Essential economic services and State aid:

A cross-sectoral analysis

by

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Abstract

This thesis focuses on the European approach to essential services post liberalisation, contributing the following: firstly, it argues that the European conceptual framework is unnecessarily complex and partially outdated. Secondly, a legal analysis shows that general State aid rules are insufficient to protect essential services; thirdly, a more flexible approach than Altmark is needed to reduce the negative effects of State aid. Fourthly, State aid is used to achieve public policy goals in the energy sector instead of creating a level playing field.

Liberalisation of network industries has been a European policy goal for decades. Different concepts ensuring access to essential services were established. This thesis assesses the legal frameworks and concludes the distinction that is made is unnecessary. Assessing the scope of essential services in telecommunications and post shows the need for revision due to societal and technological changes. Having to provide essential services can place a significant financial burden on undertakings and may require external compensation through special mechanisms that are often contained in European secondary legislation. Interestingly, preference is given to the general State aid rules although they provide insufficient protection to essential services. A case study of Commission State aid decisions, scrutinising compensation mechanisms in telecommunications and post, highlights that the Altmark test, which needs to be satisfied for external compensation to be lawful, is not suitable for all sectors. Furthermore, having examined the relation between Altmark and Article 106(2) TFEU (and the SGEI Framework), this thesis advocates for the introduction of a more flexible approach to reduce the negative effects of State aid.

The thesis discusses the Commission's use of State aid as regulatory tool in energy; using it to control the way in which Member States seek to fulfil their renewable obligations. It addresses how public policy objectives are balanced against competition objectives.

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Communications Act 2003

Loi du 13 juin 2005 relative aux communications électroniques

Loi du 21 mars 1991 portant réforme de certaines entreprises publiques économiques (adaptée à la loi du 13 juin 2005 relative aux communications électroniques)

Postal Services Act 2011

Postgesetz

Post-Universaldienstverordnung – PUDLV

Telekommunikationsgesetz

The Electronic Communications (Universal Service) Order 2003 as amended by Order 2011

The Postal Services (Universal Postal Service) Order 2012 as amended by Order 2013

List of Abbreviations

AG	Advocate General
AT	Austria
BE	Belgium
BEREC	Body of European Regulators for Electronic Communications
BG	Bulgaria
CA	Communications Act
CfD	Contract for Differences
CJEU	Court of Justice
Commission	European Commission
CY	Cyprus
CZ	Czech Republic
DE	Germany
DIR	Directive
DK	Denmark
EC	European Community
ECJ	Court of Justice
EE	Estonia
EEC	European Economic Community
EEG	German Act on the Development of Renewable Energy Sources
EL	Greece
ERGP	European Regulators Group for Postal Services
ES	Spain
EU	European Union
FI	Finland

FiP	Feed-in premium
FiT	Feed-in tariff
FR	France
HR	Croatia
HU	Hungary
IE	Ireland
IT	Italy
LT	Lithuania
LU	Luxembourg
LV	Latvia
MT	Malta
NL	Netherlands
PL	Poland
PostG	Postgesetz (Postal Act)
PSD	Postal Services Directive
PSD(C)	Consolidated version of the Postal Services Directive
PSO	Public Service Obligation
PT	Portugal
PUDLV	Post-Universaldienstverordnung (Post Universal Service Ordinance)
RES	Renewables
RO	Romania
SE	Sweden
SEA	Single European Act
SGEI	Service of General Economic Interest
SGI	Service of General Interest
SI	Slovenia
SK	Slovakia

TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TKG	Telekommunikationsgesetz (Telecommunications Act)
Union	European Union
UK	United Kingdom
USD	Universal Service Directive
USD(C)	Consolidated version of the Universal Service Directive
USO	Universal Service Obligation
USP	Universal Service Provider

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Chapter 1

Introductory chapter

1.1. Setting the scene

> Essential services are those necessary to ensure the full social inclusion of people in society and on the labour market. They concern various sectors, such as telecom, electronic communications, transport, energy and financial services, for example bank accounts. Public intervention is at times necessary to ensure availability, quality and affordability of provision.[1]

Ensuring this kind of 'social protection' as well as the 'combating of exclusion' has always been at the core of the European Union's social policy.[2] This became particularly important with the opening up to competition of the utility sectors. Prior to liberalisation, services in network industries were usually provided by state-owned monopolies.[3] A costly network infrastructure was considered to be the main reason, why for a long time, monopolies were regarded to be best suited to deliver such services. With technological progress and the gradual opening up of the network industries in the 1980s and 90s, the newly introduced competition policy in these sectors was regarded as the most appropriate way to improve access to services of a better quality and at competitive prices. Szyszczak points out that 'liberalisation of markets walked hand in hand with the privatisation of state ownership of assets *and* state provision of welfare services and commercial services.'[4] However, Member States with a strong public service background, e.g. France and Belgium, feared the potentially negative effects of the liberalisation process for their consumers, such as

[1] Commission, 'Towards a European Pillar of Social Rights: Access to essential services' <https://ec.europa.eu/commission/sites/beta-political/files/access-essential-services_en.pdf>.
[2] Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C115/47 (hereinafter TFEU), Article 151; European Commission (n 1).
[3] Matthias Finger and Dominique Finon, 'From the "public service" model to the "universal service" obligation' 1 <http://www.centre-cired.fr/IMG/pdf/Finger_Finon_Public_service_Universal_service.pdf> .
[4] Erika Szyszczak, *The regulation of the state in competitive markets in the EU* (Hart Publishing 2007) 3.

social exclusion of vulnerable groups who would be no longer able to afford those services; hence they did not want to rely on the competitive forces of the market alone. They therefore strived for a recognition of public services at European level.[5] This idea was strongly supported by the European Parliament and the European Council: they agreed that guaranteeing the right to access essential services should not be left purely to competition policy, but that specific rules were needed to protect the needs and interests of consumers.[6]

This thesis explores the ways by which these essential economic services are guaranteed and how they are financed. In order to ensure access to essential services for all consumers, and in particular to create a safety-net for vulnerable consumers, [7] a number of concepts have been introduced, such as Services of General Interest (SGIs), Services of General Economic Interest (SGEIs), Public Service Obligations (PSOs) and Universal Service Obligations (USOs).[8]

All these concepts have one feature in common: they are based on public intervention, which, to a certain extent, contradicts the fundamental idea of market liberalisation. [9] The General Court, therefore, restricted this kind of public intervention to cases of market failure, which it held in the *Colt Télécommunications France v Commission*[10] as a requirement.[11] The General Court emphasised that the market failure element is an 'objective concept' that is fulfilled when a service is not satisfactorily provided through the market. [12] The assessment of whether or not

[5] Tony Prosser, *The limits of competition law: Markets and public services* (OUP 2005) 154.
[6] Pierre Bauby, 'From Rome to Lisbon: SGIs in Primary Law' in Erika M Szyszczak and others (eds), *Developments in Services of General Interest* (T.M.C. Asser Press, Springer 2011) 21–22; Prosser (n 5) 155.
[7] Consumers who are elderly, disabled, living on low income or in geographical areas with a poor infrastructure, where the provision of essential services is therefore expensive and/or difficult are considered to be vulnerable, Commission (n 1).
[8] For a detailed discussion of these concepts, including their scope and relation to each other, see Chapter 2.
[9] Wolf Sauter, 'Services of general economic interest and universal service in EU law' (2008) 33(2) European Law Review 167, 192.
[10] Case T-79/10 *Colt Télécommunications France v European Commission* ECLI:EU:T:2013:463.
[11] ibid, para 150.
[12] ibid, para 151; Erika Szyszczak, 'Services of General Economic Interest and State Measures Affecting Competition' (2014) 5 Journal of Competition Law & Practice, 508, 514.

market failure has occurred must be based on the 'actual market situation'.[13] Market failure can, therefore, occur if the service is not provided at all, or not at a desired quality, or is not affordable.[14]

Member States can designate at least one undertaking to provide essential services. At the beginning of the liberalisation process, the incumbent was regarded to be the most suitable service provider. The provision of such services was paid by granting exclusive rights for the provision of such services to the designated service provider and/or the services were cross-subsidised by more profitable segments. However, market liberalisation, and the introduction of competition to the markets, made the financing of these kinds of essential services more and more difficult. With other operators cream-skimming profitable consumers from the incumbent, cross-subsidisation has become more difficult and often additional external funding is required to pay for those services. In some cases, EU secondary legislation contains a specific compensation mechanism (e.g. in postal services and telecommunications), while, in other cases, the State aid framework as laid down in the Treaty is applied. State aid rules are used to ensure the Member States' desire to provide access to essential services and thereby correct an imbalance created by the introduction of competition. This notion of squaring the circle is at the heart of this thesis. The attempt to establish ways which ensure access to essential services as a public policy goal, while interfering in the least possible fashion with the competitive process, is one of the foundation principles of liberalisation.

1.2. Outline of the thesis

The thesis seeks to evaluate both the European Union's and domestic approaches to essential economic services post market opening, and the role of State aid to achieve and protect public interest objectives. In so doing, this thesis analyses the European and national legal frameworks governing the concepts of essential services across

[13] ibid, para 158.
[14] Commission (n 1).

different sectors, with a particular focus on telecommunications, postal services and electricity. The thesis aims to contribute to the overall discussion of whether the current approach to essential services is still appropriate and how the provision of basic services can be secured on a long-term basis.[15]

Overall, the thesis consists of seven chapters, five of which (Chapters 2-6) are substantive. Chapters 2-6 have been written as independent papers, but are connected with each other by the overarching topic of essential economic services and the financing of such services. The chapters are written in such a way that they can be read individually; therefore, parts of the assessment may overlap.

Some sections of Chapter 3 are based on a Report conducted for the Centre for Regulation in Europe (CERRE) [16] and a literature review for the Office of Communications (Ofcom).[17] Chapter 4 is a joint work with Michael Harker, which has been recently published in the peer-reviewed European Competition Journal. [18] Chapter 5 is the result of a continuation of the author's research undertaken for Chapter 4.

Following this Introductory Chapter, the subsequent chapters proceed as follows:

Chapter 2 of the thesis evaluates the underlying European regulatory framework governing the multiple concepts of essential economic services. It seeks to add clarification to the relationship between Services of General Interest (SGI), Services of General Economic Interest (SGEI), Public Service Obligations (PSO) and Universal Service Obligations (USO) by analysing the underlying EU regulatory framework. This includes a discussion of the definition of the concepts as laid down in EU legislation,

[15] See also section 1.3.

[16] Michael Harker, Antje Kreutzmann and Catherine Waddams, 'Public service obligation and competition' (February 2013) <http://www.cerre.eu/sites/cerre/files/130318_CERRE_PSOCompetition_Final_0.pdf>.

[17] Antje Kreutzmann-Gallasch and others, 'Criteria to define essential telecoms services' (November 2013) <http://stakeholders.ofcom.org.uk/binaries/research/affordability/Ofcom_Lit_Review.pdf>.

[18] Michael Harker and Antje Kreutzmann-Gallasch, 'Universal service obligations and the liberalization of network industries: Taming the Chimera?' (2016) 12(2-3) European Competition Journal 236.

policy documents and by case law.[19] The chapter argues that the concepts have been unnecessarily blurred at the expense of legal certainty, and provides a simplified framework for essential economic services. It finishes by contemplating the practical reasons for maintaining the current complex and unclear framework.

Chapter 3 presents a comparative analysis of the nature of universal service in post and telecommunications at EU level and at domestic level. The chapter seeks to contribute to the discussion of whether the existing regulatory framework governing USOs in these sectors may cause a problem for the provision of USOs in the long-run, taking into account the declining demand for conventional postal and telecommunications services due to the growing take-up rate of e-communications. The hypothesis of this chapter is that, due to the development and growth of electronic means of communication the current scope of USOs in these two sectors is dated and no longer fulfils its intended objective of providing access and preventing social exclusion. In doing so, a detailed comparative overview of the European and domestic legislation in Belgium, France, Germany and the United Kingdom concerning universal postal service and universal service in telecommunications is provided. The chapter then discusses changing consumer behaviour as an effect of technological progress and the negative effects on conventional communications services. The research is supported by the findings resulting from a qualitative survey answered by universal service providers and alternative providers operating in the market. The chapter concludes by arguing that there is a need to change the scope of universal service in post and telecommunications from a stringent approach to a more flexible, technology-neutral one, which allows the reduction of the scope of universal service to ensure its adaptability to future societal and technological developments.

Chapter 4 considers the interrelation between the liberalisation of network industries, particularly in postal services and telecommunications, and the attempts to secure the provision of universal service. As such, it seeks to examine the potential market distortions arising from the imposition of USOs, as they can prevent a level

[19] For a more information, see Chapter 2, section 2.1.

playing field between different operators. It points out that often USOs are placed on the incumbent, which allows the entrant to 'cherry-pick' by targeting the most profitable consumers. The chapter points out that with increasing competition between service operators, some kind of compensation of the universal service provider will be required. Chapter 4 examines the European and national approaches to funding of universal service. It thereby looks at the legal framework governing the compensation of universal service and points out that in postal service and telecommunications the governing European Directives lay down the requirements by which compensation may be provided. However, the chapter shows that the Member States have hardly made use of the sectoral rules on compensation but, instead, favour the State aid rules under Article 107 TFEU. It then seeks to provide an answer to the question why the Member States prefer to use the State aid regime instead of sector-specific rules on compensation. The chapter investigates these issues further by conducting two case studies, in broadband and postal services. The rolling-out of high-speed broadband requires a substantial amount of investment. The chapter finds that the European Commission and the majority of the Member States prefer the State aid regime under Article 107 TFEU instead of including broadband within the scope of universal service and then compensating the provider according to the rules set out in the Directive due to the complexity of the net-cost assessment. The chapter then moves on to examine the effect of liberalisation on postal services, in particular the collection and delivery of letters, and discusses how the abolition of the reserved market has increased the pressure on postal services. The case study shows that, although the European Commission strives for more contestability in the majority of the Member States, the designated universal service provider is still the incumbent. It shows also that the incumbent often provides services that go beyond the minimum requirements set out in the Postal Services Directive, but then has difficulties financing those services and relies on external compensation. In contrast to broadband, where State aid is used to extend the service, State aid in postal service is used to maintain the current level of services and to secure a level playing field between universal service providers and alternative operators. Chapter 4 concludes that the protection of vulnerable groups of

consumers in the process of the market opening of network industries results in trade-offs, but relying on the State aid regime does not satisfactorily protect the sustainability of the concept of universal service.

Chapter 5 broadens the discussions on the use of the State aid for financing essential services through an examination of the relation between the *Altmark* test and Article 106(2) TFEU. The aim of this chapter is to review the divergence between the Commission's approach to financing the provision of SGEIs and the case law established by the European Courts. After briefly discussing the requirements of *Altmark* and Article 106(2) TFEU as established by EU case law, it then turns to the Commission's approach concerning the compensation of service providers in general. The findings of this chapter show that the approach of the Commission diverges from that established by the European Courts, as the Commission maintains a strict approach towards *Altmark* and introduces a market-based approach into Article 106(2) TFEU with the issuing of the 2012 SGEI Framework and the introduction of an efficiency and public procurement element.[20] To analyse whether the Commission's approach has been successful and has led to a reduction of the amount of State aid awarded to service providers, Commission State aid decisions concerning the compensation for the delivery of Services of General Economic Interest in postal services and broadband were analysed. The findings of the case study show that the successful application of *Altmark* depends on the sector, and that the impact of the 2012 SGEI Framework is limited. For example, in a sector such as post, where, in many Member States, only the incumbent has the required network to fulfil SGEIs satisfactorily, the 2012 SGEI Framework is devoid of purpose. It is, therefore, suggested that the current general multi-sector approach is replaced by a sector-specific one.

Chapter 6 examines the role of the European Commission in battling climate change by increasing the share of electricity from renewables at European and

[20] Commission, 'European Union framework for State aid in the form of public service compensation (2011)' [2012] OJ C8/15.

national level. It analyses the reasons why the Commission uses State resources as a popular.

It questions whether the Commission's use of financial support schemes to promote electricity from renewable sources has compromised the fulfilment of a well-functioning internal electricity market. Firstly, the chapter explores the approach towards green electricity at European level by analysing the underlying legislative framework. It finds that the importance of environmental protection in energy has become more and more important, but the chapter also shows that there is an awareness that a competitive energy market and an environmentally sustainable energy market is not a match made in heaven, as the two objectives do not necessarily support each other. Secondly, the chapter investigates the role of State aid in increasing the share of electricity from renewables by analysing Commission decisions concerning renewable support schemes. The assessment of the State aid decisions suggest that the Commission does intentionally favour electricity from renewable sources over electricity from fossil fuels in order to let environmentally-friendly operating undertakings grow. Nonetheless, the Commission aims to protect the competitive process but only between green electricity generators. Furthermore, the chapter demonstrates that the popularity of, and the Commission's strong reliance on, State aid in policy documents to promote environmental objectives in energy is the result of the lack of binding regulatory framework due to the Union's restricted competence in the area of energy.

Finally, Chapter 7 summarises the key findings of the thesis and the suggested policy recommendation. It finishes by outlining potential future research ideas that would allow the research of this thesis to be taken a step further.

1.3. Purpose of the thesis

This thesis explores the approach to essential economic services post liberalisation, and the role of State aid to pursue public interest objectives both at European and at national level. The thesis investigates the underlying regulatory framework with a

particular focus on postal service, telecommunications and electricity. Post and telecommunications were chosen, as these two sectors allow for an interesting comparison concerning the role of essential services. In both sectors, communication services are used to prevent social exclusion for certain groups of consumers but technological progress (increasing popularity of mobile phones and the Internet) changed consumer behaviour and has led to a reduced demand for conventional communications services in these sectors. This creates new problems, ranging from the issue of which of those services should still be regarded as essential and their provision hence prescribed by law, to the financing of essential services in post and telecommunications.

In pursuit of this aim, the thesis seeks to address the following ultimate questions in chapters 2-5:

> Is the existing universal approach to essential services still suitable in times when the liberalisation of network industries further continues and markets are very fast-moving and with users changing their behaviour quickly?
>
> And how can the provision of essential services be secured in order to secure the well-being of vulnerable groups of consumers and prevent them from social exclusion?

These research questions split down into narrower questions in each of the substantive chapters, and the chapters do not necessarily provide a direct answer to these questions but the aim of this thesis is to raise awareness of the problems related to the concepts of essential services and to show potential solutions.

Chapter 6 explores the evolving nature of another essential service – electricity. The topical nature of the transformation of the electricity sector towards a greener operation, and the Commission's and the Member States' reliance on State aid, has prompted the question of how this interferes with the long-term objective to achieve a well-functioning internal energy market in the European Union.

1.4. Significance and originality

There is a vast amount of literature discussing issues concerning the scope of essential services. It could be argued that the topic is settled. On the contrary, this topic is still current: the liberalisation of network industries has gathered pace, and markets have become more competitive. Increasing competition has many advantages for consumers: for example, it can lead to increased efficiency and productivity, proper innovation and better quality, resulting in a reduction of costs and lower prices for consumers.[21]

However, in certain cases the opening-up of the network industries and increasing competition may not be always beneficial and in the interest of every consumer. Vulnerable consumers, in particular, may be disadvantaged for several reasons.[22] There may be a lack of competitive market structure in some parts of a country due to its geographical infrastructure, which leaves consumers with no possibility of switching between providers, forcing them to stay with the incumbent provider. In other cases, the lack of information or switching costs may be too high for vulnerable consumers to benefit from competition.[23]

On the other hand, if only one or two undertakings are legally obliged to provide essential services in a competitive market, and others are free to 'cherry-pick' which services they provide where and to whom, this can affect the competitiveness of the essential service provider. Discharging such services is often expensive, but the service provider is often required to offer these services at an 'affordable price'.[24] In

[21] Maurice E Stucke, 'Is competition always good?' (2013) 1(1) Journal of Antitrust Enforcement 162, 166–167.
[22] Marcos Fernández-Gutiérrez, Sebastian Jilke and Oliver James, 'Vulnerable consumers and public services – can competition and switching reduce inequalities?' (25 May 2016) <http://blogs.lse.ac.uk/politicsandpolicy/can-competition-and-switching-in-public-service-markets-reduce-inequalities/>.
[23] ibid.
[24] See, for example, Article 3(1) of Directive 2002/22/EC of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services [2002] OJ L108/51 as amended by Directive 2009/136/EC [2009] OJ L337/11, USD(C) (Consolidated Version of the Universal Service Directive); Article 3(1) of Directive 97/67/EC of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service [1998] OJ L15/14 as amended by Directive 2002/39/EC [2002] OJ

the past, for the provision of essential economic services, the service provider was granted special rights or the service was often cross-subsidized, but with increasing competition the revenues in other market segments are decreasing and cross-subsidisation has become more difficult.

Hence it is essential to find the right balance between competition policy objectives and public interest goals (e.g. social inclusion of all consumers) and to find a practical and an economic solution that allows service providers to compete but also protects vulnerable groups of consumers who would otherwise not necessarily be able to access essential economic services.

The thesis further explores the balance between competition policy objectives and public interest goals from a different perspective by focussing on environmental protection in the field of energy, in particular electricity from renewable source as a means to tackle climate change.[25] The significant increase of greenhouse gases since the beginning of industrialisation (40% higher than before) is responsible for global warming. A large percentage of those greenhouse gases stems from the production of energy from fossil fuels.[26] The generation of 'green' energy releases a lower level of carbon dioxide[27] and is therefore an important weapon in the fight against climate change. Hence, the Union is committed to increase the share of energy from renewable sources, and Directive 2009/28/EC lays down a Union-wide mandatory target to derive 20% of the gross-final consumption of energy from renewable sources by 2020.[28]

The thesis seeks to contribute to a number of topics discussed in the existing literature. It explores the relation between the different concepts concerning

L176/21 as amended by Regulation (EC) 1882/2003 [2003] OJ L284/1 as amended by Directive 2008/6/EC [2008] OJ/L52/3] PSD(C).

[25] See, Chapter 6.

[26] Commission, 'Causes of climate change' (2017) <https://ec.europa.eu/clima/change/causes_en>.

[27] Edwin Woerdman, Martha M Roggenkamp and Marijn Holwerda, *Essential EU climate law* (Edward Elgar Publishing 2015) 128.

[28] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L 140/16, Article 3(1) in conjunction with part A of Annex I.

essential economic services by examining the European legislation and policy documents, and presents a new interpretation of the concepts. It shows that the existing framework is unnecessarily complex.

The role and nature of essential services in network industries have been addressed in the literature before.[29] The significance of this research lies in the approach this thesis has taken towards evolving nature of essential services, in particular universal postal services and USOs in telecommunications. It provides a comprehensive, comparative cross-sectoral legal analysis, which is followed by a case study and then checked again through a consultation of practitioners. This in-depth assessment allows the thesis to conclude that the existing regulatory framework governing universal service is partially dated, and enables the thesis to propose a different framework to accommodate both competition policy objectives and public interest objectives.

Furthermore, the thesis examines the legal issues related to the compensation for the provision of universal postal services and universal services in telecommunications. It critically analyses the means by which compensation can be granted to service providers and finds that Member States appear to prefer the general State aid regime over complex sector-specific regulations, which may be beneficial for competition but not for the protection of the concept of universal service. The publication of this chapter is a testament to the originality of this work.

In addition, the thesis shows originality by questioning the Commission's market-based approach towards the financing of essential services. It questions the

[29] Kjell A Eliassen and Johan From, 'Deregulation, privatisation and public service delivery: Universal service in telecommunications in Europe' (2009) 27(3) Policy and Society 239; James Alleman, Paul Rappoport and Aniruddha Banerjee, 'Universal service: A new definition?' (2010) 34 Telecommunications Policy 86; Christian Jaag and Urs Trinkner, 'The future of the USO - Economic rationale for universal services and implications for a future-oriented USO' (June 2011) Swiss Economics Working Paper 0026 <http://www.swiss-economics.ch/RePEc/files/0026JaagTrinkner.pdf>; Jim Davies and Erika Szyszczak, 'Universal Service Obligations: Fulfilling New Generations of Services of General Economic Interest' in Erika Szyszczak and others (eds), *Development in services of general interest* (T.M.C. Asser Press, Springer 2011); Grith S Ølykke and Peter Møllgaard, 'What is a service of general economic interest?' (2013) European Journal of Law and Economics 205.

significance of the *Altmark* test, and finds that the introduction of more contestability is not a suitable benchmark for all sectors.

1.5. Methodology

This thesis employs a combination of different approaches in pursuing the above-mentioned research questions.

Doctrinal legal research is the basic method used for this thesis. As Posner points out, doctrinal legal research is an important means for the further development of the law:

> The messy work product of the judges and legislators requires a good deal of tidying up, of synthesis, analysis, restatement, and critique. These are intellectually demanding tasks, requiring vast knowledge and the ability (not only brains and knowledge and judgment, but also *Sitzfleisch*) to organize dispersed, fragmentary, prolix, and rebarbative materials. These are tasks that lack the theoretical breadth or ambition of scholarship in more typically academic fields. Yet they are of inestimable importance to the legal system and of greater social value than much esoteric interdisciplinary legal scholarship.[30]

In addressing the above-mentioned research questions, primary and secondary documentary material is examined. Primary legal documents come from European legal sources (legislation, judgments, Commission Decisions) and national legislation. The secondary material includes policy papers from European and national institutions (e.g. European Commission and national regulatory authorities) as well as academic literature.

[30] Richard A Posner, 'In Memoriam: Bernard D. Meltzer (1914-2007)' (2007) University of Chicago Law Review 435, 437.

The doctrinal research framework is supplemented by a comparative approach and an interdisciplinary perspective.[31] The comparative approach is based on micro-comparison using different dimensions of comparisons in order to identify similarities and differences between the European level and national level, between various Member States but also across sectors (e.g. postal services and telecommunications).

To get a deeper level of understanding of essential economic services and the role of State aid and their value to society, other academic disciplines (economic and political science) have been taken into account. Especially in areas such competition and regulatory policy, interdisciplinary research matters, as it allows a problem to be addressed from different aspects in order to establish a policy-relevant outcome by combining elements from the three disciplines. However, interdisciplinary research can entail risks (e.g. language and communication issues).[32] However, the author is conscious of these issues and has as a student of a multi-disciplinary research centre for competition policy, a good understanding and awareness of those problems.

In Chapter 3, the legal analysis is further supported by a qualitative survey asking open and closed questions. A mixture of open-ended and closed questions was chosen to allow the respondents to answer in their own way in order to gain a deeper insight into their views. Closed questions were asked to allow a greater comparability of the responses.[33]

The thesis reflects the law as it stood on 31 May 2017. All online resources in this thesis were visited and verified on 31 May 2017. A later visit to these websites is therefore not mentioned hereinafter.[34]

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[31] Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) Erasmus Law Review 130.

[32] Joyce Tait and Catherine Lyall, 'Short Guide to Developing Interdisciplinary Research Proposals' (March 2007) <https://jlesc.github.io/downloads/docs/ISSTI_Briefing_Note_1-Writing_Interdisciplinary_Research_Proposals.pdf>.

[33] Alan Bryman, *Social research methods* (2nd ed, OUP 2004) 145, 148.

[34] An exception to this is the section in Chapter 7, section 7.2., where later political events and publications have an impact on potential future research. In the case of such a later appearance, the access date is then explicitly mentioned in the footnotes.

1.6. Limitations

The thesis does not consider essential non-economic services and, as mentioned above, essential economic services can be found in several sectors. A trade-off had to be made between the number of sectors analysed and the depth of the research. Therefore, the research is limited in Chapters 3-5 to two sectors - postal services and telecommunications - to allow a more detailed evaluation. As explained above, these two sectors allow for an interesting comparison in the field of universal service as the provision of such services has been affected significantly by technological progress.[35]

Given that the thesis provides a comparative legal analysis of the regulatory framework concerning Universal Service Obligations in postal services and telecommunications at European and Member State level as well as across national level, Chapter 3 considers four Member States (Belgium, France, Germany and the United Kingdom). When drawing conclusions and policy recommendations from this analysis, one has to be mindful of the limited number of countries. However, this restriction allows a detailed analysis of the nature of universal services in post and telecommunications. Furthermore the reasons for choosing these four countries were twofold: firstly, the selection is owed to the fact, that the research is based on a Report undertaken for the Centre on Regulation in Europe[36] and the study received financial support of several of the Centre's members who are based in the discussed Member States [37] and secondly because of the differences in the countries' approaches towards the concept of public services as well as different geographical and population size between them. [38] Nevertheless, the results drawn from this micro-level comparison allow conclusions to be made on trends in the nature of universal service in post and telecommunications, and lay the foundation for potential future research.

[35] See above, section 1.3.
[36] Harker (n 16).
[37] This did not have an impact on the outcome of the report. The academic neutrality and independence of the report was protected.
[38] For more information, see Chapter 3, section 3.2.1.

Chapter 2

The legal concepts of essential economic services at EU level and their relation to each other

2.1 Introduction

The right of access to essential services has become an important element of the Union's law and policy as the liberalisation process of utilities has further progressed. Chapter 1 briefly outlines the tensions between the establishment of an internal market and concerns of the Member States, in particular those with a strong public service background, about a full market opening, as they feared the negative effects of liberalisation for some of their consumers (social exclusion).[1] This resulted in the introduction of several European concepts, such as Services of General Interest (SGIs) and Services of General Economic Interest (SGEIs) in order to implement a safety-net for certain consumer groups that have been considered to be vulnerable (e.g. consumers living in remote areas of a Member State).[2]

The role of SGEIs further increased with the entering into force of the Lisbon Treaty and the Protocol (No 26) on services of general interest and Article 36 of the Charter of Fundamental Rights becoming parts of European primary law. The concept of Services of General Interest and Services of General Economic Interest were complemented by the concepts of Universal Service Obligations (USOs) and Public Service Obligations (PSOs).

Even though the concepts are considered to be an important part of the social policy of the European Union as they ensure the fulfilment of basic needs in times of increasing competition, the scope of the concepts is still not clear. For example, the

[1] See above, Chapter 1.
[2] Pierre Bauby, 'From Rome to Lisbon: SGIs in Primary Law' in Erika Szyszczak and others (eds), *Developments in Services of General Interest* (T.M.C. Asser Press, Springer 2011) 20-22.

terms SGEI, USO and PSO are often used interchangeably.[3] There have been few attempts to define the term SGEI[4] but nonetheless there is a lack of clarity surrounding this topic.

This chapter seeks to clarify the relationship between the different concepts as originally established by the EU. It argues that this relationship is often misinterpreted, which has left blurred frontiers between the concepts. The research is based on an analysis of the underlying EU regulatory framework. This chapter shows that the lines between the four concepts – SGI, SGEI, PSO and USO – have been blurred at European level. In section 2.2. an explanation of each of the concepts is provided; the concepts are defined by taking into account primary and secondary sources of EU law as well interpretations by European Institutions, such as the Court of Justice of the European Union and the European Commission. Then the relation of the concepts with each other is discussed, and it is shown that these concepts are related with each other but not identical. The chapter concludes in section 2.3. by arguing that the existing framework is not applied consistently in practice, and by contemplating the political dimensions behind the current approach.

[3] Johan van de Gronden, 'The Services Directive and Services of General (Economic) Interest' in Markus Krajewski, Ulla B Neergaard and Johan van de Gronden (eds), *The changing legal framework for services of general interest in Europe: Between competition and solidarity* (T.M.C. Asser 2009) 236.

[4] Wolf Sauter, 'Services of general economic interest and universal service in EU law' (2008) 33 European Law Review 167; Ulla Neergaard, 'Services of General Economic Interest: The Nature of the Beast' in Markus Krajewski, Ulla Neergaard and Johan van de Gronden (eds), *The changing legal framework for services of general interest in Europe: Between competition and solidarity* (T.M.C. Asser 2009); Koen Lenaerts, 'Defining the concept of "Services of General Interest" in light of the "Checks and Balances" set out in the EU Treaties' (2012) 19 Jurisprudencija/Jurisprudence 1247; Grith S Ølykke and Peter Møllgaard, 'What is a service of general economic interest?' (2013) Eur J Law Econ; Wolf Sauter, *Public services in EU law* (Cambridge University Press 2015); Caroline Wehlander, *Services of general economic interest as a constitutional concept of EU law* (T.M.C. Asser Press, Springer 2016).

2.2 Multiple concepts of essential economic services

This section turns to the discussion of the four concepts of essential economic services as established by the Treaties and European secondary legislation, such as Services of General Interest, Services of General Economic Interest, Universal Service Obligation and Public Service Obligation.[5] It explains the different concepts and assesses the similarities and differences, where applicable, between them by examining the governing legal framework at European level.

2.2.1 The concept of Services of General Interest (SGI)

Services of General Interest are often regarded as the main concept of essential services containing economic services, non-economic services and social services as sub-categories.[6] The term SGI is mentioned once in the Treaty, in the title of Protocol (No 26) on Services of General Interest,[7] but no definition is provided. However, Article 1 of the Protocol (No 26) refers to Services of General Economic Interest and Article 2 refers to Member States' competence for the provision of non-economic services. Following an interpretation based on the wording of the Treaty, the concept of SGIs must therefore cover economic and non-economic services that public authorities regard to be as essential for society.[8] This seems to be in line with the Commission's understanding of the term.[9] The Commission further emphasises that SGIs are 'subject to specific public service obligations'[10]. This appears to indicate that

[5] The focus of this chapter is on services related to an economic activity and hence it does not provide an analysis of the concepts of *Social Services of General Interest* (SSGI) and *Non-economic Services of General Interest* (NSGI).

[6] See, for example European Commission, 'Services of general interest' <https://ec.europa.eu/info/topics/single-market/services-general-interest_en>.

[7] According to Article 51 of the Treaty on European Union, the Protocols to the Treaties are part of the Treaty itself.

[8] Commission of the European Communities, 'Services of general interest, including social services of general interest: a new European commitment' (Communication) COM(2007) 725 final, 3–4; Lenaerts (n 4) 1249–50.

[9] Commission of the European Communities, 'Services of General Economic Interest' COM(96) 443 final, 2; Commission of the European Communities (n 8) 3–4; Commission, 'A Quality Framework for Services of General Interest in Europe' COM(2011) 900 final, 3; Lenaerts (n 4) 1250.

[10] The Commission defines SGI as 'services that public authorities of the Member States classify as being of general interest and, therefore, subject to specific public service obligations (PSO). The term covers both economic activities […] and non-economic services.' Commission, 'A Quality Framework

PSOs are to be interpreted as part of SGIs. Member States have discretion as to which services they define as Services of General Interest as long as they comply with EU law.[11]

2.2.2 The concept of Services of General Economic Interest (SGEI)

Another European creation is the term 'Services of General Economic Interest' or 'SGEI'. First, as the name implies, it is the word 'economic' that distinguishes these from the term SGI. However, as Wehlander points out, the name of the concept appears somewhat inaccurate as the general interest does not have to be of an economic nature: instead, the word 'economic' refers to services.[12]

The term SGEI has gained greater recognition with the entering into force of the Lisbon Treaty. The concept is mentioned in Articles 14 and 106(2) TFEU,[13] Article 1 of the newly introduced Protocol (No 26) on Services of General Interest (Protocol on SGI) and Article 36 of the Charter of Fundamental Rights of the European Union which became binding through Article 6(1) TEU. Despite the concept being mentioned a few times in the Treaty, there is still no definition provided by primary law.[14]

Nonetheless, the lack of a definition does not mean a lack of recognition or importance of the concept of SGEIs at EU level. Article 36 of the Charter of

for Services of General Interest in Europe' (n 9) 3. The meaning of the concept of PSO is discussed below, see section 2.2.3.

