Art. 5(e)(i). However, being an exception clause, the WTO's decisions on other exception clauses, in particular Art. XX GATT and Art. XIV GATS, could serve as guidance.

[26] Reference Paper on regulatory principles of 24 April 1996, available at: http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm (last accessed 31 May 2010).

obtained from competitors with anti-competitive results and withholding technical and commercial information from other service suppliers. The Reference Paper can, therefore, be seen as a nucleus or very basic framework of a specific telecommunication competition regime. It is, therefore, fitting that the Reference Paper also addresses universal service obligations.

Paragraph 3 of the Reference Paper States:

> Any Member has the right to define the kind of universal service obligation it wishes to maintain. Such obligations will not be regarded as anti-competitive per se, provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service defined by the Member.

This provision has three aspects. First, it accepts the right of each WTO Member to define a particular universal service obligation. As a consequence, the relative importance of the elements and objectives of a universal service obligation which could be questioned under Article 5(e)(i) of the Annex on Telecommunications[27] are not subject to review by WTO dispute settlement institutions. Second, the Reference Paper clarifies that universal service obligations will not 'be regarded as anti-competitive per se', suggesting that universal service obligations can never be challenged as such on the basis of WTO law. A challenge will always have to be based on the argument that a particular universal service obligation does not meet the requirements of Paragraph 3. Thirdly, universal service obligations have to be administered in a transparent, non-discriminatory and competitively neutral manner and should not be more burdensome than necessary for the kind of universal service defined by the Member. Hence, the administration of a universal service obligation must be transparent, non-discriminatory, competitively neutral and no more burdensome than necessary if it should conform to the Reference Paper.

This raises a number of questions.[28] The first concerns cross-subsidisation. The Reference Paper prohibits cross-subsidisation which is not competitively neutral [Paragraph 1(2)(a) Reference Paper]. Universal services obligations using cross-subsidization are, therefore, only compatible with the Reference Paper if they are applied in a manner which does not negatively affect competitive relationships. Whether this is the case seems to depend on the direction of cross-subsidisation: if the operator under a universal service obligation uses profits gained in a competitive sector to fund losses in the sector with the universal service obligation, this could be competitively neutral, because presumably there would be no competition in the loss-making sector of the market. For example, combining the licences to provide mobile telephone services (presumably profit-making) with the requirement to invest in land-line telecommunications infrastructure in remote rural areas (presumably loss-making and part of a public monopoly) seems competitive-neutral, because funds flow from the competitive sector to the loss-making

[27] See Sect. 10.3.1 supra.

[28] For a more detailed discussion of the following see Krajewski (ed) 2003.

monopoly segment of the market. In fact, this is the logic behind creating public monopolies for public services.

On the other hand, using monopoly rents to subsidise activities in a competitive sector may adversely affect competition. For example, if an incumbent telecommunications operator retaining a monopoly in land-line telephony and required to extend this service on a universal service obligation would use profits from the monopoly to cut costs in mobile telephony to offer lower prices than a competitor, this could be seen as anti-competitive. Because of the dynamics of telecommunications sector, it is possible that an unprofitable market segment may become a profitable and vice versa. Consequently, a universal service obligation, which was designed in a competitively neutral way, could become anti-competitive.

A second aspect of the requirements of the Reference Paper concerns the selection of the provider of the universal service and the imposition of this obligation. For example, imposing a universal service obligation on just one operator could be anti-competitive, because it adversely affects the competitive situation of the universal service operator. On one hand, the obligation could also be seen as more burdensome than necessary, because alternative measures could be used.[29] On the other hand, the universal service obligation may provide benefits, because it applies to a large segment of the market which gives the supplier of the universal service a dominant position. Furthermore, in situations of a natural monopoly, e.g., satellite telecommunications service for an archipelago country, the selection of one provider might be competitively neutral. Another problem in this context concerns the selection process which must be transparent and non-discriminatory. This may require the government to submit the universal service obligation to an open tender.

