1

Questions, concepts and context

1.1 Outline

Public services: building blocks or persistent irritant?

Public services are frequently a source of friction in the course of European integration. In the words of former Internal Market and Competition Commissioner Mario Monti: 'Since the nineties, the place of public services within the single market has been a persistent irritant in the European public debate.'[1] Yet just a few pages earlier in his report on the single market he states that these services form building blocks for reconciling the single market and the social and citizenship dimensions as components of the highly competitive social market economy that the 2007 Lisbon Treaty has introduced as one of the main objectives of European integration.[2] These contrasting observations coming from such a well-placed and respected commentator will require some explanation. In addition, the topic of public services in EU law is salient today not only because of the liberalization and (re)regulation trend of the past two decades but also given the increasing financial constraints on public budgets that are partly due to the ongoing international financial crisis. As a consequence the preference for private provision prevalent in the utilities may be spilling over into the sphere of welfare services. More generally, changes are now being made in the scope and delivery of a broad range of public services along a trajectory that is shaped at least in part by EU law.

In this book I aim to provide an overview of the EU law on public services within the context of the process of European integration and what appears to be the concomitant transformation of the welfare state into a regulatory state. This account is intended for an audience of lawyers, social scientists and others interested in these processes and in identifying building blocks for transforming society in a European context.

The law covered will include the internal market as well as the state aid and competition law, both the primary (Treaty) and secondary (largely

[1] M. 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, José Manuel Barroso, 9 May 2010, 73.
[2] Ibid., 68.

harmonization) rules, with emphasis on the case law of the EU Courts on services of general economic interest (SGEI). Apart from universal service obligations (USO), SGEI are the most important specific concept of EU law with regard to public services.[3] Hence these two concepts will form the key elements of my account of the EU law on public services. This book forms part of a series called 'law in context'. This context will be provided by the integration process and the transformation of economic regulation mentioned above. In addition, the context of the legal issues discussed will be provided by dealing with all public services jointly, instead of just one or several of them: apart from providing a comparative perspective this is intended to reveal the broader EU policy setting and trends. In this setting the balance between positive (market correcting) and negative (unleashing the market) integration will also be examined. In turn this may mean shedding light not just on public services but also on the course of EU integration.

Utilities versus welfare services

Introducing this topic raises an obvious preliminary question that is easier to ask than to answer: what are public services? This question is addressed in more legal and metaphysical detail in the third section of this introductory chapter. For practical purposes I can say here that I will use the term public services as comprising, on the one hand, infrastructure-based utilities such as electronic communications, energy and transport, and, on the other hand, welfare services directed at the individual, such as healthcare, education and pensions.[4] Although not all public services are covered neatly by this two-part distinction – for instance basic banking services and public broadcasting services are not covered – such exceptions can be accommodated within the overall discussion. In economic terms public services carry weight not just because of their social function (of which the usefulness may be debated) but because, jointly, public services account for a significant percentage of GDP (with healthcare alone having a growing share in excess of 10 per cent). Finally they are also intertwined with the post-Second World War Western state – the welfare state.

In EU law public services must be distinguished from public policy exceptions and overriding reasons related to the public interest in the internal market context: public policy may likewise be accommodated in EU state aid and competition law in pursuit of a wide range of (efficiency and equity) objectives. In both cases the existence of legitimate public objectives and the proportionality and coherence of the manner in which they are pursued are of central

[3] The overarching EU law concept of services of general interest (SGI) and that of social services of general interest (SSGI) are also noteworthy but used less frequently; all four concepts are discussed in section 1.3.

