

## Chapter 7

# Universal Service Obligations: Fulfilling New Generations of Services of General Economic Interest

Jim Davies and Erika Szyszczak

**Abstract** This chapter charts the development of universal service obligations (USOs) in the EU liberalisation programme. *Davies and Szyszczak* see an expanding role for the concept of USOs in the future development of the EU, from a social perspective as well as a commercial perspective. The authors note that whereas a Member State has a wide competence to define a SGEI, this is no longer the case when a USO is found in liberalising legislation. The authors question whether the use of USOs is a temporary device and whether USOs will survive if, and when, there is full market liberalisation of a sector. Their chapter charts the various stages of the evolution of an EU concept of a USO and their analysis concludes that far from the gradual demise of the USO in the liberalisation process, they see the concept changing, evolving and expanding in its role of protecting the consumer–citizen interest in the Internal Market. A second focus of this chapter is to place the consumer–citizen at the heart of the USO. While academics have argued that USOs have a role to play in protecting the *vulnerable* consumer contributing to the evolution of a *social* European private law Davies and Szyszczak argue that USOs have a much wider remit in contributing not only to the inclusiveness of EU society but also the *effectiveness* of the benefits brought by an Internal Market. They argue that by placing the consumer–citizen of EU law at the heart of a complex web of networked relationships several new issues emerge of governance of the processes and outcomes through which consumer, competition and integration issues are mediated.

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J. Davies (✉)

Department of Law, School of Social Sciences, The University of Northampton,  
Park Campus, Boughton Green Road, Northampton, NN2 7AL, UK  
e-mail: jim.davies@northampton.ac.uk

E. Szyszczak

University of Leicester, Barrister, Littleton Chambers, London, LE1 7RH, UK  
e-mail: ems11@le.ac.uk

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### 7.1 Introduction

The aim of this chapter is to trace the evolution of the universal service concepts found in EU regulation and to (re)-locate the role of the consumer as a central actor in the regulation of universal service obligations (USOs) in the liberalisation process. Our reasons for doing this are because USOs represent a Europeanisation of the traditional public services [or as they are re-named in EU law services of general (economic) interest]. A study of universal obligations allows an inquiry as to how far, and in what form, can the traditional public services be regulated at the EU level and also retain the capacity to evolve and adapt to new technology and consumer demands.

A second reason for this chapter is to revisit the classical view of USOs as focussed upon the vulnerable consumer and creating a new triangular relationship with the State. Our analysis is that USOs create a new paradigm of consumer rights. The relationships which have emerged involve not only complex triangular relationships between the consumer–provider–State but also give rise to complex networks of multi-dimensional and multi-level economic and political relationships.

In order to analyse these developments the chapter is organised as follows. After this Introduction, [Sect. 7.2](#) examines the political and economic reasons for developing ideas of USOs in EU law. [Section 7.3](#) identifies the generic understandings of USOs. [Section 7.4](#) examines the evolution of public service obligations and the move away from simple triangular relationships between the State–provider–consumer to examine a more complex triangle geometry and the emergence of networks. [Section 7.5](#) then raises issues on the governance and regulation of USOs. Finally, [Sect. 7.6](#) draws some conclusions as to whether USOs will continue to exist in EU law and the challenges which face them with new technology creating convergence between different sectors.

## 7.2 The Political and Economic Reasons for EU Universal Service Obligations

Writing in May 2010 Mario Monti states:

In order to be able to effectively participate in the single market citizens need access to a number of basic services of general economic interest, in particular in the area of network industries, such as postal services, transport services or telecommunication services. In the network industries, market opening at EU level has therefore always been accompanied by measures ensuring that a universal service continued to be provided.<sup>1</sup>

However, earlier when introducing the section of his Report ‘3.3 Social services in the single market’ Monti describes the place of public services within the single market as ‘a persistent irritant’.<sup>2</sup> Uncertainty over the survival of basic essential public services in liberalised markets led the Member States to include positive references to their existence in the central EU Treaty provisions. The concern to maintain relationships with vulnerable consumers was matched with other concerns of the Member States involving the role of public services in social, economic, and regional cohesion within the Member States. As [Chap. 2](#) by Bauby shows, Article 14 TFEU reinforces the crucial role that services of general economic interest (SGEI) play in territorial and social cohesion within the Member States and the EU and at the same time modernises the old Article 16 EC by providing a legal base for the regulation of SGEIs at the EU level, despite a lack of competence to do so, either as an aim or as an objective of the EU. Protocol 26 on Services of General Interest to the Treaty of Lisbon 2009 reinforces the role of subsidiarity and diversity in developing the delivery of SGEIs in the EU and re-affirms the Member States’ competence to deliver and organise non-economic services of general interest.

Article 36 of Charter of Fundamental Rights of the European Union, found in Chapter IV entitled ‘Solidarity’, also recognises *access* to SGEIs ‘as provided for in national laws and practices’ as part of the promotion of social and territorial cohesion in the EU. Other aspects of the Charter build upon economic and social rights found in national constitutions and international, and regional human rights, and economic and social rights’ documents. These provisions complement the role of Article 106(2) TFEU in providing a shield from the full force of the economic (or ‘market’) rules of the TFEU for SGEIs where these rules would obstruct or hinder the SGEI tasks assigned to undertakings.

Historically, the ring-fencing of SGEIs in the interpretation of Article 106 (2) TFEU allowed the Member States to demand special rules for SGEIs in the liberalisation programmes of telecommunications, postal services, and utilities which swept across the EU in the 1990s through the definition and special protection of USOs in EU legislation.<sup>3</sup> The more challenges that were made to State monopolies,

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<sup>1</sup> Monti 2010, p. 74.

<sup>2</sup> Ibid., at p.73.