Another area of potential conflict between universal service obligations and the Reference Paper concerns interconnection charges. Such charges can be used to generate additional revenue to fund infrastructure investments, especially if the tax base of the government is not sufficient for this objective. While such extra charges may already be questionable on the basis of the Annex on Telecommunications, the Reference Paper seems also to reject them on the basis that it requires interconnection charges to be 'cost-oriented'. It has been suggested that the inclusion of a charge for funding universal service obligation would make it impossible to achieve cost-oriented interconnection charges.[30]

It is not entirely clear, whether Sect. 3 of the Reference Paper would exempt interconnection charges aimed to fund universal service obligations from the obligation to be cost-oriented, because it could be argued that an interconnection charge above a cost-oriented level is more burdensome than necessary. In the *Mexico—Telecommunications* case the Panel decided that the requirement of cost-oriented interconnection in Sect.2.2(b) of the Reference Paper excluded the possibility to incorporate costs other than those directly related to the

[29] Peha 1999, pp. 369–373.

[30] OECD 2001, p. 21.

interconnection.[31] Mexico did not rely on Sect. 3 of the Reference Paper because it did not include universal service costs in its rates. Hence, the Panel did not decide on the possibility of justifying a deviation from the cost-orientation standard based on Sect. 3 of the Reference Paper. However, it should be noted that WTO case law suggests that a measure can be seen as less burdensome (or trade restrictive) than necessary even if it implies higher costs for the government.[32] If this approach were to be applied to the Reference Paper, interconnection charges aimed at financing universal service obligations could be seen as more burdensome than necessary, because alternative government funding is less burdensome. This argument is not restricted to interconnection charges. Indeed, any cost-sharing system could be seen as more burdensome than necessary if compared with direct government funding.

Following this line of argument, even the system of sharing the costs of universal service obligations authorised in the 2002 EC Universal Service Directive may be questionable. Article 13(b) and (c) of Directive 2002/22/EC allows cost-sharing arrangements between the providers of communication networks and services to finance universal service obligations. These arrangements can involve special charges imposed on service providers, but they must be transparent, non-discriminatory, proportionate and least-market distortable. The crucial question is whether cost-sharing arrangements are less burdensome than necessary. Even if these arrangements would comply with the Reference Paper, applying a cost-sharing arrangement in a transparent, non-discriminatory and proportionate way remains a difficult task in practical terms. The EC's Universal Services Directive sets firm guidelines on how to calculate and how to share the costs. These guidelines show that the administration of transparent, non-discriminatory and proportionate cost-sharing arrangements requires precise and complete data on costs of services, which could be difficult to collect.[33]

10.3.3 The EU's Proposal for a Reference Paper on Postal and Courier Services

Despite the many open questions concerning the exact content of Paragraph 3 of the Reference Paper on telecommunications, the EU seems to consider it as a

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[31] *Mexico—Measures Affecting Telecommunication Services*, para 7.170–7.174.

[32] *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161 and WT/DS169, Report of the Appellate Body adopted on 10 January 2001, para 181; *Dominican Republic—Measures Affecting the Importation and Internal Sale of Cigarettes,* Report of the Appellate Body adopted on 19 May 2005, WT/DS302/AB/R, para 72.

[33] In 2001, the ECJ declared France in breach of its obligations under the Universal Services Directive. France's defence was partly based on difficulties associated with collecting and assessing the required data, but the Court held that these difficulties could not justify the breach of those obligations, ECJ, Case C-146/00 *Commission* v. *France* [2001] *ECR* I-0767.

template for further regulatory regimes in the GATS context. In the course of the ongoing WTO services negotiations, the EU (then the EC) proposed a Reference Paper on postal and courier services in 2005.[34] According to the EU such a Reference Paper could be used by WTO Members willing to take specific commitments in the postal and courier services sector. Like the Telecommunications Reference Paper, the proposed Reference Paper on postal and courier services would be aimed at preventing suppliers who have 'the ability to affect materially the terms of participation (with regard to price and supply) in the relevant market for postal and courier services as a result of use of their position in the market, from engaging in or continuing anti-competitive practices' (Paragraph 1 of the Proposal).