[11] For more information on the approach to SGI, see Lenaerts (n 4) 1264.

[12] Wehlander (n 4) 188–89. Wehlander emphasises that the concept of SGEI covers services that are regarded to be essential by society but also have a 'market relevance'; the differentiation from the other two concepts 'Services of General Interest' and 'Non-economic Services of General Interest' also supports this argument.

[13] Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C115/47 (hereinafter TFEU)

[14] Article 14 TFEU (revising Article 16 EC) constitutes the legal basis for the Union and the Member States to ensure the provision of SGEIs (first sentence) and for the European Parliament and Council to adopt a legal framework. Article 106(2) TFEU provides an exemption from the Treaty rules in order to secure the guarantee the provision of SGEIs. Article 1 of Protocol (No 26) on Services of General Interests highlights the underlying principles of the concept of SGEIs and Article 36 of the Charter of Fundamental Rights ensures access to SGEIs. Wehlander (n 4) 14. For a more detailed discussion on the legal basis for Services of General Economic Interest, see Sauter (2008) (n 4) 169–74.

Fundamental Rights highlights the necessity of SGEIs to create 'social and territorial cohesion of the Union'. However, Prosser warns that Article 36 of the Charter of Fundamental Rights is of only limited importance, since the concept is not directly enforceable.[15] The Commission still regards the concept as 'a pillar of European citizenship'.[16]

Despite the fact primary law does not provide a definition of the concept, it sets out the principles of SGEIs. The third paragraph of Article 1 of the Protocol on SGI mentions a common set of obligations for all SGEIs, which are:

- Quality,
- Safety,
- Affordability,
- Equality,
- Universal access,
- User rights.

Member States and their public authorities have been awarded with wide discretion in order to determine what they regard as SGEIs and how to provide them.[17] The reason for this is the assumption that the Member States know the needs of their people best.

Neergards states that even though the Service Directive[18] does not apply to issues related to liberalisation of SGEIs[19] or the way SGEIs are organised or financed,[20] it can, nevertheless, help to define the concept of Services of General

[15] Tony Prosser, 'EU competition law and public services' in Elias Mossialos and others (eds), *Health systems governance in Europe: The role of European Union law and policy* (Cambridge University Press 2010) 331.
[16] Commission of the European Communities, 'Green Paper on Services of General Interest' COM(2003) 270 final, para 2.
[17] See, first paragraph of Article 1 of the Protocol on SGI; See also, Case T-17/02 *Olsen v Commission* [2005] ECR II-2031, para 216, as confirmed by order of the Case C-320/05P *Olsen v Commission* [2007] ECR I-131.
[18] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36.
[19] Directive 2006/123/EC, Article 1(2).
[20] Directive 2006/123/EC, Article 1(3).

Economic Interest.[21] According to the Service Directive, services that are provided for 'economic consideration', [22] such as in the postal sector, telecommunications, transport, electricity, gas, water and waste are SGEIs.[23]

The Commission made several attempts to define the concept of SGEI in order to add more clarity. [24] In its 2004 and 2011 policy documents, the Commission highlighted the importance of the public interest criterion. For example, in 2011 SGEIs are defined as:

> economic activities in the overall public good that would not be supplied (or would be supplied under different economic conditions in terms of quality, safety, affordability, equal treatment or universal access) by the market without public intervention. The [Public Service Obligation] is imposed on the provider by an act of entrustment and on the basis of a general interest criterion which ensures that the service is provided under conditions allowing it to fulfil its mission.[25]

The 2011 definition by the Commission can be divided into two parts. The first sentence is about the elements of an SGEI, whereas the second part is about the entrustment act and the way in which SGEIs are supplied. However, the act of entrustment does not constitute an element that actually constitutes an SGEI and

[21] Neergaard (n 4) 25–26. It is acknowledged that the concept of SGEI may be also relevant for free movement but this discussion is beyond the scope of this thesis. Nonetheless the Service Directive offers some guidance to the understanding of the term SGEI and the relation to the concept of USOs and is therefore briefly discussed.
[22] Directive 2006/123/EC, Recital 17.
[23] Directive 2006/123/EC, Articles 2(2)(c), (d) and 17(1).
[24] For an overview of the historical development of the definition of the term SGEI, see Ølykke and Møllgaard (n 4) and Sauter (2008) (n 4) 174–76.
[25] Commission, 'A Quality Framework for Services of General Interest in Europe' (n 9) 3. The Commission used the identical definition in its 2013 Guidelines, Commission, ' Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest' (Staff Working Document) SWD(2013) 53final/2, 21.

should therefore not be part of the definition. It only refers to the way in which Member States can implement SGEIs.[26]

The Commission also substitutes the term SGEI with Public Service Obligation in the second sentence. Therefore, it appears that the Commission regards the concepts of SGEI and PSO as identical. The requirements of Public Service Obligations will be discussed later, and then it will be shown that PSOs and SGEIs are not indistinguishable[27] and therefore the above definition is inaccurate.

The Commission's definition of SGEI requires an 'economic activity'. The term is to be understood from a competition law perspective.[28] The Court of Justice has held that an economic activity is any activity where the supply of goods and services is offered on the market.[29] Furthermore, the SGEI definition requires that the activity is in the general or public interest,[30] and not just in the private interest.[31] This raises the question of what is considered to be in the general or public interest, as there is no generally accepted definition of the concept of public interest. What is in the public interest can differ from one Member State to another, depending on the individual needs.[32] Nonetheless, public interest in relation to SGEIs should be understood as interests that are not related to competition policy objectives, but

[26] See also Wehlander (n 4) 184, who argues that 'entrustment need not – or rather may not – be part of the *definition* of the EU concept of SGEI. Entrustment constitutes one possible element in the chain of implementation of an SGEI, a specific element allowing to control the proportionality of public measures towards specific undertakings, for instance exclusive rights, funding or authorisations. Entrustment – in law or otherwise – can be necessary to prove the existence of an SGEI task at the level of specific undertakings, but it cannot be a general conditions for the existence of an SGEI […].' ibid; She points out, that if the entrustment act would be included in the definition, it would be not possible to fulfil both statutory provisions, the derogation contained in Article 106(2) TFEU and the principle laid down in Article 14 TFEU, since Article 14 TFEU does not require an entrustment act. ibid 186.

[27] See below, section 2.2.4.

[28] Neergaard (n 4) 23.

[29] Case C-475/99 *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] ECR-I 8089, para 19. The economic activity can be provided by any entity independent from its legal status or the way the entity is financed (definition of undertaking in the sense of competition law). ibid.

[30] For 'general interest' being one core element of SGEIs, see also Directive 2006/123/EC, Recital 70. Deringer sets 'general interest' and 'public interest' alike. Arved Deringer, *The Competition Law of the European Economic Community: a commentary on the EEC rules of competition (Articles 85-90)* (Commerce Clearing House 1968) 246 (as cited in Alan C Page, 'Member States, public undertakings and Article 90' (1982) 7 European Law Review 19, 28).

[31] Case T-289/03 *BUPA* [2008] ECR II-81, para 178.

[32] Susan T Charles and Adrian L Webb, *The economic approach to social policy* (Wheatsheaf 1986) 3.

include wider policy objectives (e.g. social or cultural).[33] The General Court has held in *SIC v Commission,* that a service (e.g. broadcasting) is assumed to be in the public interest when it has a vital role for society.[34]

Furthermore, the Commission's 2011 definition includes also a market failure element in the definition, by determining that public intervention can only take place if the 'overall public good' cannot be provided by the market or at a minimum level.[35] As shown in Chapter 1, market failure is one of the prerequisites for a service being classed as SGEI.[36] In the *Colt* case, the existence of market failure was assumed when the Member State could demonstrate that the service would not be provided by existing service providers in the near future.[37] The reasons behind the market failure (e.g. lack of private investment) are not to be taken into account when determining whether or not a service is to be regarded as SGEI.[38]

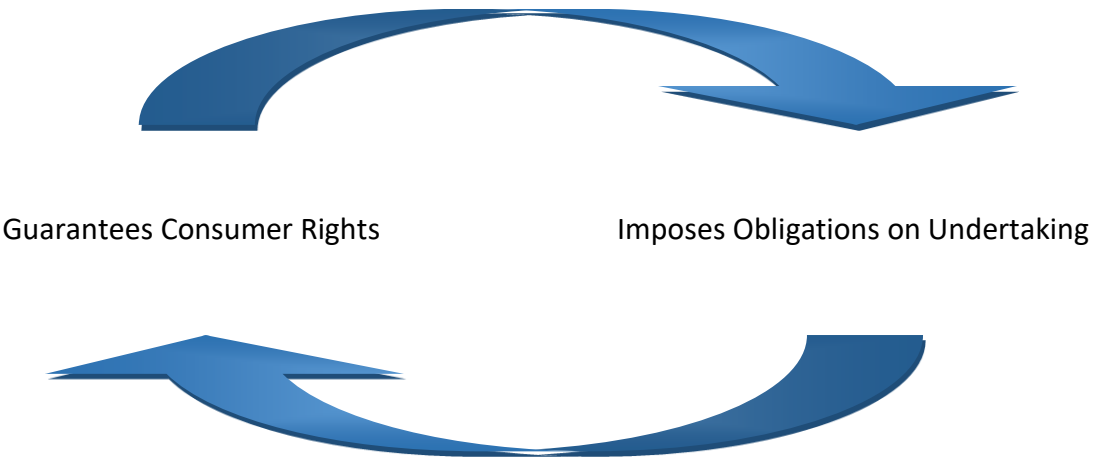
As shown above, Member States have wide discretion in what they determine as SGEIs and their discretion can only be limited if the Member State had made a 'manifest error'.[39] The General Court held in *BUPA*[40] that in order to pass the test, the Member State must show that is has satisfied the criteria laid down in the Treaty, and the Member State must explain why a service is classified as SGEI.[41]

According to the EU's approach as laid down in the Treaties and policy documents, SGEIs combine two contrasting concepts. They provide, on the one hand, rights for end-users (right of access to a basic service at a certain standard) but at the

[33] Constanze Semmelmann, 'Non-competition goals in the interpretation of Article 81 EC' (2008) 1 Global Antitrust Review 15, 17; Francis Kieran, 'A Separation of Powers Approach to Non-efficiency Goals in EU Competition Law' (2013) 19 European Public Law 189, 191.
[34] Case T-442/03 *SIC v Commission* [2008] ECR II-1161, para 197.
[35] European Commission, 'A Quality Framework for Services of General Interest in Europe' (n 9) 3, See, also Sauter (2008) (n 4) 179–80, who points out that an intervention would not make sense otherwise.
[36] See above, Chapter 1, section 1.1.
[37] Case T-79/10 *Colt Télécommunications France v European Commission* ECLI:EU:T:2013:463, para 153; Case C-180/98 *Pavlov and Others* [2000] ECR I-6451, para 75.
[38] *Colt* (n 36), para 160.
[39] Case T-289/03 *Olsen v Commission* (n 16), para 216.
[40] *BUPA* (n 31).
[41] ibid, paras 172, 175.

same time the concept of SGEIs imposes obligations and additional costs on the service provider (see Figure 1).

Figure 1 SGEIs – The combination of two contrasting concepts



2.2.3 The concept of Public Service Obligation (PSO)

After examining the concepts of Services of General Interest, Services of General Economic Interest and their connection with each other, the discussion now turns to the concept of Public Service Obligations (PSO), which can be found in a variety of EU laws and policies.[42]

Similarly to the above-mentioned concepts, there is no single accepted definition of Public Service Obligation and the concept of PSO seems to be the least clear concept out of the four. Consequently, the lines between the different concepts are blurred. For this reason, this section seeks to clarify the concept of PSO in a first

[42] Article 93 TFEU states that State aid is compatible with the internal market if it was awarded for the 'discharge of certain obligations inherent in the concept of a public service.' Article 93 TFEU is *lex specialis* to Article 106(2) TFEU (Recital 3 of 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) No 1191/69 and (EEC) No 1107/70 [2007] OJ L 315/1). The term PSO can further be found in secondary EU legislation, e.g. Energy Directives (Directive 2009/72/EC and Directive 2009/73/EC) and Regulation (EC) No 1370/2007.

step and then in a second step considers the relationship of PSOs to SGIs, SGEIs and USOs.

In 2003 and 2004, the Commission attempts to define PSO as:

> 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.[43]

This definition does not add much clarity to the concept of PSO. It does not state which 'specific requirements' a PSO must have – except for being essential to meet public interest objectives and the way in which they can be implemented. In its later 2011 Policy Paper, the Commission uses the term PSO in the SGI and SGEI definition but without explaining it.[44] The Commission then emphasises that the concept of PSO is mentioned in sector-specific legation (e.g. in transport and energy).[45]

Therefore, it will be examined whether or not secondary legislation can provide a more suitable definition.

While the concept of universal service is not mentioned by the 2009 Gas Directive,[46] both the Electricity Directive[47] and the Gas Directive contain the concept of Public Service Obligation. This speaks for the fact that, in energy, a distinction between USOs and PSOs is made. Both Energy Directives refer to PSOs as obligations concerned with consumer and environmental protection, in particular:

- Security, including security of supply;
- Regularity;
- Quality and price of supplies (reasonable tariffs);[48]

[43] Commission of the European Communities (n 16) 20; Commission (n 46) 23.
[44] See above, section 2.2.1. and 2.2.2.
[45] Commission, 'A Quality Framework for Services of General Interest in Europe' (n 9) 11.
[46] Directive 2009/73/EC. Nor is it mentioned in any of its preceding Directives (Directive 2003/55/EC and Directive 98/30/EC).
[47] Directive 2009/72/EC.
[48] Directive 2009/73/EC, Recital 47; Directive 2009/72/EC, Recital 50.

- Environmental protections, including energy efficiency, energy from renewable sources and climate protection.[49]

According to the 2009 Energy Directives, a further distinction within the PSO concept itself should be made following the two main objectives of consumer protection and environmental protection, on the one hand between PSOs that are limited to a certain geographical area or a Member State and, on the other hand, between PSOs that must be pursued beyond national borders in order to achieve the desired outcome, e.g. environmental protection.[50] The consequence for the concept of PSO is that it can be interpreted in a broad (here PSO Type I) and in a narrow (PSO Type II) sense.

In public passenger transport by road and rail the concept of PSO is defined as:

> a requirement defined or determined by a competent authority in order to ensure public passenger transport services in the general interest that an operator, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions without reward.[51]

The definition used in the Regulation EC No 1370/2007 refers to a different – a narrower – type of PSO than that used in the 2009 Energy Directives. It is similar to the definition used in the Commission's Green and White Paper. Since the concept in passenger transport by rail and road is restricted to the territory of the Member States, it must be seen as narrower than environmental protection. It will therefore be referred to in this chapter as PSOs Type II. Similar to the concept of USO, PSOs Type II in transport require some kind of market failure, and these will only be

[49] Directive 2009/73/EC, Article 3(2) and (11); Directive 2009/72/EC, Article 3(2) and (9).
[50] For example, by 2020 the EU aims for a reduction of greenhouse gas emissions by 20% compared to the levels in 1990 and an increase of energy from renewables and increase of energy efficiency of 20% each. The Union target have been translated into national targets. However, globally-effective environmental protection will only be achieved if the broader picture is taken into account. European Commission, 'Europe 2020 targets' (2011) <http://ec.europa.eu/europe2020/targets/eu-targets/index_en.htm>.
[51] Regulation (EC) No 1370/2007, Article 2(e).

introduced where the market does not provide the services sufficiently without some sort of compensation.

After having shown that the concept of PSO is to be understood in a broader as well as in a narrower sense, the constellations between PSOs (Type II) and SGEIs will be examined. The Commission does not appear to distinguish between the two concepts. From reading the definition of SGEI in the 2011 Communication Paper, it appears that the Commission uses the terms SGEI and PSO synonymously.[52] Another indication for this approach is the Commission's application of the *Altmark* judgment.[53] *Altmark* was concerned about compensation for fulfilling PSOs in the transport sector.[54] However, the Commission applies *Altmark* also in cases concerning the compensation for SGEIs before it continues with the derogation contained in Article 106(2) TFEU.[55] And it now seems to be good practice to use the ECJ's interpretation of the term PSO as used in *Altmark* as a synonym for the SGEI concept.[56] For example, in *BUPA*, the General Court accepted the parties' statement 'that the concept of public service obligation referred to in that judgment corresponds that of the SGEI […] and that is does not differ from that referred to in Article 86(2) EC [now Article 106(2) TFEU].'[57] The General Court then continues to

[52] ibid 3.

[53] Case C-280/00 *Altmark Trans* [2003] ECR I-7747. *Altmark* was about the compensation of a local bus company for the delivery of PSO. The Court developed four criteria which have to be met for a payment to be not regarded as State aid.

[54] For a detailed analysis of *Altmark* and its consequences for financing SGEIs, see below Chapter 5.

[55] Article 106(2) TFEU provides a derogation for undertakings entrusted with the delivery of SGEI from the application of the competition rules. Ølykke and Møllgaard (n 4).

[56] In two State aid decisions concerning energy projects in Malta and Lithuania, the Commission decided that the competitive market alone could not guarantee security of supply. Therefore and in accordance with Article 3(2) of Directive 2009/72/EC and Directive 2009/73/EC security of supply was considered to be a PSO. Without further discussion, the Commission replaced PSO with the term 'SGEI' to use the SGEI concept interchangeably for ensuring security of supply in national energy markets. Commission Decision, State aid SA.45779 (2016/NN) – Malta, C(2017) 2 final, paras 103-109; Commission Decision, State aid SA.36740 (2013/NN) – Lithuania, C(2013) 7884 final, paras 203-210. In the Hinkley Point Decision, the United Kingdom argued a national measure to support the generation of nuclear energy should be regarded as SGEI as it ensures security of supply. However, the Commission decided the market failure requirement was not fulfilled in this case and hence the measure did not constitute a SGEI. Commission Decision, State Aid SA.34947 (2013/C) – United Kingdom, C(2014) 7142 final cor, paras 305-315.

[57] *BUPA* (n 31), para 162; Case T-309/12 *Zweckverband Tierkörperbeseitigung v Commission* [2014] ECLI:EU:T:2014:676, para 72.
See for a more detailed discussion Wehlander (n 4) 175.

apply the four *Altmark* criteria to assess the compensation for the provision of an 'SGEI mission'.[58] *BUPA* was not an individual case. The application of the *Altmark* test in cases of SGEI compensation appears to be common practice now.[59] Hence, van de Gronden and Henning argue that the SGEI concept and the PSO concept coincide with each other.[60]

However, Wehlander disagrees with this interpretation of *BUPA*. She points out that the General Court distinguishes between, on the one hand, Public Service Obligations (private medical insurance obligations) that are regarded to be SGEI obligations and, on the other hand, private medical insurance services that are 'part of an SGEI mission'.[61] Both elements – obligations and services – are linked with each other but not identical.[62] Hence Wehlander believes that SGEIs are broader than PSOs.[63]

Furthermore, the wording of the two concepts – Service of General Economic Interest versus Public Service Obligation – does not support the Commission's approach. The Commission uses the term PSO not only for SGEI but also in relation to SGI. For example, in the 2011 Quality Framework on Services of General Interest, the term SGI is explained as services which are 'subject to specific public service obligations (PSO)'.[64] As discussed above, Services of General Interest is a broader concept than SGEI, as it covers Non-economic as well as Economic Services of General Interest. PSO (Type II) can therefore be found in non-economic Services and economic services and consequently should not used as merely as another word for SGEI.

[58] *BUPA* (n 31) paras 160, 162.
[59] Leigh Hancher and Pierre Larouche, 'The Coming Age of EU Regulation of Network Industries and Services of General Economic Interest' in Paul Craig and Gráine de Búrca (eds), *The evolution of EU law* (2nd edn, Oxford University Press 2011) 761. For example, Case C-399/08 P *Commission v Deutsche Post* [2010] ECR I-7831, para 41 and Commission State aid decisions, see below, Chapter V.
[60] van de Gronden (n 3) 236; Martin Henning, 'Public Service Obligations: Protection of Public Service Values in a National and European Context' in Erika Szyszczak and others (eds), *Developments in Services of General Interest* (T.M.C. Asser Press, Springer 2011) 191.
[61] *BUPA* (n 31) para 176.
[62] ibid, paras 174–175.
[63] Wehlander (n 4) 201–02.
[64] Commission, 'A Quality Framework for Services of General Interest in Europe' (n 9) 3.

2.2.4 The concept of Universal Service Obligation (USO)

Next, the concept of Universal Service Obligation (USO) and its relationship to SGEIs is explored. In contrast to SGIs or SGEIs, the concept of USO is not mentioned in the Treaties but has been introduced through EU secondary legislation and soft-law documents. There is no single definition for USOs, therefore this section analyses policy papers and European directives in order to establish common criteria of USOs. The Commission's 2003 Green Paper serves here as a starting point for the interpretation. According to the Green Paper, the concept of universal service is one of the elements that form SGEIs,[65] emphasising its dynamic and flexible role so it can react to societal, technological and economic changes and can be adapted to the respective needs of the Member States. It was specifically developed for regulated network industries, such as telecommunications, electricity and postal services.[66] The Commission also perceives it as a regulatory tool that can be used and revised pursuant to the 'different stages of liberalisation and market opening'.[67] The Commission explains the concept as a right to access a service 'at an affordable price and that the service quality is maintained and, where necessary, improved'.[68] The element of territorial coverage was added in the Commission's 2004 White Paper.[69] The Commission more or less maintained the definition of USOs but added that it considers the concept of Universal Service Obligations to be 'a type of PSO'.[70] According to the Commission USOs have the following elements in common: the right of access to a service, ubiquity, quality, affordability and, additionally, USOs may have sector-specific elements. Therefore, the definitions of universal service as set out in

[65] Commission of the European Communities (n 16) para 49.
[66] Commission of the European Communities (n 16) paras 50–52.
[67] ibid, para 52.
[68] ibid, para 50.
[69] Commission, 'White Paper on services of general interest' COM(2004) 374 final, 8.
[70] The Commission defines USO as 'a type of PSO which sets the requirements designed to ensure that certain services are made available to all consumers and users in a Member State, regardless of their geographical location, at a specified quality and, taking account of specific national circumstances, at an affordable price. The definition of specific USO is set at European level as an essential component of market liberalisation of service sectors, such as electronic communications, post and transport.' Commission, 'A Quality Framework for Services of General Interest in Europe' (n 9) 4.

the European directives for telecommunications, postal services and energy will be examined.

For telecommunications the Universal Service Directive describes USOs as services that Member States have to make

> available at the quality specified to all end-users in their territory, independently of geographical location, and, in the light of specific national conditions, at an affordable price.[71]

A similar description of universal service can be found in postal services. According to the Postal Services Directive:

> Member States shall ensure that users enjoy the right to a universal service involving the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users.[72]

In electricity, universal service is considered as the right of domestic customers and small enterprises

[71] Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications network and services (Universal Service Directive) [2002] OJ L 108/51, Article 3(1). No amendment to Article 3(1) was made by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 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 [2009] OJ L337/11.

[72] Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, [1998] OJ L 15/14, Article 3(1). No amendment to Article 3(1) were made by Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services [2002] OJ L176/21 and by Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services [2008] OJ L52/3.

> to be supplied with electricity of a specified quality within their territory at reasonable, easily and clearly comparable, transparent and non-discriminatory prices.[73]

The Gas Directive does not contain the obligation for Member States to guarantee universal service. The reason for this is that the supply of gas is particularly expensive and can be substituted by other forms of energy.[74]

The definitions – general and sector-specific – of USOs differ slightly from each other but all definitions have in common that they guarantee a right of access to a particular service, and refer to a certain quality, affordability and territorial coverage.[75] In electricity the provision of universal service is restricted to consumers and undertakings with less than 50 employees and an annual turnover of not more than EUR 10 million (small enterprises), while in post and telecoms it is open to all users.

The definitions show that the concept of USO likewise combines the guarantee of consumer rights[76] on the one hand, and, on the other hand, it imposes obligation on the service provider.[77] Hence it may appear that the terms SGEI and USO can be used interchangeably. Therefore the relationship between the concept

[73] Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55, Article 3(3). The Electricity Directive does not explicitly mention affordability but by ensuring 'transparent and non-discriminatory pricing', anti-competitive behaviour will be prevented.
[74] Michael Harker, Antje Kreutzmann and Catherine Waddams, *Public service obligation and competition* (February 2013) <http://www.cerre.eu/publications/public-service-obligations-and-competition> 30. In contrast to this, Sauter and Wehlander believe the concepts of USOs and SGEIs also exist in the natural gas sector. Sauter (2008) (n 4) 177; Wehlander (n 4) 199. However, the concepts are not mentioned in the 2009 Gas Directive (Directive 2009/73/EC Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L211/94) and therefore this chapter discusses obligations imposed on the natural gas sector under the concept of Public Service Obligations. See, section 2.2.3.
[75] Harker, Kreutzmann and Waddams (n 51) 4.
[76] Davies and Szyszczak point out that the concept of USOs has evolved from a concept of protecting vulnerable consumers to a complex concept combining 'consumer, fundamental rights and citizenship rights'. Jim Davies and Erika Szyszczak, 'Universal Service Obligations: Fulfilling New Generations of Services of General Economic Interest' in Erika Szyszczak and others (eds), *Developments in Services of General Interest* (T.M.C. Asser Press, Springer 2011) 161.
[77] See above, Figure 1.

of Services of General Economic Interest and the concept of Universal Service Obligation will be discussed next.

The interpretation of these two concepts based on the wording above suggests that SGEIs and USOs are not identical. Otherwise there would have been no reason to introduce two different terms. If the concepts are not identical, then what type of relationship does exist between them? Sauter, for example, argues that USOs are a sub-set of SGEIs. SGEI is the broader concept because it also includes essential services that are not required to provide territorial coverage.[78] The sub-category approach is supported by several European policy documents. Universal service is, likewise, listed as one of the elements of a Service of General Economic Interest in the Commission's 2003 Green Paper and the 2004 White Paper.[79] In the 2011 adopted Communication, the Commission emphasises the hierarchy between these two concepts even more strongly by defining USO as 'a type of PSO'.[80] For a better understanding and to add clarification, the word PSO should be substituted with SGEI in the Commission definition. It appears that the Commission uses the terms SGEI and PSO interchangeably in its 2011 policy paper. However, it was shown above when the term PSOs is discussed[81] that concepts of Services of General Economic Interest and Public Service Obligations are not identical.

Universal Service Obligations, e.g. in telecommunications, postal services and electricity, are explicitly listed in European Directives.[82] They are more explicit and thus narrower than SGEI obligations. In the case of SGEIs, Member State have a certain degree of discretion in how they define the scope and how they provide these, subject to control by the Commission only in the case of manifest error.[83] However, the discretion of the Member State no longer exists, in cases where a Universal

[78] Sauter (2015) (n 4) 15–17; Sauter (2008) (n 4) 179.
[79] Commission of the European Communities (n 16) 16; Commission (n 46) 4.
[80] Commission, 'A Quality Framework for Services of General Interest in Europe' (n 9) 4.
[81] See, section 2.2.3.
[82] For example, USOs in postal service determine the minimum days of delivery and collection of mail or in telecommunications access to a fixed network. See Chapter 3 more for a detailed discussion on the nature and scope of USOs in different sectors.
[83] *BUPA* (n 31) paras 100–101.

Service Obligation is prescribed by EU law.[84] By regulating a minimum scope of USOs in secondary EU legislation, the Union establishes ex-ante control, while SGEIs are subject to ex-post control by the Commission.

Taking the wording and the interpretation of the European policy documents and secondary legislation into account, this suggests that SGEIs and USOs are not identical concepts but that USOs are a sub-category of SGEIs.

This leaves us with identifying the relationship between USOs and PSOs (Type II). The analysis of the sector-specific legislation has shown that the two concepts are not identical. Even on the assumption that there is only one type of PSO, the concept of PSO is broader than that of USOs. This is supported by the 2009 Electricity Directive, which contain the USO to supply household and small enterprises with electricity, while PSOs relate to the objective of security of supply, which affects not just one consumer but the entire Member State. This seems to be in line with the Commission's approach towards the two concepts, [85] taking into account that the Commission referred to USO as 'a type of PSO'[86].

2.3 Conclusion

The reason behind having concepts that guarantee access to essential services was to balance the potentially negative effects of liberalisation of formerly monopolised markets in the European Union by creating a safety-net for certain vulnerable consumer groups.[87] Another aim was to create legal certainty for service providers – incumbents and new entrants – by establishing the scope of potential obligations and

[84] Jim Davies and Erika Szyszczak, 'Universal Service Obligations: Fulfilling New Generations of Services of General Economic Interest' in Erika Szyszczak and others (eds), *Development in services of general interest* (T.M.C. Asser Press, Springer 2011); Case C-206/98 *Commission v Belgium* [2000] ECR I-3509, para 45.

[85] See also Sauter (2015) (n 4) 14–16, who argues that USOs are not necessarily the same and he considers USOs rather as a sub-set of PSOs.

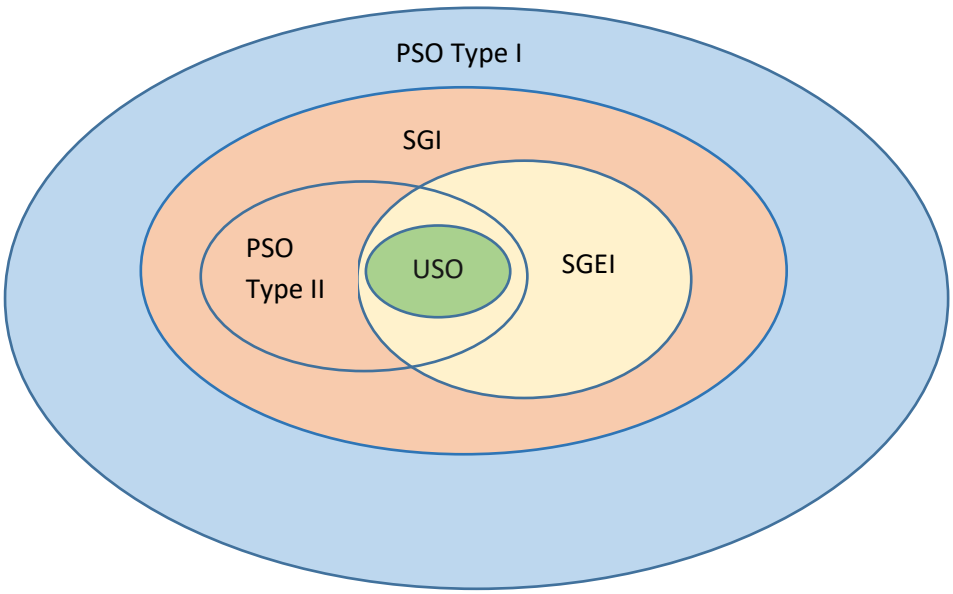
[86] Commission, 'A Quality Framework for Services of General Interest in Europe' (n 9) 4.

[87] Matthias Finger and Dominique Finon, 'From "service public" to universal service: the case of the European Union' in Matthias Finger and Rolf W Künneke (eds), *International Handbook of Network Industries: The Liberalization of Infrastructure* (Edward Elgar Publishing 2011) 55–57.

the role of regulation and the involvement of public authorities in liberalised markets.[88] The Commission strove to create more legal certainty by establishing different concepts and defining them.[89] So far, there is no generally accepted definition for each of the concepts – SGI, SGEI, USO and PSO. Despite several attempts by the Commission that aim to provide more clarification, the lines between the different concepts to provide access to essential services remain blurred. It is often claimed that the reason for a lack of a definition, and thus a lack of clarity, is the evolving nature of these concepts, and having no fixed definition allows them to be adapted according to societal and technological needs, with Member States able to maintain a certain level of control over their social policies.[90]

It has been shown that the concepts are not identical but, rather, overlap to a certain extent, and that a particular order exists between them. Figure 2 shows the relation of the five concepts – PSO Type I, SGI, SGEI, PSO Type II and USO – to each other.

Figure 2 Relationship between the five different concepts: PSO Type I, SGI, SGEI, PSO Type II and USO



[88] Commission of the European Communities (n 16) 4–6.
[89] For instance, Commission of the European Communities (n 16); Commission (n 46); Commission, 'A Quality Framework for Services of General Interest in Europe' (n 9).
[90] Lenaerts (n 4) 1264.

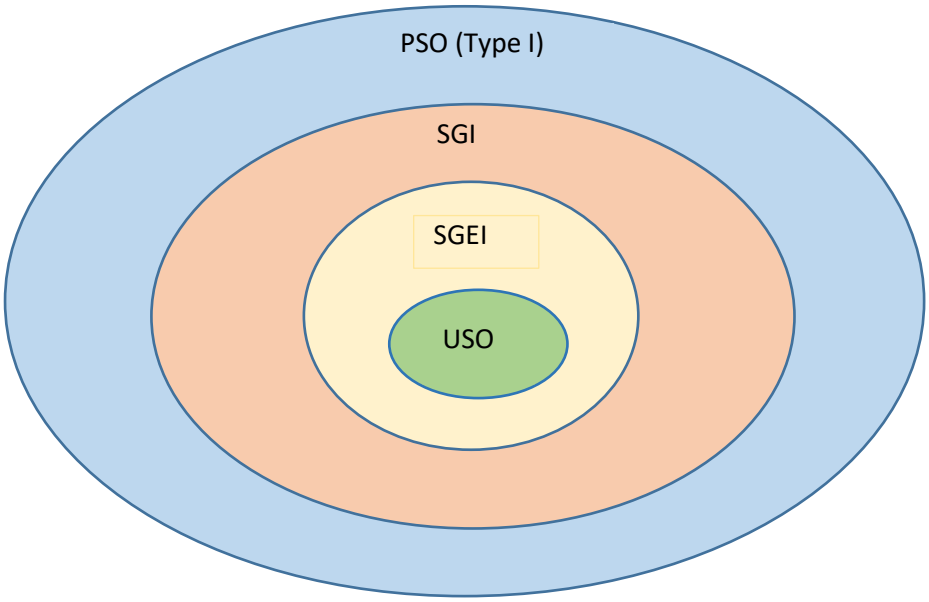
As Figure 2 shows, PSO Type I is the broadest of all concepts and is concerned with wider policy objectives that are not restricted to a geographical area, such as environmental protection. Although these policy objectives contain an overall public good, they do not offer access to 'an identifiable service that may be consumed by individual customers/clients'.[91] The other four concepts – SGI, SGEI, PSO Type II and USO – are all concerned with providing access to essential services, with the concept of Universal Service Obligation being the narrowest one. The concept of USO is not just the narrowest of all concepts but it is also the clearest, as the USOs are defined in secondary EU law.

The current system does not create the desired legal certainty for stakeholders. It is not easily accessible as it is not clear where the boundaries lie, especially between SGEI and PSO Type II. However, it also appears that the differentiation between the two concepts is less and less relevant in practice as the European Courts, the Commission as well as other parties regard the concepts of PSOs(Type II) and SGEI as alike.[92]

Having shown that the current existing regulatory framework is lacking clarity, a solution would be to simplify the regulatory framework at European level in order to create legal certainty, in particular for stakeholders. Retaining all these different concepts is unnecessary. The most suitable solution appears to be, therefore, to dissolve the frontiers of the concept of PSO (Type II). This would result in a simpler and clearer model (Figure 3). The term PSO should only be used for broader Type I obligations. The concept of USO can be maintained as their regulatory framework is set out in secondary EU law.[93]

[91] Erika Szyszczak, 'Services of General Economic Interest and State Measures Affecting Competition' (2016) 7 Journal of European Competition Law & Practice 501, 504. Szyszczak questioned whether a Member State's task of land acquisition for nature conservation can be regarded as SGEI.
[92] For example, *BUPA* (n 31) para 162; van de Gronden (n 3) 236.
[93] The scope of Universal Service Obligations differs across sectors. The nature of USOs in postal services and telecommunication is addressed in Chapter 3 of this thesis.