<sup>3</sup> See Szyszczak 2001; Neergaard 2008.

the more the Commission used soft governance processes to link the old world of public services to the new world of SGEIs and USOs. As Neergaard shows:

... the impression may be gained that ‘services of general economic interest’ are such services which are subject to ‘USOs’, such as the obligation to provide a certain service throughout the territory at affordable tariffs and on similar quality conditions, irrespective of the profitability of the individual operations.<sup>4</sup>

Similarly Neergaard cites the ECJ’s concurrence with this view from its ruling in *Almelo*<sup>5</sup> and also the report from the Conseil Economique et Social and the Opinion issued by the State Aid Group of EAGCP,<sup>6</sup> as taking the same view.<sup>7</sup> The Commission also sees linkages between SGEIs and USOs in its Communication, *Opportunities, access and solidarity: towards a new social vision for twenty-first century Europe*.<sup>8</sup>

Academic authors have also argued that universal services should coincide with SGEIs.<sup>9</sup> However, as Neergaard concludes where universal services are present there is also a strong indication that this will be a SGEI but it is not the only, or decisive, test.<sup>10</sup>

Recognising that USOs were essential *commercial* activities which are not necessarily responsive to normal market conditions was an important step in the mediation of State responsibility for universal services and the supply of these services in liberalised markets. The use of market discipline or ‘marketisation’ of essential services was seen to contribute to efficiency, affordability and choice. This was a policy approach which was a central element in the new public management: the promotion of consumer sovereignty. However, by so doing, the Member States agreed to the Europeanisation of these services, through their definition in EU legislation, setting the parameters for compensation mechanisms for the delivery of USOs by State and non-State bodies and by the creation of new sets of consumer rights where the central premises of the delivery of the USO were not met.<sup>11</sup>

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<sup>4</sup> Neergaard 2009, p. 39, citing as an example Commission, *Communication from the Commission. Services of General Interest in Europe* COM(2000) 580, 19 January 2001 and the *Commission Green Paper on Services of General Interest*, COM(2003) 270.

<sup>5</sup> ECJ, Case C-393/92 *Municipality of Almelo and Others v. Energiebedrijf IJsselmij* [1994] ECR I-1477, paras 47–48.

<sup>6</sup> *Analysis of the Implications of the Lisbon Treaty on Services of General Interest and Proposals for Implementation*.

<sup>7</sup> Discussion Paper drawn up by European Experts 2008, pp. 41–42, looking at the application of the concept of SGEIs for liberalising network industries.

<sup>8</sup> COM(2007) 726 at p.10.

<sup>9</sup> See for example, Sauter 2008, p. 179.

<sup>10</sup> Neergaard 2009, p. 44.

<sup>11</sup> Contrast with SGEIs where the Member States retain competence to define a SGEI and have some leeway in the funding arrangements provided that they follow the conditions in ECJ, Case C-280/00 *Altmark* [2003] ECR I-7747 or satisfy the proportionality of the funding to the Commission.

The regulation of the liberalisation processes in the EU was intended as an interim step, with a desired move towards fully competitive markets. This raised the question of what would be the future role of USOs and how would they be reconciled with competitive markets?

### 7.3 Generic Definitions and Understanding of Universal Service Obligations

The two terms, ‘public service obligation’ and ‘USO’, are used inter-changeably but they have a different genealogy. The General Court in *BUPA*<sup>12</sup> accepted the parties’ submission that in *Altmark*<sup>13</sup> a public service obligation corresponds with a ‘service of general economic interest’, as understood under Article 106(2) TFEU. Indeed in 1957 the drafters of the original Treaty of Rome 1957 took the bold step of re-inventing public services in a new European language of ‘services of general economic interest’, a concept unknown in the legal, political or scientific languages of the Member States in 1957.<sup>14</sup>

Public service obligations are obligations which the State has chosen to create in defining the kind and coverage of certain public services within its territory. In contrast, in this chapter, we are focusing upon a narrow definition of USOs as defined in the sectoral liberalisation legislation of the EU. This is because we see the terminology of USOs as a significant move at the EU-level to depart not only from ideas of ‘public’ service obligations but also its own terminology of ‘services of general economic interest’. Universal services signify that certain services are available to all but can be provided by either the public bodies owned and regulated by the State or non-State bodies or a hybrid of public and private provision. This neutrality in ownership and provision is significant in the over-arching EU policy of liberalisation and the creation of consumer sovereignty. Universal service obligations also create a grass-roots consumer responsiveness model in that consumers, as citizens, have a right to choose high quality, reliable, and continuous services. In the liberalised network industries public USOs establish a compensatory basis for the provision of services on social or broad economic need that would otherwise lack commercial viability but also do more: they create a *range* of consumer rights. Significantly, they create rights to access to information from providers and regulators contributing to a more sophisticated notion of a ‘consumer–citizen’ in EU law.<sup>15</sup>

<sup>12</sup> CFI/GC, Case T- 289/03 *BUPA* [2008] *ECR* II-741.

<sup>13</sup> ECJ, Case C-280/00 *Altmark* [2003] *ECR* I-7747.

<sup>14</sup> See [Chap. 2](#) by Bauby. For a discussion of the different historical, political, and cultural influences on the evolution of public services in Europe see Prosser [2005](#).

<sup>15</sup> Davies [2010](#).

Universal service obligations are defined in the *Communication From the Commission Services of General Interest in Europe* in 2001 as:

Universal service, in particular the definition of specific USOs is a key accompaniment to market liberalisation of service sectors such as telecommunications in the European Union. The definition and guarantee of universal service ensures that the continuous accessibility and quality of established services is maintained for all users and consumers during the process of passing from monopoly provision to openly competitive markets. Universal service, within an environment of open and competitive telecommunications markets, is defined as the minimum set of services of specified quality to which all users and consumers have access in the light of specific national conditions, at an affordable price.<sup>16</sup>

This is essentially explaining the over-arching normative approach to USOs, focusing upon *what they do*, rather than their content. In the liberalisation Directives the specific detail is left to sectoral legislation and a margin of discretion is left for the Member States to adapt the USO to local needs.

Szyszczak argues that the use of USOs in liberalised markets is double-edged: the use of USOs to protect essential public services in the liberalisation processes serve as a reminder of the limits of the market to guarantee the public interest values, but also as an indicator of how the market can improve the quality of these values.<sup>17</sup>

Some of the criticisms of using State monopolies came from their inability to deliver sufficiently high quality public services and to adapt to changing consumer needs and demands. Thus in addition to the idea of universality in coverage of universal services the liberalisation programmes also focused attention on quality, continuity of supply, access, affordability and consumer protection issues. This linkage between universality as well as other consumer interests was not accepted by some theorists as being naturally progressive. In addition to confusing public and private law obligations, confusion is created by shifting a former field of activities belonging to politics to economics.<sup>18</sup> Teubner describes the new role for the providers of universal obligations as a strange phenomenon whereby arcane principles discarded from medieval law obligations are suddenly transposed into the private law relationships of competitive markets.<sup>19</sup>

Universal service obligations are envisaged as having a role to play in the redistributive tasks of the State, allowing for wealthier providers and consumers to cross-subsidise poorer consumers of public services. Liberalisation is portrayed as engaging consumers by allowing consumers greater choice over services and goods, and places consumers in a better legal position to assert their rights on the *quality* of what were once perceived to be public services. This is achieved through a focus on transparency and empowering the consumer through information.

