Chapter 8
Public Service Obligations: Protection of Public Service Values in a National and European Context

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Abstract Terms such as 'services in the general interest' and 'services of general economic interest' have received a lot of attention from legal scholars and other practitioners of law during the course of the last decade. The same amount of attention has not been paid to the term 'public service obligations', which represents a common mechanism for the realisation of services of general economic interest throughout the Member States of the European Union. However, the term 'public service obligation' is not a thoroughly defined concept of law within the European Union and its legal framework. In this chapter, the term is traced back to its origins in French and Anglo-Saxon public administrative law and it is explained, how it is interpreted and applied in the context of EU law. Special focus is placed on the single provision dealing explicitly with public service obligations which can be found in the Treaty on the Functioning of the European Union namely Article 93 on State aid in EU transport law.

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8.1 Introduction

A general feature in all Member States is that, at some level, states assume responsibility for securing the provision of public services to their citizens.[1] These activities of the state share the common denominator that they are regarded as being in the general public interest within their national borders.[2] States can either ensure the provision of such services themselves or entrust their provision to external operators, either public or private, which are not considered to be emanations of the state.[3] Regardless of how public services are provided, states must have the regulatory means to be able to make sure that the services for which they are responsible, fulfil both quantitative and qualitative requirements laid down in national law or deriving from political promise or expectation. A common method applied by public authorities for ensuring the realisation of high standard public services is through the imposition of general interest requirements on service providers. This regulatory mechanism is within EU terminology referred to as 'public service obligations'.

When Member States introduce competition to markets which were previously operated by the public sector or subject to exclusive rights (monopoly), it is important to create a regulatory regime capable of ensuring that service providers fulfil the social policies which the states or their respective public authorities are committed to provide to citizens.

Besides securing the actual provision of a service to citizens, public service obligations can be used by public authorities as instruments to ensure the provision of high quality services by imposing requirements relating to security of supply, regularity, quality and price of supplies, and environmental protection.[4] Hence, public authorities possess an important regulatory tool, which can be applied in order to shape or form the content or quantity of the activities falling within the remit of their responsibility.

For these reasons, public service obligations have served as important protective instruments in the process of liberalisation in Europe. Over the course of the last decades, European countries have initiated comprehensive reforms, especially in the utilities sectors, introducing competition in regulated sectors.[5] The driving

[1] See Malaret Garcia 1998, pp. 57–82; Loughlin 2003, pp. 7–12 and Odudu 2006, p. 46.

[2] Malaret Garcia 1998, p. 57.

[3] Freedland 1998, pp. 2–5.

[4] See for example, Article 1(e) and para 17 of the Preamble to Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road, and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, *OJ* L 315/1 and similar provisions both in Article 3 of the Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, *OJ* L 176/37 and Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, *OJ* L 176/57.

[5] Defeuilley 1999, pp. 25–27.

elements behind the opening of markets to competition are based on the idea that private ownership is supposed to be superior to public, and promotion of competitive forces is expected to raise efficiency and enhance protection of consumers' interests.[6]

Nevertheless, the introduction of competition does not necessarily guarantee adequate public service provision. Where market forces rule, market players are primarily concerned with profit and have little or no incentive to pursue social considerations. In competitive markets, there is always the risk of *cherry picking* and *social dumping*. Cherry picking occurs when profit seeking draws operators to the lucrative and fast growing markets, thus refusing to offer services or offering services at higher prices on unprofitable markets or in scarcely populated areas. Social dumping, the other undesired effect of competition, can occur when service providers encourage low income customers to exclude themselves from the market by requiring the payment of high deposits, prepayment, and disconnection.[7]

The concept of public service enjoys different levels of protection in different Member States. As will become apparent, in France, public services (*les services publics*) are afforded constitutional protection both in terms of reservation of ownership as well as substantive criteria relating to the content of the services. In the United Kingdom on the other hand, the concept of public service does not enjoy the same well developed general legal principles about the concept of public service.[8] These differences in the legal status of public services may help explain why the two Member States organise their public service provision in different ways. It is attempted to demonstrate that in France, public authorities need to take into consideration criteria such as continuity, equality, and adaptability of service. For this reason, when French public authorities design public service contracts or licence agreements, they must be certain that the public service obligations imposed on service providers are in accordance with their constitutional requirements. Conversely, in the United Kingdom, public authorities and public service operators are not under the same constitutional commitment to adhere to general public service principles. Thus, service providers are not weighed down with additional constitutional requirements and interpret their obligations as precise commitments.[9]