Figure 3 Simplified version of concepts of essential services



One potential reason for the Commission's unwillingness to add more clarity to the current legal framework could be of a more practical nature. The current approach has not just an effect on the definition of the service but also on its compensation.

By blurring the lines between the different concepts, it is ensured that the Member States are able to retain more autonomy over national social policy issues and can ensure the provision of SGEIs according to their needs. However, awarding this level of autonomy to Member States allows the Commission at the same time to exert greater ex-post control over them when applying the State aid regulatory framework.[94]

By using PSOs and SGEIs interchangeably, the Commission and the General Court introduced the *Altmark*[95] criteria into the compensation assessment of SGEIs. One particular aspect of *Altmark* is the fourth criterion, which requires a public procurement procedure or the comparison of the service provider with an efficient benchmark undertaking in order to increase competition for the market. However,

[94] See also Chapter V.
[95] *Altmark* (n 74). For a detailed discussion on the applicability of the *Altmark* test and its relation to Article 106(2) TFEU for financing SGEIs, see below Chapter 5.

the *Altmark* conditions are only fulfilled in few cases. *Altmark* is applied within the Article 107(1) TFEU, which has the effect that the compensation measure then often constitutes State aid, and the compatibility assessment is continued under the scrutiny of the Commission. The Commission can assess the compatibility of the compensation measure with the internal market and ensure that the distortive effect is kept to a minimum.[96]

If one assumes that this kind of compromise actually takes place, it raises the question of whether such a practical consideration should actually be accepted at the expense of legislative clarity and, ultimately, legal certainty. This would, in the long-run, contradict the Commission's long-standing policy decision to create clarity as stated in its policy papers.[97]

[96] However, the majority of cases are either exempted under Article 107(2) or (3) TFEU or justified under Article 106(2) TFEU. Hancher and Larouche (n 59) 761–62.
[97] For example, see Commission, 'A Quality Framework for Services of General Interest in Europe' (n 9) 5; Commission of the European Communities (n16) paras 7, 83, 88.

Chapter 3

Adjusting the scope of Universal Service Obligations in postal and telecommunications - A necessary evil?[1]

3.1 Introduction

Having discussed in Chapter 2 the different concepts for the protection of access to essential services at European level, this chapter provides a comparative overview of the universal postal services and universal service in telecommunications at European level as well as at Member State level. It therefore examines closely the role of Universal Service Obligations (USOs) in these two communications sectors from different angles in order to conclude with a policy recommendation.

The focus of this chapter is on the role of USOs in postal service and telecommunications. These two communications markets play an indispensable role in everyday life. And although the definition of USOs may vary from sector to sector, they share certain common elements, such as: the right of access to basic services, a certain (minimum) level of quality, territorial coverage and affordability.[2] They prevent certain consumers from social exclusion. However, the sustainability of these obligations has come under scrutiny in the last years. Both markets have evolved due to the emergence of new technologies. The growth of, e.g. mobile technology and broadband, influenced users' behaviour and demand. While the demand for these new services is growing, that for conventional communications services, e.g. letters and public pay phones, is declining, and they are often substituted with digital

[1] Parts of this chapter have been previously published in a Report for the Centre on Regulation in Europe (CERRE). See, Michael Harker, Antje Kreutzmann and Catherine Waddams, 'Public service obligation and competition' (February 2013)

[2] See, for example, Chapter II, section 2.2.4.; Harker, Kreutzmann and Waddams (n 1) 4; H. Cremer and others, 'Universal Service: An Economic Perspective' (2001) 72 Annals of Public and Cooperative Economics 5;

alternatives, such as email and text messages. This reveals new issues from financing to maintaining social inclusion, in particular for elderly and disabled consumers.

For the last decade, the scope of universal service in these two sectors has been the subject of consultations both at European and at national level. For example, the Commission reviewed the scope of universal service in telecommunication in 2005/06, 2008 and 2011, and came to the conclusion 'that there was no need to change the basic principles or scope of the rules or to include mobile telecommunications services or broadband connections at EU level.'[3] In contrast, a recent review in the United Kingdom on broadband universal service obligations resulted in the intention of the UK Government to include broadband within the scope of universal service.[4] Similar reviews took place in the postal sector. An inquiry of the German national regulatory authority revealed that it may be necessary to adjust the regulatory framework in the future, in order to secure the sustainability of universal service in an era of a declining letter market.[5] In contrast, a review undertaken by Ofcom concluded that the regulatory authority did not believe 'the provision of the universal postal service is under threat'.[6]

The aim of this chapter is to contribute to the important discussion of whether or not the current nature of Universal Service Obligations causes a problem for the sustainability of the delivery of universal service in the long-term. The underlying hypothesis of this chapter is that, due to the growth of electronic communications the current scope of universal service obligations is dated and may no longer be suitable. It will provide a policy recommendation drawing on the consultation of service providers operating in the markets.

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[3] European Commission, 'Universal Service' (9 May 2017) <https://ec.europa.eu/digital-single-market/en/content/universal-service-0>.
[4] Ofcom, 'Designing the broadband universal service obligation - Final report to Government' (7 April 2016) <https://www.ofcom.org.uk/consultations-and-statements/category-1/broadband-uso>.
[5] Bundesnetzagentur, 'Herausforderungen des Post-Universaldienstes Vorbereitung einer Stellungnahme gemäß § 47 Abs. 1 Satz 2 Postgesetz' (Impulspapier, 2014) 5–6, <http://www.bundesnetzagentur.de/SharedDocs/Downloads/DE/Sachgebiete/Post/Verbraucher/Universaldienst/Impulspapier.pdf?__blob=publicationFile&v=1>.
[6] Ofcom, 'Review of end-to-end competition in the postal sector' (Statement, 2 December 2014) 5, point 1.9 <http://stakeholders.ofcom.org.uk/binaries/post/end-to-end-statement/end-to-end.pdf>.

Section 3.2. of this chapter provides an extensive legal comparison of the regulatory framework governing Universal Service Obligations at European level and at national level. In section 3.3., the effects of technological progress and changing consumer behaviour in relation to the nature of universal service is discussed. Section 3.4. presents results from a questionnaire concerning the role of USOs in the two sectors. The questionnaire includes responses from former incumbents and new entrants. Section 3.5. concludes by providing a critical outlook of the evolution of the concept of universal service in telecommunications and post in the European Union.

3.2 Legislative Framework of Universal Service Obligations in postal services and telecommunications[7]

This section provides a comparative analysis of the scope of universal service in post and telecommunications at European level and across national level. It summarises the European and national legal frameworks. Then it discusses the scope of universal service for the two sectors at European level and its transposition into national law in detail for four EU Member States (Belgium, France, Germany and the United Kingdom).

3.2.1 Methodology for the case study

Following the decision on a comparative approach between the European Union and Member States, there were several reasons why these four Member States were selected.

First, the choice of the four Member States is based on the original 2013 Report on 'Public service obligations and competition' conducted for the Centre on Regulation in Europe (CERRE).[8] CERRE is an independent and multi-disciplinary research centre that follows a cross-sectorial approach. Members of CERRE are

[7] Section 3.2. is based on the author's contribution in Harker, Kreutzmann and Waddams (n 1).
[8] Harker, Kreutzmann and Waddams (n 1).

universities, regulatory authorities and operators in network industries across Europe. The study received the financial support of several CERRE members from Belgium, France, Germany and the United Kingdom. Nevertheless, this did not have an impact on the outcome of the report. The academic neutrality and independence of the report was protected.

Second, from a comparative point of view the Member States are discussed because of their different functional approach to public services.[9] In continental European countries, especially France, the concept of public services plays a more significant role than in the United Kingdom. In France, the concept of public services is firmly anchored in the legal national framework (e.g. constitution), while in the United Kingdom, public service objectives were, rather, enacted through political means.[10] Furthermore, it is interesting to see whether the geography of a Member State makes a difference. The geographical size of France is approximately two and half times the size of the UK. The density of the population is another important factor. In countries, like the UK, with large parts of remote areas the costs for maintaining a universal service network are higher than in, for example, France that is more evenly populated. [11] For these reasons, one can assume that the United Kingdom only implemented the minimum level of universal service obligations into national law.

At first sight, France and Germany appear to be very similar. Both are continental countries with a strong social security and public service background, but Germany has changed its approach towards social protection and has relaxed the burden on businesses to provide it. It would be interesting to see whether this change

[9] Jaakko Husa, 'Comparative Law, Legal Linguistics and Methodology of Legal Doctrine' in Mark van Hoecke (ed), *Methodologies of legal research: What kind of method for what kind of discipline?* (Volume 9, Hart Publishing 2013) 216–217.
[10] Tony Prosser, *The limits of competition law: Markets and public services* (Oxford University Press 2005) 64, 96-97.
[11] Alex Plant and Harry Bush, 'The postal conundrum: how to protect consumer interests in a universal service in declining market' (Presentation at UEA Centre for Competition Policy, 25 April 2014).

is reflected in Germany's scope of universal service in post and telecommunications.[12]

Belgium provides an interesting case study, as its size and population are considerably smaller than those of the other three countries. It represents therefore the needs of the smaller Member States and the comparison will show whether these two factors have an influence on the transposition of European law.

After identifying the relevant Member States for the case study, a doctrinal study collecting information on the nature of USOs, the universal service provider, the beneficiary group of consumers, the monitoring body, the role of costs of supply for consumers as well as the role of costs of supply for undertakings, has been conducted to establish the legislative framework governing universal service in postal service and telecommunications in order to identify their functional approach to universal service in the two communications sectors is compared.

3.2.2 Overview of European and national legislation for universal service

Table 1 provides an overview of the European Directives governing universal service in post and telecommunications and the existing regulatory framework for the discussed Member States.

[12] Alain Fabre, 'Labour in France and Germany: opposite strategies' (3 December 2012) <http://www.robert-schuman.eu/en/european-issues/0260-labour-in-france-and-germany-opposite-strategies>.

Table 1 Relevant legislation for USOs in telecommunications and post at EU level and in Belgium, France, Germany and the UK[13]

	Telecommunications	Post
European Union	Directive 2002/22/EC (Universal Service Directive), amended by Directive 2009/136/EC	Directive 97/67/EC (Postal Services Directive) amended by Directive 2002/39/EC, amended by 2008/06/EC
Belgium	The amended Electronic Communications Act (Loi relative aux communications électroniques)	The amended Law of 21 March 1991 on the reform of certain public commercial undertakings (The 1991 Act) (21 MARS 1991 – Loi portant réforme de certaines entreprises publiques économiques, adaptée à la loi du 13 juin 2005 relative aux communications électroniques)
France	Postal and Electronic Communications Act (Code des postes et des communications électroniques)	Postal and Electronic Communications Act (Code des postes et des communications électroniques)
Germany	Art. 87f (1) GG (Grundgesetz – Basic Law) Telecommunications Act (Telekommunikationsgesetz – TKG)	Article 87f (1) GG (Grundgesetz Basic Law) Postal Act (Postgesetz – PostG) Postal Universal Service Ordinance (Post-Universaldienstverordnung - PUDLV)
United Kingdom	Communications Act 2003 (CA) The Electronic Communications (Universal Service) Order 2003 as amended by Order 2011	Postal Services Act 2011 The Postal Services (Universal Postal Service) Order 2012 as amended by Order 2013

As Table 1 illustrates, the European legislator chose directives to govern USOs in both sectors. Directives offer some flexibility. They must be transposed into national law within a specific period of time; however, they are only binding to the desired outcome, and Member States can, within certain limits, determine the way in which they want to achieve that objective.[14] By choosing directives as legal instruments, the European legislator allows Member States to exercise a certain degree of discretion, and acknowledges that Member States know the needs of their citizens

[13] Table 1 is based on the author's own and original work in Harker, Kreutzmann and Waddams (n 1) 14–18.

[14] Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C115/47 (hereinafter TFEU), Article 288.

as well as technological and geographical conditions that may influence the scope of USOs. The discretion may, however, be reduced, depending on the level of specification set out in directives.[15] The Union can therefore ensure that a harmonised minimum standard of universal service is guaranteed across all Member States. In order to establish how much 'freedom' the Member States possess, the specific USOs are outlined next.

3.2.3 USOs in telecommunications at European and national level[16]

First, this section summarises the results of the in-depth analysis of European and national legislation governing USOs in telecommunications; a comparative overview is then provided on how the four discussed Member States have transposed the European Directive into national law.[17]

The Universal Service Directive as amended by Directive 2009/136/EC requires Member States to provide: access at a fixed location to a public communications network, directory enquiry services, access to public payphones and the provision of special measures for disabled end-users.[18] The fulfilment (e.g. quality and affordability) of these obligation is to be monitored by the national regulatory authority.[19] Member States may designate one or more universal service provider.[20] According to the Directive, the universal service provider is expected to carry the costs for the provision of USOs, and can only claim reimbursement of the net costs from a public compensation fund and/or by sharing the net cost between different

[15] Case C-206/98 *Commission v Belgium* [2000] ECR I-3509, para 45.
[16] This section is based on the author's own and original work in Harker, Kreutzmann and Waddams (n 1) 19.
[17] For a detailed comparative overview of USOs in telecommunications at European level and in Belgium, France, Germany and the United Kingdom, see Annex 1, Table 3.
[18] Consolidated Version of Directive 2002/22/EC of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services [2002] OJ L108/51 as amended by Directive 2009/136/EC [2009] OJ L337/11, USD(C) [Consolidated Version of the Universal Service Directive – USD(C)], Articles 4 – 7.
[19] For example, USD(C), Article 9 and 11.
[20] USD(C), Articles 8(1) of the USD(C).

providers under the requirement that the provision places an unfair burden on the undertaking.[21]

All four Member States – Belgium, France, Germany and the UK - implemented the minimum requirements but have not adopted significant additional obligations. So all Member States ensure the access to a publicly fixed telephone network that allows users to make and receive calls. Interestingly, under Belgian and French law, it is not allowed to completely disconnect a user from the telephone network even in the case of non-payment. The end-user must still be able to receive calls, and to make telephone calls to emergency services and other free services. In France, the maintenance of the restricted service is limited to a period of up to one year.[22] This requirement of USOs highlights their role of USOs as a protective measure to prevent social exclusion.

It can be deduced from the comparative overview of the legislative frameworks that, at European and at national level, another function of USOs is to guarantee internet access but none of the discussed Member States has (yet)[23] introduced specific data rates: instead, the description of universal internet access is rather broad. For example, at European level the provision of 'functional internet access, taking into account prevailing technologies used by the majority of subscribers and technological feasibility'[24] is sufficient, while the original Universal Service Directive limited the provision of 'functional Internet access' to 'single narrowband network connections'.[25] Even though high-speed Internet access is not

[21] USD(C), Article 12 and 13.
[22] Code des postes et des communications électroniques (French Postal and Electronic Communications Act), Article L35-1; Loi relative aux communications électroniques, Article 119.
[23] The United Kingdom considers including high-speed broadband within the scope of USOs at national level. Ofcom has developed three different speed options (download speed of 10Mbit/s, download speed of 10Mbit/s and upload speed of 1Mbit/s or download speed of 30Mbit/s and upload speed of 6Mbit/s). Ofcom, 'Achieving decent broadband connectivity for everyone: Technical advice to UK Government on broadband universal service' (16 December 2016) 16 <https://www.ofcom.org.uk/__data/assets/pdf_file/0028/95581/final-report.pdf>.
[24] USD(C), Article 4(2).
[25] A single narrowband network connection referred to a data rate of 56 kbit/s and excluded more than one connection that could have been used at the same time. Directive 2002/22/EC (Universal Service Directive), Recital 8. Article 32 of the Universal Service Directive offered the possibility to

part of the scope of universal service at European level, Member States are entitled to include broadband access within the scope of their national universal service, following the change resulting from the 2009 amending Directive.[26]

Furthermore, in Belgium and France emergency calls are free,[27] whereas in Germany and the UK emergency calls must be free of charge only from public pay phones.[28]

In all four Member States USOs in telecommunications include all types of end-users and must be affordable, but Belgium, France and the United Kingdom provide social tariffs or extra special tariffs for people on low income or with special needs.[29] In Germany, price is considered to be affordable if it does not exceed the real price of the telephone services, which is based on the average price paid by a household located outside a city with more than a 100,000 inhabitants.[30]

According to the Universal Service Directive,[31] Member States may designate one or more undertakings as universal service provider. All discussed Member States, with the exception of Germany, have designated at least one undertaking as universal service provider, while Germany relies on the market and only in the case of market failure can an undertaking, under certain conditions, be obliged by the national regulatory authority to provide universal service.[32]

This section shows that the European Universal Service Directive and the national legislation increase consumer protection by ensuring access to essential

extend universal service and include internet access at a higher rate but without being permitted to introduce a compensation mechanism that involved contributions from 'specific undertakings'.

[26] For more detailed information on the topic "Broadband and its inclusion within the USOs" and the effects, see Chapter IV, Sections 4.4.1.

[27] Code des postes et des communications électroniques, Article L35-1; Loi relative aux communications électroniques, Article 107; BIPT, 'Short numbers' <http://www.bipt.be/en/consumers/telephone/numbering/short-numbers>.

[28] Telekommunikationsgesetz (TKG), section 78; Universal Service Order, Schedule 4.

[29] Loi relative aux communications électroniques, Article 74; Universal Service Order, Schedule 5(2); Code des postes et des communications électroniques, Article L35-1.

[30] TKG, section 79.

[31] USD(C), Article 8(1).

[32] For a more detailed overview of USOs in postal services at European level and in Belgium, France, Germany and the UK, see below, Annex 1, Table 4.

services throughout the entire territory at affordable prices, creating a safety-net for the end-users. The implementation of the European 2002 and 2009 Telecommunications Directives resulted in a very similar regulatory framework across the four Member States.[33]

3.2.4 USOs in postal services at European and national level[34]

As in the preceding section, a summary of the results of the in-depths review of the European and national legislation governing universal postal services is provided, and a comparative overview of the implementation of the Postal Services Directive into the national legislation of the discussed Member States is given.[35]

In the EU, before the liberalisation of the postal sector, universal postal services were provided by a public service provider. Universal service was financed by granting exclusive rights to the incumbent.[36] The concept of universal postal services has been maintained as safety-net in the European Postal Services Directives[37] to counter-balance the potentially negative effects of liberalisation, such as social exclusion.[38] As in telecommunications, the Postal Services Directives put a

[33] For a detailed overview, see below Annex 1, Table 3.
[34] This section is based on the author's own and original work in Harker, Kreutzmann and Waddams (n 1) 25
[35] For a detailed comparative overview of USOs in telecommunications at European level and in Belgium, France, Germany and the United Kingdom, see Annex 1, Table 4.
[36] See, for example, Commission of the European Communities, 'Green Paper on the Development of the Single Market for Postal Services: Annexes' COM(91) 476 final, 272.
[37] Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (European Parliament and of the Council) [1998] OJ L15/14 as amended by Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services (European Parliament and of the Council) [2002] OJ L176/21 as amended by Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services 20 February 2008 (European Parliament and of the Council) [2008] OJ L52/3.
[38] For a more detailed discussion on the evolution of postal universal service during the liberalisation process, e.g. the gradual opening of the market and gradual abolition of the reserved markets, see Chapter 4, Section 4.4.2, in particular 4.4.2.1.

particular emphasis on the 3 'As': accessibility, availability and affordability of services.

First, USOs as set out in the European Postal Services Directives are summarised, and then a comparative overview of universal postal service at national level (Belgium, France, Germany and the United Kingdom) is provided.

According to the Postal Services Directive, part of the minimum level of universal postal service obligations at European level, is:

- To provide a minimum service of five working days a week;[39]
- To provide one clearance and one delivery of postal items a day;[40]
- To ensure a sufficient density of contact and access points, including post offices and letter boxes;[41]
- To ensure the clearance, sorting, transport and distribution of postal items up to 2 kilograms and postal packages up to 10 kilograms;[42]
- To provide services for registered items and insured items;[43]
- To cover national and cross-border services.[44]

Member States are entitled to use public procurement rules to finance universal postal services.[45] The universal service provider may request external compensation for its net cost that occurred as a result of fulfilling the USOs, if the cost constitutes an unfair financial burden. The compensation can be organised in the form of public funds, or by sharing the net cots between multiple postal service

[39] Consolidated Version of Directive 97/67/EC of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service [1998] OJ L15/14 as amended by Directive 2002/39/EC [2002] OJ L176/21 as amended by Regulation (EC) 1882/2003 [2003] OJ L284/1 as amended by Directive 2008/6/EC [2008] OJ/L52/3] – PSD(C), Article 3(3).
[40] PSD(C), Article 3(3).
[41] PSD(C), Article 3(2).
[42] PSD(C), Article 3(4).
[43] PSD(C), Article 3(4).
[44] PSD(C), Article 3(7).
[45] PSD(C), Article 7(2).

providers and/or users of postal services.[46] The national regulatory authorities are responsible for monitoring the fulfilment of the USOs.[47] The Postal Services Directives allows Member State to designate one or more undertakings to provide all or only parts of universal postal service, the designation process must take into account efficiency criteria.[48] However, Member States are also free to deliver universal postal service through the market.

The transposition of universal postal services into national law varies slightly across the four Member States. For example, according to Belgian Law, universal postal services must be provided at least five days a week, excluding Sundays and public holidays, while in France and Germany they must be provided every working day,[49] and the UK distinguishes between letters (Monday to Saturday) and parcels (Monday to Friday).[50] Services related to parcels exceed the minimum requirements of the Postal Services Directive in three countries: while Belgium has only included the national collection, sorting, transport and delivery of postal packages up to 10 kilograms,[51] the other three countries include the maximum weight limit as allowed under the European Postal Services Directive for postal packages up to 20 kilograms.[52]

The German Postal Act and Postal Universal Service Ordinance provide a very detailed legislative regulatory framework about the minimum scope of universal postal services. It regulates, for example, even the number of postal outlets and post boxes and the distance to them.

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[46] PSD(C), Article 7(3).
[47] PSD(C), Article 2(18).
[48] PSD(C), Recital 30 and Article 4(2).
[49] In both countries, Saturday is regarded as a working day. Judicaël Fouquet, 'Employees' right to holidays in France' (16 July 2014) <http://www.globalworkplaceinsider.com/2014/07/employees-right-to-holidays-in-france/>; Deutsche Anwaltauskunft, 'Ist Samstag ein Werktag?' (21 November 2014) <https://anwaltauskunft.de/magazin/leben/freizeit-alltag/818/ist-samstag-ein-werktag/>.
[50] With the exception of public holidays.
[51] Loi portant réforme de certaines entreprises publiques économiques, Article 142; However, Belgian's universal postal services includes the delivery of parcels up to 20 kg from other Member States as required by Article 3(5) of the Postal Services Directive (Consolidated Version).
[52] Code des postes et des communications électroniques, Article L1; Postal Services Act, section 31 in conjunction with section 33(1)(a); Post-Universaldienstleistungsverordnung (PUDLV), section 1(1).

According to Article 12 of the Postal Services Directive, the prices for universal services must be affordable for all users independent of their geographical location, cost-oriented, transparent and non-discriminatory. Furthermore, Member States have the discretion to set out uniform tariffs, but this does not prevent universal service providers from concluding individual price agreements with users, nor from having special tariffs for bulk mail or businesses.[53]

The legislation of each of the four Member States allows for compensation of the net-costs, if the provision of universal postal services constitutes an unfair burden on the service provider.[54] France and Germany opted for sharing mechanisms, while in the UK contributions can come through a compensation fund or paid by users.[55] The UK Postal Services Act allows as an alternative to financial contributions a review of the scope of USOs or a procurement determination by the regulatory authority Ofcom.[56]

It has been shown that national USOs in all four Member States slightly exceed the minimum requirements set out by the Postal Services Directive. However, the prescribed detail of USOs by legislation varies between the four Member States.[57] All Member States have included the requirement of affordable and uniform tariffs.[58] However, according to the French legislation under certain conditions, e.g. over a certain weight limit, the requirement for uniform prices does not apply for overseas French territories.[59] In Belgium, the universal service provider can apply special tariffs to businesses and bulk mail and under UK law the universal service provider is required to provide universal service for blind and partially sighted users for free;

[53] PSD(C), Article 12.
[54] Harker, Kreutzmann and Waddams (n 1) 25.
[55] Postal Services Act, section 46(2).
[56] Postal Services Act, section 45(8).
[57] Harker, Kreutzmann and Waddams (n 1) 25.
[58] PUDLV, section 6(3); Postal Services Act, section 33; Code des postes et des communications électroniques, Article L1; Loi portant réforme de certaines entreprises publiques économiques, Article 144ter.
[59] Code des postes et des communications électroniques, Article L1.

another minimum requirement is the distribution of legislative petitions and addresses free of charge.[60]

Interestingly as in telecommunications all Member States with the exception of Germany have opted for the designation of the incumbent (e.g. BPost, LaPost and Royal Mail) as universal service provider, while in Germany universal postal service is provided through the market.[61]

3.2.5 Conclusion

As has been shown above, the European legislative framework for USOs in telecommunications and postal services is relatively specific, thereby reducing the discretion of the Member States, and this enables the Commission to exercise a greater level of control over the Member States in these sectors.[62] It may also create a greater level of certainty for all providers operating in the market.[63]

However, as liberalisation in these two sectors further progressed the scope of universal service in post and telecommunications has only insignificantly changed.[64] This is in contrast to the principle of USOs being flexible and dynamic as they are evolving over time and need to be able to adapt to economic, societal and technological changes.[65] This raises the question of whether the current scope of USOs, in particular in post and telecommunications, as outlined by the legislative framework still fulfils its requirement to guarantee the right of access to today's basic

[60] Postal Services Act, section 31, Requirement 6 and 7.
[61] The exclusive license of Deutsche Post expired on 31 December 2007, Postgesetz (PostG), section 51(1).
[62] Wolf Sauter, 'The Altmark package mark II: new rules for state aid and the compensation of services of general economic interest' (2012) 33(7) European Competition Law Review 307, 313.
[63] Michael Harker and Antje Kreutzmann-Gallasch, 'Universal service obligations and the liberalization of network industries: Taming the Chimera?' (2016) 12 European Competition Journal 236, 240.
[64] Prosser (n 9) 200; For example, as shown above, the specification of a single narrowband network connections was abolished with Directive 2009/136/EC entering into force, see above, section 3.2.3.
[65] See above Chapter 2, section 2.2.4.

essential services.[66] An adjustment of the scope of universal service may be necessary not only from a consumer protectionist point of view, but also from a sustainability point of view.[67]

3.3 The usefulness of the current scope of universal service in post and telecommunications

So far it has been shown that the universal services as covered by the European Directives in post and telecommunications include rather 'conventional' services (e.g. fixed voice telephony, public pay phones, collection and delivery of letters).[68] However, the evolving nature of new communication services (e.g. mobile telephony, high-speed broadband, mobile and wireless broadband) not only raises the question of whether the current scope as laid down by European Directives is still appropriate, but also requires a discussion as to which elements of universal service need to be adjusted. This discussion is further informed by responses from sector participants following a questionnaire survey in a number of Member States.

3.3.1 Supply and demand – an ever-changing picture

As shown in Chapter 1 of this thesis, there is no single definition for the concept of universal service and the explanation given for that is the evolving nature of USOs. The concept of USOs must be 'flexible' so it can be adjusted not only to technological

[66] Gillian Simmonds, 'Consumer Representation in Europe Policy and Practice for Utilities and Network Industries: Universal and Public Service Obligations in Europe' (2003) 4 <http://www.bath.ac.uk/management/cri/pubpdf/Research_Reports/15_Simmonds.pdf>.
[67] Axel Gautier and Xavier Wauthy, 'Competitively neutral universal service obligations' (2012) 24(3-4) Information Economics and Policy 254, 260.
[68] For example, the 1997 Postal Services Directive is based on research that dates back to 1988. At that time, the EU consisted of only 12 Member States and the majority of them had a very high mail volume per capita (243 items on average, with only Portugal and Greece significantly lower with 68 and 43 items per capita). Commission of the European Communities (n 36) Annex 2, p. 273; See, also Alex Kalevi Dieke and others, 'Main Developments in the Postal Sector (2010-2013): Study for the European Commission, Directorate General for Internal Market and Service' (WIK Consult, Final Report 2013) 300 <https://publications.europa.eu/en/publication-detail/-/publication/2a435533-0c31-40a3-b5a4-e3d26b7c467f>.

changes but also to changing consumer behaviour.[69] For example, the take-up rate of mobile phones and Internet has sky-rocketed. Indeed, in 2014, the access rate to mobile phones was higher than to fixed-line telephones; on average over 90% of all European households had access to mobile phones, compared to less than 70% with fixed-line telephone access.[70] So, in many household across Europe, fixed-line phone access is substituted by mobile telephony or alternative forms, such as Voice over IP calls – using the Internet to make and receive calls – gain more importance.[71] The increasing popularity of mobile phones also poses a threat to public pay phones. The use of public payphone services is very low maintenance costs are very high.[72]

The increased rate of Internet access is based on technological progress. It has come a long way from the slow (dial-up) single, fixed-line narrowband access, to high-speed fixed-line and wireless/mobile broadband access. Today, fewer than four out of 10 European households have no Internet access. The majority of those without Internet access are elderly citizens.[73]

New technologies have changed consumers' behaviour, and they have softened the distinction between postal services and other communications services. Internet access affected not only services in telecommunications, e.g. usage of fixed telephone services, but also conventional universal postal services. The volume of the conventional letter market has been declining due to its substitution with other

[69] James Alleman, Paul Rappoport and Aniruddha Banerjee, 'Universal service: A new definition?' (2010) 34 Telecommunications Policy 86, 89.
[70] European Commission, 'E-Communications and Telecom Single Market Household Survey: Summary' (Special Eurobarometer 414, June 2014), 14–15. <http://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs_414_sum_en.pdf>;
The penetration rate of fixed telephone access varies significantly from Member State to Member State. In Finland and the Czech Republic, only 15% of all households have fixed telephone access, while in Germany, Malta and Sweden more than 90% have fixed mobile phone telephony at home.
[71] A survey conducted by the European Commission shows an increase of Voice over IP telephony from 14% to 30% across European Member States between 2009 and 2014. ibid 18.
[72] Harker and Kreutzmann-Gallasch (n 63) 257;
According to the Commission Household Survey, more than three-quarters (88%) of all European citizens never used a public payphone in 2014. European Commission, 'E-Communications and Telecom Single Market Household Survey' (n 70) 41.
[73] European Commission, 'E-Communications and Telecom Single Market Household Survey: Report' (Report, Special Eurobarometer 414, March 2014) 41, 44 <http://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs_414_en.pdf>.

forms of communication, such as electronic mail.[74] Other services, e.g. published directories, are in declining demand as well. In contrast, the parcel market has increased due to growth of the e-commerce sector.[75]

As shown, the rapid expansion of the Internet and mobile telephony has affected conventional universal services in telecommunications and in postal service. Ensuring the sustainability of USOs that are in decline may pose a significant financial burden on the service provider, and may even endanger the sustainability of the whole concept of universal service, leading some Member States to re-think the current status of their Universal Service Obligations, with mixed outcomes. Member States' action is limited by existing EU law.

Nevertheless, Member States do have some leeway. They can decide to withdraw USOs for services that are provided through the market. Provision of access at a fixed location to a public communications network, public payphones, telephone directories and directory enquiry services have been excluded from the obligation to provide universal service in a considerable number of Member States (see Table 2).[76]

[74] According to European Commission data, letter volume has fallen in Europe by 3.63% in 2014. European Commission, 'Postal Services' <https://ec.europa.eu/growth/sectors/postal-services_en>. The total volume of the letter market varies across Member States with Germany, France and the United Kingdom contributing to more than half of the total volume. In 2024, the three countries had a combined letter volume of 38 billion out of 64 billion items; in contrast, the volume in Bulgaria, Estonia, Cyprus, Latvia, Lithuania and Malta was below 100,000 letter items per year. European Commission, 'Domestic postal traffic (USO, non-USP) – letter mail' <http://ec.europa.eu/eurostat/tgm_grow/table.do?tab=table&init=1&language=en&pcode=post_dtr_1&plugin=1>.

[75] European Commission, 'Postal Services' (n 74); E-commerce refers to the sale of goods through the Internet. European Commission, 'Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods' COM(2015) 635 final. The European Commission states that more than half of all individuals aged between 16 and 74 buy goods or services worth more than 200 billion Euros over the Internet (55% in 2016, compared to 30% in 2007), European Commission, 'Final Report on the E-commerce Sector Inquiry' SWD(2017) 154 final 10, 12.

[76] European Commission, 'Implementation of the EU regulatory framework for electronic communication - 2015' (Brussels) SWD(2015) 126 final 21–22; Diane Mullenex, Annabelle Richard and Florent Lallemant, 'Communications: regulation and outsourcing in France: overview' (1 November 2016) <https://uk.practicallaw.thomsonreuters.com/3-619-2685?transitionType=Default&contextData=(sc.Default)>.

Table 2 Types of services withdrawn from Universal Service Obligation in telecommunications at national level

Type of USO	Member States
Provision of access at a fixed location	Czech Republic, Denmark, Estonia, Luxembourg, Poland, Romania, Slovakia, Sweden
Access to public pay phones	Belgium, Cyprus, Denmark, Estonia, Finland, France, Germany, Latvia, Luxembourg, Poland, Romania, Slovakia, the Netherlands
Telephone directory	Belgium, Czech Republic, Estonia, Finland, France, Germany, Italy, Lithuania, Luxembourg, Poland, Romania, Slovakia, Sweden, the Netherlands
Directory enquiry services	Austria, Belgium, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Hungary, Italy, Ireland, Luxembourg Poland, Romania, Slovakia, Spain, Sweden, the Netherlands

The opposite trend can be noticed for broadband, where a few Member States have included broadband access within the scope of universal service, while others discuss the option of extending USOs to broadband.[77]

In postal services the changing customer behaviour has also an effect on the scope of universal service at national level. One option, chosen by some Member States, is to adjust the need of universal service to users' demand by removing elements (bulk letters and mail, direct mail, periodicals) from the Universal Service

[77] So far Belgium, Croatia, Finland, Spain, Sweden, Malta, Latvia (for disabled end-users only) have included broadband within the scope of universal service. ibid (European Commission) 22.
The United Kingdom and Slovenia intend to include broadband in the scope of their national USOs. Ofcom (n 4); The Republic of Slovenia, 'The Next-General Broadband Network Development Plant to 2020' (March 2016) <http://www.mju.gov.si/fileadmin/mju.gov.si/pageuploads/DID/Informacijska_druzba/NGN_2020/NGN_2020_Slovenia_EN.pdf>; For a more detailed discussion on 'broadband and its inclusion within the USOs', see Chapter IV, section 4.4.1. and 4.4.1.1.

Obligations.[78] Another possibility is to maintain the elements of universal postal service but re-organise the services.[79]

3.3.2 Conclusion

As this section has demonstrated, the legislative frameworks governing universal service in telecommunications and postal service are comprehensive, leaving Member States with little discretion. It has also been shown that the scope of universal service has not been adjusted – yet. Especially in telecommunications, there appears to be little variation between the universal service obligations as set out by national legislation.