The proposal also contains a paragraph on universal service obligations which mirrors precisely Paragraph 3 of the Reference Paper on telecommunications. In explaining this proposal the EC claimed that universal service is a key component of the postal sector for most Members. Hence, the principle of universal service should be expressly mentioned in additional commitment rules. The EU state that its proposal would confirm 'the possibility to impose universal services obligations provided that they respect certain basic rules, such as transparency, non-discrimination and a neutral administration'.

The EU's proposal on universal service obligations in postal and courier services is clearly inspired by the EU's own policy regarding the internal market for postal services. The proposal is to be welcomed because it strengthens the position of universal service obligations vis-à-vis the liberalisation requirements of the multilateral trading system. However, it is regrettable that the EU forgave an opportunity to make proposals for clarifying the scope and the contents of a universal service obligation in the GATS regime. It is hoped that in subsequent services negotiations the EU improves its proposal by addressing some of the problems discussed in the context of Paragraph 3 of the Reference Paper on telecommunications.

10.3.4 Conclusion

The references to public or universal service obligations in the GATS telecommunications system and in the proposed Reference Paper on postal and courier services analysed above reveal a common structure and objective. They are drafted as exception clauses aiming at protecting the rights of WTO Members to maintain such obligations within certain limits and under certain

[34] Council for Trade in Services Special Session, Communication from the European Communities and their Member States, Postal/Courier: Proposal for a Reference Paper, TN/S/W/26, 17 January 2005.

conditions. In particular, public or universal service obligations must not be applied on a discriminatory basis and they must not be more burdensome or trade-restrictive than necessary. These provisions, therefore, are structurally comparable to the general exception clauses such as Article XX GATT and Article XIV GATS. Furthermore, they also seem to serve a similar function as Article 106(2) TFEU [ex Article 86(2) ECT] which also provided for a derogation from the obligations of the EC Treaty for the application of public service obligations. The references of the GATS to public service obligations do not contain any positive obligations to maintain or introduce public or universal services. A WTO Member is, therefore, free to fully liberalise a particular service sector without maintain any public service obligations.

It is also important to note that the GATS references to public, or universal service, obligations are not part of the main agreement. Instead they are codified in an Annex (which is, however, an integral part of the agreement) and in voluntary commitments of WTO Members such as the Reference Paper on telecommunications. This suggests that even the value of a derogation clause for public or universal service obligations is not generally shared by all WTO Members. As will be shown in the next sections, the bilateral and regional trade agreements signed by the EC/EU after the foundation of the WTO in 1995 give provisions on universal service obligations a more prominent place.

10.4 Consolidating the GATS Approach: The EC–Chile Bilateral Association Agreement

In 2002, the EC and its Member States and Chile concluded a comprehensive association agreement[35] comprises a large range of trade and trade-related issues which go beyond WTO standards ('WTO plus' agreement). Title III of the EC–Chile Agreement on trade in services and establishment follows a different structure than the GATS but serves similar functions. Apart from general rules on services and establishment the EC–Chile Agreement also contains a section on telecommunication services which incorporates the principles and objectives of the Reference Paper on telecommunications into the main part of the agreement. Hence, there is also a specific provision on universal service obligations, Article 115, which holds:

[35] Agreement establishing an association between the European Community and its Member States, of one part, and the Republic of Chile, of the other part of 18 November 2002, *OJ* 2002, L 352/3.

> 1. Each Party has the right to define the kind of universal service obligation it wishes to maintain. 2. The provisions governing universal service shall be transparent, objective and non-discriminatory. They shall also be neutral with respect to competition and be no more burdensome than necessary.

This provision has the same contents and pursues the same function as Paragraph 3 of the Reference paper. The different wording of the two provisions does not indicate a difference in meaning. In fact, the wording of Article 115 of the EC–Chile Association Agreement seems clearer than Paragraph 3 of the Reference Paper. Paragraph 1 of Article 115 which has the same wording as the first sentence of Paragraph 3 of the Reference Paper unmistakably states that the parties have the 'right' to define the kind of universal service it wishes to maintain. This right is not restricted or linked to the condition that the universal service obligation meets a particular standards. Paragraph 2 then contains requirements for the provisions governing universal service and their application, which is a slight deviation from the wording of the Reference Paper. The actual requirements are the same as the ones of the Reference Paper with the exception of the requirement of objectivity which cannot be found in the Reference Paper. However, this omission does not lead to any substantial difference, because the notion of 'objective' does not seem to a have a meaning which deviates from the combined effect of the notions of transparent, non-discriminatory, competition-neutral and no more burdensome than necessary.