[4] Cf. L. Hancher and W. Sauter, 'Public services and state aid', in C. Barnard and S. Peers (eds.), *European Union law* (Oxford University Press, 2014), 539–66. This two-part distinction is also made by the Commission in its 2012 *Altmark* package. See note 11, below.

importance. As we will see below, exceptions claimed for public services similarly require legitimate objectives and have to meet a proportionality test. Public services, however, are concerned foremost with the actual provision of specific services to the public, which is different from public policies dedicated to regulating beer purity, the safety of inland watercraft, driving with motor-cycle trailers or bottle recycling.[5]

There are no EU-level public services that are designed and carried out by the EU – although a minimum set of USO may be established in EU legislation this can generally be topped up by the Member States who are also responsible for their provision. This is logical also given the limited spending power of the EU compared to the Member States: national governments generally spend some 40 per cent of GDP; whereas the EU budget is stuck at 1 per cent of GDP and is largely dedicated to the Common Agricultural Policy. Hence the EU is focused on rule-making – strengthened by the agenda-setting powers and the monopoly on proposing EU legislation of the Commission – rather than on spending to promote the public good. Consequently the EU has been described as a 'regulatory state'.[6] In the context of public services this means the EU is involved in setting the standards and coordinating the national regulators but not in providing the services to EU citizens and consumers.

Focus on exceptions and on access

The manner in which public services are organized and indeed whether the services concerned are organized as public services at national level differs between the Member States according to national preferences and conditions. Although this is more an ex post justification than a deliberate ex ante method of organization it is in line with the principle of subsidiarity which requires that decisions should be taken at the lowest effective level.[7] Nevertheless when viewed through the prism of EU law there are significant similarities regarding public services. On the one hand, these concern the scope provided for national public services under exceptions to EU rules and, on the other hand, they reflect the emergence of increasing EU-level regulation of such activities.

Here again the distinction between utilities and welfare services surfaces. In part due to the impact of European integration and EU law, utilities are now

[5] Case 178/84 *Commission* v. *Germany* [1987] ECR I-1227; Case C-142/05 *Åklagaren* v. *Percy Mickelsson and Joakim Roos* [2009] ECR I-4273; Case C-110/05 *Commission* v. *Italy* [2009] ECR I-519; Case 302/86 *Commission* v. *Denmark* [1988] ECR 4607.

[6] Cf. G. Majone, 'The rise of the regulatory state in Europe', *West European Politics*, 17 (1994), 77–101; F. McGowan and H. Wallace, 'Towards a European regulatory state', *Journal of European Public Policy*, 3 (1996), 560–76.

[7] The first part of Article 5(3) TEU reads: 'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.'

generally subject to liberalization under the competition rules and harmonized secondary law frameworks. From a more general and contextual framework we also see:

(i) a demise of public provision (privatization);
(ii) the emergence of third-party (competitor) access rights; and
(iii) the rise of specialized sectoral authorities at national level who coordinate their actions under the guidance of the EU Commission.[8]

These are three topics that deserve (and have received) specialized treatment in their own right. Instead my focus will be on SGEI and USO, which means a focus on exceptions to competition and free movement on the one hand, and on consumer access rights on the other. These other trends will only also be reviewed to the extent that they provide the context to the rise of SGEI and USO. The welfare services in large part remain subject only to the primary Treaty rules, notably those on free movement and possibly citizenship. In all cases the injunction of Article 18 TFEU on non-discrimination applies.[9] The impact has been more at the level of the rights of individuals to services of which the reach and nature are decided at the level of the Member State. Hence, so far welfare services have failed for instance to give rise to SGEI and USO.

In addition, I will deal with some of the main recent and ongoing changes regarding public services in secondary law such as the Services Directive,[10] the framework for the application of state aid to SGEI[11] and the proposals for a new

[8] Cf. M. de Visser, *Network-based governance in EC law: The example of EC competition and EC communications law* (Hart Publishing, Oxford, 2009); L. Hancher and S. A. C. M. Lavrijssen, 'Networks on track: From European regulatory networks to European regulatory "network agencies"', *Legal Issues of Economic Integration*, 36 (2009), 23–55.

[9] There appear to be three potential legal bases for such non-discrimination obligations, a general one and two more specific (and limited) ones. The first (i) is citizenship. Article 18 TFEU first para. reads: 'Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.' Case C-413/99 *Baumbast and R* v. *Secretary of State for the Home Department* [2002] ECR I-7091; E. Spaventa, 'Seeing the wood despite the trees? On the scope of Union citizenship and its constitutional effects', *Common Market Law Review*, 45 (2008), 13–45. Second (ii) there are general obligations set out in Article 20 of the Services Directive 2006/123/EC. Third (iii) similarly in the field of public procurement general obligations of non-discrimination, equal treatment and transparency have been derived directly from the Treaty. Case C-458/03 *Parking Brixen GmbH* v. *Gemeinde Brixen and Stadtwerke Brixen AG* [2005] ECR I-8585.

