

Public Services: Still an Irritant for the Single Market?

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“[Uproars and scandals come and go.] But the enduring question of British politics is about our public services ... **the holy grail of modern politics** is finding a way of making public services responsive and accountable to their consumers.”

**Andrew Rawnsley, The Observer,
10 February 2008**

Aesop's Cat

- ❑ Buendia Sierra: Everybody (but the cat) agrees that it is a good idea but...
- ❑ How to do it? Who does it?



Irritant 1

“Since the nineties, the place of public services within the single market has been a persistent irritant in the European public debate .”

Mario Monti, *A New Strategy for the Single Market. At the Service of Europe's Economy and Society. Report to the President of the European Commission Jose Manuel Barroso*, May 9, 2010, p. 73. (the 'Monti Report')

Irritant 2

- Christian Joerges

“Integration through de-legislation? An irritated heckler”

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What are Public Services in the EU?

- ❑ Services of General Economic Interest
- ❑ *Economic* Services in the General Interest
- ❑ Services of General Interest
- ❑ *Social* Services of General Interest
- ❑ Universal Service Obligations
- ❑ Public Service Obligations

EU Generic Definition

- “market and non-market services which the **public authorities** class as being of **general interest** and subject to specific **public service obligations**”
- Examples: water, energy, supply, communication, transport, health and social services, education and postal services.

1957: Europeanisation Began

- Article 106(2) TFEU
- “Services of general economic interest”
- Derogation

Explosion of Ideas

- 1990s: Use of competition law *and* the free movement rules to challenge State monopolies, especially those providing traditional public services
- *negative integration*
- *lack of consistent normative framework*
- *EU lacks capacity to re-regulate*

Consequences

- *Re-calibration of the role of the State and the Market*
- *Transformation of the Market and the State*
- *Symmetry between opening of public markets to EU Citizen-Consumers and opening of public markets to provide competing public services*

Is this the demise of the European Social Model?

- ❑ Disagreement over what is a “European Social Model”
- ❑ Little EU competence to harmonise/legislate in the area
- ❑ Ignored the use of uso/pso to create floor of welfare/social rights

Consumer-Citizenship

- ❑ Important base of minimum rights
- ❑ Universal
- ❑ No need to show discrimination
- ❑ But second generation of citizenship rights: need basic property to enjoy many of the use/psos

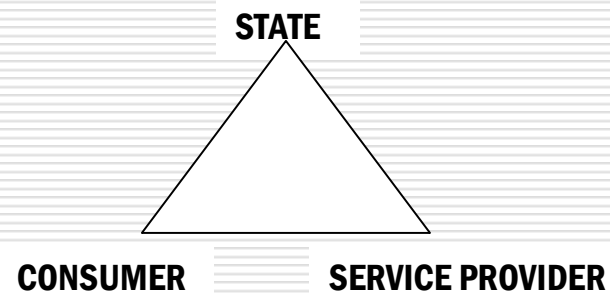
Uso/pso

- ❑ Affordable access, quality, continuity
- ❑ New sets of consumer rights
- ❑ New sets of *social* private law rights
- ❑ Linked to fundamental rights ideas
- ❑ New form of consumer rights
- ❑ New form of citizenship rights