There is no comparable provision on public service obligations in postal and courier services. Instead, the EC only included the following sentence in its commitments on postal and courier services: 'the right to a postal universal service is ensured'. The legal value of this commitment is not entirely clear because it does not contain restrictions or limitations such as the provisions on universal service obligations discussed so far. Instead it seems like a general carve-out for any measure which can be somehow related to a universal service obligation. Yet, a contextual interpretation of this additional commitment would conclude that the criteria to be found in the Reference Paper also, in general, apply to the specific commitment of the EC regarding postal universal services. In other words, it is not conceivable that the EC's commitment would be interpreted so as to also cover discriminatory, non-transparent or competition-distorting requirements.

In sum, it can be said that the EC–Chile Agreement does not go beyond the scope of the GATS with regard to universal service obligations in telecommunication services. It also provides a derogation clause for these obligations with similar restrictions and limitations on the use of such obligations. However, the EC–Chile Agreement incorporates the respective standards into the core of the agreement and makes them mandatory. This distinguishes it from the GATS approach which is built on voluntary acceptance. The EC–Chile Agreement, therefore, consolidates the GATS approach and extends it to bilateral trade arrangements of the EC.

10.5 Beyond Derogation: Universal Service Obligations in the Cariforum Economic Partnership Agreement

The Economic Partnership Agreement (EPA) between the EC and the CARIFORUM States[36] contains the most explicit and elaborate reference to public service obligations. The EC negotiated with all countries of the ACP (African, Caribbean and Pacific) group of countries such economic partnership agreements based on the Cotonou Agreement between the EC and the ACP countries.[37] These agreements became necessary because the EC had to bring its special regime with those countries in accordance with WTO requirements. So far, however, the only comprehensive and final agreement is the one concluded with the CARIFORUM states.[38] It has been applied provisionally since December 2008.

The CARIFORUM–EPA contains specific regulatory provisions on postal and courier services and telecommunications. Both sections contain articles on universal service obligations, Article 91 EPA for postal services and Article 100 EPA for telecommunications. These provisions partly reflect the standards of the GATS and partly go beyond them.

10.5.1 Incorporating the GATS Approach

Like the EC–Chile Association Agreement the CARIFORUM–EPA incorporates elements on universal service obligations which also exist in the GATS. In particular, the first two paragraphs of Article 100 EPA resemble the existing provisions on universal services in the WTO's Reference Paper.[39] Article 100(1) EPA recalls that the EC and the CARIFORUM states have the right to define the kind of universal service obligations they wish to maintain. Article 100(2) EPA states that universal service obligations 'will not be regarded as anti-competitive per se, provided they are administered in a transparent, objective and non-discriminatory way'. Furthermore, the administration of such obligations shall 'be neutral with respect to competition and not more burdensome than necessary for the kind of universal service defined by the EC Party and by the Signatory CARIFORUM

[36] The CARIFORUM States comprise Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Saint Kitts and Nevis, Suriname, Trinidad and Tobago and the Dominican Republic.

[37] Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other, signed in Cotonou on 23 June 2000, *OJ* L 317/3. On the general policy changes see Desta 2006, p. 1346 et seq.

[38] Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other, [2008] *OJ* L 289, 3.

[39] Sauvé and Ward 2009, p. 39.

States'. Article 91 EPA contains a provision on universal service obligations in postal services which uses the same language as the Reference Paper on telecommunications of the WTO.[40] It is, therefore, also identical with the paragraph on universal services in the proposal for a reference paper on postal services submitted by the EU in the context of the GATS negotiations.[41]

Article 100(1) and (2) EPA does not add anything substantially new to the approach established in the WTO context. However, like the EC–Chile agreement these paragraphs incorporate the standard of the Reference Paper into the main text of the agreement, and therefore, make them binding on all parties. As not all CARIFORUM states have adopted the Reference Paper in the WTO context, this approach of the EPA is a 'WTO plus' obligation from their perspective.[42] This is even more so for Article 91 EPA on a postal universal service. Since the GATS does not contain a universal service provision in postal services, this article of the EPA is in fact 'WTO plus' for all EPA parties.