[10] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ 2006, L376/36. Cf. C. Barnard, 'Unravelling the Services Directive', *Common Market Law Review*, 45 (2008), 323–94.

[11] I refer only to the package published in 2012 (which replaced the 2005 one): Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to state aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ 2012, L7/3; Communication from the Commission on a European Union framework for state aid in the form of public service compensation, OJ 2012, C8/15; Communication from the Commission on the application of the European Union state aid rules to compensation granted for the provision of services of general economic interest, OJ 2012, C8/4; Commission

public procurement regime.[12] Another relevant aspect are a number of changes in the primary law that were wrought by the 2007 Lisbon Treaty which came into force on 1 December 2009:

- its introduction of the objective of a 'highly competitive social market economy, aiming at full employment and social progress' in Article 3(3) TEU;
- the addition of a legal basis for legislation on SGEI in Article 14 TFEU and of a Protocol 26 on SGI and SGEI;
- giving the Charter of Fundamental Rights, including its Article 36 on SGEI, the same legal value as the Treaties by force of Article 6(1) TEU;
- instead of making competition policy a Treaty objective (as had been mooted under the Draft Constitution), linking it with the internal market in Article 3(1)b TFEU and in Protocol 27.[13]

These developments illustrate well how new the legal framework for public services is and the degree to which the relevant law is still in flux. To this I should add contrasting developments with, on the one hand, competitive provision of public services and, on the other hand, a bottom-line regime that applies when the entities involved are non-economic in nature and hence fall outside the scope of the competition rules and most secondary law. These various aspects will be discussed in detail in the following chapters. Before moving on to the research questions and the issues that will be addressed in the body of this chapter I will first say a few words about the relevant literature.

The literature

There is a significant body of literature on public services in the EU on which I am grateful to draw and to which I cannot do justice in this short section. It serves merely as a suggestion for further reading and as an indication of the type of literature which I have used.

Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid to undertakings providing SGEI, OJ 2012, L114/8. Cf. E. Szyszczak, 'Modernising state aid and the financing of SGEI', *Journal of European Competition Law and Practice*, 3 (2012), 332–43; W. Sauter, 'The *Altmark* package mark II: New rules for state aid and the compensation of services of general economic interest' *European Competition Law Review*, 33 (2012), 307–13.

[12] In December 2011 the Commission proposed reviewing the two existing procurement directives (Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ 2004, L134/1; Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ 2004, L134/114) and adding a new Procurement Directive on concessions: http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/reform_proposals_en.htm.

[13] See N. Fiedziuk, 'Services of general economic interest and the Treaty of Lisbon: Opening doors to a whole new approach or maintaining the "status quo"?' *European Law Review*, 36 (2011), 226–42.

The monograph that provides the earliest comprehensive treatment of the main issues regarding SGEI is that by José Luis Buendia Sierra in 1999.[14] More recently Erika Szyszczak and Tony Prosser likewise produced essential volumes on the relationship between state and market in EU law.[15] However, all three of these books also deal with the *effet utile* dimension of state action (useful effect, based on the Member States' good faith obligations under the Treaty to respect the competition rules), which I will not cover. In turn they do not cover welfare services, which I will do, so our texts may in this respect be regarded as complementary. Among edited volumes those in the TMC Asser/Springer Verlag series on legal issues of services of general interest by Johan van de Gronden, Markus Krajewski, Ulla Neergaard and Erika Szyszczak (in various constellations) stand out,[16] as does that edited by Marise Cremona.[17] There are too many individual articles and contributions to edited volumes to mention here except the incisive chapter on SGEI in the utilities sector by my Tilburg colleagues Leigh Hancher and Pierre Larouche.[18]

On EU law and the welfare state, and on social services and EU law, there is again a rich literature that is largely based on edited volumes. Worth mentioning are the collections edited by Gráinne de Búrca,[19] by Michael Dougan and Eleanor Spaventa[20] and by Beatrice Cantillon and others.[21] By definition there are too many contextual books to mention individually, but I benefited especially from the integration-oriented works of the political scientists Fritz

[14] J. L. Buendia Sierra, *Exclusive rights and state monopolies under EC law: Article 86 (former Article 90) of the EC Treaty* (Oxford University Press, 2000).