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<sup>16</sup> *OJ* 2001 C 17/4, 19 January 2001, Annex II, p. 23.

<sup>17</sup> Szyszczak 2007, p. 243.

<sup>18</sup> Micklitz 2009, p. 10.

<sup>19</sup> Teubner 1998, p. 411.

A central outcome in the liberalisation process is to place the consumer at the epicentre of a system of complex networks. This aspect of liberalisation has been ignored in the various analyses of the dynamics of liberalisation and USOs.

Micklitz has argued ‘... that the EU rules on universal services contain the nucleus of an emerging social European private law.’<sup>20</sup> His argument is that USOs were used to prevent social exclusion as State monopolies delivering basic services were privatised. Thus the role of USOs was to ‘... guarantee the supply of these services to those who lack the resources to buy them at the market price.’<sup>21</sup> However, the role of universal services in providing protection for vulnerable consumers is seen as flawed because its focus is upon a second generation of social law in the form of consumer rights. This critique is seen in the analysis which examines the creation of a consumer-citizenship role for citizens within a fundamental rights context.<sup>22</sup> It is argued that for citizens many of the rights attaching to ‘universal’ service obligation are contingent upon *access* to a first generation of *social* rights: owning, or having access to property in order to enjoy telecommunications, postal and utility services.

If we look more closely at the content and scope of USOs we see that the role of USOs extends beyond the protection of the vulnerable consumer to playing a bigger role in social, regional and territorial cohesion and the concept is used to assuage fears of the Member States that their role in providing for, protecting, and developing the general interest is limited where core services necessary for the general interest are taken away from State control.

Our analysis of USOs shows that over time different generations of USOs have developed and that the concept has evolved into a normative status, capable of adaptation to new technological and social demands. Rather than retreating in a competitive market place the concepts have evolved into new forms of fundamental and consumer-citizenship rights as Member States have linked the evolution of USOs with developments in technology. There has been a focus on the content and delivery of public service obligations and USOs, particularly in terms of sector specific content and their delivery at national level.

What interests us is understanding the development of USOs in such a way that we can consider what, if any, core aspects can be identified, what their scope may be, and what the next stage in the evolution of USOs may look like. Already at the EU level, we can see the development of multi-layered obligations and the sectoral influences of the market or technology on the nature of USOs. We also observe consumer, fundamental rights, and citizenship rights emerging as core ideas in the development and evolution of USOs.

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<sup>20</sup> Micklitz 2009, p. 1.

<sup>21</sup> Ibid.

<sup>22</sup> Szyszczak 2009a, b.

## 7.4 The Evolution of Universal and Public Service Obligations

In this part of the chapter we show how different generations of USOs have emerged in the liberalised sectors.

### 7.4.1 *Developing the Model: The Telecoms Sector and Universal Service Obligations*

Early USOs were about *access*, essentially concerned with providing a service to consumers and users within geographical areas where there could be no commercial advantage. Beginning in the telecoms sector, USOs introduced the concept of splitting the *content* of services away from the physical network infrastructure and creating new wholesale markets as delivery streams for providing consumers and end users with *choice*. The development of USOs has been through EU legislation, hard law, and soft law communications, and is notable by the very sparse litigation in the area. Thus the concepts are legislative concepts, with only minor input from judicial interpretative sources.

The telecommunications terminal equipment market was the first to experience EU legislative USOs through which the Member States were to ensure equality of access in which consumers were to be given a free choice between the various types of equipment available.<sup>23</sup> Sectoral liberalisation was to be promoted through the withdrawal of any existing special or exclusive rights to provide terminal equipment and provisions to ensure that economic operators had the right to import, market, connect, bring into service and maintain terminal equipment, subject to independent regulatory type-approval for technical specification.<sup>24</sup> This legislative foray into the design of EU-wide liberalised and regulated markets was merely a first step, soon to be followed by reinforcement of the provisions for full mutual recognition of type-approval for terminal equipment<sup>25</sup> and the ECJ's endorsement of the regulatory independence aspect of the liberalised market model.<sup>26</sup>

During the first half of the 1990s, the telecom sector liberalisation measures spread rapidly beyond the terminal equipment market to provide for harmonised conditions for open and efficient access to telecoms networks and telecoms

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<sup>23</sup> Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment, *OJ* 1998 L 131/73, and particularly recital 2 of the Preamble.

<sup>24</sup> *Ibid.*, Articles 2, 3 and 6.

<sup>25</sup> Directive 91/263/EEC of 29 April 1991 on the approximation of the laws of the Member States concerning telecommunications terminal equipment, including the mutual recognition of their conformity, *OJ* 1991 L 128/1.

<sup>26</sup> ECJ, Case C-221-94 *Commission v. Luxemburg* [1996] *ECR* I-5669, para 21.



services,<sup>27</sup> harmonised and liberalised markets in satellite equipment and services<sup>28</sup> and the removal of restrictions limiting the provision of cable TV services.<sup>29</sup> The Full Competition Directive of 1996 brought an end to the special or exclusive rights that had ensured the initial financial stability of telecom network operators in developing a *geographic* universal service and connection to *any* service provider upon request within a reasonable period of time.<sup>30</sup> Network investment and technological development had brought geographic coverage and digitalisation to a number of Member States and the on-going heavy investment programmes, optic fibre-coverage, and network penetration were expected to improve significantly in the other Member States in the following years.<sup>31</sup> Universal service coverage at an affordable price, as the tenet of PSO's in the Open Network and Universal Service Directive, was accompanied by a particular geographic and *social* obligation to maintain affordability 'for users in rural or high cost areas and for vulnerable groups of users such as the elderly, those with disabilities or those with special social needs.'<sup>32</sup> To that end, Member States were to be able to provide for special or targeted tariff schemes with, *inter alia*, price capping or geographical averaging until competition was able to provide effective price control.<sup>33</sup>

The culmination of this first phase in the development of the USO model came with the much discussed Universal Services Directive in which the model was identified as dynamic and responsive to technological change. The first recital in the Preamble identified that:

[t]he liberalisation of the telecommunications sector and increasing competition and choice for communications services go hand in hand with parallel action to create a harmonised regulatory framework which secures the delivery of universal service. The concept of universal service should evolve to reflect advances in technology, market developments, and changes in user demand. The regulatory framework established for the

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<sup>27</sup> Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision, *OJ* 1990 L 192/1.