10.5.2 Establishing a Basic Regulatory Framework for Universal Service Obligations

The EPA does not only incorporate the standards of the GATS telecommunications reference paper with regard to universal service obligations, but also contains provisions which are more elaborate than the Reference Paper.[43] A first important innovation of the EPA is that it defines the notion of universal services both regarding postal services and telecommunications. According to Article 89(2)(b) EPA universal service in the context of postal and courier services 'means the permanent provision of a postal service of specified quality at all points in the territory of the EC Party and of the Signatory CARIFORUM States at affordable prices for all users'. Article 94(1)(f) EPA defines universal service in telecommunications as:

> the set of services of specified quality that must be made available to all users in the territory of the EC Party and of the Signatory CARIFORUM States regardless of their geographical location and at an affordable price; its scope and implementation are decided by the EC Party and by the Signatory CARIFORUM States.

Both definitions strongly resonate the definition of public or universal service obligation under EU internal law.[44] They refer to the key elements of affordability, availability, quality and security or continuity of service ('permanent provision'), and therefore, clearly incorporate a model of universal service into the EPA which is similar to, if not identical with, the European model of universal service.

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[40] Schloemann and Pitschas 2009, p. 101(114).

[41] See Sect. 10.3.3 supra.

[42] Schloemann and Pitschas 2009, p. 101(117).

[43] Sauvé and Ward 2009, p. 40.

[44] See Sect. 10.2 supra.

Article 100(3) EPA already adds an element to the universal service provision which goes beyond the standard of the WTO's approach. This paragraph reads:

> All suppliers should be eligible to ensure universal service. The designation shall be made through an efficient, transparent and non-discriminatory mechanism. Where necessary, the EC Party and the Signatory CARIFORUM States shall assess whether the provision of universal service represents an unfair burden on organisations(s) designated to provide universal service. Where justified on the basis of such calculation, and taking into account the market benefit, if any, which accrues to an organisation that offers universal service, national regulatory authorities shall determine whether a mechanism is required to compensate the supplier(s) concerned or to share the net cost of universal service obligations.

At the outset, it should be noted that this paragraph reads like a brief summary of the internal EU law concerning universal service obligations in telecommunications.[45] In fact, the wording of Article 100(3) EPA provision follows closely the relevant provisions of the EU Universal Service Directive, that is, Articles 8(2) on the designation of undertakings, Article 12(1) on the calculation of costs and Article 13 on the methods of financing the universal service obligations. It can, therefore, be argued that the EU 'exports' its own regulatory model regarding universal service in telecommunications to its trading partners in the Caribbean.

Unlike the GATS Reference Paper, Article 100(3) EPA does not leave the content and structure of the universal service obligation completely to the autonomy of the parties of the agreement. Instead it holds that all service suppliers should be eligible to participate in the universal service. This seems to prohibit models which impose the universal service obligation a priori only to one service supplier. It is not entirely clear, however, whether the provision would also exclude models utilising tendering the universal service if the tendering procedures are open to all service suppliers. It could be argued that the second sentence of Article 100(3) EPA would allow the designation of a single universal service supplier as long as this designation process did not exclude any service supplier. Article 100(3) EPA, therefore, contains a specific clarification of the principle of non-discrimination regarding the application of universal service obligations. Furthermore, the designation process has to be efficient, transparent and non-discriminatory.

The background of Article 100(3) EPA seems to be the fear that the market share of new market entrants could be restricted through the definition of the universal service and the exclusion of foreign service suppliers from that segment of the market. Article 100(3) EPA, therefore, serves two functions: on one hand, it restricts the potential scope for countries to deviate from the obligations of the agreement by relying on universal service provisions. This ensures the economic value of the commitments in telecommunication services, and therefore, supports a liberalisation model. On the other hand, Article 100(3) EPA can also be seen as a positive obligation to establish or maintain a universal service model which is based on the principles of non-discrimination, transparency and efficiency.