[15] E. Szyszczak, *The regulation of the state in competitive markets in the EU* (Hart Publishing, Oxford, 2007); T. Prosser, *The limits of competition law: Markets and public services* (Oxford University Press, 2005). Cf. W. Sauter and H. Schepel, *State and market in European Union law: The public and private spheres of the internal market before the EU Courts* (Cambridge University Press, 2009).

[16] Such as: E. Szyszczak and J. W. van de Gronden (eds.), *Financing services of general economic interest: Reform and modernization* (TMC Asser Press, The Hague, 2013); U. Neergaard et al. (eds.), *Social services of general interest in the EU* (TMC Asser Press, The Hague, 2013); M. Krajewski, U. Neergaard and J. van de Gronden (eds.), *The changing framework for services of general interest in Europe: Between competition and solidarity* (TMC Asser Press, The Hague, 2009); E. Szyszczak et al. (eds.), *Developments in services of general interest* (TMC Asser Press, The Hague, 2011). Also in this series: L. Nistor, *Public services and the European Union: Healthcare, health insurance and education services* (TMC Asser Press, The Hague, 2011).

[17] M. Cremona (ed.), *Market integration and public services in the European Union* (Oxford University Press, 2011).

[18] L. Hancher and P. Larouche, 'The coming of age of EU regulation of network industries and services of general economic interest', in P. Craig and G. de Búrca (eds.), *The evolution of EU law*, 2nd edn (Oxford University Press, 2011), 743–81.

[19] G. de Búrca (ed.), *EU law and the welfare state: In search of solidarity* (Oxford University Press, 2005).

[20] M. Dougan and E. Spaventa (eds.), *Social welfare and EU law: Essays in European law* (Hart Publishing, Oxford, 2005).

[21] B. Cantillon, H. Verschueren and P. Ploscar (eds.), *Social inclusion and social protection in the EU: Interactions between law and policy* (Intersentia, Antwerp, 2012).

Scharpf[22] and Giandomenico Majone.[23] I have used, perhaps not obviously, Maurizo Ferrara,[24] Julian Le Grand[25] and Anton Hemerijck's[26] works on the future of welfare states. On regulation I have referred mainly to the works by Anthony Ogus,[27] and by Robert Baldwin, Martin Cave and Martin Lodge,[28] as well as several more legal texts (edited) by Dawn Oliver, Bronwen Morgan and others.[29] Regarding the economics of welfare states, where I am less well qualified, I have relied on the standard work by Nicholas Barr.[30]

The reasons that I thought the present book might have something to add to the above-mentioned works are: (i) as an update; (ii) because of its contextual nature; (iii) because it covers not only the utilities but also welfare services; and (iv) given its approach combining a discussion of primary and secondary law in their horizontal and vertical dimensions. To this I could add the current topicality of reviewing the welfare state at a time of global economic hardship which however forms only a very general background.

Purpose of the chapter

As its title shows, in the remainder of this first and introductory chapter I want to do the following three things: first, introduce the research *questions* that I intend to address in the course of this book as a whole; second, discuss the *concept* of public services and introduce the various related categories that are relevant to this concept in EU law in more detail; and third, provide a broader *context* in terms of the debate on the changing role of the state and of the shape and merits of EU integration in relation to public services. These three tasks will be intermingled to some extent. In addition, I will set out the way the book is

[22] F. W. Scharpf, *Community and autonomy: Institutions, policies and legitimacy in multilevel Europe* (Campus, Frankfurt am Main, 2010). Earlier: F. W. Scharpf, *Governing in Europe: Effective and democratic?* (Oxford University Press, 1999).