New Triangular Relationships

- Teubner, Micklitz, Ross

Figure1



More Complex

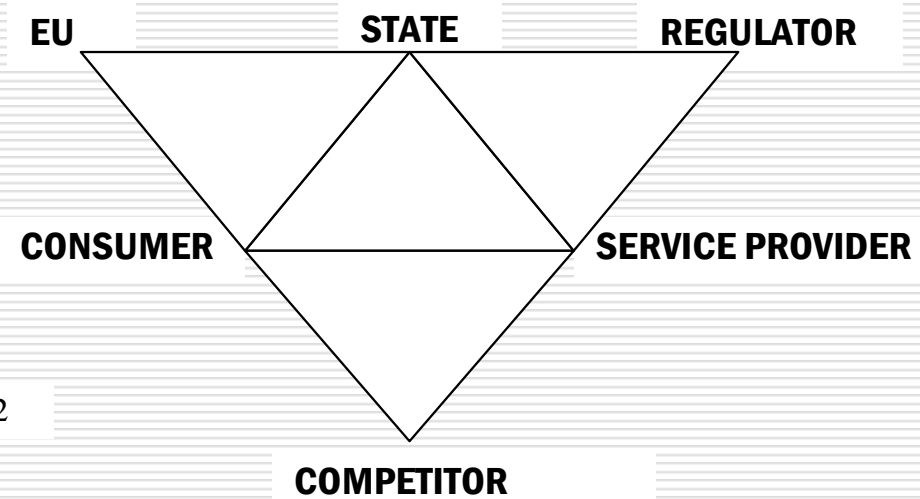


Figure 2

Networked Relationships

- Different forms

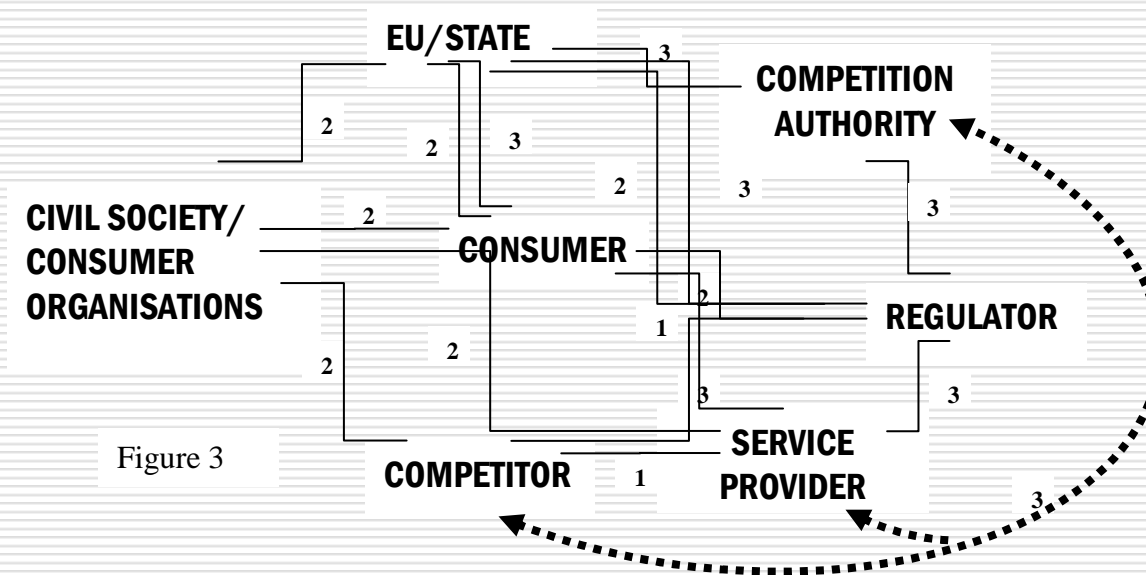
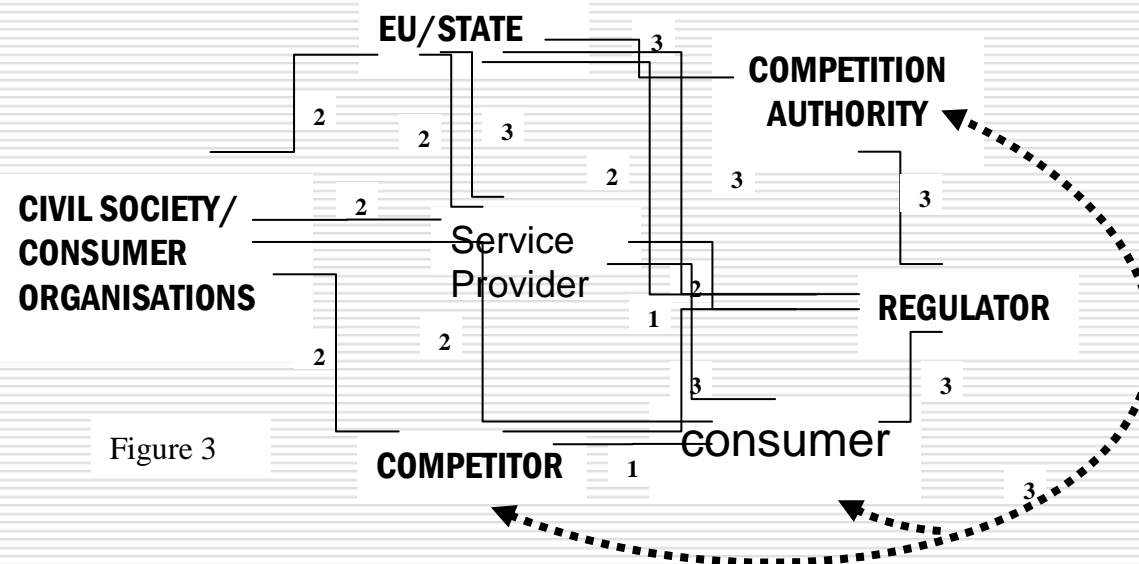


Figure 3

Change of position of central actor

- Shape of relationships will change



Networks of relationships

Arrow 1: consumer private law relationships

Arrow 2: channels through which organisations and structures of civil society have developed to influence the market through offering consumers' informational support, through pursuing soft law solutions and consumer watchdog activities, and through giving consumers the voice and influence to shape policy at the national and EU levels.