[45] I would like to thank Olga Batura for this observation.

In particular, the requirement of an efficient designation method indicates that the universal service model should also be effective even though the requirement formally only applies to the designation of the universal service supplier and not to the supply of the universal service in general.

The remaining part of Article 100(3) EPA reflects the fact that the imposition of a universal service does not have to be a burden. In fact, in some cases, the universal service obligation can been seen as an economic asset.[46] That is why the EPA requires the parties to assess whether the provision of universal service represents an unfair burden on the organisation which have to provide it. If this is not the case, in particular because the organisation which offers universal service may be accrued a market benefit, there may not be a need to compensate the supplier concerned or to share the net cost of universal service obligations. The last reference to methods of financing the universal service is also noteworthy. It does not prescribe for a particular method, but it indicates that the compensation method and the cost-sharing method are acceptable. Both methods are also part of the internal EU telecommunication law. It can, therefore, be argued that the parties of the CARIFORUM–EPA are of the opinion that the cost-sharing method is not more burdensome than necessary. This perception could be considered by a panel or the Appellate Body in the interpretation of the GATS telecommunications Reference Paper which does not contain such a specification of the necessity standard.[47]

Another innovation of the EPA with regard to universal service obligations can be found in Article 100(4) EPA. It states:

> The EC Party and the Signatory CARIFORUM States shall ensure that: (a) directories of all subscribers are available to users in a form approved by the national regulatory authority, whether printed or electronic, or both, and are updated on a regular basis, and at least once a year and (b) organisations that provide the services referred to in subparagraph (a) apply the principle of non-discrimination to the treatment of information that has been provided to them by other organisations.

This provision is nothing less than a positive commitment towards ensuring a minimum standard of a universal service. It requires the parties to establish or maintain directories of all telephone subscribes and to update them at least annually. This requirement can be seen as an element of a universal service. In this context, it is important to note that Article 5 of the EC's Universal Service Directive 2002/22/EC contains a similar obligation regarding directory services. Even though this is a small and possibly uncontroversial element of a universal service, it is a positive obligation and not just a derogation.

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[46] Schloemann and Pitschas 2009, p. 101(122). See also the decision of the British Postal Regulator, the Postal Services Commission (POSTCOMM), which concluded in 2001 that the universal service did not represent a significant burden in the market at that time, see POSTCOMM, Cost and benefit of the universal service, available at http://www.psc.gov.uk/universal-service/cost-of-the-universal-service.html (last accessed 31 May 2010).

[47] On this problem see Sect. 10.3.2 supra.

The background of including this provision could be practical commercial interests, because directories allow telephone service providers to market their services more efficiently. However, from a conceptual perspective the positive obligation of at least one—albeit minor—element of a universal service obligation should not be underestimated. Article 100(4) EPA establishes a positive obligation of the EPA parties to establish or maintain an element of universal service. The provision, therefore, clearly departs from the GATS model which is designed purely as a derogation clause. Article 100(4) EPA indicates a small, but noticeable step towards a positive obligation of a universal service.

10.6 Towards a 'Next Generation' of Public Service Provisions?

The EU is currently negotiating bilateral free trade agreements (FTA) with some of its trading partners. The state of the negotiations differs and in some cases agreements have already been reached while in others the negotiations are still ongoing. This section will briefly look at the proposed or likely provisions on public services in the agreements with Korea, Colombia and Peru and Canada. Korea and the EC and its Member States have been negotiating a bilateral FTA since 2007. The Draft EU–Korea FTA has been initialled in Brussels in October 2009, but has not yet been formally signed. Negotiations between the EU and Peru and Colombia were concluded in March 2010, but the agreement has not yet been finalised. However, since there are no major disagreements any longer the agreement could enter into force as soon as 2011. Finally, the EU is negotiating a FTA with Canada. These negotiations have not yet been concluded. The analysis, therefore, relates to proposed texts which have not yet been agreed upon.