This section has also shown that the current scope of universal service in the two sectors are partially dated due to technological development, resulting in a change of users' behaviour. Some Member States have already adjusted – within the limits of European law – the nature of their Universal Service Obligations to the new development.

Maintaining the current scope of USOs may distort competition in the market.[80] Providing USOs may place a significant burden on the service provider and put the undertaking into a disadvantaged position compared to other providers, new

[78] Dieke and others (n 68) 130–131; It must be noted that those services are not part of the universal service required by the Postal Services Directive and not all Member States had chosen to include those service within the scope of their universal postal service in the first place as only basic letter post and basic letter parcels must be included in universal postal service, ibid 129; Henrik B Okholm and others, 'Main Developments in the Postal Sector (2008-2010): Final Report' (29 November 2010) 126 <https://www.copenhageneconomics.com/dyn/resources/Publication/publicationPDF/7/217/0/Main%20developments%20in%20the%20postal%20sector.pdf>.

[79] In particular, Southern and Eastern European Member States have reduced the number of their postal outlets, while mainly Western European States have chosen to transform their postal outlets in postal agencies that are, for example, located in local shops. Dieke and others (n 68) 191–192; furthermore the number of public letter boxes has decreased notably in Denmark, Latvia, Lithuania, Poland, Portugal, Slovakia and Slovenia (reduction of more than 5 per cent within 2010/11 and 2011/12) ibid 193.

[80] This section discusses only briefly the reasons that led to a review of the scope, since Chapter IV of this thesis (see below) contains a detailed discussion on the tensions between liberalisation and USOs in post and telecommunications.

entrants, operating in the market. In the past, USOs were placed on the incumbent, as it was regarded as being most suitable to carry out those services. This approach allowed alternative providers to enter and position themselves in the market.[81]

'Cherry-picking' is another problem associated with Universal Service Obligations. New entrants chose, therefore, selective market entry (e.g. offering business-to-business or business-to-consumer services in densely populated areas) as they are then able to target the most profitable consumers, offering a competitive, cheaper price. In contrast, the universal service provider must establish and maintain a more cost-intensive nation-wide network in order to meet its Universal Service Obligations.[82] In the past costs for carrying out USOs were often cross-subsidized by more lucrative segments, but with the full market-opening of the sectors, the sustainability of universal service is under threat.[83] A universal service provider may require external compensation to secure the provision of USOs, which, in turn, can have distortionary effect on competition.[84] These issues are further drawn on below from company responses which were conducted in a questionnaire.

3.4 Opinions from Undertakings

Having considered the legislative framework of USOs in post and telecommunications at European and national level, and how demand of universal services has been influenced by technological changes, this section highlights how USOs are perceived from undertakings in practice. The findings are based on a questionnaire.

[81] Steffen Hoernig, 'Universal Service Obligations: Should they be imposed on entrants?' (January 2001) <ftp://193.196.11.222/pub/zew-docs/div/IKT/hoernig.pdf>.
[82] Harker and Kreutzmann-Gallasch (n 63) 239.
[83] ibid 265–266.
[84] For more detailed information, see Chapter IV.

3.4.1 Methodology for the survey

The motivation behind the survey was to find out more about how USOs are perceived in practice and to investigate whether the liberalisation of the markets put the concept of universal service in post and telecommunications under threat.

This survey was initially undertaken as part of a wider Report for the Centre on Regulation in Europe (CERRE).[85] This study consisted of an online questionnaire addressed to all members of CERRE operating in post and telecommunications and based in the discussed Member States (Belgium, France, Germany and United Kingdom). The survey was carried out between December 2012 and January 2013.

The questions were designed in English by Harker, Kreutzmann and Waddams. At first, a pilot study was distributed to three service operators. The comments received from the pilot responses were used to alter the questionnaire. The final questionnaire was then circulated to incumbents and new entrants operating in the two communications markets. For postal services and telecommunications five responses were received. The incumbents are also new entrants in other markets or some companies are new entrants in several Member States, so they operate in more than the four Member States and provide their services also in Austria, Greece, Hungary, Italy, Luxembourg, Poland, Romania, Slovakia and the Netherlands.[86]

The nature of the questions, was partly open-ended to obtain a deeper insight in the perception of USOs and partly closed, where the participants had to choose from a given set of responses in order to ensure the compatibility of their answers.[87] In some cases, the answer to a closed question resulted in an open one.

The survey began with introductory questions to establish which sector the company was serving, in which Member States it was operating, and their main market. The next set of questions related to the nature and scope of universal service. The participants were asked to define the concept of universal service. This was

[85] Harker, Kreutzmann and Waddams (n 1) 55.
[86] ibid.
[87] Alan Bryman, *Social research methods* (2nd edn, Oxford University Press 2004) ch 7.

followed by questions on elements of universal service (e.g. geographical location, access for consumers on low income, access for consumers who require particular equipment); the participants had to agree or disagree as to whether a particular element should be part of universal service. They were asked, if the target groups of universal service have – in the participants' opinion – benefitted from USOs. Another set of questions related to the costs and financing of the delivery of USOs, and the effects on the sector in areas, such as innovation, efficiency and competition policy related issues. They were asked whether the obligation to provide universal service has created a barrier to entry or whether the delivery of USOs prevent a level playing field and, if so, which party benefits (incumbent or new entrant) and why.[88]

3.4.2 Findings from the survey

As described above, the participants of the questionnaire were asked to describe the concept of universal service in their sectors. The responses reflect the definition set out in the Universal Service Directive and the Postal Services Directive. Some highlighted the fact that universal service is meant to create a safety-net against social exclusion. One respondent argued that, given the costs related to the provision of universal service, the scope of universal service in telecommunications should be limited to basic services with only a minimum of statutory requirements.[89]

The Universal Service Directive requires the provision of universal service in the whole country 'independently of geographical location'.[90] The same requirement is laid down in the Postal Services Directive.[91] All but one service provider, a new entrant, believed that universal service should include access to services based on geographical location. Furthermore, only one respondent agreed that universal service should include special rights of access for consumers on low income, while the other four service providers disagreed, and also thought that consumers with

[88] For the full questionnaire, see below Annex 2.
[89] Harker, Kreutzmann and Waddams (n 1) 56.
[90] USD(C), Article 3(1).
[91] PSD(C), Article 3(1).

special technological requirements should not be covered by universal service.[92] It should be noted that it was not specified what is to be understood by 'special technological requirements':[93] whether or not it refers to certain equipment needs for disabled users. However, another question explicitly asked the participants who they believe to be the target groups (rural customers, people with disabilities, users on low income, pensioners, other). Rural customers, people with disabilities and on low income were named as targets group most frequently, in four out of five cases, while two operators also include pensioners in the target group.[94] Four service provider believed that these mentioned customer groups have benefited from universal service to a certain extent, one respondent believed that, in his country the targeted groups (rural customers and customers on low income) have not benefited from USOs.[95]

In some Member States, a universal service provider was specifically designated with the provision of USOs, whereas in one country all undertakings were responsible for providing universal service.[96]

There were different opinions regarding who should bear the costs for the delivery of USOs. Three respondents argued that the designated service provider should carry the costs, while one believed all market operators should do so. Some point out that if the provision of universal service creates an unfair burden, the universal service provider may be compensated for its net cost through a compensation fund, emphasizing that the distribution of universal service effects then all market players.[97] One undertaking argued that higher costs might be passed onto end-users. The same respondent pointed out that currently the 'costs of providing basic telecommunication services […] are negligible' in the country where

[92] Harker, Kreutzmann and Waddams (n 1) 56.
[93] Respondent CERRE questionnaire for companies to Michael Harker, Antje Kreutzmann, Catherine Waddams (January 2013).
[94] Harker, Kreutzmann and Waddams (n 1) 57.
[95] ibid.
[96] ibid, 56.
[97] ibid.

the undertaking has its main turnover.[98] In another case, the cost of USOs are cross-subsidized by other business segments.

All participants agreed that there are more efficient or effective ways to provide universal service in post and telecommunications. The postal service provider argued that the current scope of USOs might have to be adjusted,[99] suggesting the five day delivery requirement may not be maintained in the future, and/or delivery to the door may be replaced by delivery to central mailboxes in some regions. In telecommunications, changing the standards of USOs was also suggested by one respondent, who argued that USOs should be defined in a technologically neutral way and 'not be based on traditional definitions'.[100] It was also suggested to abolish uniform tariffs but allow for price differentiation, the same operator 'suggests that public levies might curb the enthusiasm of public bodies to impose such obligations'.[101] Two operators in different Member State suggested a 'pay-or-play' mechanism to enhance efficiency.[102] Another incumbent who bears the costs of universal service in telecommunications argued for a reduction of quality requirements and that the obligation to carry out universal service should be restricted to areas where no other operator is active.[103]

The majority of participants believed that USOs have affected innovation in their sector, while one disagreed. The financial burden of maintaining dated services and technologies, e.g. public pay phones, results in a lack of investment of new technologies, e.g. new sorting machinery in post. One incumbent was concerned that the potential inclusion of broadband within the scope of USOs will have a negative effect on innovation and may create a barrier to entry and could have a distortionary effect on competition.[104] Only a new entrant believed that USOs have created a

[98] ibid, 56–57.
[99] ibid, 59.
[100] Respondent CERRE questionnaire for companies to Michael Harker, Antje Kreutzmann, Catherine Waddams (January 2013).
[101] Harker, Kreutzmann and Waddams (n 1) 57.
[102] ibid.
[103] ibid.
[104] ibid.

barrier to entry without giving any examples, while the incumbent from another Member State disagreed.[105] All respondents, except for the postal service provider, believed USOs have distorted competition. One universal service provider argued that the obligation without 'fair' compensation puts him at a competitive disadvantage, while another undertaking operating in the same Member State argued the costs are imposed on all market players, not just the incumbent; this opinion is shared by a respondent from another country. Furthermore, two entrants also thought the obligation to provide universal service places the incumbent at a competitive advantages 'because they do not have to recruit new consumers and can retain the most "sticky" group and in another [case] because the incumbent is compensated for inefficiencies without a proper assessment of the benefits which USOs deliver'.[106] On the contrary, the incumbents argued that USOs give the new entrants a competitive advantage as they can target the most attractive consumer groups and market segments. The standard of their services is not bound to specific statutory obligation. Furthermore, the incumbents claimed that the costs for the delivery of USOs are not completely compensated.[107]

All participants agreed that the liberalisation of their markets has not affected the nature of USOs, but two incumbents argued that the opening up of the markets allowed a cherry-picking situation and reduced the margins for cross-subsidies. Two participants believed changes to the nature of USOs are somewhat related to innovation and substitution (e.g. mobile phones replacing public payphones).[108]

Furthermore, two respondents – an incumbent and an entrant – agreed that USOs prevent a level playing field, each; giving a contradictory explanation for their assumption. The incumbent claimed it is because of the 'unilateral burden' and the

[105] ibid.
[106] ibid.
[107] ibid.
[108] ibid.

lack of 'fair compensation',[109] whereas the entrant believes it is because of the cross-subsidisation of USOs through contribution from other market players.[110]

The survey results support the finding that USOs distort competition, but while incumbents believe they are disadvantaged and the new entrants are the beneficiaries, the new entrants think it is the opposite way around. Furthermore, the questionnaire supports the hypothesis that it is necessary to review the scope of universal service and reduce it to make it sustainable for the future.

3.5 Conclusion

The comparative legal analysis of the relevant legislative tools for USOs in telecommunications and post, which is further informed by the results of the qualitative survey data, highlights the need for change. On the one hand, the existing EU regulatory framework covering universal service in telecommunications and post is very comprehensive, particularly in postal services; Member States often exceed the minimum requirements set out in the Postal Services Directive, while this is less the case in telecommunications. On the other hand, the existing framework preserves mainly dated technologies.

The demand for traditional USOs has declined due to technological progress and changes of consumer behaviour, which raises the question of whether or not the current scope of USOs in telecommunications and post will be sustainable in the future.[111] The financing of SGEIs has become more challenging. With the opening up of the markets, competition has increased and profit margins in other segments of the sectors have decreased, which impedes the cross-subsidisation of universal service. For example, even though the volume of parcel delivery has grown due to e-

[109] Respondent CERRE questionnaire for companies to Michael Harker, Antje Kreutzmann, Catherine Waddams (January 2013).
[110] Harker, Kreutzmann and Waddams (n 1) 58.
[111] See also Jim Davies and Erika Szyszczak, 'Universal Service Obligations: Fulfilling New Generations of Services of General Economic Interest' in Erika Szyszczak and others (eds), *Developments in Services of General Interest* (T.M.C. Asser Press, Springer 2011) 176.

commerce, the revenues are small because competition is high. This finding is supported by the results of the questionnaire. In addition to that, the existing regulatory framework has adverse effects on innovation and competition, as it places not just a burden on the universal service provider but affects the competitiveness of other undertakings operating in the market too.[112]

There are different options to secure the delivery of the universal service, such as establishing external funding mechanism to compensate the universal service provider. Even if it can be ensured that the pricing mechanism is transparent, it should only be used as a short-term solution, to secure universal service as in the long-term this may create barriers to entry and have a distortionary effect on competition in a liberalised market.[113]

However, to guarantee on-going access to basic essential services, the nature of universal service in post and telecommunications has to be adjusted. As shown, there has not been a significant change of the scope since the adoption of the 1997 Postal Services Directive and the Universal Service Directive in 2002. Nevertheless, few Member States have reacted and adjusted the national scope of universal service within the limits given by the European Directives (e.g. by reducing the standards of USOs). In some cases, the nature of universal service has also increased at national level (e.g. by introducing broadband), which is not always welcomed by service providers as it may have a distortionary effect on competition, as has been pointed out by one of the respondents of the survey.[114] These changes appear not to tackle the roots of the problem but even if Member States would wish to go a step further, they are still bound by EU law. It is therefore necessary to revise the concept of USOs in post and telecommunications at EU level and not just at national level. Thereby

[112] Alexandre de Streel and Martin Peitz, 'The Right to Communicate: Redefining Universal Service Obligations in Postal and Electronic Communications Markets' (13 March 2015) Discussion Paper 7 <http://www.cerre.eu/sites/cerre/files/150313_CERRE_DiscussionPaper_Right%20to%20communicate_2.pdf>

[113] Harker, Kreutzmann and Waddams (n 1) 79.

[114] See above, section 3.4.4.

the evolving nature of universal service has been particularly taken into account, as well as the underlying purpose of the universal service.

First of all, Member States must have more flexibility to decide which service, and to what extent they want to include within the scope of universal service. Both the Postal Services Directive and the Universal Service Directive were adopted at a time before electronic communications became a replacement for conventional communication and postal services. Furthermore, since the adoption of the Directives, there has been different market development across the Union, which makes a harmonisation of access to essential services across all Member States more difficult. A greater degree of flexibility allows Member States to effectively adjust the scope of universal service to their needs. It may be also time not just to reduce the scope of universal service, but to abolish the tariff averaging, as suggested in the questionnaire, which means that users in rural areas who are able to afford it, pay more for their services, instead of being subsidised.

As discussed above, the growth of the Internet blurred the fixed line between postal services and telecommunications; it may, therefore, be further necessary to approach universal service in telecommunications and the postal sectors from a new – combined rather than separate – perspective.[115]

To ensure the adaptability of the concept of universal service, access to basic services should not focus on a particular technology, but should adopt a technological neutral approach.[116]

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[115] Bundesnetzagentur (n 5) 5–6; Christian Jaag and Urs Trinkner, 'The future of the USO - Economic rationale for universal services and implications for a future-oriented USO' (June 2011) Swiss Economics Working Paper 0026, 11 <http://www.swiss-economics.ch/RePEc/files/0026JaagTrinkner.pdf>; Fabra et al refer to it as a 'general "right to communicate".' Natalia Fabra and others, 'Network industries: efficient regulation, affordable & adequate services: CERRE Regulation Dossier for the Incoming European Commission 2014-2018' (Brussels, 18 June 2014) 40 <http://www.cerre.eu/sites/cerre/files/140618_CERRE_RegulDossIncomEC_Final.pdf>.

[116] Antje Kreutzmann-Gallasch and others, 'Criteria to define essential telecoms services' (November 2013) 16 <http://stakeholders.ofcom.org.uk/binaries/research/affordability/Ofcom_Lit_Review.pdf>; Jaag and Trinkner (n 115) 12.

In addition, it is essential to reflect on the initial purpose of the concept of universal service. USOs were incorporated into the Postal and Universal Service Directive to counterbalance potentially negative effects resulting from the market opening. Their objective was to create a safety-net: both Directives are addressed to all consumers. However, taking the different development across the European Union into account, there appears to be no reason to include consumers in the circle of universal service protection in cases where the services are provided through the market. Instead it may be necessary to limit access to universal service to vulnerable consumers to ensure their needs are effectively addressed in light of the evolution of new technologies.[117] The maintenance of the concept of universal service is essential for vulnerable groups of consumers, but there are different means to achieve that objective.

In the case of inaction or insufficient adjustment of the scope, there is a risk that the delivery of universal service will not be possible without an external compensation mechanism. This presents the unwanted potential for a distortion of competition in the market.

[117] Kreutzmann-Gallasch and others (n 116) 16.

Annex 1: Tables

Table 3: Comparative overview of USOs in telecommunications at EU level and in Belgium, France, Germany and the UK[1]

	European level	Belgium	France	Germany	United Kingdom
Nature of USO	Connection at a fixed location to a public communications network to allow voice, facsimile and data service at a sufficient rate to provide functional Internet access[2] Service includes access to public telephone network to allow national and international phone calls[3]	Access to basic voice telephony service and access to basic fixed public communications network throughout the entire country; Provision of technical assistance; When non-payment, the end-user shall still be	Connection to a publicly fixed open network that allows to make and receive telephone calls, use facsimile and data communications at sufficient rates for access to the Internet for everyone; In case of non-payment, the end-user is still able to receive calls and	Connection at a fixed location to a public telephone network Services allow voice, facsimile and data service at rates that are sufficient for a functional internet access Availability of directory, which is	Connection at a fixed location to the public electronic communications network and for access to publicly available telephone services[19] Service must allow to make and receive local, national and internal calls, facsimile communications and data communications, at data rates that are

[1] Table 3 is based on the author's own and original work in Harker, Kreutzmann and Waddams (n 1) 14–18.
[2] USD(C), Article 4(1) and (2).
[3] USD(C), Article 4(3).
[19] Electronic Communications Act, section 65(2); The Electronic Communications (Universal Service) Order 2003 Schedule 1(1), as amended by the Electronic Communications (Universal Service) (Amendment) Order 2011.

	European level	Belgium	France	Germany	United Kingdom
	Availability of one printed and/or electronic directory, updated once a year[4] One directory enquiry to all end-users[5] Availability to public pay telephones to meet requirements with respect to	able to receive calls and make calls to free services or emergency services[9] Provision of universal information service[10]	make calls to free services or emergency services (restricted service for one year)[14] Free emergency calls[15] Publication of universal directory[16]	updated regularly, at least once a year Availability of at least one comprehensive public telephone directory enquiry service, including the provision of the area codes of national users and users in other countries, as far as data is available	sufficient for functional internet access[20] One comprehensive printed or electronic directory, which is updated at least once a year[21]

[4] USD(C), Article 5(1)(a).
[5] USD(C), Article 5(1)(b).
[9] Loi relative aux communications électroniques, Article 70.
[10] Loi relative aux communications électroniques, Article 79.
[14] Code des postes et des communications électroniques, Article L35-1.
[15] Code des postes et des communications électroniques, Article L35-1.
[16] Code des postes et des communications électroniques, Article L35-4.
[20] Electronic Communications Act, section 65(2); The Electronic Communications (Universal Service) Order 2003 Schedule 1(2), as amended by the Electronic Communications (Universal Service) (Amendment) Order 2011.
[21] Electronic Communications Act, section 65(2) and 69; The Electronic Communications (Universal Service) Order 2003 Schedule 2(1), as amended by the Electronic Communications (Universal Service) (Amendment) Order 2011.

	European level	Belgium	France	Germany	United Kingdom
	geographical coverage, number, accessibility to disabled users, quality of service[6] Emergency phone calls from public pay telephones using 112 or a national emergency number must be free of charge and possible without any means of payments[7]	Provision of universal directory service[11] Free emergency calls[12] Provision of public payphones[13]	Special measures for disabled users to provide equal level of access[17]	Provision of public pay telephones or other access points in accessible locations and in working order throughout the territory of Germany Emergency calls from public pay telephones free of charge and without any means of payment by dialling either 112 or the	One comprehensive telephone directory enquiry service[22] Provisions of public payphones, taking into account geographical coverage, number of phones, quality of services; Emergency calls from public pay phones free of charge and without

[6] USD(C), Article 6(1).
[7] USD(C), Article 6(3).
[11] Loi relative aux communications électroniques, Article 86.
[12] Loi relative aux communications électroniques, Article 107.
[13] This requirement can be waived by the national regulatory authority; Loi relative aux communications électroniques, Article 75.
[17] Code des postes et des communications électroniques, Article L35-1.
[22] Electronic Communications Act, section 65(2) and 69; The Electronic Communications (Universal Service) Order 2003 Schedule 3(1), as amended by the Electronic Communications (Universal Service) (Amendment) Order 2011.

	European level	Belgium	France	Germany	United Kingdom
	MS must ensure special measure to provide equal level of rights for disabled users[8]			national emergency number[18]	any means of payment by dialling 112 or 999[23] Special services for end-users with disability: Access to directory information facilities, provision of priority fault repair services, provision of access to relay services, appropriate method of billing, accessibility and functionality of public pay telephones, including provision of textphones[24]

[8] USD(C), Article 7(1).
[18] TKG, section 78(2) no 1-6.
[23] The Electronic Communications (Universal Service) Order 2003 Schedule 4, as amended by the Electronic Communications (Universal Service) (Amendment) Order 2011.
[24] The Electronic Communications (Universal Service) Order 2003 Schedule 6, as amended by the Electronic Communications (Universal Service) (Amendment) Order 2011.

	European level	Belgium	France	Germany	United Kingdom
					(The UK Government seeks to incorporate broadband within USOs)[25]
Universal Service Provider	One or more undertakings by using an efficient, objective, transparent and non-discriminatory designation	One undertaking[27] (Proximus – formerly Belgacom)[28]	One or more undertakings[29] (Orange – formerly France Télécom) [30]	The market; In case of market failure an undertaking can be obliged by regulatory authority to provide universal	At least one undertaking[32] (BT and KCOM)[33]

[25] Ofcom, 'Designing the broadband universal service obligation - Final report to Government' (7 April 2016) <https://www.ofcom.org.uk/consultations-and-statements/category-1/broadband-uso>.

[27] Loi relative aux communications électroniques, Article 71; Article 76 for designation of USP for public payphones; Article 80 for information services; Article 87 for directory.

[28] Yves van Gerven and Anne Vallery, 'Communications: regulation and outsourcing in Belgium: overview' (1 November 2015) <https://uk.practicallaw.thomsonreuters.com/0-619-9985?transitionType=Default&contextData=(sc.Default)>.

[29] Code des postes et des communications électroniques, Article L35-2.

[30] Orange is universal service provider for universal service within the scope of Article L35-1. Ministére de L'économie et des Finances, 'Avis et communications' Journal Officiel De La République Français, Texte 75 sur 81 (26 April 2017) < https://www.arcep.fr/fileadmin/reprise/dossiers/su/avis-appel_candidature-SU-service-telephonique_20170426.pdf>.

[32] The Electronic Communications (Universal Service) Order 2003 Schedule 1(1), as amended by the Electronic Communications (Universal Service) (Amendment) Order 2011.

[33] Ofcom, 'Universal Service Obligations' (26 March 2005) <https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/telecoms-competition-regulation/general-authorisation-regime/universal-service-obligation>.

	European level	Belgium	France	Germany	United Kingdom
	mechanism, no a-priori exclusion[26]			services if the undertaking has a significant market power in the geographical area or a minimum of four per cent sale in this market[31]	
Group of consumers	All end-users[34]	All end-users[35]	All end-users[36]	All end-users[37]	All end-users[38]
Who monitors USO	National regulatory authority[39]	National regulatory authority (BIPT – Belgian Institute for Postal Services and Telecommunications)[40]	National regulatory authority (ARCEP – Regulatory Authority for Electronic	National regulatory authority (Bundesnetzagentur –	National regulatory authority (Ofcom)[43]

[26] USD(C), Article 8.
[31] TKG, section 80.
[34] USD(C), Article 3(1).
[35] Loi relative aux communications électroniques, Article 70.
[36] Code des postes et des communications électroniques, Article L35-1.
[37] TCA, section 78(1).
[38] The Electronic Communications (Universal Service) Order 2003, 4(a), as amended by the Electronic Communications (Universal Service) (Amendment) Order 2011.
[39] USD(C), Article 11.
[40] Loi relative aux communications électroniques, Article 103.
[43] The Electronic Communications (Universal Service) Order 2003, as amended by the Electronic Communications (Universal Service) (Amendment) Order 2011.

	European level	Belgium	France	Germany	United Kingdom
			Communications and Post)[41]	Federal Network Agency)[42]	
Role of costs of supply for consumers	Affordability Special tariff options or packages for consumers on low incomes or with special social needs End-user shall only pay for services which are essential for universal service	Social tariffs[45]	Affordability; Special tariffs for users on low-income[46]	Affordable price: Price is affordable if it does not exceed the real price, which is based on average price paid by a household located outside a city with a population of more than 100.000[47] Prices not based on market abuse[48]	Common tariff(s) for universal services that are affordable and uniform (unless approved otherwise)[50] Appropriate tariffs for end-users on low income or for end-users with special social needs[51]

[41] Code des postes et des communications électroniques, Article L35-2.
[42] TKG, section 78(4).
[45] Loi relative aux communications électroniques, Article 74.
[46] Code des postes et des communications électroniques, Article L35-1.
[47] TKG, section 79(1).
[48] TKG, section 79(2) in conjunction with section 28.
[50] Electronic Communications Act, section 68; The Electronic Communications (Universal Service) Order 2003, 4, as amended by the Electronic Communications (Universal Service) (Amendment) Order 2011.
[51] Electronic Communications Act, section 68; The Electronic Communications (Universal Service) Order 2003, Schedule 5(2), as amended by the Electronic Communications (Universal Service) (Amendment) Order 2011.

	European level	Belgium	France	Germany	United Kingdom
	Possibility to monitor and control expenditures to avoid disconnection[44]			End-user cannot be obliged to pay for services or facilities which are not required or not necessary[49]	Possibility to monitor and control expenditures [52] End-user cannot be obliged to pay for services or facilities which are not required or not necessary[53]
Role of costs of supply for undertakings	When costs are an unfair burden based on net cost calculation, MS can establish an public compensation fund and/or to share	Renumeration through compensation fund[55] Compensation for provision of social tariffs[56]	Compensation fund[57]	Universal service provider can request compensation (either the sum established in the	Scheme in order to share burden universal service provision, if the financing burden is unfair[59]

[44] USD(C), Articles 9 and 10.
[49] TKG, section 84(2).
[52] Electronic Communications Act, section 68; The Electronic Communications (Universal Service) Order 2003, Schedule 5(1), as amended by the Electronic Communications (Universal Service) (Amendment) Order 2011.
[53] Electronic Communications Act, section 68(3).
[55] Loi relative aux communications électroniques, Article 73, 78, 94 in accordance with Articles 100-102.
[56] Loi relative aux communications électroniques, Article 74/1.
[57] Code des postes et des communications électroniques, Article L35-3.
[59] Electronic Communications Act, section 71.

	European level	Belgium	France	Germany	United Kingdom
	the net costs between different providers[54]			tendering process or, in cases where no provider was found in the tendering process by calculating the difference between the cost for a designated undertaking of operating without the USO and the cost of operating due to the obligation) When costs are an unfair financial burden then compensation of the calculated amount[58]	

[54] USD(C), Article 13.
[58] TKG, section 82.

Table 4: Comparative overview of USOs in post at EU level and in Belgium, France, Germany and the UK[60]

	European level	Belgium	France	Germany	United Kingdom
Nature of USO	Density of access point must meet the needs of customers[61] At least one delivery and collection to home or premises or to appropriate installations (under exceptional circumstances or geographical conditions) for five working days per week[62] Clearance, sorting, transport and distribution of postal items up to 2 kilograms	Collection, sorting, transport and delivery of postal items up to 2 kilograms and packages up to 10 kilograms Delivery of parcels up to 20 kilograms from other Member States Parcels which cannot be delivered in person, shall be kept in a place located in the municipality of the addressee; this place must be accessible for	Collection, sorting, transport and delivery to domestic houses or premises of legal persons of postal items up to 2 kilograms, parcels up to 20 kilograms as well as registered and insured items National and cross-border service Every working day, apart from exceptional circumstances[70]	Collection and delivery of postal items up to 2 kilograms, parcels up to 20 kilograms, periodical prints, registered and insured items[71] National and cross-border services[72] At least 12,000 postal outlets across Germany; Municipals with at least 2,000 residents must have one postal outlet; Every municipality with more than 4,000 inhabitants shall in	At least one delivery of letters every Monday to Saturday (except for public holidays) to homes and premises of individual and legal persons or approved access points At least one delivery of postal packets up to 20 kilograms every Monday to Friday (except for public holidays) to homes and premises of individual and legal persons or approved access points

[60] Table 4 is based on the author's own and original work in Harker, Kreutzmann and Waddams (n 1) 26–29
[61] PSD(C), Article 3(2).
[62] PSD(C), Article 3(3).
[70] Code des postes et des communications électroniques, Article L1.
[71] PUDLV, section 1(1).
[72] PUDLV, section 1(4).

	European level	Belgium	France	Germany	United Kingdom
	and packages up to 10 kilograms (with a maximum weight limit of 20 kilograms), services for registered and insured items[63] Delivery of parcels up to 20 kilograms from other Member States[64] Dimensions for items eligible for universal service can be found in the Convention and Agreement concerning Postal Parcels adopted by the Universal Postal Union[65]	at least five days a week, except Sunday and a public holiday Services for registered and insured items Includes national and cross-border services Service provision throughout the Kingdom of Belgium Service five days a week, except Sundays and public holidays[67]		general ensure that there is a postal outlet within 2,000 metres Additionally, at least one postal outlet per 80 square kilometres; Other locations must be supplied through a mobile postal station[73] At least one post box within 1,000 kilometres; Post boxes have to be cleared every working day and if required also on Sundays or a bank holiday; Collection times have to be line with the needs of business life,	At least one collection of letters every Monday to Saturday (except for public holidays) from every access point At least one collection of postal packets up to 20 kilograms every Monday to Friday (except for public holidays) from every access point National and cross-border services[80]

[63] PSD(C), Article 3(4) and (5).
[64] PSD(C), Article 3(5).
[65] PSD(C), Article 3(6).
[67] Loi portant réforme de certaines entreprises publiques économiques, Article 142.
[73] PUDLV, section 2(1).
[80] Postal Services Act, sections 31 and 33.

	European level	Belgium	France	Germany	United Kingdom
	Universal service covers domestic and cross-border services[66]	Network must consist of a minimum of 1,300 postal service points of which at least 650 are post offices[68] Postal financial services[69]		collection times and the next collection must be mentioned on the post box[74] On a yearly average 80 per cent of the items have to be delivered by the next working day after posting and 95 per cent by the second working day after posting[75] Letters must be delivered at least once per working day[76] Distribution/transport of parcels requires the	

[66] PSD(C), Article 3(7).
[68] Loi portant réforme de certaines entreprises publiques économiques, Article 141.
[69] Loi portant réforme de certaines entreprises publiques économiques, Articles 140 and 141.
[74] PUDLV, section 2(2).
[75] PUDLV, section 2(3).
[76] PUDLV, section 2(5).

	European level	Belgium	France	Germany	United Kingdom
				same number of access points as letters[77] On a yearly average 80 per cent of the parcels have to be delivered by the next working day after posting Personal delivery to home or business address unless stated otherwise[78] Delivery at least once a day[79]	
Universal Service Provider	One or more undertaking[81]	BPost (2011-2018)[82]	LaPoste[83]	Market (designation possible in case of market failure)[84]	One or more undertakings[85] (Royal Mail is designated undertaking)[86]

[77] PUDLV, section 3(1) in conjunction with section 2(1).
[78] PUDLV, section 3(2).
[79] PUDLV, section 3(4).
[81] PSD(C), Article 4(2).
[82] Loi portant réforme de certaines entreprises publiques économiques, Article 144octies.
[83] Code des postes et des communications électroniques, Article L2.
[84] The exclusive license of Deutsche Post expired on 31 December 2007, PostG, section 51(1).
[85] Postal Services Act, section 35.
[86] Ofcom, 'Conditions imposed on postal operators' (12 July 2013) <https://www.ofcom.org.uk/postal-services/conditions>.

	European level	Belgium	France	Germany	United Kingdom
Group of consumers	All[87]	All[88]	All[89]	All[90]	All
Who monitors USO	National regulatory authority[91]	National regulatory authority (BIPT - Belgian Institute for Postal services and Telecommunications)[92]	National regulatory authority (ARCEP – Regulatory Authority for electronic communications and post)[93]	National regulatory authority (Bundesnetzagentur - Federal Network Agency)[94]	National regulatory authority (Ofcom)[95]
Role of costs of supply for consumers	Affordable, cost-effective prices, prices may be uniform Provider can conclude individual price agreements with users	Affordable, cost-oriented, uniform tariffs, transparent, non-discriminatory tariffs;[97] Special tariffs for services to business, bulk mail can be	Affordable, cost-oriented tariffs[99]	Affordable prices and uniform tariffs for licenced products; Provider can conclude individual price agreements[100]	Affordable prices: Affordable prices (uniform, public tariff) for conveying postal packets

[87] PSD(C), Article 3(1).
[88] Loi portant réforme de certaines entreprises publiques économiques, Article 144quater.
[89] Code des postes et des communications électroniques, Article L1.
[90] PostG, section 11(1) includes all users of licensed products.
[91] PSD(C), Article 22.
[92] Loi portant réforme de certaines entreprises publiques économiques, Article 144quater.
[93] Code des postes et des communications électroniques, Article L2.
[94] PostG, section 11(2).
[95] Postal Services Act, section 29(1).
[97] Loi portant réforme de certaines entreprises publiques économiques, Article 144ter.
[99] Code des postes et des communications electroniques, Article L1.
[100] PUDLV, section 6.

	European level	Belgium	France	Germany	United Kingdom
	Possibility to maintain or establish free universal service for blind and partially-sighted users[96]	applied, as long as they are transparent and non-discriminatory[98]			Affordable and uniform prices for registered and uniform items Free provision of universal service items for blind and partially-sighted users Distribution free of charge of legislative petitions and addresses[101]
Role of costs of supply for undertakings	No exclusive rights If USO provision constitutes an unfair burden, compensation of net-costs possible	Net-costs compensation if provision of universal serves put an unfair burden on provider[103]	Net-costs compensation through sharing mechanism[104]	Compensation fund (contribution by any licensee with a yearly turnover exceeding EUR 500.000)[105]	Reimbursement, if universal service provision constitutes an unfair burden or review of USOs or procurement

[96] PSD(C), Article 12.
[98] Loi portant réforme de certaines entreprises publiques économiques, Article 144ter.
[101] Postal Services Act, section 31.
[103] Loi portant réforme de certaines entreprises publiques économiques, Article 141ter, 144novies and Article 144undecies.
[104] Code des postes et des communications électroniques, Article L2-2.
[105] PostG, section 15 and 16.