Arrow 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

Use of Competition Rules

- Article 106 TFEU (in conjunction with Article 102 TFEU)
- Cases concerned with ideas over “quality”, unfairness in trading terms and meeting demand for a service

Battle Field: Article 106 TFEU

- Seen as “protecting” services of general economic interest from the **full application** of the free movement *and* competition rules;
- Applies to competition Chapter *but also* free movement provisions.

Battle between the Commission and the European Courts' response to opportunist litigation

Article 106 TFEU but the focus of the debate shifts to financing and State Aid: payment for SGEIs

New Approach:

- Commission and the European Courts “protect” social/public provision of services from the EC Treaty;
- Use of the technique of “solidarity”;
- Too generous? Some activity is “economic” leads to a wide exclusion of activity from scrutiny; need a rigorous approach
- Counter-view from Baquero-Cruz: use of Article 106(2) TFEU as a switch-rule (binary rule)

Legislative/Prescriptive Approach

- Use of pso/uso in liberalisation legislation;
- *Altmark*

Altmark

- ❑ Cornerstone case of EU law?
- ❑ Modernisation: focus upon quality, efficiency
- ❑ Commission practice rather than Court judgments
- ❑ Monti-Kroes package introduces de minimis and safe havens
- ❑ 2010 review of *Altmark* and Monti-Kroes package
- ❑ 2011 no legislation

A New Battle Field: *Social* Services of General Interest

- ❑ Health care services
- ❑ Begins with use of citizenship ideas to free movement (access, exit, quality);
- ❑ Opening up public markets to access for receivers of services, ideas of competition in the provision of services
- ❑ Movement towards use of competition (FENIN), state aid issues (BUPA), mergers (Rhon-Klinikum).

Use of different “sector” approaches?

- Pensions: *Albany*
- Healthcare: *BUPA*

More “soft” law

- Communications, Green Papers, White Papers, Working Documents, FAQs
- Why?
- Different forms
- De-legalisation
- Public services decided upon by unelected judges and Commission

Safe Havens

- Monti-Kroes package
- Services Directive
- Procurement Law

Better Approach

- Use of Treaty of Lisbon legislative base to create *core* of social activity which is protected from competition;
- Implement normative framework for common principles for SGEI (derived from liberalisation legislation?)

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- Protocol on SGEIs annexed to Treaty of Lisbon 2007;
 - Commission Communication on Services of General Interest COM (2007) 725 final;
 - Commission Working Document on the Application of Article 86(2) EC to State Aid in the form of psc (SEC(2007) 1516 final);
 - Working Document on the application of public procurement rules to social services of general interest (SEC(2007) 1514);
 - Working Document on progress made since the 2004 White Paper on SGIs (SEC(2007) 1514

Article 36 *Access to SGEI*

The Union recognises and respects **access** to SGEIs as provided for in national laws and practices, in accordance with the Treaties in order to promote the social and territorial cohesion of the Union

Other Fundamental “Social” “Rights”

- ❑ Article 29 – right of access to placement services;
- ❑ Article 34 – social security and social assistance;
- ❑ Article 35 – healthcare;
- ❑ Article 37 – environmental protection;
- ❑ Article 38 – consumer protection

Article 14 TFEU

- Without prejudice to Article 4 of the TEU or to Articles 93, 106 and 107 of this Treaty,
- given the place occupied by services of general economic interest in the **shared values of the Union** as well as their role in promoting social and territorial cohesion,
- the Union and the Member States, each within their respective powers and within the scope and application of the Treaties,
- shall take care that such services operate on the basis of principles and conditions particularly economic and **financial conditions, which enable them to fulfil their missions.**
- The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of the Member States, in compliance with the Treaties, to provide, to commission and to fund such services.

Article 1 of Protocol 9

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.

Article 2

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

After Lisbon?

- New emphasis upon values;
- Is competition “down-graded”?
- Wider range of justifications?

2011

- Commission review of *Altmark* and Monti-Kroes package
- Greater Institutional interest in SSGIs

New Explosion of ideas

- What *are* SGEIs, SGIs SSGIs?
- What is their *role* in the liberalisation of markets?
- Are there bright lines distinguishing social services of general interest?
- Is the *economic/non-economic* distinction of use?
- Is *solidarity* a useful concept?
- What is *legitimate* financing?
- Consumers and/or citizens?
- What is the *role* of the *State*? Provider, competitor and bail-out when “markets” fail
- Is it possible to have a *Framework Directive* on SGEIs?

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