The Draft EU–Korea FTA builds on language of the existing trade agreements.[48] It defines 'universal service' in the same way as the CARIFORUM–EPA. According to Article 7.27(h) of the Draft EU–Korea FTA universal service means 'the set of services that must be made available to all users in the territory of a Party regardless of their geographical location and at an affordable price'. A footnote clarifies that scope and implementation of universal services shall be decided by each Party. Article 7.34 of the Draft EU–Korea FTA contains a clause on universal service obligations in telecommunications which follows the model of the EC–Chile Agreement. However, the Draft EU–Korea FTA does not go as far as the positive universal service obligations of the CARIFORUM–EPA. The Draft EU–Korea FTA also mentions universal service obligations in postal services, but does not regulate them. However, the parties have instructed their joint Trade Committee to set out the

[48] The draft text is available from webpage of the European Commission's Directorate General on External Trade, http://trade.ec.europa.eu/doclib/press/index.cfm?id=443 (last visited 31 May 2010).

principles of the regulatory framework applicable to postal and courier services which should also address universal service no later than three years after the entry into force of the agreement (Article 7.26 Draft EU-Korea FTA).

Apart from incorporating the GATS standard, the draft FTA between the EU and Peru and Colombia of 2010[49] also contains a provision on universal service obligations in a section on telecommunications which is similar to Article 100(3) CARIFORUM–EPA requiring that '[a]ll suppliers should be eligible to ensure universal service and no supplier shall be a priori excluded. The designation shall be made through an efficient, transparent and non-discriminatory mechanism, in accordance with the Party's domestic legislation'. A separate provision requires the publication of telephone directories. Furthermore, the Draft EU–Peru/Colombia agreement contains a provision on universal services in postal and courier services. If these draft provisions would be agreed upon the EU–Peru/Colombia agreement would contain similar provisions as the CARIFORUM–EPA.

Finally, in the negotiations with Canada, the EU proposed a provision on telecommunication services the same language as in Article 100 of the CARIFORUM.[50] Canada has proposed a different text which would not go as far as the proposed EU text. The EU has also proposed a provision universal service in postal services which would be similar to the respective EPA provision. It remains to be seen which view will inform the final text. If the EU convinces Canada the EU–Canada agreement would further strengthen the perception that basic elements of a law on universal services in telecommunications could be emerging at the global level. Much will depend on the outcome of the EU–Canadian negotiations and on the potential impact of these new developments on the negotiations in the WTO.

Despite the evolving trend in the most recent EU trade agreements, it seems too early to say whether the incorporation of some elements of positive universal service obligations in EU bilateral trade agreements can be seen as an attempt of the EU to promote its own values regarding universal service obligations in its external relations or whether the incorporation of these elements are predominantly directed by commercial interests.

10.7 Conclusion

The preceding analysis of provisions on public service obligations in the EU's international agreements shows that universal service obligations are generally considered as a possible ground for the justification of deviations from the obligations of these agreements. However, the administration of these universal

[49] The draft text is available from the webpage www.bilaterals.org, http://www.bilaterals.org/spip.php?article17138&lang=en (accessed 31 May 2010).

[50] The Draft is available from the website of the Canadian Trade Justice Network: http://www.tradejustice.ca/tiki-download_wiki_attachment.php?attId=14 (31 May 2010).

Table 10.1 Scope and function of Universal Service Obligations (USO) in EU Trade Agreements

	Telecommunications			Postal services
	USO as derogation: not mandatory	USO as derogation: mandatory	USO as positive obligation	USO as derogation
GATS	X			
EC–Chile agreement		X		X
CARIFORUM–EPA		X	X	X
Draft EU–Korea FTA		X		
Draft EU–Peru/Colombia FTA		X	X	X
EU proposals for EU–Canada FT		X	X	X

service obligations must be non-discriminatory, transparent and no more burdensome than necessary to achieve their objectives. This approach was first incorporated into the GATS framework on telecommunications and has also been used in bilateral trade agreements. In some of the bilateral trade agreements the 'derogation model' of universal service obligations has also been applied to postal services. Even though the provisions on public or universal service obligations have not yet been fully applied in a dispute, it can be assumed that the standards developed in the WTO jurisprudence on the general exception clauses (Article XX GATT and Article XIV GATS) could also be applied to the universal service obligations.