	European level	Belgium	France	Germany	United Kingdom
	through public funds or sharing mechanism[102]				determination by regulatory authority[106] Contributions through users or compensation fund[107]

[102] PSD(C), Article 7.
[106] Postal Services Act, section 45.
[107] Postal Services Act, section 46.

Annex 2: Questionnaire for companies

Q 1 What sector (s) does your company operate in?

- ❑ Telecommunications
- ❑ Postal services
- ❑ Electricity
- ❑ Gas
- ❑ Railways
- ❑ Other _____

Q 2 What countries does your company operate in [for the Telecommunication sector and/or the Postal Service sector and/or the Electricity and/or the Gas sector and/or the Railway sector and/or the Other sector]?

- ❑ Austria
- ❑ Belgium
- ❑ Bulgaria
- ❑ Cyprus
- ❑ Czech Republic
- ❑ Denmark
- ❑ Estonia
- ❑ Finland
- ❑ France
- ❑ Germany
- ❑ Greece
- ❑ Hungary
- ❑ Ireland
- ❑ Italy
- ❑ Latvia
- ❑ Lithuania
- ❑ Luxembourg
- ❑ Malta
- ❑ Netherlands
- ❑ Poland
- ❑ Portugal
- ❑ Romania
- ❑ Slovakia
- ❑ Slovenia
- ❑ Spain
- ❑ Sweden
- ❑ United Kingdom

Q 3 In which sector is your firm's main market (by turnover)?

- ❑ Telecommunications
- ❑ Postal services
- ❑ Electricity
- ❑ Gas
- ❑ Railways
- ❑ Other _____

Q 4 In which country is your firm's main market (by turnover)?

- ❑ Austria
- ❑ Belgium
- ❑ Bulgaria
- ❑ Cyprus
- ❑ Czech Republic
- ❑ Denmark
- ❑ Estonia
- ❑ Finland
- ❑ France
- ❑ Germany
- ❑ Greece
- ❑ Hungary
- ❑ Ireland
- ❑ Italy
- ❑ Latvia
- ❑ Lithuania
- ❑ Luxembourg
- ❑ Malta
- ❑ Netherlands
- ❑ Poland
- ❑ Portugal
- ❑ Romania
- ❑ Slovakia
- ❑ Slovenia
- ❑ Spain
- ❑ Sweden
- ❑ United Kingdom

For the remainder of the questions, please answer for your firm's main market only

Q 5 How would you define the concept of universal service?

Q 6 Should Universal Service include access to services based on geographical location?

- ❍ Yes
- ❍ No

Q 7 Should Universal Service include special rights of access for consumers on low incomes?

- ❍ Yes
- ❍ No

Q 8 Should Universal Service extend to consumers with special technological / equipment requirements?

- ❍ Yes
- ❍ No

Q 9 How does Universal Service differ from public service obligations?

Q 10 What do you understand by the concept of universal service in your sector?

For the purposes of the answering the remainder of this survey, please see the definitions we give to USOs and PSOs.

Universal service USO: Universal service obligations establish rights of access to services which might otherwise be restricted if the full cost of provision were imposed on the individual consumer. A universal service obligation often imposes an additional cost on the provider(s) that may be compensated, for example, through an industry levy or a state subsidy.

Public service PSO: Public service obligations apply to all firms operating in the sector and usually relate to minimum levels of quality and sector specific consumer rights. In contrast to USOs, no compensation is usually paid to the providers for fulfilling these obligations over and above the price charged to the individual consumer.

We do not include in these definitions obligations which are not related directly to consumers.

However, we ask you to focus on universal service obligations.

Q 11 Who is responsible for delivering universal service obligations in your sector?

Q 12 Who bears the costs/pays for the delivery of USOs?

Q 13 How are the costs recovered? (e.g., user levies, firms levies, state subsidies, hidden cross subsidies)

Q 14 Who are the target groups?

- ❑ Rural customers
- ❑ People with disabilities
- ❑ Low income
- ❑ Pensioners
- ❑ Other _____

Q 15 Have they benefited to some extent?

- ❍ Yes
- ❍ No

Q 16 Do you think there are more efficient or effective ways in which USOs could be delivered?

- ❍ Yes
- ❍ No

If Yes is selected:
Q 16:1 Can you give some examples of how USOs could be delivered in a more efficient or effective way?

Q 17 Have USOs affected innovation in your sector?

- ❍ Yes
- ❍ No

If Yes is selected:
Q 17:1 Can you give some examples of how USOs have affected innovation?

Q 18 Has the provision of USOs created barriers to entry?

- ❍ Yes
- ❍ No

If Yes is selected:
Q 18:1 Can you give some examples of how USOs have created barriers to entry?

Q 19 Have USOs distorted competition?

- ❍ Yes
- ❍ No

If Yes is selected:
Q 19:1 Can you give some examples of how USOs have distorted competition?

Q 20 How has opening the market affected the scale and nature of USOs in your sector?

Q 21 How has opening the market affected who bears the cost of USOs in your sector?

Q 22 Which consumers do new entrants target?

Q 23 Which consumers have new entrants been able to attract?

Q 24 How have USOs changed, if at all, with increased competition?

Q 25 Click if you agree with the following statements:

- ❑ Where incumbents remain responsible for the delivery of USOs they are placed at a competition advantage (1)
- ❑ Where incumbents remain responsible for the delivery of USOs there is evidence that they are being over-compensated for the cost of delivering USOs (2)
- ❑ Where incumbents remain responsible for the delivery of USOs there is evidence that new entrants are placed at a competitive advantage because they do not share (the cost of) USOs (3)

If (1) is selected:
Q 25:1 Why do you think incumbents are placed at a competition advantage?

If (2) is selected:
Q 25:2 Can you explain how incumbents are being over-compensated for the cost of delivering USOs?

If (3) is selected:
Q 25:3 Can you explain how new entrants are placed at a competitive advantage because they do not share (the cost of) USOs?

Q 26 Has a provider, or providers, of last resort been appointed in your sector?

- ❍ Yes
- ❍ No

If Yes is selected:
Q 26:1 How is (are) the provider(s) of last resort appointed in your sector?

Q 27 If a company fails, and the provisions on provider of last resort activated, how are the consumers' terms of supply varied?

Q 28 If a company fails, and the provisions on provider of last resort activated, is there any special treatment for vulnerable consumers?

- ❍ Yes
- ❍ No

If Yes is selected:
Q 28:1 Can you specify the special treatment for vulnerable consumers?

Q 29 If a company fails, are consumers encouraged to switch from the provider of last resort?

- ❍ Yes
- ❍ No

Q 30 If a company is appointed as provider of last resort does this impose a disproportionate burden?

- ❍ Yes
- ❍ No

If Yes is selected:
Q 30:1 How is this disproportionate burden imposed, and on which market players?

Q 31 Do you agree or disagree with the following statements?

	Agree	Disagree	Neither	Do not know
USOs prevent a level playing field	❍	❍	❍	❍
USOs benefit the incumbent	❍	❍	❍	❍
USOs benefit the entrants	❍	❍	❍	❍

If "you agree that USOs prevent a level playing field" is selected:
Q 31:1 Can you give any examples of how USOs prevent a level playing field?

If "you agree that USOs benefit the incumbent" is selected:
Q 31:2 Can you give any examples of how USOs benefit the incumbent?

If "you agree that USOs benefit the entrant" is selected:
Q 31:3 Can you give any examples of how USO benefit the entrant?

Chapter 4

Universal service obligations and the liberalisation of network industries: Taming the Chimera?

4.1. Introduction

Over the last three decades, the EU has been pursuing a liberalisation agenda across all of the network industries – telecommunications, postal services, energy, water and railways. A concern to arise from this is that when traditionally monopolised markets are opened to competition, new entrants may be able to enter and target the most profitable consumers, leaving the incumbent with a disproportionate number of consumers who provide insufficient revenue to cover their costs. This is a particular problem where there have historically been extensive cross-subsidies in favour of groups of consumers who are viewed as vulnerable, deserving or politically sensitive (e.g. those living in rural areas). As a consequence, it is often politically difficult or socially undesirable to achieve cost-reflective pricing through tariff rebalancing.

The response in the EU has been to formalise the protection of certain classes of customers through the imposition of Universal Service Obligations (USOs). In the early days of liberalisation, such obligations were normally imposed on the incumbent without it being compensated; its size and the advantages it had derived as the historic monopolist meant that it could afford to absorb these additional costs without being placed at a significant competitive disadvantage. The effectiveness of this approach to universal service begins to unravel where the market share of the incumbent is significantly eroded by new entry, or where new investment is needed in network infrastructure. In the long-run, a sustainable approach to funding universal service has to be found.

In this chapter, the legal responses to the protection of the universal service in the EU are considered. In section 4.2. of this chapter, a definition of what is meant by USOs is provided, and some of the potential market distortions that can occur in pursuing them are explained, including how entrants and incumbents may be placed at a competitive (dis)advantage. While there are inherent tensions in attempting to secure universal service alongside liberalisation, a number of EU Member States would never have accepted the latter goal without some formal protection for the former. However, in more recent years, the policy emphasis has shifted towards the introduction of contestability into the provision of universal service with an attempt to reverse the de facto presumption of the incumbent's continuation of the role. The legal frameworks for universal service provision are explained and compared in section 4.3. In the network industries, the relevant EU secondary legislation often prescribes both the requirements of USOs and the means by which compensation may be made to those entrusted with its provision. Alternatively, as a subset of Services of General Economic Interest (SGEIs), Member States may instead choose to make compensation payments to universal service providers (USPs) under the State aid regime, as reformed by the 2012 SGEI package. In recent years, under both the sectoral and State aid regimes, increased emphasis has been placed upon contestability in the provision of universal service. In section 4.4., two contrasting areas are selected for further investigation. The first relates to the provision of high-speed broadband, the expansion of which requires substantial investment in infrastructure, both public and private. What is particularly striking here is that Member States have eschewed the secondary legislation, and the sectoral rules on compensation which it contains, in favour of making use of the State aid regime. The second area is postal services, in particular the collection and delivery of letters. The provision of universal service has come under particular strain in recent years due to increased liberalisation and dramatic falls in demand. Nevertheless, very little use of compensation mechanisms can be seen here, either under the sectoral or State aid regimes, with a focus instead on incumbents achieving efficiency gains. Section 4.5. concludes, contemplating the future of universal service, its sustainability, and the extent to which it is subordinated to pro-competition goals.

4.2. USOs and liberalisation

In this section, first it is defined what is meant by universal service, before proceeding to explain some of the tensions that exist between its protection and the promotion of liberalisation and competition in the network industries. It is discussed how the protection of universal service in the EU was essentially a political compromise by Member States in accepting the EU's liberalisation agenda for the network industries. Then is explained how universal service can be secured, particularly by utilising the various options that exist in the design of compensation mechanisms.

The nature and extent of USOs differ significantly between sectors and countries.[1] In some sectors, such as telecommunication and postal services, USOs tend to be highly specified, whereas in others, EU law lays down requirements which are fairly open textured, leaving Member States with a broad degree of discretion. While there is no universal definition of what is meant by the term, it is normally taken to mean a requirement which maximises the ubiquity of a service in terms of *coverage* and *accessibility*.[2] First, there may be an obligation to provide a prescribed level of geographical coverage for a particular type of service. To achieve geographical ubiquity, it may be necessary to use cross-subsidies (e.g. from customers in urban areas to those in rural areas). Second, such obligations may require that services are offered at a price which is 'affordable'. Again, this may involve cross-subsidies between different types of users (e.g. between business and domestic customers). Uniform pricing may be used to achieve this goal or a more targeted approach may be used in the form of special tariffs in favour of particular types of disadvantaged consumers ('social tariffs'). What unifies all of these different requirements is the notion that the market would not otherwise serve these areas

[1] For a comprehensive review of the literature see Michael Harker, Antje Kreutzmann and Catherine Waddams, 'Public service obligation and competition' (February 2013) 23-46, <http://www.cerre.eu/sites/cerre/files/130318_CERRE_PSOCompetition_Final_0.pdf>.
[2] Colin R Blackman, 'Universal service: obligation or opportunity?' (1995) 19 Telecommunications Policy 171, 172.

and/or consumers, or if it did, prices would be charged which would place services beyond the reach of a significant number of consumers.[3]

The imposition of USOs may lead to a number of market distortions. Restrictions on pricing, in particular uniform pricing mechanisms, can create strategic links between market participants which have complex effects;[4] for instance, the possibility of higher prices for all consumers, including the intended beneficiaries of the policy.[5] The imposition of USOs may also reduce entry, especially if the obligations are imposed on entrants.[6]

One particular problem with USOs is 'cherry-picking', i.e. where new entrants target the most profitable consumers, leaving the incumbent with those consumers who provide insufficient revenue to cover their costs.[7] While this may be sustainable in the short term, as new entrants establish their position on the market, in the long-run the incumbent's costs will be forced upwards, meaning it will either be required to increase its prices, or some form of compensation mechanism will have to be employed (for example, an industry compensation scheme). Such mechanisms are not without their own problems and may lead to the over-compensation of the incumbent.[8] It may also mean that certain classes of customers are left with the incumbent provider, who is perhaps offering an inferior level of service to that which

[3] On social exclusion, see Erika Szyszczak, *The regulation of the state in competitive markets in the EU* (Hart Publishing 2007) 243.
[4] F Mirabel, JC Poudou and M Roland, 'Universal service obligations: The role of subsidization schemes' (2009) 21 Information Economics and Policy 1, 7.
[5] Calzada demonstrates that uniform pricing will affect the development of competition enabling the entrant to enter in a limited way, increasing both the incumbent's prices and the profitability of both players, Joan Calzada, 'Universal service obligations in the postal sector: The relationship between quality and coverage' (2009) 21 Information Economics and Policy 10, 18; Hviid and Waddams Price show how non-discrimination clauses imposed in the UK energy markets result in higher prices for all consumers, Morten Hviid and Catherine Waddams Price, 'Non-Discrimination Clauses in the Retail Energy Sector' (2012) 122 The Economic Journal F236.
[6] Steffen Hoernig, 'Universal Service Obligations: Should they be imposed on entrants?' (2001) <ftp://193.196.11.222/pub/zew-docs/div/IKT/hoernig.pdf>.
[7] Lucien Rapp, 'Public service or universal service?' (1996) 20 *Telecommunications Policy* 391, 394; Gillian Simmonds, 'Consumer Representation in Europe Policy and Practice for Utilities and Network Industries, Universal and Public Service Obligations in Europe' (2003) CRI Research Report 15, 8. <http://www.bath.ac.uk/management/cri/pubpdf/Research_Reports/15_Simmonds.pdf>.
[8] Axel Gautier and Xavier Wauthy, 'Competitively neutral universal service obligations' (2012) 24 Information Economics and Policy 254, 259-60.

would be available to them in a competitive environment.[9] This tends to emphasise the importance of analysing the counterfactual, i.e., the market conditions which would prevail absent the USO. Indeed, it may even be the case that the imposition of USOs on the incumbent provider may actually place it at a competitive advantage vis-à-vis new entrants, especially where it is over-compensated for the cost of providing the USO.

From a political perspective, it is often difficult to withdraw USOs, especially where doing so may lead to the erosion of cross-subsidies leading to adverse distributional consequences.[10] Tariff rebalancing may be perceived as inequitable where it leads to higher prices for lower income and rural consumers, and may even result in some consumers disconnecting from the network altogether.[11] The political sensitivity of tariff rebalancing may be employed by incumbents to resist liberalisation, or to slow its pace, and there is certainly evidence from the past that incumbents have used its spectre as a means of resisting liberalisation.[12]

While there are obvious tensions between liberalisation and USOs, it may be that there is a more nuanced relationship between the two. First, the formal recognition of USOs was seen as a quid pro quo for further liberalisation, especially for Member States like France that have a strong tradition of public service in utilities.[13] In this context then, USOs may be characterised as a 'means to protect the weakest citizens from market liberalisation'.[14] So without the strengthening of USOs

[9] John C Panzar, 'A methodology for measuring the costs of universal service obligations' (2000) 12 Information Economics and Policy 211.
[10] See OECD, 'Rethinking Universal Service for a Next Generation Network Environment' (2006) OECD Digital Economy Papers 113, 22-23, <http://dx.doi.org/10.1787/231528858833>.
[11] ibid.
[12] The UK gas incumbent, British Gas, provided an early example of such lobbying in its evidence to the 1993 Monopolies and Mergers Commission Inquiry into opening the market. They predicted huge increases in fixed charges, less than a decade before they themselves abolished them in the competitive market, see Matthew Bennett, Dudley Cooke and Catherine Waddams Price, 'Left out in the cold? New energy tariffs, low-income households and the fuel poor' (2002) 23 Fiscal Studies 167.
[13] Tony Prosser, *The limits of competition law: Markets and public services* (OUP 2005), 106-13. For a comparative discussion, see Kjell A. Eliassen and Johan From, 'Deregulation, privatisation and public service delivery: Universal service in telecommunications in Europe' (2009) 27 Policy and Society 239.
[14] Matthias Finger and Dominique Finon, 'From 'Service Public' to universal service: the case of the European Union' in Matthias Finger and Rolf W. Künneke (eds), *International handbook of network industries: The liberalization of infrastructure* (Edward Elgar Publishing Limited 2011) 55.

in law, the achievement of liberalisation policies at the EU level would have been more difficult. Second, liberalisation and USOs may serve the same ends. Increased competition may lead to lower prices, greater efficiency and increased affordability. Furthermore, the formal legal status and specification given to USOs, while differing significantly between sectors, may lead to more meaningful (and enforceable) rights for consumers.[15] The clearer specification of USOs also increases certainty for market players, including new entrants.

There are potential downsides to greater specification of USOs.[16] The concept of universal service is a dynamic one, which needs to adapt to changing societal and technological needs.[17] Issues of particular concern include affordability in the light of changing living standards, changing perceptions of what is an essential service (e.g. access to the internet is increasingly perceived as a basic need), and the danger of locking in services which are no longer used extensively nor judged as essential. So where USOs remain static and highly specified, they may become outmoded or irrelevant.[18]

While some form of compensation may be necessary in order to achieve USOs, there are a number of different models which can be chosen, and the incumbent firm

[15] Wolf Sauter, 'Services of general economic interest and universal service in EU law' (2008) 33 European Law Review 167, 178.

[16] The actual level of specification differs significantly between sectors. For post and telecommunications, there is more detailed specification of the universal service requirements in EU law than is the case for the other network industries, in particular, transport, water and electricity. This can, in part, be attributed to the structural characteristics of the different network industries (for example, the amount of cross-border trade); and in part to the historical traditions in the Member States with regard to the definition and implementation of universal and public service provisions in these sectors. See Simmonds (n 7) 61; Prosser (n 13) 174-206; and for a full survey, see Harker (n 1) 65-73.

[17] James Alleman, Paul Rappoport and Aniruddha Banerjee, 'Universal service: A new definition?' (2010) 34 Telecommunications Policy 86, 90; Jim Davies and Erika Szyszczak, 'Universal Service Obligations: Fulfilling New Generations of Services of Economic Interest', in Erika Szyszczak and others (eds), *Developments in Services of General Interest* (T.M.C. Asser Press Springer 2011) 162-71; Antje Kreutzmann-Gallasch and others, 'Criteria to define essential telecoms services' (November 2013) 9-16, <http://competitionpolicy.ac.uk/documents/8158338/8264594/Ofcom+Lit+Review+Essential+Services_final_updated+title.pdf/68cfe355-a5dd-4450-a982-a3455fbe1077>.

[18] Kreutzmann-Gallasch (n 17); Harker and others, 'Competition for UK postal sector and the universal service obligation' (2014) BIS Consultation response from the ESRC Centre for Competition Policy <http://competitionpolicy.ac.uk/documents/8158338/8261737/CCP+Response+-+BIS+-+Competition+for+UK+Postal+Sector.pdf/364e21b3-6296-4ee9-8e4d-945b696e8235>.

is not necessarily the best candidate for discharging the USO. One option is to remove the subsidies from the competitive retail supply market and deliver them through other means, for example, via a monopoly distribution network (where one exists). This occurs in many distribution networks where rural consumers are subsidised by urban consumers by the charging of uniform distribution prices. A second option is to grant special or exclusive rights over certain markets to the USP, preserving its ability to cross-subsidise between profitable and non-profitable customers. This was the model used until recently in postal services. A third option, which tends to be the default regulatory choice, is to allow the incumbent to carry the costs without compensation because it enjoys other advantages. In the long-run, as liberalisation gathers pace, it is unlikely that failing to compensate the incumbent will be sustainable. This then raises the vexed question of how to calculate the net costs and benefits for the purpose of compensating the USP.[19] There are two possible sources of compensation. One is an industry compensation scheme whereby entrants compensate the incumbent for fulfilling the relevant USO. Another is compensation directly from public funds. In either case, there is the problem that the incumbent will be over-compensated because, as with regulation more generally, it enjoys an informational advantage over, and an incentive to exaggerate, its costs. In addition, the incumbent may enjoy certain other intangible benefits in being appointed as USP, for example, brand ubiquity.

There is no reason, however, why the incumbent should be the USP. An auction could be held for supplying consumers who require enhanced services or who are loss-making, inviting bids to supply them with a subsidy. This is similar to the franchising arrangements for loss making transport routes, and has the obvious advantage of potentially revealing the most efficient provider. Another option is to require all suppliers to either 'pay or play', so that either they supply a particular

[19] A paper by Rodriguez and Storer pays considerable attention to the calculation of USOs. Two main approaches are suggested: the net avoided cost and the entry pricing approach, but both have their difficulties. Frank Rodriguez and David Storer, 'Alternative approaches to estimating the cost of the USO in posts' (2000) Information Economics and Policy 285. In a later report on telecoms, the OECD reports on the difficulties in estimating the net cost of providing universal service, including identification of the intangible benefits which might accrue to the universal service provider, and the adverse effect such uncertainty might have on investment in the sector: OECD (n 10) 18.

portion of the loss making consumers, or pay a contribution (in proportion to their market share) into a central fund which is then distributed to those who do.[20] As discussed in the remainder of this chapter, substantial efforts have been made in recent years to expand the provision of universal service beyond the historic incumbents, albeit with varying degrees of success.

4.3. The funding of universal service in a changing environment

In this section, the legal frameworks which govern the compensation of universal service are explained. First, since USOs are generally accommodated within the Treaty – as a subset of SGEI – compensation for the costs generated by them may be justified, even if this requires a derogation from the EU competition rules, including the State aid rules.[21] Therefore, the main principles and requirements for compliance with the State aid rules are briefly sketched. Second, the general rules on State aids and SGEIs have, to a certain extent, been displaced by the rules contained in the EU secondary legislation which both define universal service goals and lay down the procedural and substantive provisions for compensation. While these sectoral rules have been in place for a number of years, they have been left largely inactive by Member States due to the incumbents' ability to maintain cross-subsidies without explicit compensation. Indeed, as it is explained, the compensation provisions are only triggered if and when the USP can demonstrate that the USO imposes upon it an 'unfair burden', which is by no means straightforward. In recent years the Commission has used its enforcement powers in numerous instances, especially

[20] For a discussion, see Philippe Choné, Laurent Flochel and Anne Perrot, 'Universal service obligations and competition' (2000) 12 Information Economics and Policy 249. The OECD is of the view that such processes can 'generate incentives to contain costs, innovate, and reveal the true cost of delivering universal service thus minimising the subsidy required (OECD (n 10) 5). It points to some success in competitive tendering in Chile and Peru, although less success in Australia and Switzerland (where trials resulted in no competitive entry), OECD (n 10) 18.

[21] Indeed, in theory, where compensation exists which does not exceed the net cost of providing the USOs, undertaking(s) charged with their fulfilment are not placed at a competitive advantage, and so the State aid rules are not engaged at all.

where compensation mechanisms appear to be over-compensating the incumbent, or are designed in such a way as to exclude entrants from being designated as a USP.

4.3.1. State aid, universal service, and SGEIs

While no explicit mention is afforded to universal service in the Treaty on the Functioning of the European Union (TFEU),[22] the concept is generally considered to fall within the scope of SGEI, which are given specific protection under the TFEU, primarily under Article 106(2).[23] Notwithstanding the various attempts by the Commission to define SGEI[24] (and USOs),[25] Member States have a measure of discretion in defining a service as a SGEI.[26] This approach allows Member States to establish, extend and adjust the provision of particular services to specific national needs, subject to certain limiting principles developed by the EU courts. That said, in recent years the Court has held that services can only be categorised as a SGEI if it can be demonstrated that the service would not otherwise be provided through the

[22] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47. Unless indicated otherwise, all further references are made to the TFEU.

[23] SGEIs are also given protection under Article 14 TFEU, Protocol 26 to the TFEU and Article 36 of the Charter of Fundamental Rights. On the effects of Article 14, Protocol 26, and Art 36 of the Charter of Fundamental Rights: Sauter argues that these provisions add substantively little to Article 106(2), see Sauter (n 15) 174; Wolf Sauter, *Public services in EU law* (Cambridge University Press 2015) 12. For a general discussion see Natalia Fiedziuk, 'Services of general economic interest and the Treaty of Lisbon: opening doors to a whole new approach or maintaining the "status quo"' (2011) 37 European Law Review 226. On the other hand, von Danwitz argues that their adoption is 'the culmination point in the fight for a specific legal status for public services' (Thomas von Danwitz, The Concept of State Aid in Liberalised Sectors, (2008) EUI Working Papers LAW 2008/28, 1 <http://cadmus.eui.eu/bitstream/handle/1814/9588/LAW_2008_28.pdf?sequence=1>.

[24] The term 'SGEI' also lacks a clear definition. However, the European Commission has sought to clarify and define the concept of SGEI in several of its policy documents, for example, as 'economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of quality, safety, affordability, equal treatment or universal access) by the market without public intervention'. European Commission, 'A Quality Framework for Services of General Interest in Europe', (Communication) COM (2011) 900 final, 5.

[25] In the 2011 Communication, the Commission referred to USOs as: 'requirements designed to ensure that certain services are made available to all consumers and users in a Member State, regardless of their geographical location, at a specified quality and, taking account of specific national circumstances, at an affordable price'. ibid, 4. This definition is in line with Article 3(1) of Directive 2002/22/EC (Universal Service Directive) [2002] OJ L108.

[26] The Treaty allows Member States and their local, regional and national public authorities broad discretion to define a service as being SGEI (and USO). Case T-17/02 *Olsen v Commission* [2005] ECR II-2031, para 216 (confirmed by order of the Case C-320/05P *Olsen v Commission* [2007] ECR I-131).

market – the 'market failure' requirement – which significantly limits the apparently broad discretion of Member States.[27] For example, in a recent case concerning high-speed broadband, the General Court confirmed that the presence of market failure is a necessary condition for a SGEI.[28]

Although external financing may be necessary to secure the provision of USOs, it can also distort competition. Article 106(2) TFEU contains a derogation from the application of the competition rules, including the general prohibition on State aids. However, where the payment made to a USP goes no further than merely compensating the undertaking for the net costs of fulfilling the USO, there is in principle no market distortion, since it is not placed at a competitive advantage vis-à-vis its competitors.

In the past there was no clear understanding of whether payments for the provision of SGEIs were to be regarded merely as compensation for discharging those services (the 'compensation approach'), or as State aid (the 'State aid approach'). Under the State aid approach, each payment to an entrusted undertaking was considered as State aid within the meaning of Article 107(1) and, therefore, incompatible with the internal market unless they satisfied one of the public interest exceptions contained in Article 107(2-3) TFEU. However, even if the compensation in question did not satisfy the State aid exceptions, it could still be justified under Article 106(2) TFEU. Even though the payment may ultimately be compatible with the internal market, the Commission must be notified of it in advance and the Member State is required to wait for the Commission's approval before making the payment (the standstill obligation).[29] In contrast, under the compensation approach, payment for the pure recovery of the undertaking's net costs (including a reasonable profit)

[27] Whether or not a service is provided through the market is then addressed by the test for 'manifest error of assessment', *Olsen v Commission (*n 26) para 166. For a defence of this position see Sauter (n 15) 178.
[28] In the *Colt* case, the existence of market failure was assumed when the Member State can demonstrate that the service will not be provided by the market within the near future, Case T-79/10 *Colt Télécommunications France v European Commission* ECLI:EU:T:2013:463, para 153. Earlier, the General Court ruled in *BUPA* that in order to pass this test, a SGEI must have a 'universal and compulsory nature' and the Member State is obliged to explain why a particular service is to be regarded as SGEI, Case T-289/03 *BUPA* [2008] ECR II-81, para 172.
[29] Art 108(3) TFEU.

for the delivery of a SGEI is to be regarded as merely compensatory and not as State aid. Such a payment would be compatible with the internal market without recourse to the public interest exceptions nor the derogation under Article 106(2) TFEU. Further, as it is not regarded as State aid, a prior assessment by the Commission is not necessary.[30] In practice, therefore, the main difference between the two approaches is the notification requirement and standstill obligation under the State aid approach, which obviously gives the Commission more control over Member States' autonomy.

In terms of the jurisprudence, it is fair to say that, while the EU courts have not been entirely consistent, the compensation approach dominates.[31] The issue was apparently settled in the *Altmark* case,[32] where the Court confirmed that the compensation approach was the correct one to be followed, confirming as a point of principle that provided the undertaking does not receive over-compensation for the fulfilling its public service mission, such payments do not put it at a competitive advantage within the meaning of Article 107(1) TFEU.[33] The Court went further, however, by developing four cumulative criteria which have to be met for a payment to fall outside of the scope of Article 107(1) TFEU ('the *Altmark* criteria').[34] Despite the apparent clarity of the Court's criteria, their application has not been unproblematic. The fourth criterion – requiring that the undertaking is either

[30] Leigh Hancher and Pierre Larouche, 'The Coming Age of EU Regulation of Network Industries and Services of General Economic Interest' in Paul Craig and Gráine de Búrca (eds), *The evolution of EU law* (2nd edn, OUP 2011) 759; Alison Jones and Brenda Sufrin, *EU competition law* (5th edn, OUP 2014), chapter State aid, 67-8; For a detailed discussion of the compensation approach and the state aid approach, see Szyszczak (n3) 222–28.

[31] For examples of the compensation approach, see: Case 240/83 *Procureur de la République v ADBHU* [1985] ECR 531, para 18; Case C-53/00 *Ferring* [2001] ECR I-9067, para 27. For examples of the State aid approach, see: Case C-387/92 *Banco Exterior de Espana SA v Ayuntamiento de Valencia* [1994] ECR I-877, paras 20-22.; Case T-106/95 *FFSA and Others v Commission* [1997] ECR II-229, para 172; Case T-46/97 *SIC v Commission* [2000] ECR II-2125, para 84.

[32] Case C-280/00 *Altmark Trans* [2003] ECR I-7747.

[33] ibid, para 92.

[34] The criteria can be summarised as follows: First, the recipient undertaking must actually have 'public service obligations' to discharge, and the obligations must be clearly defined. Second, the method by which the compensation is calculated must be established in advance in an objective and transparent manner. Third, the compensation cannot exceed what is necessary to recover costs incurred. Fourth, the undertaking discharging the public service must either be chosen by a public procurement procedure or the level of compensation should reflect the cost of a 'typical, well-run undertaking', ibid, paras 88-94.

selected by a public procurement process or that compensation should reflect the costs of a 'typical, well-run undertaking' (hereafter 'the efficiency benchmark') – has been very difficult to apply in practice.[35] However, in *BUPA*, this requirement was relaxed by the General Court. Depending on the established compensation scheme in place, an efficiency benchmark may not be needed, even in cases in which the undertaking was not entrusted by an act of public procurement.[36] Furthermore, in the *Deutsche Post* case,[37] the General Court set aside the Commission's State aid decision principally on the ground that it had failed to assess sufficiently whether the payments received by Deutsche Post amounted to over-compensation (as it was required to do in applying the third *Altmark* criteria).[38] The decision of the General Court was upheld by the Court,[39] and the case is seen as an important confirmation of the *Altmark* criteria and the 'compensatory approach' which underpins it.[40]

In terms of the decisional practice of the Commission, the *Altmark* criteria has been applied strictly and in the majority of cases the fourth criterion is not met.[41] The consequence, therefore, is that most payments are considered as State aid (within the scope of Article 107(1) TFEU), subject to the Commission's control, the prior

[35] Hancher and Larouche (n30) 761-2; See also Max Klasse, 'The Impact of Altmark: The European Commission Case Law Responses' in Erika Szyszczak and Johan Willem van de Gronden (eds), *Financing Services of General Economic Interest* (T. M. C. Asser Press 2013) 36–37; EAGCP, 'Services of General Economic Interest' (2006) Opinion prepared by the State aid Group of EAGCP, <http://ec.europa.eu/competition/state_aid/studies_reports/sgei.pdf>.

[36] *BUPA (*28) paras 245-8. However, the Commission is still required to examine whether the compensation does not result from any inefficiencies of the service provider (ibid, para 249). See Nuna Albuquerque Matos, 'The Role of the BUPA Judgement in the Legal Framework for Services of General Economic Interest' (2011) 16 Tilburg Law Review 83, 86–89. In the *Chronopost* judgment, three weeks prior to *Altmark*, the ECJ decided that in markets where there is no undertaking to compare the incumbent's costs with, compensation cannot be based on market conditions but rather must 'be assessed by reference to the objective and verifiable elements which are available' (Joined Cases C-83/01P, C-93/01P; C-94/01P *Chronopost* [2003] ECR I-6993, paras 38-40).

[37] Case T-266/02 *European Commission v Deutsche Post AG and others* ECLI:EU:T:2008:235.

[38] In particular, the Commission had failed to assess whether or not the total costs of delivering the door-to-door parcel service at a uniform tariff exceeded the level of subsidy it received.

[39] C-399/08 *European Commission v Deutsche Post AG and others* ECLI:EU:C:2010:481. See David Christian Bauer and Georg Muntean, 'Case Note on European Commission v Deutsche Post AG et al.' (2011) 10 European State Aid Law Quarterly 655; Andreas Bartosch, 'Clarification or Confusion? How to Reconcile the ECJ's Rulings in Altmark and Chronopost', (2003) 2 European State Aid Law Quarterly 375.

[40] Bauer and Muntean (n 39) 669.

[41] See Matos (n 36).

notification requirement and the standstill obligation.[42] However, even where compensation cannot be justified under Article 107(2) or (3) TFEU, it may still be subject to the derogation under Article 106(2). According to the Court, Article 106(2) TFEU has three requirements: the SGEI must be clearly-defined; it must be provided by an 'explicitly entrusted' undertaking;[43] and 'the exemption… must not affect the development of trade to an extent that would be contrary to the interests of the Community'.[44] In contrast with *Altmark*, neither a tendering procedure nor the application of an efficiency benchmark is required.[45]

Following the *Altmark* judgment, in 2005 the Commission issued guidelines on granting State aids in the form of public service compensation.[46] These were replaced by a new SGEI Package in 2012, consisting of revised Decision and Framework documents, in addition to a new Communication document.[47] The objective of the 2012 package is to provide guidance and clarification to the Member

[42] Klasse (n 35) 50.

[43] An entrusted undertaking is any entity engaged in an economic activity, regardless of their legal status and the way in which the entity is financed (see e.g. Case C-41/90 *Höfner and Elser v Macrotron* [1991] ECR I-1979, para 21 and Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, para 74. Entrustment requires that the undertaking must discharge a public service assigned by an act of a public authority. See Case 127/73 *BRT v SABAM* [1974] ECR-313, para 20.