[23] G. Majone, *Dilemmas of European integration: The ambiguities and pitfalls of integration by stealth* (Oxford University Press, 2009).

[24] M. Ferrara, 'Towards an "open" social citizenship? The new boundaries of welfare in the European Union', in de Búrca (2005), above n. 19, 11–38; M. Ferrara, 'Modest beginnings, timid progress: What's next for social Europe?' in Cantillon, Verschueren and Ploscar, above n. 21, 17–40; M. Ferrara, *The boundaries of welfare: European integration and the new spatial politics of social protection* (Oxford University Press, 2005).

[25] J. Le Grand, *The other invisible hand: Delivering public services through choice and competition* (Princeton University Press, 2007).

[26] A. Hemerijck, *Changing welfare states* (Oxford University Press, 2013).

[27] A. I. Ogus, *Regulation: Legal form and economic theory* (Hart Publishing, Oxford, 2004).

[28] R. Baldwin, M. Cave and M. Lodge, *Understanding regulation: Theory, strategy and practice*, 2nd edn (Oxford University Press, 2013); and R. Baldwin, M. Cave and M. Lodge (eds.), *The Oxford handbook of regulation* (Oxford University Press, 2010).

[29] D. Oliver, T. Prosser and R. Rawlings (eds.), *The regulatory state: Constitutional implications* (Oxford University Press, 2010); B. Morgan and K. Yeung, *An introduction to law and regulation: Text and materials* (Cambridge University Press, 2009).

[30] N. Barr, *Economics of the welfare state*, 5th edn (Oxford University Press, 2012).

structured and introduce the approach of the various chapters. First we will look at the research questions.

1.2 The research questions

More detailed issues will be raised on a chapter by chapter basis. However, the overarching research questions that I will address can be grouped under the following three sets of issues.

The first set of issues revolves around the question of what are the rules of EU law on public services, using the traditional triad of EU law as regards the legal basis, the applicable legal rules and the exceptions to these rules.

1. What is the relevant primary and secondary EU law?
2. What are the limits that EU law imposes on public services?
3. What scope is left for national policies regarding public services under EU law exceptions?

The second set of questions regard the dynamics in the case law and the legislative process. This will involve looking at the balance between positive and negative integration.

4. What are the common elements regarding public services in the case law?
5. Are EU standards emerging and what is their role?
6. How does this affect legislation?

The final set of questions regards the role and development of the main EU-level concepts.

7. What is the role of the concept of service of general (economic) interest?
8. What is the role of universal service in this context?
9. Is there an EU citizenship dimension?

In the present chapter I aim to give a provisional answer on the role of the concepts of USO and SGEI, as well as what constitutes the EU law on public services, providing themes that will be revisited and explored more fully in the subsequent chapters. The European integration process and the multi-level system of governance of the EU provide the context for this analysis, as does a short section on the economic context.[31] At a general level these political and economic contextual aspects will be dealt with mainly in the current chapter. Specific applications will follow in the later chapters.

[31] Cf. G. Marks, L. Hooghe and K. Blank, 'European integration from the 1980s: State-centric v. multi-level governance', *Journal of Common Market Studies*, 34 (1996), 341–78; F. W. Scharpf, 'The joint-decision trap: Lessons from German federalism and European integration', *Public Administration*, 66 (1998) 239–78.

1.3 The concept of public services in EU law

Public services in EU law: terminology

Throughout this book I will use the term public services as a convenient form of shorthand for the utilities and the welfare services sectors combined (which also includes basic banking services and public broadcasting even though these are more difficult to group in either of these two categories). At the same time the usage of the vernacular term public services underlines the contextual nature of my approach where the starting point is the more traditional general (and/or national) concept that is gradually being colonized by EU law and its technical terminology – or argot. For instance, as over time Member States may want to rely more frequently on the SGEI exception of Article 106(2) TFEU they will more frequently explicitly define their services – or at least: the relevant part of their services – thus.[32] Likewise liberalization tends to lead to the definition of USO. Strictly speaking, however, there is no such thing as an EU law concept called public service. The concept of services of general interest (SGI) that will be discussed later in this section comes closest as a functional equivalent but has so far rarely been used in a legal context – although in a policy context it dates back to 1996 (see section 1.4).