<sup>28</sup> Directive 94/46/EC of 13 October 1994 amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications, *OJ* 1994 L 268/15.

<sup>29</sup> Directive 95/51/EC of 18 October 1995 amending Directive 90/388/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalized telecommunications services, *OJ* 1995 L 256/49.

<sup>30</sup> Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets, *OJ* 1996 L 074/13, recital 4 of the preamble. Special or exclusive rights for the provision of voice telephony had hitherto been maintained by Article 2 of Directive 90/388/EEC on competition in the markets for telecommunications services, *OJ* 1990 L 192/10. .

<sup>31</sup> *Ibid.*

<sup>32</sup> Directive 98/10/EC on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment, *OJ* 1998 L 101/24, Article 3(1).

<sup>33</sup> *Ibid.*

full liberalisation of the telecommunications market in 1998 in the Community defined the *minimum* scope of USOs and established rules for its costing and financing.<sup>34</sup>

It was a model that, at a minimum, defined universal service as a product available to all, independent of geography and at an affordable price.<sup>35</sup> A product that was to be provided in a regulated, and competitive market<sup>36</sup> with quality of service and reporting obligations placed on service providers,<sup>37</sup> together with financial transparency,<sup>38</sup> special measures to ensure access and affordability to the disabled and those end users identified as having low incomes or special social needs<sup>39</sup> and with provisions made for transparent, simple and inexpensive consumer complaints processes.<sup>40</sup>

#### ***7.4.2 The Model Applied: First Generation Obligations Extended to Other Market Sectors***

The liberalisation of the telecom sector in the late 1980s, was a key turning point in the realisation that consumers wanted *choice* in the provision of essential services. The approach in the telecom sector saw different obligations relating to different aspects of the telecom business introduced on a step by step basis as a mechanism for eventually providing a geographical universal service network and an open access model that brought a competitive environment to service content. It was only after a number of years of developing the model that a review and restatement of the nature of the public service obligation (PSO) saw the notion of geographic universality introduced in 1997. In the same year, many aspects of the model were applied to postal services.<sup>41</sup>

The developmental initiative of maintaining special or exclusive rights during the early stages of liberalisation that had been used in the telecom sector were, within price, and weight limits, repeated in the postal sector for ‘the clearance, sorting, transport, and delivery of items of domestic correspondence, whether by accelerated delivery or not.’<sup>42</sup> As with telecoms, the Postal Services Directive provided for the creation of independent national regulatory

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<sup>34</sup> Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services (Universal Service Directive), *OJ* 2002 L 108/51 [emphasis added].

<sup>35</sup> *Ibid.*, Article 3.

<sup>36</sup> *Ibid.*, Article 17.

<sup>37</sup> *Ibid.*, Article 11 and Annex III.

<sup>38</sup> *Ibid.*, Articles 13, 14 and 17(4).

<sup>39</sup> *Ibid.*, Articles 7 and 9(3).

<sup>40</sup> *Ibid.*, Article 34.

<sup>41</sup> Directive 97/67/EC on common rules for the development of the internal market of Community postal services and the improvement of quality of service, *OJ* 1998 L 15/14.

<sup>42</sup> *Ibid.*, Article 7(1).

authorities,<sup>43</sup> competition of the non-reserved services relating to domestic correspondence,<sup>44</sup> quality of service obligations,<sup>45</sup> financial transparency,<sup>46</sup> and provisions made for transparent, simple and inexpensive consumer complaints processes.<sup>47</sup> Minimum harmonisation of universal quality of service obligations for the postal sector were set out in Article 3 and Articles 16–18 of the Directive with a standard formula for monitoring the routing time for end to end delivery for cross-border mail provided for in an Annex.

The next sector to be liberalised was postal services. The Postal Competition Directive of 2002 provided for reductions, to take effect in 2003 and 2006, of the price and weight limits that applied to the special or exclusive rights attached to items of domestic correspondence.<sup>48</sup> The objective was the ‘gradual and controlled opening of the letters market to competition which allows all universal service providers sufficient time to put in place the further measures of modernisation and restructuring required to ensure their long-term viability under the new market conditions.’<sup>49</sup> The final removal of special or exclusive rights in the postal sector came with the 2008 Full Market Opening Directive that acknowledged that the:

... progressive and gradual opening of postal markets to competition has provided universal service providers with sufficient time to put in place the necessary modernisation and restructuring measures required to ensure their long-term viability under new market conditions, and enabled Member States to adapt their regulatory systems to a more open environment.<sup>50</sup>

Again, the legislative model for USOs was reinforced with the 2008 Directive that elaborated the scope of independent national regulatory authorities, the gradual opening of markets to full competition, the setting of quality standards for universal service provision and the creation of a system to ensure compliance with those standards, financial transparency and provisions made for transparent, simple and inexpensive consumer complaints processes.<sup>51</sup>

With the passing of time, similar obligations have been applied to the gas and electricity utilities but it is only in the telecoms, posts, and electricity sectors that we find the obligation for a *universal* service offering. There is no such obligation with regard to retail gas services where the sector has, since its second legislative

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<sup>43</sup> Ibid., Articles 1 and 22.

<sup>44</sup> Ibid., recital 39 of the Preamble with Article 22.

<sup>45</sup> Ibid., Articles 16, 17 and 18.

<sup>46</sup> Ibid., Articles 12–15.

<sup>47</sup> Ibid., Article 19.

<sup>48</sup> Directive 2002/39/EC amending Directive 97/67/EC with regard to the further opening to competition of Community postal services, *OJ* 2002 L 176/21, Article 1(1).

<sup>49</sup> Ibid., recital 14 of the Preamble.

<sup>50</sup> Directive 2008/6/EC amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services, *OJ* 2008 L 052/3, recital 12 of the preamble and Article 1(8).

<sup>51</sup> Ibid., Article 1.

package, been organised on the basis of *public service obligations* and *consumer protection*.<sup>52</sup> The Common Rules Directive of the second legislative package for the internal electricity market<sup>53</sup> identifies that the retail electricity sector is also organised on the basis of PSOs and *consumer protection* with provision for universal service extended specifically to all household customers and ‘where Member States deem it appropriate, small Enterprises... with fewer than 50 occupied persons and an annual turnover or balance sheet not exceeding EUR 10 million.’ We return to these distinctions concerning the nature of PSO’s and USOs, and to the association of PSOs with consumer protection, shortly, but first highlight those aspects of our *first generation* USO model that both reappear and are developed in the common rules of the energy sector.