[44] Case T-442/03 *SIC v Commission* [2008] ECR II-1161, para 144; Joined Cases T-204/97 and T-270/97 *EPAC v Commission* [2000] ECR II-2267, paras 125-6; Case C-179/00 *Merci Convenzionali Porto di Genova* [1991] ECR-5889, para 26.

[45] *SIC v Commission* (n 44) para 145; *Olsen v Commission* (n 26) para 239. In the *CBI* case, the General Court confirmed that Article 106(2) TFEU does not require an efficiency test such as that which is laid down in the fourth *Altmark* criteria; Case T-137/10 *CBI v Commission* ECLI:EU:T:2012:584, paras 295-300. Furthermore, the second *Altmark* criterion is not required under Article 106(2) TFEU. For a more detailed discussion, see Chapter 5, in particular sections 5.2.3. and 5.2.4.

[46] The 2005 SGEI Package – or so-called 'Monti/Kroes Package' – consisted of a Decision and a Framework document. Both documents contained conditions under which compensation payments granted to entrusted undertakings with the provision of SGEI are compatible with the internal market 'Community framework for State aid in the form of public service compensation' [2005] OJ C 297/4; 'Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of series of general economic interest' [2005] OJ L 312/67).

[47] Commission, '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' [2012] OJ C8/4; Commission Decision (2012/21/EU) 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 [2011] OJ L7/3; Commission, 'European Union framework for State aid in the form of public service compensation (2011)' (2012/C 8/03) [2012] OJ C8/15 (2012 SGEI Framework).

States for the assessment of public financing of SGEI.[48] The Decision is a de facto block exemption for State aids below certain thresholds. Where the requirements of the Decision are satisfied, the public service compensation constitutes State aid but is considered to be compatible with the internal market and therefore no notification is required.[49] For cases that fall outside the scope of the SGEI Decision, the compatibility of the payment must be assessed under the SGEI Framework.[50] Where its criteria are satisfied, the payment still constitutes State aid but it is justified under Article 106(2) TFEU.[51]

The requirements of the SGEI Framework only partially correspond with Article 106(2) TFEU jurisprudence. In line with recent case law, the Commission emphasises the market failure requirement in order to establish a genuine SGEI.[52] The 2012 Framework also prescribes that the entrustment period is limited to the time necessary to recover the most significant assets,[53] and prescribes methodologies for calculating the compensation payment.[54] However, the

[48] European Commission, 'State aid: Commission adopts new rules on services of general economic interest (SGEI)' (2011), Press Release, IP/11/1579 <http://europa.eu/rapid/press-release_IP-11-1571_en.htm>.

[49] For SGEIs in postal services and telecommunications, the compensation threshold was lowered from EUR 30 million to EUR 15 million per annum (Article 2(1)(a) of the Decision (2012/21/EU)). Undertakings providing SGEI have to be entrusted with the provision of the service by the Member State (Article 4). The scope of the Decision is then further limited by a 10 year entrustment period (under certain circumstances, where a longer period is required for the amortisation of the investment cost, this period can be extended) to reduce the negative impact on competition as the entrustment act can create a barrier to entry (Recital 12 and Article 2(2) of the Decision); see Adinda Sinnaeve, 'What's New in SGEI in 2012? - An Overview of the Commission's SGEI Package' (2012) 11 European State Aid Law Quarterly 347, 357. To avoid overcompensation of the entrusted service provider, the Decision limits the amount of compensation to the net costs, including a reasonable profit (Article 5(1)), in line with the third *Altmark* requirement.

[50] Note also the de minimis rules: Commission Regulation (EU) 360/2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest [2012] OJ L114/8.

[51] 2012 SGEI Framework, Recital 7. The 2012 SGEI Framework does not apply to SGEI in the land transport or public service broadcasting sectors, nor to providers of SGEI in difficulty; 2012 SGEI Framework, Recital 8 and 9.

[52] With regard to the Member States' discretion to actually judge whether the service is not provided through the market, the Commission's control is limited to the manifest error of assessment, 2012 SGEI Framework, Recital 13.

[53] 2012 SGEI Framework, Recital 17. This limitation is new compared to the 2005 SGEI Framework.

[54] The first and preferred method is the so-called 'net cost avoided methodology'. The second possible method is the 'cost allocation methodology'. Under the first methodology, the necessary net costs – or the net costs expected to be necessary – shall not exceed the difference between the net costs for discharging the services and the net cost or profits for the same provider without the

Framework further mandates compliance with the EU Public Procurement rules,[55] and also requires Member States to 'introduce incentives for the efficient provision of SGEI of a high standard, unless they can duly justify that it is not feasible or appropriate to do so'.[56] These two new requirements potentially reduce the compatibility of State aid measures under Article 106(2) TFEU.[57] However, the threshold of these two requirements must be lower than the criteria enumerated by the Court in *Altmark*, otherwise Article 106(2) TFEU would be rendered largely redundant.[58] Nonetheless, it should be noted that both the requirements of a public procurement procedure and the efficiency test is contrary to established case law on Article 106(2) TFEU.[59]

4.3.2. The directives and compensation principles: postal services and telecommunications

This section turns to the alternative route open to Member States in compensating for the provision of universal service, with a focus on postal services and

obligation to provide such services (2012 SGEI Framework, Recital 25). For further guidance, the 2012 SGEI Framework refers in Recital 26 to the Annex IV of the Universal Service Directive (Directive 2002/22/EC) and to Annex I of the First Postal Services Directive (Directive 97/67/EC). The 'cost allocation methodology' uses the difference between the costs and revenues for the calculation of the net costs necessary to provide the obligations (2012 SGEI Framework, Recital 28). For a discussion see Damien Geradin, 'The New SGEI Package' (2012) 3 Journal of European Competition Law & Practice 1. See generally Rodriguez and Storer (n 19).

[55] 2012 SGEI Framework, Recital 18-19.

[56] 2012 SGEI Framework, Recital 39. For example, Member States can incorporate productive efficiency targets in the entrustment act and the level of compensation then depends on the extent to which the targets have been met, 2012 SGEI Framework, Recital 40 and 41.

[57] One should bear in mind that where an undertaking is entrusted with the provision of SGEI through a procurement procedure or where the level of compensation is based on the costs of a comparable efficient undertaking, the *Altmark* criteria will be satisfied and the payment will constitute a pure compensation payment and not State aid. In such a case, it would not be necessary to rely on the SGEI Framework.

[58] Rather than being based on a 'typical and well-run undertaking' (as in the *Altmark* test), they must be based on objective and measurable criteria (2012 SGEI Framework, Recital 42). See Sinnaeve (n 49) 360. The General Court confirmed that Article 106(2) TFEU does not require an efficiency test such as laid down in the fourth *Altmark* criteria in *CBI v Commission* (n 45) paras 295-300.

[59] In comparison with *Altmark*, a tendering procedure is not required by established European case law *SIC v Commission* (n 44) para 145; *Olsen v Commission* (n 26) para 239. See also Geradin (n 54) 6–7; Ernst-Joachim Mestmäcker and Heike Schweitzer, *Europäisches Wettbewerbsrecht* (3rd edn, C.H. Beck2014) 8.

telecommunications. In these two sectors, relative to the other network industries,[60] a stronger emphasis was put on the formal protection of universal service in the EU secondary legislation, and the principles and procedures governing compensation are the most developed.[61] For postal services and telecommunications the relevant rules are contained in the *Postal Services Directive* (PSD)[62] and *Universal Service Directive* (USD) respectively.[63]

4.3.2.1. The scope of universal service in postal services and telecommunications

As was discussed above, Member States enjoy a measure of discretion when defining SGEI (including USOs). This discretion can be reduced or displaced where USOs are specified by European secondary legislation.[64] The degree to which discretion can be displaced depends on how precisely services are specified in secondary EU legislation. While Member States may impose USOs which go beyond those specified in the Directives,[65] they may not use the compensation mechanisms contained within them

[60] The different structure of the electricity sector in Member States as well as the different stages of liberalisation may have contributed to the fact that universal service is less defined in electricity, see Prosser (n 13) 186, 197, 205.

[61] In contrast, the Directive for electricity (Directive 2009/72/EC) contains more limited provisions on both universal service obligations and on compensation mechanisms. With respect to the former, the Directive requires that Member States ensure that all household customers and – at the discretion of Member States – SMEs shall enjoy universal service, defined as the 'right to be supplied with electricity of a specified quality within their territory at reasonable, easily and clearly comparable, transparent and non-discriminatory prices' (Article 3(3)). On financial compensation, the Directive merely states that 'financial compensation, other forms of compensation and exclusive rights which a Member State grants for the fulfilment' of any obligations 'shall be done in a non-discriminatory and transparent way' (Article 3(6)). The 2003 Directive [Directive 2003/54/EC (repealed)] was identical. For a wider discussion see Harker (n 1) 52-64.

[62] Directive 97/67/EC of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service [1998] OJ L15/14, as amended by Directive 2002/39/EC [2002] OJ L176/21, as amended by Directive 2008/6/EC [2008] OJ/L52/3.

[63] Directive 2002/22/EC of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) [2002] OJ L108/51, as amended by Directive 2009/136/EC [2009] OJ L337/11.

[64] Case C-206/98 *Commission v Belgium* [2000] ECR I-3509 para 45.

[65] The USOs are defined in the Postal Services Directive, Article 3 Directive 97/67/EC, as amended by Directive 2002/39/EC, as amended by Directive 2008/6/EC and in the Universal Service Directive, Articles 3 – 9 Directive 2002/22/EC, as amended by Directive 2009/136/EC.

to compensate service providers for these additional obligations.[66] If Member States go further and expand the scope of USOs, they are subject to the State aid rules.[67]

For telecommunications, the USD requires that Member States ensure that services included in the scope of universal service are made available to all end-users irrespective of their geographical location at an 'affordable price'.[68] In addition, with respect to ensuring the affordability of access, Member States may impose on operators to offer tariffs which depart from 'normal commercial conditions', such as 'social tariffs' for those on low-incomes or with 'special social needs'.[69] They may also require operators to offer tariffs which include geographical averaging.[70] In postal services, the USOs include the provision of a sufficient density of post offices and post boxes, the daily delivery and collection of specified mail items, at prices affordable for all users.[71]

4.3.2.2. Securing contestability in the provision of USOs

In order for firms to be compensated for fulfilling universal service, they must first be *designated* by the Member State.[72] While Member States have some discretion when

[66] Directive 2002/22/EC, Article 32; Directive 2008/6/EC, Recital 30.
[67] Directive 2008/6/EC, Recital 30. In doing so, Member States' discretion under the State aid regime is subject to a stricter proportionality standard (Sauter (n 15) 186-88); see also Malcom Ross, 'A healthy approach to services of general economic interest? The *BUPA* judgment of the Court of First Instance' (2009) 34 European Law Review 127, 136-8; Fiedziuk (n 23) 228; Klasse (n 35) 50-51.
[68] Directive 2002/22/EC, Article 3(1). The relevant services are: access to a publicly available telephone network at a fixed location to a public communications network (Directive 2002/22/EC, as amended by Directive 2009/136/EC, Article 4), a directory of users and a directory enquiry service (Directive 2002/22/EC, as amended by Directive 2009/136/EC, Article 5), the provision of public pay telephones (Directive 2002/22/EC, as amended by Directive 2009/136/EC, Article 6), and special measures for disabled end-users (Directive 2002/22/EC, as amended by Directive 2009/136/EC, Article 7).
[69] Directive 2002/22/EC, as amended by Directive 2009/136/EC, Article 9(2).
[70] Directive 2002/22/EC, Article 9(4).
[71] This includes letters up to 2 kilograms, packages up to 10 kilograms but may be increased up to 20 kilograms, and 20 kilograms for inbound parcels from other Member States and services for registered and insured items at a minimum of five working days per week, Directive 1997/67/EC, as amended by Directive 2008/6/EC, Article 3.
[72] Directive 1997/67/EC, as amended by Directive 2008/6/EC, Article 4; Directive 2002/22/EC, as amended by Directive 2009/136/EC, Article 8. The historical position in postal services is different, as the postal incumbents in Member States retained exclusive rights over reserved services in order to facilitate the cross-subsidisation of universal service (this is explained in more detail in section 4.2.2.

it comes to designation, it is circumscribed by a number of principles, including least market distortion.[73] The USD and PSD make clear that Member States may designate different undertakings to deliver different elements of universal service and/or to cover different parts of the national territory.[74] In so doing, Member States are, in both cases, required to abide by the principle of non-discrimination,[75] and the USD further stipulates that the designation mechanism must not result in any undertaking being 'a priori excluded from being designated',[76] ensuring that new entrant firms are not excluded in practical terms from providing USOs. A specific issue was identified in 2005, which appeared to limit designation to the French telecommunications incumbent.[77] This was because designation was limited to undertakings that were able to cover all of the national territory. An infringement procedure was launched, and the Court found that the provision in question, to the extent that it excluded operators who were unable to serve the whole of France, breached the principles contained in the USD.[78] There are obvious tensions between the objective of cost effectiveness and the no a priori exclusion rule, especially in relation to economies of scale and scope.[79] It is clear from the approach of the

below). However, the Third Postal Services Directive required the abolition of these exclusive rights, while at the same time putting in place new requirements for designation (modelled on those contained in the USD).

[73] For telecommunications, the Directive requires that Member States must 'determine the most efficient and appropriate approach' which respects the principles of 'objectivity, transparency, non-discrimination and proportionality', and 'seek to minimise market distortions… whilst safeguarding the public interest', Directive 2002/22/EC, Article 3(2). The PSD similarly refers to the requirements of 'transparency, non-discrimination, proportionality, transparency and least market distortion', Directive 97/67/EC, as amended by Directive 2008/136/EC, Article 4(2).

[74] Directive 97/67/EC, as amended by Directive 2008/6/EC, Article 4; Directive 2008/6/EC, Recital 23; Directive 2002/22/EC, as amended by Directive 2009/136/EC, Article 8; Directive 2002/22/EC, Recital 14.

[75] Directive 2002/22/EC, Article 8(2); Directive 97/67/EC, as amended by Directive 2008/6/EC, Article 4(2).

[76] Directive 2002/22/EC, Article 8(2).

[77] Commission, 'European Electronic Communications Regulation and Markets 2005 (11th Report)', (Staff Working Document) Volume I, SEC(2006) 193, 143. Infringement proceedings were also launched against Finland in 2005. In that case, the relevant legislation appeared to specify that the operator designated as USP would be the company either with significant market power or having the largest market share in the region. The case did not come before the Court (ibid, 269).

[78] Case C-220/07 *Commission v France* [2008] ECR I-95, paras 32-33.

[79] BEREC, '*Report on Universal Service – reflections for the future'* (2010), 17 <http://berec.europa.eu/eng/document_register/subject_matter/berec/reports/187-berec-report-on-universal-service-reflections-for-the-future>.

Commission and the Court, however, that the no a priori exclusion rule takes precedence.[80]

Various problems have been identified concerning designation, especially in telecommunications. A number of countries have been slow to put in place legislation for the designation of USPs, much to the chagrin of the Commission.[81] Despite the principles outlined above, and the increased formalisation by Member States of the designation process in domestic legislation, in practice the incumbents are appointed as USPs in the vast majority of cases in both telecommunications[82] and postal services.[83] This may be the result of a lack of incentives for new entrants to apply for designation, even if the process is open to them, a point made by BEREC:

> …[I]t appears that the number of competitors having the technical and financial standing required for an USP designation is very limited, which adds to what can be described as an inherent reluctance of market players to

[80] In another case, which resulted in infringement proceedings against Spain, one firm expressed an interest in providing a directory enquiries service. The Spanish rules excluded from consideration firms who were only interested in offering one unique element of the USOs, and hence the firm was not considered. Despite attempting to justify its approach on the ground of cost-effectiveness, the Commission held that the rules for designation were in breach of the principles of the USD. Letter of formal notice from the European Commission to Spain (27.06.2007), 'Designation and financing of universal service'; European Commission, 'New round of infringement proceedings under the EU telecom rules: What are the issues?', (MEMO/07/255, 27 June 2007) < http://europa.eu/rapid/press-release_MEMO-07-255_en.htm>; The Commission closed the case after Spain had changed its national legislation, European Commission, 'Telecoms: Commission requests information from Spain on new charge on operators; closes infringement case on universal service' (Press Release, IP/10/322, 18 March 2010) <http://europa.eu/rapid/press-release_IP-10-322_en.htm?locale=en>.

[81] Commission, 'Progress Report on the Single European Electronic Communications Market (15th Report)', (Staff Working Document) Volume I, SEC(2010) 630 final, 57-58.

[82] In 2005, it was only in Estonia that a tender process resulted in the designation of a new entrant as USP; in Belgium and the Czech Republic, elements of the service were provided by entrants alongside the incumbent, Commission, 'European Electronic Communications Regulation and Markets 2006 (12th Report)', COM(2007), 155 final, 17. According to a 2010 Report, published by the Body of European Regulators for Electronic Communications (BEREC), eight out of 27 BEREC countries used the tender process to designate the universal service provider, BEREC (n 79) 30-33.

[83] Alex Kalevi Dieke and others, 'Main Developments in the Postal Sector (2010-2013)' (Study for the European Commission, Directorate General for Internal Market and Services) (2013), 137, <https://publications.europa.eu/en/publication-detail/-/publication/2a435533-0c31-40a3-b5a4-e3d26b7c467f>.

> compete for being designated as bearers of obligations… under the regulatory framework.[84]

For postal services, a recent survey of the USP designation points to a failure of most Member States to consider introducing some element of contestability in universal service provision, using instead 'universal service designation to continue some remnant of the former legal privileges of the public postal operators'.[85]

4.3.2.3. Deciding whether to compensate – 'net costs' and 'unfair burden'

The relevant legislation on telecommunications and postal services contain broadly similar principles on the implementation and design of compensation mechanisms.[86] Before such arrangements may be made, the relevant regulator must be satisfied that the provision of universal service represents an 'unfair burden' on the designated undertaking(s) based on a 'net cost' calculation of the provision.[87] The meaning of 'unfair burden' is not elaborated upon in either the USD or PSD.

The calculation of net cost, upon which an assessment of unfair burden depends, is by no means straightforward.[88] When assessing net costs, account should

[84] BEREC (n 79) 31–32.
[85] Dieke (n 83) 137. Malta, Sweden and Germany are exceptions. The latter has not designated any operator at all since 2008, Harker (n 1) 37. In Estonia, Luxemburg, Poland, Romania and Sweden universal service is also provided without relying on a designated USP, European Commission, 'Implementation of the EU regulatory framework for electronic communications – 2014' (Commission Staff Working Document) SWD(2014) 249 final, 17.
[86] For postal services, alongside the abolition of the 'reserved market', new rules on the compensation mechanism were promulgated in 2008 (Directive 97/67/EC, as amended by Directive 2008/6/EC, Article 7(1)), which largely reflect those already in existence for telecommunications that are contained in the Universal Service Directive (Directive 2002/22/EC).
[87] Directive 2002/22/EC, Article 12(1) in accordance with Annex IV, Part A; Directive 97/67/EC, as amended by Directive 2008/6/EC, Article 7(3) in accordance with Annex I, Part B.
[88] Net costs are defined as the difference between the USP's net costs operating with the universal service obligations and operating without them, Directive 2002/22/EC, Annex IV, Part A; Directive 97/67/EC, as amended by Directive 2008/6/EC, Annex I, Part B.

be had to any 'market benefit' or 'intangible benefits' which accrue to the USP.[89] The calculation of attributable costs includes identified services or users which can only be provided or served at a loss or under cost conditions falling outside normal commercial standards. A calculation of the net costs of each aspect of universal service is to made separately in order to avoid any 'double counting' of any direct or indirect benefits and costs. Notwithstanding the principles above, both the USD and PSD do not define what is meant by 'unfair', and several alternative approaches have been suggested, including: whether the net costs of the USO exceed those costs which would be involved in setting-up a compensation mechanism, the inability of the USP to make a normal economic profit (the requirement for a 'reasonable profit' is recognised in the PSD),[90] or where the profitability of the USP differs significantly from its competitors.[91]

Neither the USD nor the PSD specify or give examples of what is an intangible benefit. Recital 20 of the USD merely states that such benefits should be an 'estimate in monetary terms, of the indirect benefits that an undertaking derives by virtue of its position as [a] provider of universal service'. In a survey of BEREC members, a number of examples of intangible benefits were gathered from national regulatory authorities (NRAs). These included: the benefits of geographical ubiquity, which arises where a customer moves from an area served only by the USP to another area where there are new entrants; the 'life-cycle effect' benefit, relating to a customer who it is currently unprofitable to serve who might become profitable in the future;

[89] Directive 2002/22/EC, Article 12(1) in accordance with Annex IV, Part A; Directive 97/67/EC, as amended by Directive 2008/6/EC, Article 7(3) in accordance with Annex I, Part B. See also Commission, 'Assessment Criteria for National Schemes for the Costing and Financing of Universal Service in telecommunications and Guidelines for the member States on Operation of such Schemes', COM(96) 608 final. For a discussion of different methodologies used in postal services to determine whether or not a financial burden is 'unfair', see Frontier Economics, 'Study on the principles used to calculate the net costs of the postal USO: A Report prepared for the European Commission' (2013), 123-36 <http://ec.europa.eu/internal_market/post/doc/studies/2012-net-costs-uso-postal_en.pdf>.

[90] Directive 97/67/EC, as amended by Directive 2008/6/EC, Annex I, Part B. For a discussion see François Boldron and others, 'A Dynamic and Endogenous Approach to Financing the USO in a izeed Environment', in Michal A Crew and Paul R Kleindorfer (eds), *Progress in the competitive agenda in the postal and delivery sector* (Edward Elgar Publishing 2009).

[91] Frontier Economics (n 89) 123–36.

and benefits resulting from brand enhancement and corporate reputation.[92] As BEREC observes, estimating and quantifying the intangible benefits is likely to 'prove extremely difficult' in practice.[93]

Once the net costs have been calculated, and these are judged to be an 'unfair burden', the Member States must then decide, upon the request of the designated undertaking(s), how to compensate. This compensation can be drawn directly from public funding, or by sharing the net costs between market participants.[94] Such a sharing mechanism must be administered by a body independent of the beneficiaries of the scheme,[95] respecting the principles of transparency, non-discrimination, and proportionality.[96] For telecommunications, Member States must also respect the principle of 'least market distortion',[97] and have the discretion to exempt new entrants 'which have not yet achieved any significant market presence'.[98]

The net cost calculation and establishment of an unfair burden appears to be a complicated and time-consuming process in telecommunications. Due to various administrative delays, court proceedings, delays in contributions, or updates of net cost calculation methodologies, compensation schemes have not been widely employed by Member States.[99]

[92] BEREC (n 79) 35–36. For a similar study in respect of postal services, see Frontier Economics (n 89) 109–22.
[93] For some examples of methodologies used by the national regulatory authorities, see BEREC (n 79) 36–38.
[94] Directive 97/67/EC, as amended by Directive 2008/6/EC, Article 7(3); Directive 2002/22/EC, Article 13(1).
[95] Directive 2002/22/EC, Article 13(2), which goes on to specify this should be either the NRA or a body supervised by it; Directive 97/67/EC, as amended by Directive 2008/6/EC, Article 7(4). The PSD also refers to the requirement of supervision by the NRA in the calculation of net costs, Directive 2008/6/EC, Recital 29.
[96] Directive 97/67/EC, as amended by Directive 2008/6/EC, Article 7(5); Directive 2002/22/EC, Article 13(3).
[97] Directive 2002/22/EC, Recital 23.
[98] Directive 2002/22/EC, Recital 21.
[99] In 2009, compensation mechanisms were only in place and activated in France, Czech Republic, Italy, Spain, Romania, Latvia and in Belgium for social tariffs only, Commission (n 81) 58. As is discussed below, the Belgian compensation mechanism for social tariffs was later challenged by the European Commission.

The most important case on the principles which must be followed by Member States in compensating USPs is *Commission v Belgium*.[100] The USO in question related to 'social tariffs', i.e., discounts which were available to consumers on low incomes and with special needs. All operators, the incumbent and entrants alike, were required to offer these tariffs to such customers. A compensation scheme was set up whereby payments were made to any operator which carried a disproportionate number of social tariff consumers relative to its market share. Compensation was calculated at a flat-rate for all operators and was automatic – there was no additional need to demonstrate that the number of social tariffs carried by an individual operator imposed an 'unfair burden', and the net cost of serving a social tariff customer was assumed to be the same for all operators.

The Court found that the automatic nature of the scheme breached the Directive's requirement that an undertaking had to be found to bear an unfair burden before compensation mechanisms could be put in place.[101] The Court held that a net cost is not per se an unfair burden:

> …[T]he unfair burden which must be found to exist by the national regulatory authority before any compensation is paid is a burden which, for *each undertaking* concerned, is excessive in view of the undertaking's ability to bear it, account being taken of all the undertaking's own characteristics, in particular the quality of its equipment, its economic and financial situation and *its market share*.[102]

[100] Case C-222/08 *Commission v Belgium* [2010] ECR I-9017. See also Case C-389/08 *Base and Others* [2010] ECR I-9073, a preliminary reference procedure covering the same ground. See also Case C-384/99 *Commission v Belgium* [2000] ECR I-633.
[101] *Commission v Belgium* [2010] (n 100) para 58. In *Commission v France*, a compensation scheme set up to compensate the incumbent was unnecessary given that the incumbent held a near monopoly over the market (Case C-146/00 *Commission v France* [2001] ECR I-9767, paras 25-30).
[102] *Commission v Belgium* [2010] (n 100) para 49 (emphasis added).

For the purposes of this assessment, the NRA had to lay down 'general and objective criteria' taking into account the undertaking's characteristics, and must carry out 'an individual assessment of the situation of each undertaking concerned'.[103] The Court also held that the assessment of the net cost for the undertaking must also include intangible benefits, in line with the requirements of the Directive.[104] It rejected the Belgium Government's argument that where USOs applied to all operators, the benefits would be the same for all of them.[105]

4.3.3. Conclusions

As it has been demonstrated, the provisions which exist for compensating undertakings for the costs of universal service are complex and cumbersome. This would appear to explain their limited take-up by Member States. This may further explain why, in telecommunications, the ex ante system of compensation has been usurped by the State aid regime, especially in relation to the provision of universal service in broadband services. However, the State aid regime has been significantly reconfigured in recent years to promote contestability in the assignment of universal service obligations.

4.4. Balancing universal access and liberalisation: case studies in broadband and postal services

In this section, recent developments in securing universal service in broadband and the letter collection and delivery markets are analysed. It is in these two sectors where the most pronounced tensions between the achievement of USOs and liberalisation can be seen, albeit for different reasons. In telecommunications, technological change and liberalisation are the most advanced. However, for broadband, the regime for securing universal access under the USD has largely been

[103] ibid, para 50.
[104] ibid, para 84.
[105] ibid, para 69.

usurped by the use of State aid, with important consequences in terms of the Commission's supervisory powers and the formal protection of USOs. Furthermore, while state support for the rolling-out of significant broadband infrastructure investment may be seen as necessary to secure universal access to vital communications services, this objective is subject to a number of limiting principles which give precedence to securing and maintaining effective competition. For postal services, the model of achieving universal service, as originally envisaged under the EU legislation, was one where the incumbent could sustain cross-subsidies because it had exclusive rights over certain market sectors. These rights were gradually withdrawn, with full competition being introduced across the EU between 2010 and 2012. Alongside this, the rules on compensation were also reformed to the extent that Member States were encouraged to ensure that there was a level of contestability in universal service provision. In the collection and delivery of letters, our focus here, demand has been declining for a number of years, while at the same time incumbents have seen a gradual reduction in their ability to subsidise USOs. In this sector, there is little use of compensation mechanisms, despite the claims that universal service is being placed in jeopardy by new entrants and their so-called 'cherry-picking' of the most profitable consumers. The emphasis thus far has been on the incumbents achieving efficiency gains.[106]

4.4.1. Broadband and its inclusion within the USOs

There is no doubt that, in a sector such as communications where technological progress and demand conditions evolve rapidly, services which might have been seen as essential until only recently can become obsolete. There is no better example than the provision of public payphones which are only used by a very small percentage of end-users, yet are very expensive to maintain.[107] It is hardly surprising, therefore,

[106] See, for example, Dieke (n 83) 220-22.

[107] Some Member States have already withdrawn the obligation to provide public payphones as part of the USO (Belgium, Finland, the Netherlands, Latvia, Cyprus, Denmark, Estonia, Germany, Luxembourg, Poland, Romania and Slovakia), Commission, 'Implementation of the EU regulatory

that bringing new services within an EU-wide definition of universal service has been approached with considerable caution by both Member States and the Commission. In some cases, such as mobile services, the answer is straightforward; the market is the best route to maximising both ubiquity and affordability, without the need for any form of state intervention.[108]

The position with broadband is quite different, where it is clear that neither national governments nor the Commission believe that universal broadband coverage will be achieved by the market alone.[109] This is particularly the case when it comes super-fast broadband – so-called 'next generation access' (NGA) – the rolling-out of which requires substantial upgrading and replacement of existing telecommunications infrastructure.[110] An obvious solution to this problem would be to use the existing sectoral regime by including a minimum level of broadband services within the definition of USOs, triggering – where appropriate – the use of compensation mechanisms for the investment necessary to secure coverage in areas that would otherwise be unprofitable to serve.

Since the original USD, Member States have been required to ensure that all users connected at a fixed location have access to data communications 'at data rates that are sufficient to permit functional internet access, taking into account prevailing technologies used by the majority of subscribers and technological feasibility'.[111] In contrast to the original Directive which specified, for the purposes of imposing a USO, functional internet access as a single narrowband connection at a maximum data rate,[112] the 2009 amending Directive removed any reference to a defined data

framework for electronic communication – 2015' (Commission Staff Working Document) SWD(2015) 126 final, 22.

[108] Commission, 'Universal service in e-communications: report on the outcome of the public consultation and the third periodic review of the scope in accordance with Article 15 of Directive 2002/22/EC', (Communication) COM(2011) 795 final, 8-9, 12.

[109] Filomna Chirico and Norbert Gaál, 'A Decade of State Aid Control in the Field of Broadband' (2014) 13 European State Aid Law Quarterly 28, 28–29.

[110] For an overview see Anette Kliemann and Oliver Stehmann, 'EU State Aid Control in the Broadband Sector - The 2013 Broadband Guidelines and Recent Case Practice' (2013) 12 European State Aid Law Quarterly 493, 495-7.

[111] Directive 2002/22/EC, Article 4(2).

[112] ibid, Recital 8. A single narrowband network connection referred to a data rate of 56 kbit/s. Member States were allowed to deviate and lower the data rate where necessary.

rate,[113] making clear that Member States were to have flexibility in defining a minimum level of internet access, 'taking due account of specific circumstances in national markets, for instance the prevailing bandwidth used by the majority of subscribers in that Member State, and technological feasibility, provided that these measures seek to minimise market distortion'.[114] This was a significant change since Member States, while always being free to impose more onerous USOs than those specified in the USD, were not permitted to include these within any compensation mechanism involving specific undertakings.[115] The situation now allows Member States to include broadband access within the scope of USO, with the potential to activate any of the compensation mechanisms specified therein, rather than notifying measures under the State aid framework.[116] The interesting fact is that they so rarely do so.[117]

4.4.1.1. Compensating investment for universal broadband coverage – USD v State aids regime

Despite the permissive approach created by the 2009 amending Directive, in its review of universal service in 2011, the Commission encouraged Member States not

[113] Directive 2009/136/EC.
[114] ibid, Recital 5.
[115] Directive 2002/22/EC, Article 32. The wording of this provision was unchanged by the 2009 amending Directive. However, Directive 2009/136/EC, Recital 5 makes clear that where an expansion of minimum internet access covered by USO within a Member State results 'in an unfair burden on a designated undertaking, taking due account of the costs and revenues as well as the intangible benefits resulting from the provision of the services concerned, this may be included in any net cost calculation of universal obligations'.
[116] Directive 2009/136/EC, Recital 5 makes clear that alternative financing methods may also be enacted. The Commission confirmed that compensation for the infrastructure and wholesale provision of basic broadband in the form of State aid did not breach the original USD, Decision N381/2004 *Haut débit en Pyrénées-Atlantiques* [2004] Press Release IP/04/1371; *Decision N382/2004 Haut débit en Limousin - DORSAL* [2005] Press Release IP/05/530.
[117] Belgium, Spain, Finland, Croatia, Malta, Sweden and Latvia (only for disabled end-users) have included broadband at different broadband speeds within the scope of universal service. Latvia, Slovenia and the United Kingdom are discussing whether or not to extend the scope of USO by including broadband, Commission (n 107) 22. However, there are reports the European Commission is now proposing to include broadband access in the scope of universal service, Catherine Stupp, 'Broadband internet access will become a legal right under new EU telecoms rules' (*EurActiv.com*, 29 July 2016) <http://www.euractiv.com/section/innovation-industry/news/broadband-internet-access-will-become-a-legal-right-under-new-eu-telecoms-rules/?nl_ref=17987440>.

to include broadband access within their USOs, fearing that doing so could lead to higher prices for consumers, and 'could distort markets and put an unreasonable burden on the sector'.[118] This message has been largely followed by Member States.[119]

In parallel, however, the EU has developed a proactive policy in favour of encouraging public support and subsidies in favour of increasing both the coverage and quality of broadband access. A key plank of the Europe 2020 strategy, the 'Digital Agenda for Europe' (DAE) adopted in 2010, is aimed at accelerating the role-out of high-speed broadband across the EU.[120]

The DAE contains a number of ambitious broadband targets,[121] the achievement of which will involve considerable investment in infrastructure, both private and public. The key danger of leaving infrastructure investment merely to private firms is that high-speed broadband access will be 'concentrated in a few high-density zones with significant entry costs and high prices'.[122] Furthermore, relying only upon the private sector will result in under-investment since the positive externalities resulting from network expansion will not be captured, particularly the economic growth which it can facilitate. Such 'market failures' can be corrected somewhat by public sector investment and, for this reason, the DAE seeks to impose on Member States an obligation to draw-up national broadband plans which should include the use of 'public financing in line with EU competition and state aid rules', in particular avoiding market distortions.[123]

[118] Commission, 'Universal service in e-communications: report on the outcome of the public consultation and the third periodic review of the scope in accordance with Article 15 of Directive 2002/22/EC', (Communication) COM(2011) 795 final, 12.
[119] Subject to some limited exceptions, it appears that the majority of Member States are pursuing increasing broadband access outside of the sectoral rules, see BEREC (n 79) 59.
[120] Commission, 'A Digital Agenda for Europe' (Communication) COM(2010) 245 final.
[121] The first of these – securing the availability of basic broadband to all European citizens – was achieved ahead of schedule in 2013. The focus now is how to provide fast and ultra-fast broadband by 2020 to all and half of the European households respectively. Commission, '100% basic broadband coverage achieved across Europe – EU target achieved ahead of schedule. Next stop is fast broadband for all.' (17 October 2013) <http://europa.eu/rapid/press-release_IP-13-968_en.htm>.
[122] Commission (n 120) 19.
[123] ibid, 21.