The purpose of this chapter is twofold. Firstly, a closer look will be taken at the evolution of the concept of public service obligations in France and the United Kingdom. For the purposes of making sense of the term, its constituent elements will be analysed separately in a comparison between French and UK public administrative law. Since all public service obligations involve the performance of a 'public service' it is essential to conduct an analysis of national conceptions of 'public service' and how the authorities manage them by imposing obligations

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[6] Ibid., p. 26.

[7] Ibid., p. 28.

[8] Prosser 2005, at p. 96.

[9] Ibid., addressing the situation among UK public utilities, p. 30.

upon service providers. Having reviewed national practice, it will be attempted to compare the national understanding and use of the terms 'public service' and 'public service obligations' to those employed in EU law. In this regard, it will also be asked how the national ideas of 'public service' relate to the EU law creation 'services of general interest' which is now made part of the European legal vocabulary through the Protocol on services of general interest which is annexed to the TEU and the Treaty on the Functioning of the European Union (TFEU).

Having placed the concept of public service obligations in a larger national and EU law context, focus will shift towards the use of the term in the TFEU. It is submitted that the use of the term 'public service' in the primary legislation of the TFEU causes semantic confusion. It is further discussed whether the concept of public service found in the TFEU holds the same meaning as 'services of general interest'. Drawing on this discussion, it is questioned whether the creation of legal terms such as 'services of general interest,' benefits or undermines the goal of promoting the shared values upon which Union membership is based.

8.2 Public Service Obligations: From a National to a European Legal Concept

8.2.1 Public Service Obligations: Protection of Public Services in France

France is frequently cited as a representative of what can be described as a *Continental* concept of public service. Public service regimes in Continental European countries share certain similar traits, such as constitutional or legal protection of public services and well developed general principles about the meaning of public service.[10] However, it is not the purpose of this chapter to synthesise these similarities on a European-wide scale. Instead, this chapter is confined to demonstrating how public authorities exercise control over public services. It starts off by examining what the French notion of 'service public' entails and showing how the public administration imposes special obligations on the selected operators of essential services.

As pointed out by Malaret Garcia, legal scholars are in agreement that the French concept of 'service public' is used with at least two distinct meanings.[11] The first meaning of the term is *organic*, referring to the institutional structure of the administrative apparatus of local or central government, that is, the public service sector itself. The second meaning of the term is not concerned with

[10] Prosser 2005 at p. 96.

[11] Malaret Garcia 1998, p. 62. See also Scott 2000, at p. 312.

describing the personnel side of public administration, but refers to the material legal principles which apply to the provision of public services. When describing the concept of 'service public' from a material perspective, focus is directed at the actual activities performed, asking whether they are tasks of general interest falling within the responsibility of the state. The French 'service public' must be viewed from an institutional as well as a functional perspective, thus making a distinction between the actual public service providers, as well as recognising the criteria which apply to the provision of public services.

Public services viewed from a functional perspective can explain how public services can be performed by bodies which are not part of the state or governed by public law. Since public services are activities, it is not indispensable to entrust their operation to companies outside the public sector. As pointed out by Fournier, in France, for instance, the task of passenger transport by train is regarded as a 'service public' which is entrusted to the SNCF (the French railways). However, from an institutional perspective, the SNCF does not belong to the public service sector.[12]

Defining exactly what constitutes a 'service public' is no simple task. First of all, not all activities of general interest are public services. For instance, the general provision of food, which under all circumstances would amount to an activity in the general interest, is, except in times of crisis, left to private initiative and has for that reason not been considered a 'service public'.[13] Initially, the French state was only preoccupied with functions of sovereignty such as justice, police, and tax collection—known as the 'Etat gendarme', but has over the course of the last centuries grown to include welfare activities such as education, public works, health, employment, urban development, and transport.[14]

It is thus relevant to ask which activities are considered 'services publics' and who determines their public service nature? According to Malaret Garcia, the answer to the first part of the question is that the determination of the 'service public' characteristics of an activity must be drawn up objectively.[15] She arrives at this argument by referring to the work of Duguit who stated that a public service is[16]:

> … any activity that has to be governmentally regulated and controlled because it is indispensable to the realization and development of social interdependence and is of a nature such that it cannot be fully assured save by governmental intervention.