The first generation USO model has developed from the rules attached to the telecoms Terminal Equipment Directive of 1988 into a relatively standard design embracing common components. Primary among these components is the obligation placed on Member States to establish competent, independent *national regulatory authorities* (NRAs) that have developed from the independent body merely responsible for type approval in the 1988 Directive<sup>54</sup> to the regulatory authorities of the first decade of the twenty-first century. These are regulatory authorities with diverse responsibilities for ensuring non-discrimination, effective competition, and efficient functioning of the market. The key areas of responsibility for the NRAs begin with the monitoring in their respective industry sectors of the capacity and interconnection in open networks; transparent accounting; tariff calculations; adherence to the competition rules; quality of service parameters; sectoral development within the context of the internal market and consumer complaints processes.

With Member States obliged to develop independent NRAs, increasingly detailed operational obligations have been placed on the service providers to meet and publish quality of service measures and to provide transparent complaints processes as a consumer right. The most recent obligations in the telecoms and the electricity sector call for service providers to provide tariff options to consumers that meet special social needs or provide special measures for disabled end-users. This is an important development because new sets of triangular relationships emerge with distinctive rights enforceable through legal processes. These we would term ‘consumer-citizenship rights’ and can be viewed as part of a new process of creating and delivering a European-level and a European-wide social model which extend the consumer role, not merely through the application of a developing rights agenda, but also through a greater agency role in sectoral

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<sup>52</sup> Directive 2003/55/EC concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, *OJ* 2003 L 176/57, Article 3.

<sup>53</sup> Directive 2003/54/EC concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, *OJ* 2003 L 176/37.

<sup>54</sup> Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment, *OJ* 1998 L 131/73, Article 6.

governance structures that are, or at least as the early indications suggest, evolving to provide platforms of voice and influence for consumer input into policy processes.

At the EU level, and with a sector specific architecture similar to that described elsewhere for the networks and structures of European consumer policy governance more generally,<sup>55</sup> the Council of European Energy Regulators (CEER) and the European Regulators Group for Electricity and Gas (ERGEG) were established to facilitate cooperation between the national regulatory agencies (NRAs) directly, and between the NRAs and the Commission. In a joint commentary from CEER and ERGEG, they identify that the aim ‘is to create a stable and coherent climate for investment in an efficient integrated grid and, to deliver *open and competitive single EU markets in gas and electricity in the consumer interest.*’<sup>56</sup> Their fact-sheet summarises the consumer specific provisions of the *third* legislative package for energy<sup>57</sup> as including: a new *consumer forum* that is intended to stimulate the creation of a truly liberalised retail market and is positioned as analogous to the Florence (electricity) and Madrid (gas) forums that were established to promote market opening and competition through an informal EU level framework for the discussion of issues and the exchange of experience.<sup>58</sup> Based on these intentions, the new forum is to ‘focus on specific retail issues... [in which] it should serve as a platform for all stakeholders to promote the establishment of an EU wide retail market’ and provide guidance to assist Member States and the regulatory authorities in establishing clear, and gradually harmonising, market rules on competition in the retail market.<sup>59</sup>

Called the ‘Citizens’ Energy Forum’, this new body is chaired by the Commission and attended by national and European consumer associations, representatives of the Member States, national energy regulators, and representatives from the electricity and gas industries. At its meetings in October 2008 and September 2009, in London, the Forum has debated, in detail, the changing role of the regulator and the increasing role of consumers in the new legislation, and has progressed a range of issues in the consumer interest. The Forum has identified ‘the limited extent to which European citizens, and in some cases Member States,

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<sup>55</sup> Davies 2009, p. 245.

<sup>56</sup> ERGEG and CEER, ‘3rd energy package and creating an effective EU Agency (ACER) in the consumer’s interest’ (2008) Fact Sheet Reference No. FS-08-01, Available at: [http://www.energy-regulators.eu/portal/page/portal/EER\\_HOME/EER\\_PUBLICATIONS/NEWS\\_ARCHIV/FS-08-01\\_CEER-ERGEG\\_EnergyAgency\\_2008-02-20.pdf](http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/NEWS_ARCHIV/FS-08-01_CEER-ERGEG_EnergyAgency_2008-02-20.pdf) (last accessed on 25 June 2010).

<sup>57</sup> Comprising, Regulation (EC) No 713/2009 establishing an Agency for the Cooperation of Energy Regulators; Regulation (EC) No 714/2009 on conditions for access to the network for cross-border exchanges in electricity; Regulation (EC) No 715/2009 on conditions for access to the natural gas transmission networks; Directive 2009/72/EC concerning common rules for the internal market in electricity, and Directive 2009/73/EC concerning common rules for the internal market in natural gas.

<sup>58</sup> Commission (EC), ‘Draft proposal for a Directive concerning common rules for the internal market in electricity’ (Communication) COM (2007) 528 final, 19 September 2007, 18.

<sup>59</sup> Ibid.

understood how European legislation protects their rights.<sup>60</sup> The response has been to facilitate the provision of accurate and practical *information* about local or regional retail markets through a ‘Checklist’ relating to energy consumer rights.<sup>61</sup> Significantly, the Forum also suggests that:

[i]nformation for consumers is not enough to ensure their active participation in the market... [that] consumers must be put back in the driving seat with regard to the development of retail markets so that they are sufficiently empowered to make markets deliver concrete benefits.<sup>62</sup>

The rhetorical structure of the energy Directives suggests USOs can be defined as a special sub-set or application of public service obligations in which all consumers enjoy a right to access the service at ‘a specified quality within their territory at reasonable, easily, and clearly comparable and transparent prices’ and in which the Member State may appoint a supplier of last resort.<sup>63</sup> This is a sector specific right to a universal service as one component in a set of public service obligations that have developed a consumer protection, rather than consumer access, character that we suggest can be catalogued as a *second generation* of public service obligations.

### 7.4.3 A Second Generation of Public Service Obligations

The second generation of PSOs are multi-layered, placing operational obligations on service providers, through the Member States, to provide transparent, quality of service performance information. They have developed from initiatives aimed at opening national markets in services of general economic interest with new objectives directed at the continuation of cross-border market consolidation and elimination of residual competitive barriers. The 2009 Energy Directives highlight these developments providing for the promotion of regional cooperation in which Member States are obliged to facilitate the creation of a competitive internal market and foster ‘the consistency of their legal, regulatory and technical

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<sup>60</sup> Press Release, ‘Citizens’ Energy Forum’, MEMO/09/429, 30 September 2009, <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/429&format=HTML&aged=0&language=EN&guiLanguage=fr> (last accessed on 25 June 2010) at p. 2.