In order to complement the general guidelines on State aids (explained in section 4.3.1. above), the Commission has attempted to enunciate in detail the principles it will apply to broadband in a set of Guidelines first issued in 2009, and then subsequently updated in 2013,[124] the latter reflecting the priorities of the DAE, particularly the need for increased public investment in NGA broadband.[125]

The Guidelines recognise, on the one hand, that the DAE targets cannot be achieved without the support of public funds, while cautioning that State aid should only be complementary to, and not a substitute for, the investments of market players, limiting as far as possible the risk of 'crowding out of private investments'.[126] It notes the need to go beyond mere market failures; markets may produce outcomes which are efficient but are otherwise 'unsatisfactory from a cohesion policy point of view' in addressing the digital divide.[127] An element of market distortion is consistent with this policy, but these effects need to be outweighed by the positive effects of wider access and penetration.[128]

In scrutinising state interventions, principally assessed under Article 107(3) TFEU,[129] the Commission applies a series of necessary conditions, including the need to demonstrate that – absent the aid – the infrastructure investment would not take place, that the aid is limited to the minimum level necessary to remedy either the market failure or to correct social or regional inequalities that would the market alone would produce.[130] Overall, it is the incumbent upon the Member State to demonstrate a 'step change' in broadband availability before any distortion of

[124] Commission, 'EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks' [2013] OJ C25/1.
[125] The cost of the provision of internet speeds of 30 Mbps are estimated to be nearly EUR 60 billion and to provide at least half of the European households with ultra-fast internet (100 Mbps) may be up to EUR 268 billion, ibid para 2.
[126] ibid, para 4.
[127] ibid, para 5.
[128] ibid, para 6.
[129] In the case of broadband projects, the State aid measures may be compatible with the internal market, if the measure promotes the economic development of areas with an abnormally low standard of living or high unemployment rate (Article 107(3)(a) TFEU) or in which the aid enhances the development of certain economic activities or certain economic areas and does not have a negative effect on the European Union (Article 107(3)(c) TFEU).
[130] Commission (n 124) paras 30-54.

competition can be justified by the efficiency or social goals being pursued. Even where aid can be justified, a series of measures to minimise market distortions are required, including consultation with market players who may be planning infrastructure investments in the areas concerned, and the imposition of wholesale access conditions commensurate with the need to avoid the creation of regional service monopolies at the retail level.[131] Echoing the SGEI Framework, the Guidelines also require that, in selecting the beneficiaries of the aid, there is a competitive selection process in line with EU public procurement principles.[132] The use of a competitive selection procedure appears to be vital to avoid the 'tendency of public authorities to contract with the national telecommunications incumbent'.[133] Failure to comply with the terms of the Guidelines may result in a (costly) requirement to re-run the tender process.[134]

There has been a considerable increase in the number of broadband State aid cases since the first one was notified in 2003.[135] Between December 2003 and August 2009, the Commission processed only 47 cases, whereas between the adoption of the 2009 Guidelines and mid-February 2014, it decided 85 broadband cases, clearing 82.[136] In terms of the volume of State aid involved, this increased sharply from an annual average of €30-55 million in 2003-2005, to almost €2 billion per year from 2010 and €6 billion in 2012.[137]

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[131] Commission (n 124) paras 51, 78; See Kliemann and Stehmann (n 110) 512-13.
[132] Commission (n 124) para 78(c); Member States are also required to respect the principle of technological neutrality with no a priori preference given to one type of technology over another, Commission (n 124) para 78(e).
[133] Kliemann and Stehmann (n 110) 511.
[134] Filomena Chirico and Norbert Gaál, 'State aid to broadband: primer and best practices' (2011) (Competition Policy Newsletter, Number 1) 50, 55 <http://ec.europa.eu/competition/publications/cpn/2011_1_10_en.pdf>. Even where this requirement is not met, aid may be lawful under Article 106(2) (see Decision *N196/2010* Establishment of a Sustainable Infrastructure Permitting Estonia-wide Broadband Internet Connection (EstWin Project) [2010].
[135] Decision *N282/2003* Cumbria Broadband-Project Access [2003].
[136] Commission, 'Commission decision on State aid to broadband' (2016) <http://ec.europa.eu/competition/sectors/telecommunications/broadband_decisions.pdf>. For a detailed discussion of the cases, see Kliemann and Stehmann (n 110).
[137] Chirico and Gaál (n 109) 30. This amounts to 10% of the total State aid granted (ibid, 31). This actual amount may be higher since the notification requirement does not apply, in theory at least, to investment which meets the *Altmark* criteria.

The vast majority of cases appear to be notified and cleared under the State aid regime, but there remains a residual category for cases which may escape the State aid regime altogether because the Member State seeks to rely upon the *Altmark* criteria.[138] Such cases are dealt with briefly in the Guidelines.[139] The most significant case to date is *Réseau à trés jait débit en Hauts-de-Seine*.[140] Here, following a competitive tendering process, the French authorities awarded a subsidy of €59 million over 25 years to a consortium to build a high-speed broadband network in the Hauts-de-Seine department, an area bordering Paris. Following a voluntary notification by France, the Commission determined that the payment did not constitute State aid,[141] a decision which was contested by a number of competitors before the General Court.[142] The Court upheld the Commission's decision that all four *Altmark* critera were met. The first of these, the existence of a SGEI, was present since there was evidence of a 'market failure' in so far as, despite being a relatively densely populated area, there was evidence to suggest that the commercial operators would not have the incentives to serve all users in the area with high-speed broadband. The General Court confirmed that the presence of a market failure, which was an 'objective concept',[143] was a necessary condition for finding a service to fall within the SGEI definition.[144] It also held that the presence of universal service with respect to basic broadband, did not demonstrate the lack of a market failure on the high-speed broadband market.[145] The Court also rejected the arguments of the commercial operators that over-compensation would occur,

[138] According to Kliemann and Stehmann (n 110) 504 only three cases have been considered by the Commission under Article 106(2) TFEU, all concerning France. Of course, there are other categories of cases where public investment does not amount to State aid (eg where the market investor principle can be demonstrated with respect to the aid, Commission (n 124) paras 16 and 17.
[139] Commission (n 124) paras 18-27.
[140] Decision *N 331/2008* Réseau à trés jait débit en Hauts-de-Seine [2009] C(2009) 7426 final.
[141] Strictly speaking, there is no requirement to notify, but it appears that France opted to do so for legal certainty reasons, Kliemann and Stehmann (n 110) 504.
[142] Case T-79/10 *Colt Télécommunications France v Commission* ECLI:EU:T:2013:463; Case T-258/10 *Orange v Commission* ECLI:EU:T:2013:471; Case T-325/10 *Iliad and Others v Commission* ECLI:EU:T:2013:472.
[143] *Colt* (n 142) para 158.
[144] ibid, para 153. As has been pointed out elsewhere, this is an important development since it limited the discretion have to determine whether there is the necessity for a SGEI, Erika Szyszczak, 'Services of General Economic Interest and State Measures Affecting Competition' (2014) 5 Journal of European Competition Law & Practice 508, 514.
[145] *Colt* (n 142) para 161.

contrary to the third *Altmark* criterion, merely because the scheme is designed to use cross-subsidies from profitable consumers to reduce the costs of serving those who are unprofitable.[146]

4.4.1.2. Conclusions

The approach of the European Commission and the majority of the Member States raises the question of why they prefer using State aid procedures instead of including broadband in the scope of universal service under the USD and then, if necessary, compensate the USP.

All Member States have developed national broadband plans for fulfilling the goals of the DAE, some going even further. Some countries focus on improving broadband access in rural areas, while others that have sufficient coverage in all parts of their country may focus on the availability of NGA broadband. [147] This differentiated approach certainly tells against the adoption of a USO at the EU level with prescribed minimum broadband speeds. On the other hand, the requirement as it now stands in the USD does leave Member States with a considerable amount of discretion when it comes to defining a universal level of broadband access suitable to the relevant markets and demand conditions. Furthermore, for national governments, invoking the provisions of the USD with respect to both prescribing and, where necessary, compensating for universal levels of broadband access does have the advantage of avoiding the Commission's supervisory jurisdiction under Article 108(3) TFEU.[148] However, the use of the USD procedures are complex and may give rise to a level of legal uncertainty which itself may result in sub-optimal levels of investment. A USO provider must first be designated, and it will only be compensated

[146] ibid, paras 185-6. The Court of Justice ruled inadmissible the competitors challenge to the General Court's judgment Case C-621/13P *Orange v Commission* ECLI:EU:C:2015:114; Case C-624/13P *Iliad and Others v Commission* ECLI:EU:C:2015:112.

[147] For detailed information on national broadband plans and their realisation, see Commission (n 120); BEREC (n 79).

[148] Interestingly, Chirico and Gaál argue that the principles established in the Guidelines and the underlying case law are now so clear and consistently applied that a State aid exemption for broadband should now be put into place, Chirico and Gaál (n 109) 36.

where the NRA determines that it bears an unfair burden. As was discussed in section 4.3.2., this does not simply mean net costs; in each case an individual assessment is required and what is an unfair burden for one undertaking may not be for another operator (this assessment depends on the firm's size and market share, its equipment, economic and financial situation, and any intangible benefits of being the USP).[149] As the rules under the USD derive from the *Altmark* criteria, the level of compensation is strictly limited to the provision of USO, i.e. the USP can only be compensated for infrastructure investment which could not be supported by the market.[150] This methodology no doubt creates uncertainty for a potential USP, which is likely to impact disproportionately on new entrant firms who might otherwise be willing to invest in infrastructure, rather than merely relying upon access to the incumbent's network. Indeed, one of the key benefits of relying on the State aid regime is the extent to which it opens avenues for infrastructure competition, especially in relation to the deployment of NGA broadband, which can no longer be supported only by the incumbent's legacy networks.[151] By way of contrast, a reliance on the incumbent provider is likely to create significant barriers to entry, and merely extend incumbency advantages into new broadband service markets.

4.4.2. Postal services

The concept of universal service in the postal sector has a long history. Historically, the norm throughout the EU was to have a monopoly postal provider charged with an obligation to fulfil universal service at a uniform price. From the early 1990s, however, this model of universal service delivery was gradually dismantled, with the abolition of exclusive rights for incumbents from 2012 onwards. Alongside this there has been significant changes in demand, especially a steep decline in the volume of letters, as customers and businesses increasingly use electronic forms of

[149] *Commission v Belgium* [2010] (n 100) para 101.
[150] Commission (n 124) para 26; Lambros Papadias, Filomena Chirico and Norbert Gaál, 'The new State Aid Broadband Guidelines: not all black and white' (Competition Policy Newsletter, Number 3, 2009) 17, 20 <http://ec.europa.eu/competition/publications/cpn/2009_3_3.pdf>.
[151] For a discussion see Kliemann and Stehmann (n 110) 498.

communication.[152] While new entry in the postal services market may have played a significant role in securing greater efficiency, it has also posed a challenge to the sustainability of universal service. Competition has come from firms who have only entered the most profitable segments of the market, such as bulk mail, business to business communications, and the growing parcel delivery sector.[153] This poses particular difficulties for incumbents, whose ability to cross-subsidise USOs has been eroded.

4.4.2.1. Liberalisation of postal services and the protection of USOs: reconciling the two objectives

The liberalisation of postal services began with the publication of a Green Paper in 1992 which proposed to protect and finance USOs by granting exclusive rights to the incumbents with respect to specific reserved services.[154] This was followed in 1994 by a Council resolution inviting the Commission to come forward with legislative proposals to include a definition of a minimum level of universal service and, in order to ensure 'the economic and financial viability' of the provision of universal service, the definition of 'a sector of appropriate dimensions which may be reserved for universal service providers'.[155] The First Postal Services Directive[156] in 1997 defined universal service as 'the permanent provision of a postal service of specified quality

[152] In the UK, the volume of letter mail has dropped by 28.2% since 2008. Despite the loss in volume, the prices for standard-sized letter mail are cheaper than in other European countries, Ofcom, 'International Communications Market Report' (2014) 311 <http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr14/icmr/ICMR_2014.pdf>. The financial crisis and the recession has left its scars, Dieke (n 83) 168.

[153] The parcel market has grown over the last years (23.4% between 2008 and 2013), mainly because of an increasing popularity of e-commerce leading to a growth of the business to consumer segment of the parcel market. The revenues in the parcel market are also higher than in the letter market. In 2014, Royal Mail's domestic parcel revenue market share was 31%, Business, Innovation and Skills Committee, 'Competition in the postal services sector and the Universal Service Obligation' (Ninth Report of Session 2014-15), para 56, <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmbis/769/769.pdf>.

[154] Commission, 'Green Paper on the Development of the Single Market for Postal Services' (Communication) COM(91) 476 final.

[155] Council Resolution of 7 February 1994 on the development of Community postal service [1994] OJ C 48/3.

[156] Directive 97/67/EC.

at all points in their territory at affordable prices for all users',[157] prescribing the minimum levels of service Member States should seek to protect.[158] At the same time, it stipulated the limitations of reserved services, and set out a number of deadlines to be met in the gradual reduction of their scope, 'taking into account the financial equilibrium of the universal service provider(s)'.[159]

In 2002, the Commission reported on the effect of liberalisation of universal service, painting a very positive picture of the situation in all of the Member States.[160] Not only were the minimum requirements of the Directive being met, in many countries they were being exceeded significantly. Furthermore, while the Directive only required universal service at 'affordable prices',[161] the Commission reported that 'the uniform tariff remains a cornerstone of universal service in all Member States (even if not a regulatory requirement in all of them)'.[162] However, there was evidence that the financial stability of USPs was in question: in seven Member States, provisions for compensation mechanisms were in place, although at that time only Spain had plans to activate a fund.[163] All in all, the Commission concluded that universal service was 'not at risk'.[164] This finding was hardly surprising given the report had been overtaken by the adoption of Second Postal Services Directive,[165] which laid down deadlines for the significant reduction in the scope of reserved services in 2003 and 2006 while at the same time leaving the universal service requirements substantially the same.[166]

[157] Directive 97/67/EC, 3(1).
[158] Directive 97/67/EC, Article 3(3).
[159] Directive 97/67/EC, Article 7(3).
[160] Commission, 'Report from the Commission to the European Parliament and the Council on the application of the Postal Directive (97/67/EC Directive)' COM(2002) 632 final, 16-19.
[161] Directive 97/67/EC, Article 3(1).
[162] Commission (n 160) 17.
[163] ibid, 18.
[164] ibid.
[165] Directive 2002/39/EC.
[166] Directive 97/67/EC, as amended by Directive 2002/39/EC, Article 7(1). The market was opened in four steps. The first reduction of the reserved areas took place in 1999 when the market was opened for items weighing 350 grams or more and costing less than five times the public tariff. The Second Postal Services Directive reduced the limit for reserved services further to items weighing less than 100 grams as from 1 January 2003 and for services weighing less than 50 grams from 2006 on respectively.

Although the clear endpoint was the removal of reserved markets, there was evidence of some nervousness over the sustainability of USOs, the Directive requiring the Commission complete an assessment by the end of 2006 of the 'impact on universal service of the full accomplishment of the postal internal market'.[167] In fulfilling that requirement, the Commission announced a detailed 'prospective study' of the implications of full market opening on universal service.[168] Published in 2006, the study had one core message: that market opening should not be delayed beyond 2009.[169] Those countries which had already introduced significant postal competition – Sweden, Finland and the UK – had not seen a decline in the attainment or quality of USOs, and there was evidence of increased efficiency and reliability of postal services in those countries.[170] Indeed, the Commission opined, one of the key problems in delaying full market opening would be the resulting lack of incentives operating on the incumbents to increase their efficiency and preparedness for fully fledged competition. Overall, the Commission's premise was that competition would enhance service quality, with universal service benefiting from the 'dynamic efficiencies' that would be created.[171] Only once this was achieved would further interventions be required to protect USOs. These would be regulatory safeguards, in the form of service standards or price caps and, *only in the last resort*, specific subsidies for USPs.[172]

The key recommendation of the Commission's study was implemented with the adoption in 2008 of the Third Postal Services Directive.[173] All postal markets had

[167] Directive 97/67/EC, as amended by Directive 2002/39/EC, Article 7(3).
[168] Commission, 'Report from the Commission to the European Parliament and the Council on the application of the Postal Services Directive (97/67/EC Directive as amended by Directive 2002/39/EC)' COM(2005) 102 final, 7.
[169] Commission, 'Prospective study on the impact on universal service of the full accomplishment of the postal internal market in 2009' (Report) COM(2006) 596 final.
[170] ibid 4.
[171] ibid 7.
[172] ibid.
[173] Directive 2008/6/EC.

to be fully opened to competition by the end of 2010, although 11 Member States took advantage of a two year transitional period.[174]

Despite the removal of the reserved areas, the scope of universal postal service has been retained substantially at the levels originally laid down in the First PSD.[175] Member States do retain a degree of discretion and flexibility to meet national demands and circumstances.[176] While the first two Directives clearly envisaged the incumbent as the de facto USP, alongside the removal of the reserved areas, the Third Postal Services Directive gives the Member States more freedom to designate one or more USP(s), or to rely on the market when intervention is not necessary.[177] The need to move beyond relying only upon the incumbent as the USP is reflected in the Third PSD which now encourages the use of public procurement procedures in the funding of universal services.[178]

4.4.2.2. How changes in demand / the abolition of the reserved market has led to increased tensions on postal services – the UK and Germany

Despite the Commission's position, sustained for over two decades, that liberalisation and universal service could both be pursued successfully in tandem, this view has come under stress in recent years. The logic underpinning the reserved areas approach was that the incumbent would retain an ability to cross-subsidise the non-profitable elements of its service from the profitable ones. While the potential to do so was progressively lowered with the reduction in the scope of reserved areas, full liberalisation has left incumbents facing 'cherry-picking' by new entrant firms across all of their activities. New entrants have chosen selective entry, mainly offering their services in urban areas with a focus on the business to business market.

[174] Directive 2008/6/EC, Article 2(1) and Article 3(1); Those Member States were Czech Republic, Greece, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Malta, Poland, Romania, and Slovakia.
[175] Directive 97/67/EC, as amended by Directive 2002/39/EC, as amended by Directive 2008/6/EC, Article 3.
[176] Directive 2008/6/EC, Recital 23.
[177] Directive 2008/6/EC, Recital 23.
[178] Directive 97/67/EC, as amended by Directive 2008/6/EC, Article 7(2).

They can also freely choose the quantity and quality of their collections and deliveries, not being subject to the USO requirements. In many rural and less populated areas, the former incumbent is still the only service provider, with the 'final mile' of delivery remaining a natural monopoly. Incumbents then are forced to lower prices where they face new entry, and raise prices where they do not, undermining the sustainability of universal service, at least in the long-term.

One solution to this problem, of course, is to extend USOs to new entrants. However, doing so especially in the early days of liberalisation, may well have created significant barriers to entry hindering competition. The same could be said, albeit to a lesser extent, of requiring new entrants to contribute to an incumbent's net costs via a compensation mechanism. Another alternative is to reduce the scope of universal service (subject, of course, to the minimum requirements of the PSD). This has been done in a number of EU countries.[179]

In order to explore some of these issues further, this sub-section focuses on recent developments in two Member States, Germany and the UK. These two countries were in the vanguard of opening their postal service markets to competition, well ahead of the 2010 deadline.[180] The issue of the sustainability of universal service has come to the fore in both, with pressure from incumbents to reduce the scope of universal service.[181]

[179] The frequency of delivery has been reduced to five days a week in the Netherlands and Italy. European Regulators Group for Postal Services, 'Discussion paper on the implementation of Universal Service in the postal sector and the effects of recent changes in some countries on the scope of the USO' ERGP(14)16, 8 <http://ec.europa.eu/internal_market/ergp/docs/documentation/2014/ergp-14-16-uso_en.pdf>; PostNL, 'General Conditions for the Universal Postal Service 2014', <https://www.postnl.nl/en/Images/general-conditions-universal-postal-service_tcm9-76004.pdf>.

[180] The UK and German postal services markets were fully liberalised in 2006 and 2008 respectively. David Hough and Lorna Booth, 'Postal Services: Royal Mail plc' (2014) House of Commons, Standard Note, SN/EP/06763 <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06763>; Section 51(1) of the Postgesetz of 22 December 1997, BGBl. I, 3294, as amended by Art. 4 Abs. 106 G v. 7.8.2013, BGBl. I, 3154.

[181] Both countries impose obligations which go further than is required by the PSD. The Postal Services Directive only requires the collection and delivery of letters and parcels from Mondays to Fridays, whereas in the UK and Germany letters are collected and delivered six days a week (Mondays to Saturdays) and in Germany the six days a week collection and delivery applies also for parcels. For a summary of USOs at European level, in Germany and the UK, see Harker (n 1) 35-38.

Currently in the UK, USOs are only imposed on the incumbent, Royal Mail, and there is no compensation mechanism in place. In areas which an entrant does not wish to serve, it can choose instead downstream access, i.e. handing their postal items over to Royal Mail for final mile delivery. In Germany, Deutsche Post was designated as USP, but since the introduction of competition in 2008, its designation was removed, and no USP is now designated. If universal service cannot be fulfilled by the market, then all licensed operators must provide the service jointly.[182]

The levels of end-to-end competition (where the entrant collects, sorts and then distributes and delivers the mail) are low in the letter market as the vast majority of letters are still delivered by the former incumbent.[183] In the UK, the most significant entrant was offering direct letter delivery in London, Liverpool and Manchester, but withdrew from the direct delivery market in 2015.[184] However, despite an overall decline of letter volumes, the demand for downstream access has increased.[185] In Germany, while there are hundreds of licensed operators,[186] Deutsche Post delivers nearly 90% of all (licensed) letters.[187] In rural areas, consumers often do not have a choice between different providers and instead have

[182] If the German regulatory authority believes that the level of discharging universal service is not satisfactory, then all operators who have a licence, subject to a turnover threshold of 500,000 euros in the preceding calendar year, jointly provide universal postal service (section 12(1) of the Postgesetz of 22 December 1997, BGBl. I, 3294, as amended by Art. 4 Abs. 106 G v. 7.8.2013, BGBl. I, 3154). See Claudio Feijoo and Claire Milne, 'Re-thinking universal service policy for the digital era: setting the scene – an introduction to the special issue on universal service' (2008) 10, info 4.

[183] In the UK, in 2013-14 only 0.6% of letters by volume were delivered by providers other than Royal Mail, Ofcom, 'Annual monitoring update on the postal market: Financial year 2013-14' (2014), paras 6.26-6.27, <http://stakeholders.ofcom.org.uk/binaries/post/monitoring-reports/annual-monitoring-update-postal-2013-14.pdf>

[184] BBC, 'Royal Mail regulation to be reviewed by Ofcom' (16 June 2015) <http://www.bbc.co.uk/news/business-33145446>.

[185] Ofcom (n 183) paras 6.20-6.23.

[186] At the end of 2013, there were about 600 licenced enterprises, many of them small or even micro businesses, Bundesnetzagentur, 'Herausforderungen des Post-Universaldienstes Vorbereitung einer Stellungnahme gemäß § 47 Abs. 1 Satz 2 Postgesetz' (2014) Impulspapier, 2 <http://www.bundesnetzagentur.de/SharedDocs/Downloads/DE/Sachgebiete/Post/Verbraucher/Universaldienst/Impulspapier.pdf?__blob=publicationFile&v=1>.

[187] Bundesnetzagentur, 'Marktuntersuchung Bericht über den lizenzpflichtigen Briefbereich 2015' (2016) 7, <http://www.bundesnetzagentur.de/SharedDocs/Downloads/DE/Sachgebiete/Post/Unternehmen_Institutionen/Marktbeobachtung/LizenzpflichtigePDL/Marktuntersuchung2015.pdf?__blob=publicationFile&v=5>

to rely on the former incumbent.[188] Downstream access also plays an important role in Germany.[189]

In both countries, the sustainability of universal service has been questioned. In the UK, Royal Mail regards itself as being at a competitive disadvantage compared with the other providers and has asked for a number of regulatory reviews of the USO scheme. In 2008, the Hooper Report acknowledged that universal service was under threat, mainly because of the declining letter market, but it also suggested that the incumbent was in a position to reduce its costs still further before any intervention was required.[190] Two years later, in an update to the report, Hooper came to the conclusion that the situation had become more serious.[191] However, repeating the findings of the previous report, the 2010 Report found that Royal Mail still had the potential to increase further its efficiency before any reduction of the scope of the USOs would be contemplated.[192] The postal regulator, Ofcom, has taken a very robust stance with Royal Mail. In a report on universal service in 2014, it dismissed Royal Mail's claims that it was unable to fulfil its USOs, stating

[188] Monopolkommission, 'Post 2013: Wettbewerbsschutz effektivieren' Sondergutachten 67, 27, <http://www.monopolkommission.de/images/PDF/SG/s67_volltext.pdf>.

[189] The majority of alternative postal provider carry out the entire service from collection to delivery of letters. Despite the fact that in 2012 more than 60% of all licensed letters carried out by the incumbents stemmed from downstream access, only a tenth of those products came from new entrants. Bundesnetzagentur, 'Post 2012 /2013' (2013) Tätigkeitsbericht, <http://www.bundesnetzagentur.de/SharedDocs/Downloads/DE/Allgemeines/Bundesnetzagentur/Publikationen/Berichte/2013/131216_TaetigkeitsberichtPost2012.pdf?__blob=publicationFile&v=3>

[190] Richard Hooper, Deirdre Hutton and Ian R Smith, 'Modernise or decline: Policies to maintain the universal postal service in the United Kingdom' (An independent review of the UK postal service sector, 2008), para 38, <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228786/7529.pdf>.

[191] Richard Hooper, 'Saving the Royal Mail's universal postal service in the digital age: An Update of the 2008 Independent Review of the Postal Services Sector' (September 2010) para 7 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31808/10-1143-saving-royal-mail-universal-postal-service.pdf>.

[192] ibid. Unlike the 2008 Report, the updated version concluded that the creation of a compensation fund should not be excluded per se, ibid 40. For a discussion see Lorna Booth and David Hough, 'TNT Post and Royal mail: end-to-end competition in postal services' (2014) House of Commons Briefing Paper, <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06935>.

unequivocally that universal postal service in the UK is 'not under threat', and reiterated the need for Royal Mail to increase its efficiency.[193]

In Germany, similar issues have come to the fore and in 2014 the postal regulator, Bundesnetzagentur, launched an inquiry into the universal postal service.[194] Since Germany is relying on the market to secure universal service, there is the real prospect that a declining letter market and increasing competition in parcel market may threaten the sustainability of USOs, at least in the long-term. Anticipating a further decline, and higher costs for the service providers, the regulator has emphasised the need for operators to increase their efficiency and develop new services.[195] However, unlike its UK counterpart, the Bundesnetzagentur has signalled that it may be necessary to change the national and even the European regulatory framework to guarantee an adequate universal postal service in the future. This could involve both increasing and reducing the scope of USOs; new services that have been developed because of increased competition could be brought within it (perhaps by combining universal service in telecoms), while the scope of traditional letter services may need to be reduced, especially in rural and less populated areas.[196] Given that the incumbent is not subject to any formal requirement with respect to universal service, it is not surprising that the situation in Germany is seen as more urgent than it is in the UK.

[193] Ofcom, 'Securing universal postal service' (2 December 2014) <http://stakeholders.ofcom.org.uk/post/securing-universal-postal-service/>; The regulator also argued that selective entry does not create a 'cherry-picking' situation, ibid. More recently the BIS Select Committee, in a report published in March 2015, reached the conclusion that alternative providers are able to 'cherry-pick' but the current level is too low to require any regulatory action, Business, Innovation and Skills Committee (n 153) para 39; Ofcom has recently confirmed the position: Ofcom 'Review of the Regulation of Royal Mail' (25 May 2016), <http://stakeholders.ofcom.org.uk/binaries/consultations/royal-mail-review/summary/Review-of-Royal-Mail-Regulation.pdf>.

[194] Bundesnetzagentur (n 186) 2.

[195] ibid 2-3.

[196] ibid 5-6.

4.4.2.3. Compensation mechanisms for universal service in postal services

In postal services, it appears that while the majority of Member States have legislated for the establishment of a compensation fund, as of 2013, only four have actually gone on to establish one.[197] A further four compensate the USPs directly from public funds.[198] For those countries which have actively considered the introduction of compensation mechanisms, there is a wide variety of views on the pros and cons of their implementation from a competition perspective. The Swedish NRA is of the view that designation is vital to protect competition since the designation procedure triggers the requirement of the PSD on cost-related pricing.[199] On the other hand, the Spanish competition authority has been highly critical of the designation of the incumbent as the USP for a 15 year period, which it considers to be contrary to both the spirit and the letter of the PSD.[200] This approach, however, appears to represent the practice in other Member States; in all cases where a USP has been designated it has been the incumbent firm, despite the Third Postal Services Directive encouraging some level of contestability.[201] It also appears that, subject to limited exceptions, the vast majority of users in Member States will have service levels which meet the minimum USO requirements of the Directive without the need for intervention.[202]

State aid fulfils a different role in postal services compared to broadband. In broadband, state aid is used to increase access to a service, whereas in postal services it is used to maintain the current level of services and secure a level-playing field between undertakings that provide USOs and alternative operators with no such obligation. State aid cases are relatively few. There have only been 27 State aid decisions concerning compensation for discharging SGEI in the postal sector between

[197] Dieke (n 83) 154.
[198] ibid. As of 2013, 22 have legislated for a compensation fund, while six have deemed that the USO represents an unfair burden on the USP. ibid.
[199] ibid 133.
[200] Comision Nacional de la Competencia, The new regulatory framework for the traditional postal sector in Spain (March 2011), cited in Dieke (n 83), 133.
[201] Dieke (n 83) 16.
[202] This is the result of a survey of Member States which concludes that 'the risk of persons lacking basic universal service appears to be confined to relatively small populations living in thinly populated rural areas', ibid, 136.

2003 and 2014.[203] All of the cases concerned compensation payments to the former incumbent and the majority of cases involved aid granted for the provision of services that go beyond the minimum objectives and conditions set out by the PSD.[204]

There are only a handful of State aid cases that concern only the funding of USOs as defined in the PSD. In decisions, the subsidy granted by the Italian government to the incumbent, Poste Italiane, was held to be State aid as the fourth *Altmark* criterion had not been satisfied.[205] There are a number of other cases where Member States have been found to be subsidising services which include but go beyond the definition of USO in the PSD.[206] Although these may be capable of being disaggregated for the purposes of a State aid assessment, Member States are unlikely to set-up a separate compensation scheme under the PSD, with all of the administrative and bureaucratic architecture that implies, if there are other subsidies which have to be notified to the Commission. Of course, this has the effect in practice of excluding new entrants from fulfilling the USOs. Where compensation mechanisms are used, the Commission guards against market distortionary effects. For example, in a recent State aid decision concerning the Greek postal incumbent, ELTA, the Commission had to assess a compensation fund based on contributions by the incumbent's competitors.[207] The Commission concluded the compensation scheme was incompatible as it appeared to place a disproportionate burden on new

[203] The cases were collected from the European Commission with the help of the EC's internal search engine <http://ec.europa.eu/competition/elojade/isef/index.cfm>. The search focussed on cases for the economic sector 'H.53 – Postal and courier activities' between 25.07.2003 (after *Altmark*) and 31.12.2014. The search was further refined by limiting the cases to compensation payments for the provision of SGEI. State aid decisions that concern subsidies paid to cover pension costs were excluded. Other cases not listed as a result of the online search but we became aware of through a review of the relevant literature so that 25 cases are part of the case law assessment.
[204] Services of General Economic Interest in postal services are, for example, the distribution of periodicals, the provision of basic financial services, the distribution of electoral material, and in some Member States even the payment of pensions. See, Commission, 'High quality and competitive postal services for citizens and businesses - State aid control in the postal sector' (May 2014) Competition policy brief, 2 <http://ec.europa.eu/competition/publications/cpb/2014/006_en.pdf>.
[205] Decision NN51/2006 [2006] *Poste Italiane SpA* and Decision NN24/2008 [2008] *Poste Italiane SpA*.
[206] N462/2008 [2008] *Poland*; N312/2010 [2010] *Poland*; SA. 33989 [2012] *Italy*; SA.17653 [2013] *Germany*.
[207] Decision SA.35608 [2014] *Hellenic Post (ELTA)*.

entrants, requiring them to make a contribution of up to 10% of their turnover, thereby creating barriers to entry or even forcing them to exit the market.[208]

4.4.2.4. Conclusions

The findings of the case study suggest that the compensation mechanisms in the PSD have not been widely used. In many Member States, the incumbent provides services that go beyond the minimum requirement of universal postal service, but then struggles to finance those services, relying on state subsidies to maintain historic service levels. In those countries, such as the UK and Germany, where liberalisation has advanced significantly, incumbents have argued that universal service is unsustainable given the ability of new entrants to 'cherry-pick' the most profitable customers. Such arguments are likely to gain traction as demand for letter collection and delivery declines in the future.

4.5. Conclusions

In this chapter, it has been considered the protection of universal service in the network industries, with a focus on telecommunications and postal services.

As has been observed in the literature, the protection of universal service was essentially a quid pro quo for liberalisation of the network industries. The EU sectoral legislation represented a compromise between these competing values; it sought to give formal legal protection to USOs and, in anticipation of full liberalisation and the eventual reduction of incumbents' market shares, put in place detailed and elaborate mechanisms for compensating the costs of serving disadvantaged and unprofitable consumers. As it has been demonstrated, to a surprising degree, these provisions have remained dormant. Where they have been tested, they have demonstrated themselves to be particularly complex and cumbersome. The substantive rules, as

[208] ibid, paras 193-194.

interpreted by the Court and the Commission, have been framed primarily to promote contestability in the provision of universal service and to avoid the danger of over-compensation to the USP (the incumbent in the vast majority of cases). It is difficult to avoid the conclusion that the limited use of compensation mechanisms is due in no small part to the complexity of the underlying sectoral rules.

Another surprising finding in this chapter is the degree to which the State aid regime has been used as an alternative mechanism for funding USOs.[209] Indeed, with respect to the public funding of investment in broadband infrastructure, this appears to be the result of a deliberate policy decision on the part of the Member States, albeit with a strong steer from the Commission.

There is nothing new or novel in the use of the general competition rules as an alternative to sectoral regulatory tools.[210] The more pertinent and interesting question from our point of view is why Member States would prefer to channel compensation schemes for approval under the State aid regime, rather than relying upon the detailed procedural and substantive rules contained in the Directives. It is difficult to avoid the conclusion that the State aid regime is preferred because of its flexibility, and the legal certainty resulting from the Commission's ex ante role in scrutinising the Member States' interventions in these markets.

State aid rules are not unproblematic. As a judge of the CJEU, Thomas von Danwitz, has observed, the State aid rules are not necessarily an appropriate tool in this context:

[209] The Commission takes the rather surprising view that compensation payments for the provision of USOs through a compensation fund set up under the PSD is State aid and, therefore, assesses the compatibility under the State aid regime (*Hellenic Post* (n 207)). We disagree with this approach.
[210] For a detailed discussion see Michael Harker, 'EU Competition Law as a Tool for Dealing with Regulatory Failure:
The Broadband Margin Squeeze Cases' (2013) Journal of Business Law 817; Niamh Dunne, 'Margin Squeeze: From Broken Regulation to Legal Uncertainty' (2011) 70 Cambridge Law Journal 34; Damien Geradin and Robert O'Donoghue, 'The Concurrent Application of Competition Law and Regulation: The Case of Margin Squeeze
in the Telecommunications Sector' (2005) 1 Journal of Competition Law and Economics 355.