As explained by Prosser, the trademark of 'service public' reflects state concern for social solidarity and social cohesion, making the concept 'essentially

[12] Fournier 1993, pp. 13–61.

[13] See Fournier 2010 Public Services available at Embassy of France in Washington, available at http://www.info-france-usa.org/spip.php?article641, last accessed 30 November 2010.

[14] Ibid.

[15] Malaret Garcia 1998, p. 64, see in particular fn. 27.

[16] Ibid.

non-economic and distributive in nature'.[17] Activities displaying these characteristics will be classified as 'services publics' and subjected to a special legal regime based on principles of continuity, equality among users, adaptability of service. These substantive requirements were initially developed by Professor Rolland in the 1930s and are to a varying degree applicable to all public services.[18] In recent years; however, Rolland's laws have been supplemented by new rules established by Parliament, including provisions relating to quality of service and transparency, and are not universally applied to all public services.[19]

Given the importance of 'services publics', the French government, or part of its public administration, assumes responsibility for the provision of such services. As pointed out by *Malaret Garcia*, the 'service public' is 'an activity with respect to which the public administration fulfils a fundamental role'. However, the importance of such activities does not require the public administration to provide the activities directly, but must somehow assume responsibility for their provision to citizens. In doing so, the state or the responsible public authority must establish the framework and instruments necessary for guaranteeing their distribution.[20]

Thus, having established a framework and necessary instruments for providing public services to citizens, the French public administration possesses the necessary tools for imposing obligations on service providers. With the regulatory framework in place, a link between the public administration and the service provider is created, enabling the public administration to impose obligations related to the content, price, quality, and frequency of the activities to be provided to citizens.[21] The necessity of establishing such a regulatory framework is not only based on the duty upon the public administration to fulfil the public service requirements deriving from the 'Rolland's laws', but such a framework also provides a special apparatus of regulation of the economic and social functioning of the activity concerned.[22]

8.2.2 Public Service Obligations: Protection of Public Services in the United Kingdom

As distinct from France, in the United Kingdom there is no recognition of public services at the level of constitutional principle. Although public services lack constitutional protection or a general legal foundation developed in case law, this is not to say that they have been left unsheltered from the market forces.

[17] Prosser 2005 at p. 103.

[18] Malaret Garcia 1998, pp. 65–69 and Prosser 2005 at pp. 102–106.

[19] Scott 2000, p. 312.

[20] Malaret Garcia 1998, pp. 62–63.

[21] Ibid., p. 63.

[22] See generally, Freedland 1998, pp. 2–5.

The common law doctrine of 'common callings', which is the precursor of the 'essential facilities' doctrine secures public access to important facilities such as docks and harbours and prevent owners (often monopolies) from engaging in abuse of dominance and restricting output.[23] Another type of protection came through political means. From the 1940s nationalisation of public utilities offered protection of public service goals by the minister, through the role of the board of the industry and through the representation of consumers by consumer councils and consultative mechanisms.[24]

In light of the privatisation of public services in the 1980 and 1990s, regulatory authorities were created which supervised both the completion of competition on markets as well as vesting the regulatory authorities with regulatory powers in order to acheive public service goals.[25] However, the UK Government did not embody principles of public service in law, the exception being the creation of regulators of public utilities with specific provisions intended to serve public goals. These particular public service goals were in turn often laid down as public service obligations in licences (or authorisations) awarded to public utilities.[26]

In the United Kingdom, there is a long tradition of subjecting public utilities to 'universal service obligations'.[27] In general EU law, the principle of universality covers a set of obligations relating to access to essential facilities and the imposition of obligations on service providers to offer defined services according to specified conditions, including complete territorial coverage and at reasonable prices.[28] Nevertheless, as pointed out in the 2007 Communication from the Commission, these universal obligations are a minimum set of rights and obligations which can be further developed at national level.[29] However, in the United Kingdom, little development of universal service obligations beyond the minimum standards occurred.