More recent (draft) trade agreements of the EU have moved beyond the derogation standard. In particular the EC–CARIFORUM–EPA but also proposals for bilateral FTAs include positive obligations which require the parties of the agreement to maintain or establish universal directory services. This can be seen as the nucleus of a positive obligation of universal services. The scope and function of the different universal service obligation models is summarised in Table 10.1.

Whether the approach of the CARIFORUM–EPA and the proposal for the EU–Canada FTA indicate a new trend remains to be seen. It may, therefore, be still too early to give a definite answer to the question whether international trade law provisions on public service obligations will move from derogation to obligation in a way which could—at least on a very fundamental level—be compared with the redefinition of Article 106(2) TFEU (ex Article 86(2) ECT) regarding services of general economic interest. However, the new developments show the need to embed the liberalisation of public services, such as telecommunications and postal services, through international agreements in a regulatory framework. The EU will have to contribute to the development of such a framework if it aims to pursue the same values it is promoting internally in its external relations.

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References

Adlung R (2006) Public Services and the GATS, 9 JIEL, 455

Batura O (forthcoming) Embedded transnational markets in telecommunications. In: Joerges C, Falke J (eds) Karl Polanyi, globalisation and the potential of law in transnational markets. Hart Publishing, p 245

Bronckers M, Larouche P (2008) A review of the WTO regime for telecommunications services. In: Alexander K, Andenas M (eds) The World Trade Organization and trade in services. Nijhoff, Leiden, pp 319–379

Desta M (2006) EC-ACP economic partnership agreements and WTO compatibility, CML Rev 43:1343

Dimopoulos A (2010) The effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy. Eur Foreign Affairs Rev 15:150

European Commission (2006) Global Europe—competing in the world, a contribution to the EU's growth and jobs strategy, p 5

Houben I (2008) Public service obligations: Moral counterbalance of technical liberalization legislation? Eur Rev Private Law 16:7

Krajewski M (2008a) Comment: Quis custodiet necessitatem? Adjudicating necessity in multilevel systems and the importance of judicial dialogue. In: Panizzon M, Pohl N, Sauve P (eds) GATS and the regulation of international trade in services, CUP, Cambridge, pp 397–404

Krajewski M (2008b) Protecting a shared value of the union in a globalized world: services of general economic interest and external trade. In: Van de Gronden JW (ed) The EU and WTO law on services. Kluwer Law International, Alphen aan den Rijn, pp 173–213

Krajewski M (2003) National Regulation and Trade Liberalization in Services—the legal impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy. Kluwer Law International, London

Neergaard U (2009) Services of general economic interest: the nature of the beast. In: Krajewski M, Neergaard U, Van de Gronden J (eds) The changing legal framework of services of general interest in Europe. TMC Asser Press, The Hague, pp 17–50

OECD (2001) Working party on telecommunication and information services policies: interconnection and local competition, 7 February, DSTI/ICCP/TISP(2000)3/FINAL

Peha J (1999) Tradable universal service obligations. Telecommun Policy 23:369–373

Regan D (2007) The meaning of 'necessary' in GATT Article XX and GATS Article XIV: the myth of cost–benefit balancing. World Trade Rev 6:347–369

Roseman D (2003) Domestic regulation and trade in telecommunications services: experience and prospects under the GATS. In: Mattoo A, Sauvé P (eds) Domestic regulation and service trade liberalization. Oxford University Press, Washington, DC

Ross M (2000) Article 16 E.C. and services of general interest: from derogation to obligation? EL Rev 25:22–37

Sauvé P, Ward N (2009) The EC-CARIFORUM economic partnership agreement: assessing the outcome on services and investment. European Centre for International Political Economy (ECIPE)', Brussels, January http://www.ecipe.org, 39

Schloemann H, Pitschas C (2009) Cutting the regulatory edge? In: Zusammenarbeit (ed) How to ensure development friendly economic partnership agreements, Gesellschaft für technische p 101