<sup>61</sup> Directive 2009/73/EC concerning common rules for the internal market in natural gas, Article 3(12) and Directive 2009/72/EC concerning common rules for the internal market in electricity, Article 3(16).

<sup>62</sup> Press Release, ‘Citizens’ Energy Forum’, MEMO/09/429, 30 September 2009, <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/429&format=HTML&aged=0&language=EN&guiLanguage=fr> (last accessed on 25 June 2010) at p. 2.

<sup>63</sup> Directive 2009/72/EC concerning common rules for the internal market in electricity, Article 3(3).

framework.<sup>64</sup> Whilst the scope of PSOs has been extended from regulatory oversight of market opening at national level to one at the level of a fully integrated internal market, the development of associated consumer protection measures introduced by these most recent Energy Directives, further, and incongruously extends other aspects of the regulatory role in the direction of protective consumer agency.

With an emphasis on security of supply, the right to a universal supply of electricity at a reasonable, easy and clearly comparable, transparent and non-discriminatory price is coupled, in both the electricity and gas sectors with an increased range of PSOs that take the form of reinforced consumer rights and better enforcement. The role of regulators is considerably extended through new duties requiring them to ensure that consumer protection measures are enforced and that customers benefit through the efficient functioning of their national market. Regulators will be involved in ensuring that the consumer has prompt access to their consumption data, and in monitoring the level, and effectiveness of market opening through the active monitoring of switching rates, complaints, and any distortion or restriction of competition in the retail market.<sup>65</sup> The Directives of this third legislative package oblige the Member States to ensure that a single point of contact be established to provide consumers with all necessary information concerning their rights<sup>66</sup>; to ensure that an independent mechanism such as an energy ombudsman or a consumer body is in place for the efficient treatment of complaints and out-of-court dispute settlements<sup>67</sup>; and to define vulnerable consumers and may refer to those suffering energy poverty, a definition that may also refer to the prohibition of disconnection at critical times.<sup>68</sup> As with their predecessors, the new energy sector Directives also contain specific consumer protection measures in an Annex: but measures that are reinforced here with new provisions providing consumers with the right to be properly informed of actual electricity consumption and costs, frequently enough to enable them *to regulate their own electricity consumption* and the right to a *good standard* of complaint handling by their energy service provider in which the consumer must be informed of the appropriate procedures.<sup>69</sup> Changes, it is argued, that will strengthen the normative base for consumer-citizenship practice and, to a degree, stimulate features of consumer motivation and capability that will promote increased consumer agency in the energy markets.

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<sup>64</sup> Directive 2009/72/EC concerning common rules for the internal market in electricity, Article 6 and, similarly Directive 2009/73/EC concerning common rules for the internal market in natural gas, Article 7.

<sup>65</sup> Directive 2009/72/EC concerning common rules for the internal market in electricity, Article 37(p) and (j); Directive 2009/73/EC concerning common rules for the internal market in natural gas, Article 41 (q) and (j).

<sup>66</sup> *Ibid.*, Articles 3(12) and 3(9) respectively.

<sup>67</sup> *Ibid.*, Articles 3(13) and 3(9) respectively.

<sup>68</sup> *Ibid.*, Articles 3(7) and 3(3) respectively.

<sup>69</sup> *Ibid.*, respectively Annex 1(i) and Annex 1(f) of both Directives [emphasis added].

This development of a consumer rights focus to PSOs in services of general economic interest is taken even further in the Consumer Rights and Privacy Directive of November 2009.<sup>70</sup> This latest legislative development introduces a number of amendments, *inter alia*, to the Universal Services Directive that obliges Member States to ensure: an equivalence of access, choice, and information to disabled consumers and end users<sup>71</sup>; the right to a clear, comprehensive and easily accessible contract meeting a minimum of specified requirements<sup>72</sup>; consumer involvement in the setting, by the regulator, of service provider performance targets<sup>73</sup>; the right to withdraw from a contract without penalty upon notice from the service provider of any modification to contractual conditions<sup>74</sup>; the respect of fundamental rights and freedoms as defined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>75</sup>; the promotion of access to services of social value including the missing children hotline number<sup>76</sup>; ease of switching supplier<sup>77</sup> and as far as possible, that NRAs take account of, amongst others, the views of consumers, and disabled consumers through the establishment of a consultation mechanism that should include a consumer consultation body independent of the NRA.<sup>78</sup>

Taken together, this latest generation of Services of General Economic Interest measures highlight a set of PSOs that provide for market monitoring, fundamental rights, and social needs. They require transparency of quality and cost information and the structural development of consumer interfaces with the market. If this range of provisions is taken to represent the parameters the EU is using to define PSOs, then it would appear that a core set of PSOs have evolved that can be listed as:

- The measurement of the level and effectiveness of market opening through the active monitoring of switching rates, complaints, and any distortion or restriction of competition in the retail market.
- Provision of mechanisms for consumer consultation.

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<sup>70</sup> Directive 2009/136/EC amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (Text with EEA relevance), *OJ* 2009 L 337/11.

<sup>71</sup> Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), *OJ* 2002 L 108/51, Articles 1(1), 6(1), 7(1), 21(3)(f), 23(a)(1), 26(4), 27(a)(2) and 31(1), as amended.

<sup>72</sup> *Ibid.*, Article 20(1), as amended.

<sup>73</sup> *Ibid.*, Articles 11(4) and 22(3), as amended.

<sup>74</sup> *Ibid.*, Article 20(2), as amended.

<sup>75</sup> *Ibid.*, Article 1(3), as amended.

<sup>76</sup> *Ibid.*, Article 27(a), as amended.

<sup>77</sup> *Ibid.*, Article 30(4), (5) and (6), as amended.

<sup>78</sup> *Ibid.*, Article 33(1) as amended, together with Recital 49 of Directive 2009/136/EC.