The reasons for the lack of further development of the principle of universality may be explained by the fact that the United Kingdom, unlike France, lacks a well-developed public service doctrine. As explained in Sect. 8.2.1, in France, public services enjoy constitutional protection and activities classified as 'services publics' are subject to requirements of continuity, equality, and adaptability of service. In the United Kingdom, this general legal backdrop is missing. Instead, as pointed out by Defeuilley, in the wake of the introduction of competition, the 'principle of universality has been translated in precise commitments (quality and performance

[23] Prosser 2005 at 39–40, However, as pointed out by Scott, the common law doctrine of common callings has been virtually obliterated by over a century of sector specific legislation in the UK, although it is still remembered in the US under the duties of 'common carriage', Scott 2000, pp. 312–313.

[24] Prosser 2005, pp. 41–42.

[25] Ibid., pp. 44–45.

[26] Ibid., pp. 68–69.

[27] Rawnsley and Lazar 1999, pp. 182–183. See Chap. 7 by Davies and Szyszczak.

[28] COM(2007) 725, p. 10.

[29] Ibid.

standards, complaints procedures, access to information), whose scope and limits vary from one industry to another'.[30] Therefore, it is possible that UK public utilities and public service providers in general, do not feel obliged to take on a broad concept of public services similar to that adopted in France. In turn, service providers, who do not wish to expand their public service commitments more than necessary, interpret their public service obligations narrowly.

Consequently, a narrow interpretation of public service obligations and a strong focus on competition can have negative effects upon technological choice. As pointed out by *Defeuilley*, [i]n a competitive environment, public utilities tend to adopt least-cost available techniques considering neither their social effects (externalities), nor their ability to match future evolution'.[31] However, the preference for competition over social policy is not solely to blame on UK public utilities and profit seeking behaviour. Another element to be taken into consideration is the fact that UK public utilities have been placed in an unstable regulatory environment.[32] Public utilities, when exposed to changing public duties and confronted with new market entrants, respond by adopting a short-term perspective concentrating of producing high profit and giving low priority to long-term investments.[33]

However, in France, both public authorities and service operators adopt long-term perspectives for the purposes of providing public services. The constitutional backdrop placing both public authorities and service providers under an obligation to adhere to the principles of continuity, equality, and adaptability, has resulted in a more stable regulatory environment. The substantive content of public service obligations is less likely to change overnight, thus making long-term planning a less risky venture than in the United Kingdom.

8.2.3 Public Service Obligations: Protection of Services of General Interest Under EU Law

8.2.3.1 Introduction

As demonstrated in Sects. 8.2.1 and 8.2.2, Member States can protect their public service values by imposing different obligations on service providers. The level of commitment and devotion by service providers to ensure the fulfilment of these obligations is influenced by the legal status of public services in national legal systems, the degree of competition on markets and the duration of the contract concluded with the awarding authorities.

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[30] Defeuilley 1999, pp. 27–28.

[31] Ibid., p. 28.

[32] Ibid., p. 34.

[33] Ibid., p. 35.

Unlike Member States, which impose requirements on service providers in order to fulfil a public service mission within the borders of their territory, protection of services of general interest under EU law has a supranational perspective. Firstly, EU law determines the scope of application of the rules on competition to services of general interest.[34] Member States must not award exclusive rights which can lead to an abuse of a dominant position.[35] However, where market intervention is necessary in order to ensure the provision of the public service task entrusted to the service provider, State measures in breach of the competition rules can be justified through the derogatory mechanism provided in Article 106(2) TFEU.

Secondly, the rules laid down in Article 14 TFEU, Article 36 of the Charter on Fundamental Rights and the new addition of the Protocol on Services of General Interest, places the EU under a duty to respect and to ensure the completion of the shared values inherent in services of general interest. These values are precisely what public service obligations are intended to secure, thus placing the EU under a duty to make sure that its legal framework allows for their realisation under EU law.

In order to avoid confusion between a structural and an organic understanding of the term 'public service', the EU legislature makes use of the terms 'services of general interest' and 'services of general economic interest'.[36] As explained by Supiot, in an organic sense, the term public service 'designates a service provided by or under the authority of the State (as is the case, for instance, with public enterprises charged with responsibility for providing a service to the public)'.[37] Another reason for steering clear of the term 'public service' is that 'services of general economic interest' is an EU law concept which does not correspond to the different national concepts employed in all Member States.[38]

It would be acceptable to submit that the concept of 'services of general interest' is *functional*. Whereas an organic concept would be limited to those services provided by the state or emanations of the state, a functional concept

[34] For a particularly interesting discussion of what constitutes 'economic activity' and the scope of application of the rules on free movement and competition, see Odudu 2006, pp. 23–56.