This does not mean the term public services is not used in EU law: it is used relating to transport (as it appears in the text of Article 93 TFEU) and as public services compensation in the state aid setting. The much-quoted *Altmark* case (2003) is a prominent example of such usage.[33] In general the term 'public services' is used in EU legal texts interchangeably with SGI and SGEI just like USO is frequently used interchangeably with the term 'public service obligations' (PSO).[34] Also there is legislation with regard to 'public' undertakings (the Transparency Directive),[35] and with regard to public services in the public

[32] Although the existence of an SGEI can be derived from its legislative and regulatory context, for instance in the state aids context (see e.g. Case T-289/03 *British United Provident Association Ltd (BUPA), BUPA Insurance Ltd and BUPA Ireland Ltd* v. *Commission* [2008] ECR II-81, para. 181ff, noted by W. Sauter in *Common Market Law Review*, 46 (2009), 269–86), emphasis is increasingly placed clearly on an explicit act of entrustment. See para. 3.3 'Entrustment act' in SGEI compensation Communication (2012), above n. 11.

[33] This usage appears to originate from the reference to public services in the transport provisions of the TFEU. Cf. N. Fiedziuk, 'Putting services of general economic interest up for tender: Reflections on applicable EU rules', *Common Market Law Review*, 50 (2013), 87–114. Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg* v. *Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* [2003] ECR I-7747.

[34] On the universality requirement see especially Case T-289/03 *BUPA*, above n. 32, at para. 172. However, the General Court in *BUPA* also frequently uses the terms PSO and public service requirements.

[35] Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency with certain undertakings, OJ 2006, L318/17. The legal basis is Article 106(3) TFEU. Public undertakings are undertakings over which public authorities exercise dominant influence by virtue of ownership, financial participation or rules that govern them.

procurement context,[36] alongside rules for water, energy, transport and telecommunications.[37] Nevertheless, as noted, there is a tendency to revert to SGEI and USO.

As an indication of the complications involved it should be noted that the concept of public services is fundamentally wider than SGEI because it generally refers to the services as a whole – postal services, healthcare services or transport services – not just that element that is part of or required to ensure a public service obligation or USO that will constitute an SGEI. Nor are public services (such as general education or statutory social insurance) necessarily economic in nature, which all services of general *economic* interest (SGEI) by definition must be. It is worth highlighting that in my view it is not the public service concerned as a whole that forms an SGEI. Rather the SGEI forms part of a public service (or SGI), and in turn a PSO is part of an SGEI, of which PSO if it contains universal service requirements a USO can form part. I will return to this point below with the help of more formal definitions and some visual aids.

Public services in the national context

It should be added that there is no ready general concept of public services at national level to rely on either, at least not one that is widely shared across the different national jurisdictions of the Member States. In the literature a comparative analysis of the various national concepts of public service is sometimes provided.[38] However, because I am adopting an EU law perspective, and to some extent a forward looking one, there does not appear to be a pressing need to attempt to disentangle up to twenty-eight national definitions (assuming there would be just one per Member State). This reluctance is even stronger because, as we will see, SGEI are an open-ended category, and Member States are free to claim SGEI status for any set of services which they wish to be universally available within proportionate constraints on the applicability of the Treaty rules. According to the Commission's 2012 Communication on SGEI and state aid:

> Since the distinction between economic and non-economic services depends on political and economic specificities in a given Member State, it is not possible to draw up an exhaustive list of activities that a priori would never be economic. Such a list would not provide genuine legal certainty and would thus be of little use.[39]

[36] Directive 2004/18/EC, above n. 12. [37] Directive 2004/17/EC, above n. 12.

[38] Thus, Heike Schweitzer has referred to the French administrative law category of *service public* and contrasted this with the German concept of *Daseinsvorsorge* in her chapter 'Services of general economic interest: European law's impact on the role of markets and of Member States', in Cremona, above n. 17, 11–62. Likewise Tony Prosser has looked at UK versus French and Italian approaches to the concept of public service, above n. 15.

[39] Above, n. 11, para. 14.