- Provision of consumer information concerning their rights through a single point of contact.
- The right to a good standard of complaint handling by the service provider in which the consumer must be informed of the appropriate procedures.
- The right to a transparent description of tariffs and the services offered so that consumers are able to make choices between providers.
- The right to published and comparable supply time, and quality of service measurements.
- The fundamental right to privacy with respect to the processing of personal data.
- Access and affordability provisions for vulnerable and disabled consumers.
- An independent mechanism such as an ombudsman or independent consumer body is established for the efficient treatment of complaints and out-of-court dispute settlements.

## 7.5 Governance and Regulatory Issues

Although individual market sectors attract different approaches to universal or public service obligations the core of normative ideas we see associated with the developing definitions of USOs have brought a number of advantages. They have helped to facilitate a degree of cross-border trade and introduced or developed a number of basic rights. There are also limitations. The minimum harmonisation approach has seen regulatory fragmentation at the national level where regulatory bodies may vary significantly in terms of competences, independence, and financial and human resources. These are obstacles that have been seen as barriers to the development of pan-European services. Some of these obstacles may be addressed by placing the role of the consumer at the heart of the system of networks and network governance which have been created.

### 7.5.1 *Triangular Relationships: Triangle Geometry*

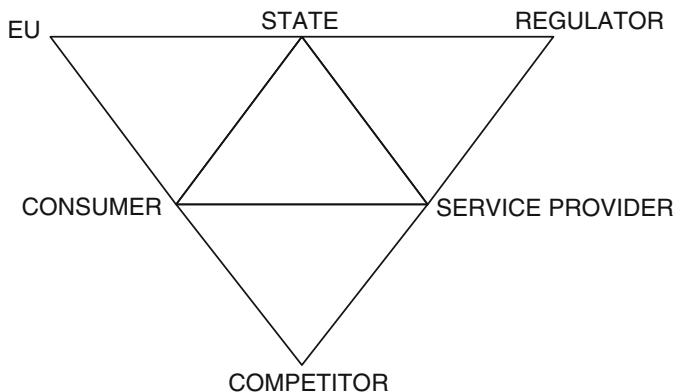
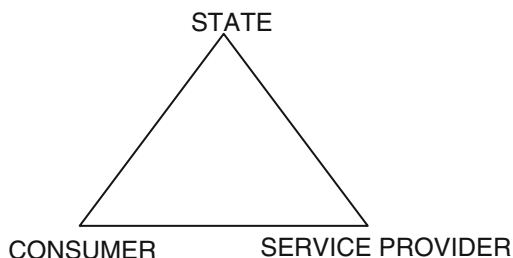
The classic model of drawing the regulatory relationships in the liberalisation process is that of a simple triangle (Fig. 7.1). The State is the regulator of the new provider–consumer relationship. This conceptual approach is developed by Teubner<sup>79</sup> and is followed in other writings.<sup>80</sup> This simple triangle analysis ignores the dynamic regulatory role of the EU, which we would argue, should add a complementary, second, triangle of relationships: the EU–Member State–provider/user dynamic. The intervention of the EU provides not only the legal basis of the

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<sup>79</sup> Teubner 2000.

<sup>80</sup> See for example, Micklitz 2009.

**Fig. 7.1** Classic model of liberalisation relationships



**Fig. 7.2** Developed model of liberalisation relationships

content of the USO, but also the private law means for the consumer to enforce the legal obligations Fig. 7.1.

The triangular relationship between the State–the service provider–the user (consumer) has been used to explain the decentralisation of resource allocation and increased efficiency, balanced alongside the role of the State in intervening in the regulation of liberalised services and goods, in order to ensure that a collective welfare can be maintained where the services involved are not normally commercially viable. But this limited analysis of the dynamics of liberalised markets uses only a triangular relationship at the level of the State–the provider–the user (consumer) and ignores other dynamic relationships involved with USOs. We argue that even if we remain with the relationships at the State level, USOs require regulatory independence creating a further, third, triangle involving independent regulators Fig. 7.2.<sup>81</sup>

Finally, and to add symmetry, but also to reflect the idea of consumer choice as an obligation, we can add a fourth triangle to represent the day to day market relationships between the consumer, the supplier and any competitors. Even so, the visualisation and description of these relationships in this way does not capture the

<sup>81</sup> Thatcher and Coen 2008, p. 31.

dynamics of the regulation and role of PSOs in liberalised markets. To this end a more fluid description appears necessary.

Prior to the mid 1980s the traditional simple bilateral private law relationship, based on freedom to contract between the customer and the merchant, had been complicated. In those sectors that were subject to liberalisation, the incumbent service provider was obliged to contract with the customer and the legal relationship between the State monopoly and the customer switched to a public law setting in which price was often determined by political subsidy. Privatisation and liberalisation introduced new dynamics into the customer/service provider relationship. Privatisation brought with it the concept of the USO that reached ‘beyond the limits set to the freedom of contract via standard terms legislation.’<sup>82</sup> It introduced a guarantee of ‘access to all, irrespective of the economic, social or geographical situation, at a specified quality and an affordable price.’<sup>83</sup>

Where privatisation was accompanied by rules to prevent social exclusion, liberalisation introduced competition to and *choice* of service provider. The essential nature of this marketisation of public services attracted an amalgam of developing normative processes and the hybridisation of public and private law in the sector specific regulation discussed above in [Sect. 7.3](#). This is a regulatory framework in which the Commission expresses an aspiration for an active and participatory consumer citizenship practice with the regulatory agencies acting in part as ‘representatives’ of the consumer–citizen interest alongside consumer organisations and other influential bodies of civil society. The Commission recognises that for consumers to take up their rights often requires the existence of independent regulators with appropriate staff, and clearly defined powers and duties. These include powers of sanction that include the ability to monitor the transposition and enforcement of public and universal service provisions. The Commission is also positively supporting the development of networks of consumer organisations, both sector specific and general *and* at both national and EU level.<sup>84</sup> Consumer organisations that also support the exercise of consumer rights and provide the consumer with:

- Support in pursuing individual issues and complaints;
- Proactive consumer watchdog agencies;
- Political lobbying agencies in consumer matters;
- Cross-border consumer dispute resolution bodies;
- Policy influencing representative associations of consumer groups.

These are organisations of civil society that complement the national enforcement and regulatory public agencies. Together, this network of agencies provides for the representation and active participation of consumers in the definition and evaluation of services; the availability of appropriate redress and compensation

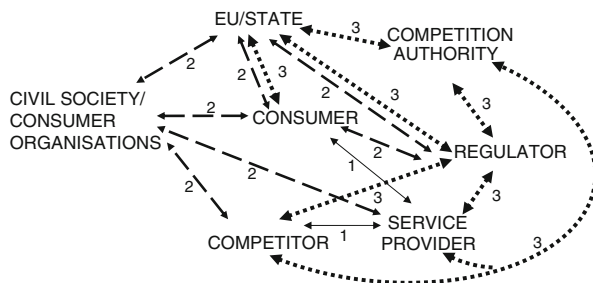
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<sup>82</sup> Micklitz 2009, p. 11.