[35] Article 106(1) TFEU cf. Articles 101 and 102 TFEU, for an extensive analysis see Buendia Sierra 1999.

[36] See COM(96) 443, 2 and COM(2003) 270, *Green Paper on Services of General Interest*, pp. 6–7. The term'services of general economic interest' can be found in TFEU Articles 106(3), 14, and in the Charter of Fundamental Rights of the European Union Article 36, see Neergaard 2009 who explains thoroughly how these terms are used in a EU law context. In the Protocol on services of general interest, both the terms 'services of general interest' and 'services of general economic interest' are employed, for a particularly interesting discussion of the this protocol, see D. Damjanovic and De Witte 2009 at p. 53.

[37] Supiot 1998, p. 161.

[38] Buendia Sierra 1999, pp. 279–280.

refers to the importance of the provision of certain services to the benefit of society.[39] By drawing attention away from the structure under which a service is performed, and instead focusing on the indispensable nature of the service to society, the concept steers clear of the public/private divide which is capable of depriving EU law of its efficiency. The creation of functional concepts is an approach which is also embraced by the Court of Justice in the field of free movement[40] and in competition law.[41]

Whereas it is true that the concept of 'services of general interest' is functional for the purpose of discarding the public/private law divide, the functionality of the concept is not without its limitations. A completely functional conception of 'services of general interest' would be extendable to all services or activities in society which are indispensable to citizens, not only those endorsed or secured by the State. Yet, the European conception of 'services of general interest' seems to be confined to certain essential activities which are either provided by the State itself or to activities provided through private initiative where the State acts as a guarantor of their provision.

It is difficult to imagine an activity, which is not endorsed by a Member State, being classified as a 'service of general interest'. This necessary link between the State and the provision of the service is evident in Article 106(2) which states that undertakings 'entrusted' with particular tasks may be exempted from the rules contained in the Treaties, in particular the rules on competition. This link, confining 'services of general economic interest' to activities backed by State initiative was confirmed in *BRT-II*,[42] in which the Court made clear that:

> 20. Private undertakings may come under that provision, but they must be entrusted with the operation of services of general economic interest by an *act of the public authority*.
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> 21. This emerges clearly from the fact that the reference to 'particular tasks assigned to them' applies also to undertakings having the character of a revenue-producing monopoly.

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[39] Morris 2000, p. 171.

[40] See ECJ, Case 149/79 *Commission* v. *Belgium* [1980] *ECR* 3881, concerning the ambit of Member State discretion to reserve certain posts within the public service sector to nationals. The Court of Justice limited the scope of the 'public service exception' in Article 45(4) TFEU (ex Article 39(4) EC) to those posts which involved 'direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities', para 10. By focusing on the nature of the disputed posts, the approach of the Court can be described as 'functional' as opposed to an 'institutional' or 'organic' test, which would depend on the way in which posts were classified under national law, see Arnull 1999, p. 372.

[41] In ECJ, Case C-41/1990 *Klaus Höfner and Fritz Elser* v. *Macrotron GmbH* [1991] *ECR* I-1979, the Court displayed its affinity for efficient application of Union competition law by defining the concept of 'undertakings' in Article 101(1) TFEU in functional terms. The functionality of the test is apparent in paragraph 21 where the Court defines undertakings as 'every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed', see also Odudu 2006, p. 24.

[42] ECJ Case 127/73 *BRT II* [1974] *ECR* 318, paras 20 and 21.

The necessary link between State and 'services of general interest' makes it difficult to comprehend exactly why the EU lawmakers felt the need to set this concept apart from the more understandable and well-known term 'public service'. Certainly, a distinction should be drawn between economic and non-economic services, but the former category could rather be classified as 'industrial and commercial public services', thus avoiding the current incomprehensible terminology.[43]

The TEU and TFEU contain no legal definition of the concept of 'public service obligations'. However, the European Commission in its *White Paper on Services of General Interest* in 2004, gives a useful description of the term which encapsulates the concept in a EU law perspective[44]:

> The term public service obligations is used in the White Paper. It 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, for instance, in the matter of air, rail and road transport, and energy. These obligations can be applied at Community, national or regional level.

It is unlikely that the EU will make an attempt at capturing the essence of the concept of 'public service obligations' in a legal definition in its Treaties. It would most likely be counterproductive to try to define once and for all the various requirements imposed on service providers given the task of ensuring public interest objectives on behalf of public authorities. This submission is supported by the statement of the European Parliament which considered that[45]:

> … it is neither possible nor relevant for common definitions of services of general interest, or of the public-service obligations resulting from them, to be drawn up, and that an eventual framework instrument would be much too general in nature to provide added value, and may risk jeopardising the continuous development of services of general interest.

It is noticeable that in an EU law context, public service obligations are instruments which can be employed by public authorities to impose requirements on service providers. However, the use of the term 'public service obligations' is reserved to the imposition of requirements, related to the realisation or protection of 'services of general interest'.

EU law does not contain an exhaustive list of the criteria qualifying as 'specific requirements' which public authorities may impose on service providers. However, it seems apparent that it is futile to speak of 'public service obligations' outside situations in which public authorities are dealing with the realisation of a service of general interest. This use of the term excludes requirements which are

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[43] See Supiot, who compares the European concept of 'services of general economic interest' to traditional 'industrial and commercial public services' performed by private law organisations in France, Supiot 1998, p. 161.

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

[45] European Parliament Resolution on the Green Paper on services of general interest, 14.01.2004, (T5-0018/2004).

unrelated to general interest objectives laid down in contract or legal provision from being labelled 'public service obligations'. Thus, a service requirement can only be characterised as a public service obligation if it imposes on the provider one or more of the elements included in the Union concept of service of general interest. In the 2003 *Commission Green Paper on Services of General Interest* these elements include in particular values and goals recognised by the European Union as a whole such as universal service, continuity, quality of service, affordability, and user and consumer protection.[46]

As shown in Sect. 8.2.1, the French qualification of the concept of 'service public', reserves the use of the term to those services designated as public services by the state or competent public authorities. A similar system of qualification is thus emerging in EU law. Even though Member States are free to create their own services of general interest, a Europe-wide concept inevitably presupposes 'European recognition' of the shared values deserving the status of 'service of general interest'.

8.2.3.2 Article 93 TFEU: The Provision That the World Forgot About

As explained in Sect. 8.2.3.1 the European Commission and the European Parliament show preference towards the use of the term 'service of general (economic) interest' over 'public service'. It is unquestionable that the term 'services of general interest' has come to stay, and its authority as a legal concept has been confirmed by the fairly recent inclusion of Article 14 to the TFEU, Article 36 of the Charter on Fundamental Rights and Protocol 26 on services of general interest.[47]

Nevertheless, the TFEU is not without reference to the expression 'public service'. As opposed to Article 45(4) TFEU,[48] Article 93 TFEU contains a functional concept of 'public service', allowing Member States to protect public

[46] COM(2003) 270, paras 49–63.

[47] However, it must be pointed out that Article 14 TFEU and Article 36 of the Charter on Fundamental Rights refer to 'services of general economic interest', whereas the concept 'services of general interest' was for the first time mentioned in Protocol 26 on Services of General Interest which entered into force 1 December 2009.

[48] Article 45(4) TFEU includes derogation from the freedom of movement of workers, providing that Member States in certain cases may reserve 'employment in the public service' to its own nationals. It is clear from the wording of Article 45(4) that this derogation provides a possibility for Member States to subject entire public sectors to a nationality criterion. However, a purely structural interpretation of the term would enable Member States to determine at will, the post covered by the exception. For this reason, the institutional approach to this derogation was rejected and instead a functional approach limitation to the exception was adopted, taking into account the tasks and responsibilities of each post (ECJ, Case C-173/93 *Commission* v. *Belgium* [1997] *ECR* I-3207, para 27). The rejection of an institutional approach to this provision by the Court of Justice has fittingly been described by Sauter and Schepel as '… functionalism within the institutional category of State-employed workers', Sauter and Schepel 2009, pp. 62–63.

service values through financing of measures intended to facilitate the 'needs of coordination of transport'[49] or the process whereby the state or public authorities compensate operators for the cost of providing services which the undertakings are required to perform by law or acts of public authority.[50] Article 93 TFEU reads:

> Aids shall be compatible with this Treaty if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service.