<sup>83</sup> Szyszczak 2007, pp. 244–245.

<sup>84</sup> See Davies 2009.

**Fig. 7.3** Functional model of liberalisation relationships



mechanisms, and for a review of the consumer protection and support framework to reflect new social, technological and economic developments.<sup>85</sup> Yet, there is no legal obligation in the secondary legislation for the regulatory agencies to uphold the rights of consumer citizens, although there is a gradual movement of EU secondary law into that direction which might overcome the discrepancies between the role and function of the regulatory agencies in the Member States.<sup>86</sup>

When analysing the policy of the EU in relation to PSOs, the consumer can be considered as a node within a network of legal and quasi-legal relationships. Whilst any node in such a network may be assessed in relation to all the other nodes that make up that network we have, as a reflection of our assertions that PSOs contain elements of fundamental rights and social needs for individuals, placed the consumer at the heart of this network that we have depicted in Fig. 7.3. If we take the consumer market as a whole, not just the liberalised services of general interest, what we now see are the remains of the *private law* relationships between the consumer and the service provider and in the normal commercial relationships between competitors on the same market, indicated by the arrows numbered 1 in Fig. 7.3. The *public law* areas of consumer protection and market regulation now define the legal relationships between the statutory market actors and those undertakings providing the services that comprise the market: relationships that we have indicated by the arrows numbered 3 in Fig. 7.3.

To complete this network model, structures of new governance, indicated here with arrows numbered 2, provide channels through which organisations, and structures of civil society have developed to influence the market by offering consumers' informational support, through pursuing soft law solutions and consumer watchdog activities, and by providing consumers the voice and influence to shape policy at the national and EU levels.

<sup>85</sup> Commission (EC), 'Services of general interest, including social services of general interest: a new European commitment' (Communication) COM(2007) 725 final, 20 November 2007, pp. 10–11 [emphasis added].

<sup>86</sup> Micklitz 2009, p. 16.

## 7.6 Conclusions: Will there be Future Generations of Universal Service Obligations?

Article 3 TEU states that the Union shall establish, *inter alia*, ‘a highly competitive social market’. There is much debate as to what shape the future EU highly competitive social market will look like. It may appear hazardous to predict the content of this new mix of law, politics, and economics but the way this will take shape may be more predictable.<sup>87</sup> Universal service obligations would be a useful vehicle to create competitive markets with a social dimension. The Monti Report 2010 addressed the use of USOs as an element of the new strategy for the single (internal) market, making a concrete proposal for using Article 14 TFEU as the legal base for an extension of USOs to the provision of broadband access.<sup>88</sup> It is also worth recalling that Article 1 of Protocol No. 26 annexed to the TFEU and the TEU states a modern role for SGEIs which embrace aspects of universal service concepts:

### *Article 1*

The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular:

- The essential role and the wide discretion of national, regional, and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;
- The diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;
- A high level of quality, safety and affordability, equal treatment, and the promotion of universal access and of user rights.

Our research shows that USOs exist in an evolving environment but there are indicators that we can identify to give us clues as to what the next generation of USOs may look like and, learning from experience, question how cautious should we be with some of the Commission’s proposals for change?

From our analysis of USOs our conclusion is that far from the gradual demise of the USO in the liberalisation process, we see the concept changing and evolving, and expanding in its role of protecting the consumer–citizen interest in the Internal Market. Universal services evolve within the framework of each sector as technology advances, but also new concepts emerge. The focus of the EU has been on network services but societal changes also drive new consumer demands and necessities. One example is the decline of cash-based transactions with the move towards banking services for a range of payment mechanisms, including the

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<sup>87</sup> See for example, Van de Gronden and Szyszczak 2011, where the role of solidarity is analysed to cement the tensions between national health care systems and the emerging EU regulation of many health care issues.

<sup>88</sup> Monti 2010, p. 75.

payment of social security. Thus ownership of a bank account has become a prerequisite of economic engagement in the EU and a symbol of exclusion where access to banking services is not available.<sup>89</sup> In health care, tensions exist between national, solidarity-based health care systems based on providing a universal health service and the fact that with rising costs and more demands placed on providing high quality immediate health care, are forcing the Member States to transfer costs away from the tax payer by greater privatisation of health care provision. The EU has not been able to develop a satisfactory response to this new mix of public and private provision when applying the competition rules to health care undertakings. One solution would be to develop concepts of USOs which could be ring-fenced from the full application of the market rules.<sup>90</sup>

From our analysis we can define some basic questions to be addressed in future provision of USOs. Are USOs necessary? How will they be defined? How will they be funded? What new questions should we be asking about USOs, given the evolution in the scope and application of these ideas already seen in the EU? In response to the last question we can ask if the processes through which USOs emerge are responsive enough to technological changes which have accelerated as a result of liberalisation and privatisation processes. For example, in the telecoms sector there is a rapid convergence between telephony, internet broadcasting, and multimedia technologies. Without adapting to these technological changes the use of USOs attached to old technology can leave vulnerable users socially excluded. In the postal sector, can the USO connected to 'snail mail' continue to be a USO when faster and more efficient means of sending 'mail' and texts have replaced letter-writing? The application of technological developments also affects the convergence of service offerings between previously distinct sectors. For example, in the future, what can we expect from the roll-out of smart metering technology that draws together digital communications and energy services and that will, in time, give consumers new levels of control and choice over their energy usage that they will exercise through their broadband internet service?<sup>91</sup> This new technology may affect wider concerns over privacy and data protection. Thus an unknown factor is what will consumer expectations of better quality, technological innovation and more efficient services have on the market? And how will the State and the market respond?

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<sup>89</sup> Again in Monti 2010, p. 75, a proposal is made for a proposal, possibly using Article 14 TFEU as the legal base, for a regulation ensuring that all citizens are entitled to a number of basic banking services.

<sup>90</sup> See Szyszczak 2009, p. 191.

<sup>91</sup> Art. 3(11), Dir. 2009/72/EC concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (hereafter, E-directive) and Art. 3(8), Dir. 2009/73/EC concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC.

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