There is no obvious explanation to why this provision makes use of the term 'public service'. It is tempting to ask whether the values 'inherent in the concept of a public service' differ from the values inherent in the concept of 'services of general interest'? The answer to this question is unmistakably no. It is clear that the two terms mean exactly the same thing. The similar meaning of the terms is reflected in the circular, definition of 'public service obligations' in Regulation 1370/2007 on public passenger transport by road and rail Article 1(e) which states that:

> 'public service obligations' means 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.

It seems that the EU legislators are reluctant to remove completely the well-established terms 'public service' and 'public service obligations' from their legal vocabulary. For instance, if the EU were to get rid of all reference to 'public service' in their legal framework, it would end up with incomprehensible constructions of 'Eurospeak' such as 'service of general interest obligation' or 'service of general economic interest obligation'.[51]

It is questionable whether the creation of the term 'services of general interest' has enhanced clarity concerning the shared values among Member States. Criticising EU legal terminology might be considered by some as quibbling over semantics. Nevertheless, the European legislators should be mindful of creating new legal concepts which blur rather than bring out the underlying values inherent in the concept of public service.

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[49] The European Courts have not defined precisely what aids meeting 'the needs if coordination of transport' means, see Greaves 2000, p. 20.

[50] Ibid.

[51] The European Federation of Public Service Unions (EPSU) abstains from the use of the terms 'service of general interest' and 'services of general economic interest' referring to such constructions as 'Eurospeak', see http://www.epsu.org/spip.php?page=recherche&recherche=eurospeak&x=0&y=0. The ECJ has also demonstrated its fondness for the term 'public service obligations', see ECJ, Case C-280/00 *Altmark* [2003] *ECR* I-7747. Notice should be taken that the term 'service of general interest obligation' has indeed been used by the Commission, see Commission of the European Communities, Communication from the Commission, Services of general interest in Europe, 20.09.2000, COM(2000) 580 (2001/C17/04), 19 January 2001, Section 14.

8.3 Conclusion

Imposition of obligations on service providers has proved to constitute a useful tool for Member States in terms of complying with their duty to supply essential services to citizens. Each Member State has its own national concept of 'public service' which makes it difficult to capture this concept in an all embracing definition. In the wake of liberalisation of service provision, the historical background and legal status of public services has led to different national legal frameworks for imposing public service obligations on service providers. In this article, it has been demonstrated that in French public administrative law 'les services publics' enjoy constitutional protection and a general awareness of the duty placed upon public authorities and service providers to respect the principles of continuity, equality among users, adaptability of service. This legal basis protecting the substantive character of public services has led to stable conditions and legal certainty for service providers. The use of long time contracts has enabled public authorities and service providers to develop public service obligations in a steady environment which has resulted in an adaptable system responding to the changing needs of society.

In the United Kingdom, public services do not enjoy the same constitutional status as in France. Public service values have been protected through political rather that legal mechanisms. However, especially the public utilities have been subjected to extensive sector specific regulation. It is submitted that the lack of protection of public service values at constitutional level has been among the reasons why public service obligations are interpreted by the utilities as specific requirements rather than general overarching duties.

Under EU law, 'services of general interest', that is public services in the language of the EU, are afforded protection from both the rules of free movement and competition through different juridical techniques. The EU has also committed itself and its Member States to protect the shared values inherent in the concept of 'services of general interest' through recognition of common values such as universal service, continuity, quality of service, affordability and, user and consumer protection. This recognition of shared values is influenced particularly by the French and Continental tradition. The mechanism enabling public authorities in Member States to impose public service obligations on service providers is recognised in EU utilities regulation, and serves the purpose of harmonising certain shared values.

However, it is submitted that the replacement of the term 'public service' for the new creation 'service of general interest' undermines the mission of protecting common shared values in the EU. This confusion created by terminology is highlighted by the fact that the TFEU and sector specific regulation still contain reference to the term 'public service'. In this regard, it can be asked whether the EU should abandon their newly invented legal terms or stick with the well established and easily understood concept of 'public service' which can be found in Article 93 TFEU.

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