> we have to acknowledge that state aid control is not a generally usable, unconditioned instrument of regulatory policy for realising a level playing field in liberalised markets. State aid control is rather focused on the use and abuse of state resources in a competitive environment.[211]

Under the State aid rules, the Commission has substantial control over Member States' autonomy when it comes to protecting and promoting universal service. Where an EU norm exists in secondary legislation (as in the case of both the USD and PSD), Member States retain some measure of discretion to go beyond that norm, but a stricter test of proportionality obtains, requiring Member States demonstrate that the State aid measure is the least restrictive means of achieving the objective in question.[212] Furthermore, the Commission has sought to limit the discretion that Member States enjoy in the design of compensation mechanisms, maximising the boundaries of its supervisory powers by its restrictive interpretation of the *Altmark* criteria and Article 106(2) TFEU.

Controlling Member States' autonomy when intervening in markets is not the same task as regulating to ensure that the aims and objectives of regulation are being fulfilled. As it has been explained, the State aid rules, as they are now to be interpreted under the 2012 SGEI package, have been realigned to promote contestability in public service provision. Nevertheless, the public procurement requirement introduced by the SGEI Framework is by no means a panacea. While the intention is to encourage more contestability in the provision of SGEI, it may be that tendering does not result in the best outcomes.[213] Asymmetries of information may have the effect that the winning bidder actually puts forward a bid which is too low to recover the costs of universal service. Furthermore, procurement procedures cannot prevent undertakings colluding in order to achieve higher compensation

[211] von Danwitz (n 23) 12.
[212] Sauter (n 15) 180-81; see also Ross (n 67) 136-8; Fiedziuk (n 23); Klasse (n 35) 50-51.
[213] Natalia Fiedziuk, 'Putting services of general economic interest up for tender: reflections on applicable EU rules' (2013) 50 Common Market Law Review 87, 93.

payments. And even though an incumbent may be able to offer to fulfil USOs at the lowest cost, it will have an incentive to bid-up its price as the costs of its competitors will in general be higher. There are also potential problems when it comes to specifying and securing service levels as there are incentives on bidders to compete purely on price rather than quality of service.[214] While using a tendering process obviates the need for Member States to engage in the complex requirements under the Directives, reliance solely on the EU public procurement rules is not an effective substitute for regulation; they do not involve an effective ex post check on the accounts of the incumbent to avoid any over-compensation.[215] Furthermore, the State aid rules may not be engaged at all where the compensation payments are not capable of being imputable to the state.[216]

There will often be trade-offs between pursuing liberalisation policies while at the same time seeking to protect vulnerable and disadvantaged consumers from some of the adverse consequences of competition. The core issue is whether these trade-offs are better made within a framework which seeks to give formal protection to specified levels of universal service, while at the same time putting in place safeguards – procedural and substantive – aimed at minimising distortions of competition. There are a number of dangers, outlined above, in relying upon the State aid regime to control Member States' compensation of USOs. However, in our view, the key problem is that the State aid regime gives insufficient protection to the importance of universal service. The State aid rules are permissive; they do not

[214] EAGCP (n 35) 6-7.
[215] ibid 6; Klasse (n 35) 46-47; Fiedziuk (n 213) 93-96.
[216] On the problem of imputability see von Danwitz (n 23) 7-8. The extent to which an industry compensation scheme constitutes State aid is by no means straightforward. It depends upon whether the scheme is deemed to meet the cumulative conditions of being 'aid granted by the State' and 'through State resources'. The latter condition may be particularly difficult to meet in cases where the contributions towards an industry compensation scheme are made only by private undertakings and are not redistributed via a public institution (see Case C-379/98 *PreussenElecktra AG* [2001] ECR I-2099). See Marianne Clayton and Maria J Segura Catalan, 'The Notion of State Resources: So Near and yet so Far' (2015) 14 European State Aid Law Quarterly 260 for a discussion of recent case law. It would appear vital that the scheme is both administered by a state institution and that there is state control over how the resources collected are distributed. However, the 2012 SGEI Communication posits that 'compensatory payments for the operation of SGEIs which are financed through parafiscal charges or compulsory contributions imposed by the State and managed and apportioned in accordance with the provisions of the legislation are compensatory payments made through State resources.' Commission (n 48) Recital 36.

require Member States to put in place mechanisms for compensation where the fulfilment of USOs require it. The danger is that such a discretionary approach to securing universal service will result in a diminution of USOs, leading to less protection for vulnerable and disadvantaged consumers. The Commission has been more concerned with ensuring that interventions in support of universal service do not produce disproportionate market distortions, that the incumbent is not over-compensated, and that new entrant firms are not excluded from being the USP. Very little, if any, attention has been paid to whether the USOs are in fact being fulfilled and, of equal importance, are being appropriately updated in the light of changing demand, technological and market conditions. It is difficult to avoid the conclusion that universal service, as a formal EU regulatory norm in the network industries, is in managed decline.

Chapter 5

Altmark and Article 106(2) TFEU - different means to achieve the same end or the Commission's approach towards more competition in Services of General Economic Interest

5.1 Introduction

The preceding chapters have discussed the general relationship between the different concepts related to the provision of essential services,[1] and then continued to analyse the evolving nature of Services of General Economic Interest (SGEI) due to technological progress and changing consumer habits, in particular in post and telecommunications.[2] It has also been highlighted in Chapter 4 that the liberalisation of the markets reduced the possibility to cross-subsidise the provision of essential services and, as a result, increased the need for external compensation. Instead of relying on the compensation mechanism contained in Union Directives, both the Member States and the Commission appear to prefer the general State aid framework.

Under Union law, it is prohibited for Member States to award State aid to certain undertakings on a selective basis, as this may prevent a level playing field between undertakings and distort competition.[3] As highlighted in Chapter 4, previously, there used to be no clear understanding when a financing measure for the delivery of essential services was considered to be pure compensation or State aid, as the case law was inconsistent. However, with the *Altmark* ruling the Court of

[1] See above, Chapter 2.
[2] See above, Chapter 3.
[3] Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C115/47 (hereinafter TFEU), Article 107(1).

Justice settled with the compensation approach.[4] The *Altmark* judgment was warmly received as its test is claimed to have provided clarity and legal certainty.[5] In the academic literature *Altmark* is often referred to as a 'landmark' case in financing SGEIs.[6] However, there have been few cases in which the four conditions were positively confirmed.[7] In cases, where the *Altmark* criteria are not fulfilled, the State aid measure can nonetheless be justified under Article 106(2) TFEU. From 2012, the Commission applied new Guidelines on the use of State aid awarded to undertakings providing SGEIs (the 'Almunia Package'). Of particular interest is the 2012 SGEI Framework,[8] wherein the Commission introduced a more market-based approach in the State aid regulatory framework to minimise the amount of State aid awarded to specific undertakings, as these can distort competition by preventing a level playing field. The objective is to minimise Member States' intervention in order to allow markets to grow and make use of market mechanisms to increase access to services for users at lower costs.

The aim of this chapter is to review the divergence between the Commission's approach and the established Union case law in SGEI compensation cases; it will also evaluate whether the Commission's strict applicability of the *Altmark* criteria and the introduction of a more market-based approach under Article 106(2) TFEU with the issuing of the 2012 SGEI Framework has minimised the amount of State aid granted to undertakings discharging SGEIs.

[4] See above, Chapter 4, Section 4.3.1.
[5] Damien Geradin, 'Public Compensation for Services of General Economic Interest: An Analysis of the 2011 European Commission Framework' (30 March 2012) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2031564>.
[6] For example, Max Klasse, 'The Impact of Altmark: The European Commission Case Law Responses' in Erika Szyszczak and Johan Willem van de Gronden (eds), *Financing Services of General Economic Interest* (T.M.C. Asser Press, Springer 2013); Leigh Hancher, Tom Ottervanger and Pieter J Slot (eds), *EU state aids* (4th edn, Sweet & Maxwell 2012), para 22-022.
[7] Leigh Hancher and Pierre Larouche, 'The Coming Age of EU Regulation of Network Industries and Services of General Economic Interest' in Paul Craig and Gráine de Búrca (eds), *The evolution of EU law* (2nd edn, Oxford University Press 2011) 762; Klasse (n 6) 36.
[8] 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 2011 [2012] OJ L7/3.

Section 5.2. of this chapter discusses the *Altmark* conditions and the requirements under Article 106(2) TFEU and then critically compares the two tests with each other. It emphasises the Commission's incentive to establish a more market-based approach towards the provision of SGEIs. The focus of Section 5.3. is on the applicability of the *Altmark* conditions and Article 106(2) TFEU by concentrating on Commission State aid decisions concerning SGEIs in postal services and broadband. It will be shown that the applicability of *Altmark* depends on the sector. It will also be explained that the impact of the 2012 SGEI Framework on the justification of State aid cases under Article 106(2) TEFU is limited. The chapter concludes with Section 5.4. by emphasising that it appears to be time to adopt a more sector-specific approach to reduce distortions of competition generated by compensation of SGEIs.

5.2 Compensation of undertakings for providing Services of General Economic Interest

It was shown in the previous chapters that the delivery of Services of General Economic Interest (SGEI) can put a financial constraint on the service provider. It has also been shown that with the erosion of cross-subsidies from other elements, the financing of SGEIs has become more challenging for the service provider, which increases the need for external funding.[9] Despite the fact that there are special compensation mechanisms contained in the Postal and Universal Service Directive, the Member States appear to rely on the State aid regime for the compensation of SGEIs.[10]

[9] See above, Chapter 3 and Chapter 4.
[10] See above, Chapter 4, Section 4.5.

5.2.1 State aid

Relying on the State aid regime can distort competition within the market, hence the general rule is that State aid is not compatible with the internal market.[11] For a measure to fall under Article 107(1) TFEU, the measure can be 'any aid granted by a Member State or through State resources'. This includes direct subsidies and indirect measures.[12] The beneficiary must receive an advantage, which improves its economic situation, and the measure must be imputable to the State,[13] which must exercise some sort of control so the measure can be attributed to it.[14] State aid is not compatible with the internal market as it can prevent a level playing field between the beneficiary and the other undertakings operating in the market. The measure does not need to distort competition; a potential likelihood that it may distort competition is sufficient.[15] Furthermore, the selective measure must provide a selective advantage, favouring certain undertakings or goods. It can be any undertaking, irrespective of its legal identity as long as it is 'engaged in an economic activity'.[16] And the measure must have a negative effect on intra-Member State trade. This condition can only be met in open markets,[17] – for example, when a measure prevents service providers from other Member States from entering the market.[18] It is not necessary for the measure to have a real effect on trade between Member States.[19] In the case that a measure satisfies these requirements, the measure is considered to be incompatible with the internal market.

However, there are exceptions to the general rule of incompatibility. Any measure that falls under Article 107(2) TFEU is automatically exempted from the

[11] Article 107(1) TFEU.
[12] Hancher, Ottervanger and Slot (n6), paras 3-002 – 3-003.
[13] Case C-345/02 *Pearle VB* [2004] ECR I-7139, para 35.
[14] Case C-482/99 Stardust Marine [2002] ECR I-4397, para 52.
[15] Case T-387/11 *Nitrogénművek Vegyipari Zrt. v. Commission* ECLI:EU:T:2013:98, para 89.
[16] Case C-41/90 *Höfner and Elsner* [1991] ECR I-1979, para 21; Case C-138/11 *Compass-Datenbank* ECLI:EU:C:2012:449, para 35.
[17] Commission, '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' [2012] OJ C8/4, para 37.
[18] Günter Knieps, 'Privatisation of Network Industries in Germany: A Disaggregated Approach' (2004) CESifo Working Paper Series No. 1188, 15 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=551423>.
[19] *Nitrogénművek Vegyipari Zrt. v. Commission* (n15) para 89.

general prohibition contained in Article 107(1) TFEU. In contrast, a measure that falls under Article 107(3) TFEU may be compatible with the internal market if the positive effects of achieving one of the public interest objectives contained in the Treaty outweigh the negative effect on competition.[20] It is important to note that even though the State measure may be compatible with the internal market, Member States are still required to notify the Commission.

5.2.2 The *Altmark* judgment

In the past, the question of whether external funding for delivering SGEIs is to be evaluated as compensation payment or as State aid used to create legal uncertainty. After years of inconsistency, the Court of Justice settled on the compensation approach, meaning that external payments for discharging SGEIs are not to be regarded as State aid within Article 107(1) TFEU as long as the payment does not exceed what is necessary to recover the service provider's net costs for the SGEI provision.[21] This approach was confirmed and clarified in *Altmark*.[22] This section briefly outlines the *Altmark* judgment and explains its importance for the compensation process of SGEIs.

The case concerned compensation payments for the provision of regional public bus transport. A competitor sought annulment of the licence granted to the service provider, *Altmark Trans GmbH*, as *Altmark Trans* was not able to deliver the service without public subsidies. They argued the licence was therefore unlawful.[23] The complaint was dismissed at first, but on appeal it was set aside by the regional

[20] Commission of the European Communities, 'State Aid Action Plan: Less and better targeted state aid: a roadmap for state aid reform 2005-2009' (Consultation) COM(2005) 107 final, paras 10–11, 19; Phedon Nicolaides, Mihalis Kekelekis and Maria Kleis, 'Chapter II: Exceptions under Article 87 EC' in Phedon Nicolaides, Mihalis Kekelekis and Maria Kleis (eds), *State aid policy in the European Community: Principles and practice* (vol 16, 2nd edn, Kluwer Law International 2008) 50; Alison Jones and Brenda Sufrin, *EU Competition Law* (State aid chapter, available at <http://global.oup.com/uk/orc/law/competition/jones_sufrin6e/>, 5th edn online chapter, OUP 2014) 101.

[21] For a more detailed discussion on the 'compensation approach' versus 'State aid approach', see above Chapter 4, Section 4.3.1.

[22] Case C-280/00 *Altmark Trans Gmbh* [2003] ECR I-7747.

[23] ibid, para 23.

Higher Administrative Court. *Altmark Trans* then appealed to the Federal Administrative Court (Bundesverwaltungsgericht), which referred the case to the Court of Justice for a preliminary ruling.[24] The Federal Administrative Court asked, amongst other things, whether subsidies paid for providing local public transport are prohibited under Article 107(1) TFEU.[25]

The Court of Justice (Court) held that a public compensation measure for the provision of public service obligations does not fall under Article 107(1) TFEU, as the undertaking does not obtain a 'real financial advantage' and the service provider is not put 'in a more favourable position than' his competitors.[26] However, the Court introduced four additional cumulative requirements that have to be fulfilled if a compensation payment is not to be classified as State aid.[27] The four criteria, are:

1. [T]he recipient undertaking must actually have public service obligations to

   discharge, and the obligations must be clearly defined. In the main proceedings, the national court will therefore have to examine whether the public service obligations which were imposed on Altmark Trans are clear from the national legislation and/or the licences at issue in the main proceedings.[28]

2. [T]he parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings.[29]

3. [T]he compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking

[24] ibid, paras 25-29.
[25] ibid, para 31.
[26] ibid, para 87.
[27] ibid, para 88.
[28] ibid, para 89.
[29] ibid, para 90.

into account the relevant receipts and a reasonable profit for discharging those obligations. Compliance with such a condition is essential to ensure that the recipient undertaking is not given any advantage which distorts or threatens to distort competition by strengthening that undertaking's competitive position.[30]

4. [W]here the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.[31]

The *Altmark* test is applied within Article 107(1) TFEU.[32] In cases where the state measure satisfies the four *Altmark* criteria, the compensation is not regarded as State aid.

The *Altmark* test provides a stringent framework for Member States' compensation measures for SGEI to fall not under the State aid control of the Commission, as the *Altmark* criteria – in particular the fourth condition – proved difficult to meet in practice.[33] The Court of Justice did not lay out the requirements on the public procurement procedure in *Altmark* but the Commission regards that an open, transparent and non-discriminatory procedure in line with EU Public

[30] ibid, para 92.
[31] ibid, para 93.
[32] Case T-442/03 *SIC v Commission* [2008] ECR II-1161; Hancher and Larouche (n 7) 762.
[33] Hans Vedder and Marijn Holwerda, 'The European Courts' Jurisprudence After Altmark; Evolution or Devolution?' in Erika Szyszczak and Johan Willem van de Gronden (eds), *Financing Services of General Economic Interest* (T.M.C. Asser Press, Springer 2013) 58, 64.

Procurement Legislation[34] meets the fourth condition.[35] Sinnaeve points out that the second element of the fourth criterion may be difficult to fulfil, as there is often no alternative suitable efficient benchmark undertaking to compare with.[36]

In *BUPA*, the General Court therefore introduced more flexibility regarding the interpretation of the *Altmark* criteria.[37] The General Court held that there are alternative ways to establish the fourth *Altmark* condition in the absence of a public procurement procedure or a comparative efficient benchmark undertaking.[38] In *Chronopost II*, the Court of Justice confirmed that there are alternative ways to meet the fourth *Altmark* criterion by, for example, relying on data which allows the verification of the costs of the service provider for providing SGEIs.[39] In the two more recently decided judgments, *CBI v Commission* and *Germany v Commission,* the General Court held that *Altmark* applies to all sectors but the specific nature of the sector must be taken into account without providing any more detailed information.[40] Despite the fact that these two cases concern healthcare services (public funding granted to public hospitals in Belgium and funding granted for the disposal of dead animal carcasses to prevent an epidemic outbreak), the General

[34] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L97/65; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L94/1.
[35] Commission (n17) para 63. The restricted procedure and negotiated procedure with prior publication can also be sufficient under exceptional circumstances.
[36] Adinda Sinnaeve, 'What's New in SGEI in 2012? - An Overview of the Commission's SGEI Package' (2012) 11 EStAL 347, 352.
[37] Case T-289/03 *BUPA* [2008] ECR II-81; For a more detailed analysis of the *BUPA* judgment see, Nuno A Matos, 'The Role of the BUPA Judgement in the Legal Framework for Services of General Economic Interest' (2011) 16 Tilburg Law Review 83; Vedder and Holwerda (n 33).
[38] *BUPA* (n 37) paras 246-250.
[39] Joined Cases C-341/06 P and C-342/06 P - *Chronopost and La Poste v UFEX and Others* [2008] ECR I-4777 (ECJ) paras 148-149; Vedder and Holwerda (n 33) 63-64.
[40] Case T-137/10 *CBI v Commission* ECLI:EU:T:2012:584 paras 85-86; Case T-295-12 *Germany v Commission* ECLI:EU:T:2014:675 para 131; See also Phedon Nicolaides, 'Not Surprisingly, Another Member State Fails to Prove Compliance with the Altmark Criteria' (9 September 2014) <http://stateaidhub.eu/blogs/stateaiduncovered/post/33>.

Court does not appear to limit these principles to healthcare services but they apply to SGEIs in all sectors.[41]

5.2.3 Article 106(2) TFEU

Even in cases where the compensation payment does not meet the *Altmark* test and is therefore considered to be State aid and not exempted under Article 107(2) or (3) TFEU, it may still be justified under Article 106(2) TFEU.

Article 106(2) TFEU provides a derogation from the application of the competition rules, including the general prohibition on State aid, for undertakings entrusted with the operation of SGEIs. Szyszczak argues that Article 106(2) TFEU should therefore be interpreted in a narrow sense and considering the proportionality test.[42]

In order for a compensation to fall under Article 106(2) TFEU three requirements must be fulfilled. The General Court interpreted the conditions of the wording very strictly, namely:

> First, the service in question must be an SGEI and clearly defined as such by the Member State; second, the undertaking in question must have been explicitly entrusted by the Member State with the provision of that SGEI; thirdly, the application of the competition rules of the Treaty – in this case,

[41] On the other hand, in *Spezzino* (Case C-113/13 *Spezzino and Others* ECLI:EU:C:2014:2440) the Court of Justice appears to introduce an alternative test to *Altmark* for healthcare services (reimbursement of emergency ambulance services) which does not require to meet the public procurement in the case of a non-profit economic activity. Graells refers to it as a 'budgetary efficiency' test. Graells points out that the *Spezzino* test and the *Altmark* test are separate from each other. Graells argues the test is too vague and creates legal uncertainty as it is against other EU case law, in which the ECJ held that public procurement rules and competition law apply also to voluntary, non-profit activities as long as they have an economic nature. Albert Sanchez Graells, 'Competition and State Aid Implications of the Spezzino Judgment (C-113/13): The Scope for Inconsistency in Assessing Support for Public Services Voluntary Organisations' (30 June 2015) 9–10 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625166>; See also Erika Szyszczak, 'Services of General Economic Interest and State Measures Affecting Competition' (2015) 6 Journal of European Competition Law & Practice 681, 687–688.

[42] Erika Szyszczak, *The regulation of the state in competitive markets in the EU* (Hart Publishing 2007) 225.

> the ban on State aid – must obstruct the performance of the particular tasks assigned to the undertaking and the exemption from such rules must not affect the development of trade to an extent that would be contrary to the interests of the Community.[43]

In cases where a compensation meets these requirements, the compensation is to be considered as State aid within Article 107(1) TFEU and the Commission must be notified under Article 108(3) TFEU but the measure is considered to be compatible with the internal market.[44]

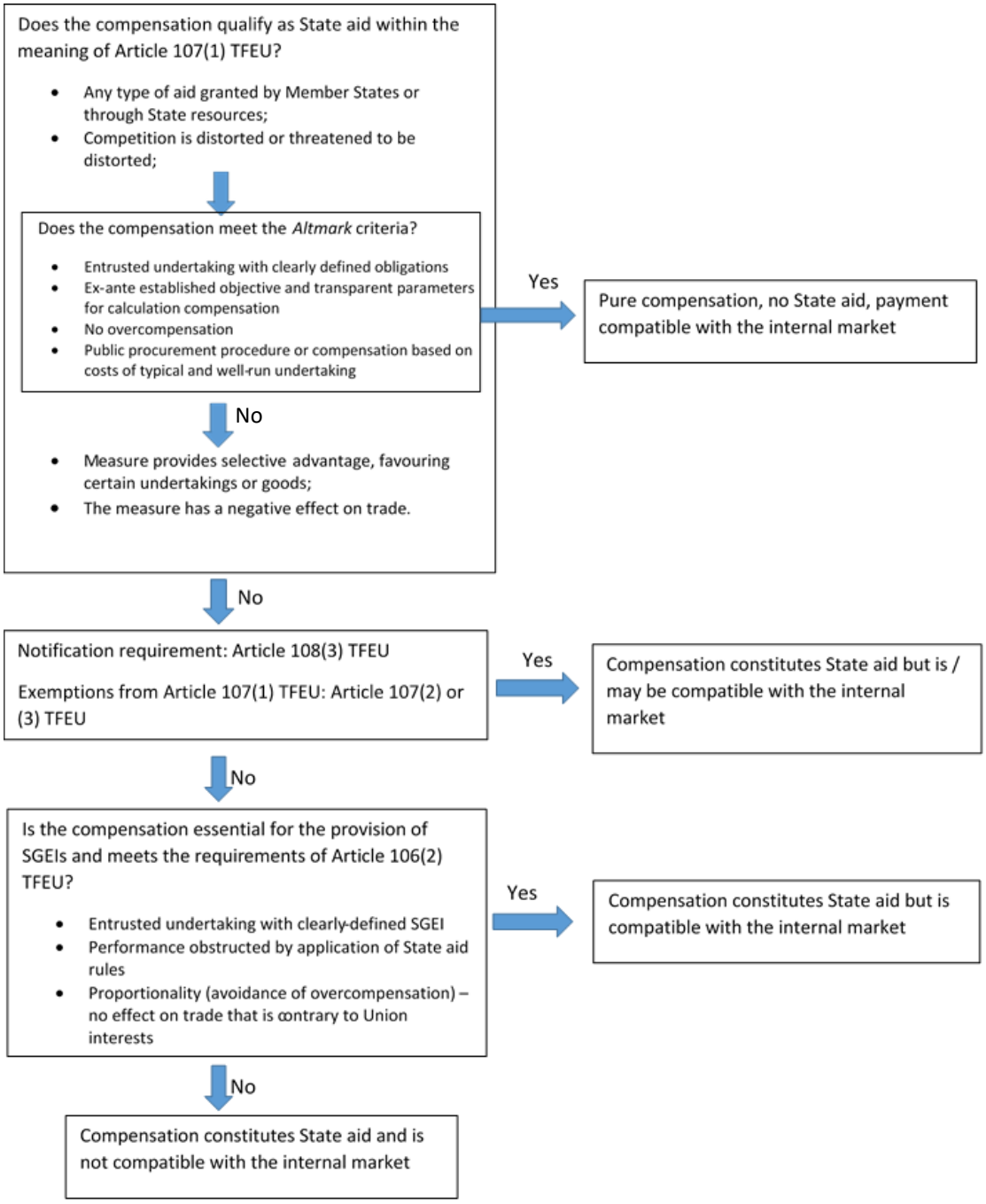
5.2.4 The Commission's approach to *Altmark* and Article 106(2) TFEU

Having outlined the different steps in the compensation process of SGEI provider and their elements, this section turns to the relationship between the *Altmark* judgment and the Treaty provision Article 106(2) TFEU.

Compensating an undertaking for discharging SGEIs does not necessarily mean that the measure is not compatible with the internal market. The assessment of compensation that falls under the State aid framework and does not apply specific compensation mechanisms set out in EU Directives follows several steps (see Figure 4). First, there is the general assumption that if a compensation payment falls under Article 107(1) TFEU, it is to be regarded as State aid and incompatible with the internal market unless it either meets the *Altmark* criteria or is justified by one of the exemptions in Article 107(2) or (3) TFEU. If the measure is not compatible with the internal market, the assessment continues with Article 106(2) TFEU.

[43] *SIC v Commission* (n 32) para 144; Case T-17/02 *Olsen v Commission* [2005] ECR II-2031, para 125.
[44] Erika Szyszczak, 'Introduction' in Erika Szyszczak and Johan Willem van de Gronden (eds), *Financing Services of General Economic Interest* (T.M.C. Asser Press, Springer 2013) 25.

Figure 4: Compensation of undertakings for discharging Services of General Economic Interest



As shown,[45] the *Altmark* criteria and the ones of Article 106(2) TFEU are similar. A comparative overview of both of these is provided in Table 5.

Table 5: Comparative overview of the *Altmark* criteria and the requirements under Article 106(2) TFEU[46]

Cumulative criteria	*Altmark* test	Article 106(2) TFEU
1.	Clearly defined public service obligations	Entrusted undertaking with clearly defined SGEI
2.	Ex-ante established objective and transparent parameters for calculating compensation	Application of Treaty rules obstruct SGEI performance
3.	No overcompensation	No negative effect of the Union's interests (proportionality and necessity of measure)
4.	Public procurement procedure or compensation based on costs of typical and well-run undertaking	

Table 5 highlights similarities and differences between the *Altmark* criteria and Article 106(2) TFEU. The first criterion is identical if it is assumed for this comparison that the concepts of Public Service Obligation and Services of General Economic Interest are alike.[47] A further similarity between the two is the third condition. In *Altmark*, the compensation cannot exceed what is necessary to cover the costs for the provision of the Public Service Obligations, as overcompensation can prevent a level playing field between different undertakings operating in the market and may have a distortive effect on competition. The second sentence of Article 106(2) TFEU requires that the Union's interests are not negatively affected by the measure. The Court of Justice held in *Federutility and Others*[48] that the intervening measure must comply with the principle of proportionality and cannot exceed what is necessary to achieve the intended objective.[49]

[45] See above, Sections 5.2.2. and 5.2.3.
[46] The blue-shaded fields represent similarities between the two tests; the apricot shaded fields show differences between *Altmark* and Article 106(2) TFEU.
[47] As shown in Chapter 2, PSOs and SGEIs are not identical but the Commission and Courts do not distinguish between the concepts and use SGEIs, PSOs and USOs interchangeably. To be able to assess the Commission and the European Courts approaches to financing of SGEIs, this chapter therefore follows the Commission interpretation of the concepts.
[48] Case C-265/08 *Federutility and Others* [2010] ECR I-3377.
[49] ibid, paras 33–38.

The second condition in *Altmark* and Article 106(2) TFEU differ from each other. The second *Altmark* element establishes the parameter for the compensation calculation in an objective and transparent manner in order to meet the third criterion and avoid overcompensation.[50] In contrast, the second element under Article 106(2) TFEU states that the application of the Treaty rules, in particular the rules on competition, must obstruct the provision of SGEIs. This requirement restricts the applicability of Article 106(2) TFEU to cases in which a derogation from the Treaty is necessary in order for the entrusted service provider to fulfil its SGEI mission. It is no longer necessary that the exception is only justified if otherwise the performance of the service would not be possible at all, it is sufficient that otherwise the entrusted undertaking would not be possible to provide 'its service in the condition of an economic equilibrium'.[51]

However, the most significant difference between *Altmark* and Article 106(2) TFEU is that the fourth public procurement/benchmark efficiency criterion is missing under Article 106(2) TFEU. In the recent case *Viasat Broadcasting UK v Commission*, the Court of Justice confirmed that the *Altmark* conditions, especially the second and fourth elements, are not part of the assessment under Article 106(2) TFEU.[52] *Altmark* is to be applied within Article 107(1) TFEU.[53]

The comparison shows that the *Altmark* test is stricter than Article 106(2) TFEU, and it is more difficult for a measure to meet the *Altmark* criteria than to be justified under Article 106(2) TFEU. *Altmark* must provide a higher benchmark than Article 106(2) TFEU since, if *Altmark* is fulfilled, the compensation is not to be regarded as State aid and falls outside the Commission's control, whereas under Article 106(2) TFEU, the measure is notified and assessed by the Commission before

[50] Case T-125/12 *Viasat Broadcasting UK v Commission* ECLI:EU:T:2015:687, para 81; Phedon Nicolaides, 'The Perennial Altmark Questions' (27 October 2015) <http://stateaidhub.eu/blogs/stateaiduncovered/post/3961>.
[51] For example, Case C-475/99 *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] ECR-I 8089, paras 56–65; For a more detailed discussion on the restrictive scope of the second criterion, see Tony Prosser, 'EU competition law and public services' in Elias Mossialos and others (eds), *Health systems governance in Europe: The role of European Union law and policy* (Cambridge University Press 2010) 327–329.
[52] Case C-660/15 P *Viasat Broadcasting UK v Commission* ECLI:EU:C:2017:178, para 33.
[53] ibid, para 35.

it can be declared as justified or not. Article 106(2) TFEU constitutes a 'catch-all' provision for awarding reimbursement to providers of SGEIs, which would otherwise not be compatible with the internal market. According to the second sentence of Article 106(2) TFEU, the compatibility of the measure was 'limited to the most serious competition distortions'.[54]

However, in 2012 the Commission issued the 'European Union framework for State aid in the form of public service compensation (2011)', the 2012 SGEI Framework, in relation to compensation for service provider discharging SGEIs.[55] The Commission set out new requirements for compensation measures to be justified under Article 106(2) TFEU, and those requirements only partially correspond with the conditions in Article 106(2) TFEU.[56] Table 6 provides an overview of the newly introduced elements and compares them with the *Altmark* criteria.

[54] Nicola Pesaresi and others, 'The New State Aid Rules for Services of General Economic Interest (SGEI): the Commission Decision and Framework of 20 December 2011' (2012) 20 <http://ec.europa.eu/competition/publications/cpn/2012_1_9_en.pdf>

[55] Commission, 'European Union framework for State aid in the form of public service compensation (2011)'[2012] OJ C8/15. The Commission has also issued a *de minimis* Regulation - Commission 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 granted to undertakings providing services of general economic interest [2012] OJ L114/8; and a Commission Decision – 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 [2012] OJ L7/3 – and another Communication on the application of State aid rules for compensation of SGEI providers European Commission (n 35);
The Communication provides clarification of the State aid concept in relation to SGEIs.
The SGEI *de minimis* Regulation states that if a reimbursement for discharging SGEIs does not exceed EUR 500,000 over three fiscal years, then it is assumed that the compensation does satisfy Article 107(1) TFEU and therefore the notification requirement is omitted, Article 2(1 and 2) of Commission Regulation (EU) No 360/2012.
In cases where the compensation complies with the Commission Decision, the Member State is exempt from the notification requirement. For more information on the Commission Decision, see Chapter 4, Section 4.3.1. Since, in cases where the *de minimis* Regulation and the Commission Decision is fulfilled, the notification requirement is omitted, these cases do not fall under the further scrutiny of the Commission, as they are considered to be compatible with the internal market. The applicability of the Decision and *de minimis* Regulation is therefore not within scope of this chapter.

[56] See also above, Chapter 4, Section 4.3.1.

Table 6: Comparative overview of the Altmark criteria and the requirements under Article 106(2) TFEU in conjunction with the 2012 SGEI Framework[57]

Cumulative criteria	*Altmark* test	Article 106(2) TFEU and the 2012 SGEI Framework	
1.	Clearly defined public service obligations	Entrusted undertaking with clearly-defined SGEI with limited duration[58]	These conditions are set out to ensure that trade is not affected contrary to the Union's interests.[59]
2.	Ex-ante established objective and transparent parameters for calculating compensation	Calculation based on expected or actual costs, including reasonable profit,[60] calculation must include efficiency incentives[61]	
3.	No overcompensation	No overcompensation[62]	
4.	Public procurement procedure or compensation based on costs of typical and well-run undertaking	Compliance with public procurement rules and, where applicable, with Transparency Directive[63]	

The Commission has introduced new requirements, and only if those requirements are satisfied is the State aid measure considered to be compatible with the internal market.[64] Table 6 shows that the newly introduced conditions under the 2012 SGEI Framework only partially correspond with the initial requirements under Article 106(2) TFEU.[65] Especially, the public procurement and efficiency incentives' criteria prove to be controversial. The Commission altered the initial requirements and now

[57] The blue-shaded fields represent similarities between the two tests; the apricot shaded fields show differences between *Altmark* and Article 106(2) TFEU.

[58] Commission, 'European Union framework for State aid in the form of public service compensation (2011)' (n 55) paras 12, 15, 17.

[59] ibid, para 51. The SGEI Framework also demands more transparency, which requires the publication of certain information. ibid, para 60.

[60] ibid, paras 21-22, 25, 28.
The calculation is preferable based on the net avoided cost methodology (difference between the net cost with the provision of SGEI and without the provision of SGEI, taking intangible benefits into account) but the Commission accepts alternative methods too. ibid, paras 25 and 27.

[61] ibid, para 39.

[62] ibid, para 47.

[63] ibid, paras 18-19.

[64] José L Buendía Sierra and José M Panero Rivas, 'The Almunia Package: State Aid and Services of General Economic Interest' in Erika Szyszczak and Johan Willem van de Gronden (eds), *Financing Services of General Economic Interest* (T.M.C. Asser Press, Springer 2013) 143.

[65] For a more detailed discussion on Article 106(2) TFEU and Commission's 2012 SGEI Framework, see above, Chapter 4, point 4.3.1. The 2012 SGEI Framework applies in principle also for unlawful aid in cases, in which the Commission decides on the measure after 31 January 2012. Commission, 'European Union framework for State aid in the form of public service compensation (2011)' (n 55) para 69.

states that if a Member State complies with the 2012 SGEI Framework, the measure does not affect trade in such a way that is against the Union's interests.[66]

The criteria introduced by the 2012 SGEI Framework added further requirements for Member States to consider in relation to Article 106(2) TFEU that effectively reduced the scope of Article 106(2) TFEU. The 2012 SGEI Framework also reduced the difference between the two tests by bringing Article 106(2) TFEU closer to *Altmark*.[67]

In contrast, the 2005 SGEI Framework only required an entrusted undertaking with clearly-defined SGEI, statutory specification of calculation method and no overcompensation.[68]

The 2012 SGEI Framework is a soft-law instrument and, as such, not legally binding in relation to the Member States,[69] which may speak against the practical relevance of the 2012 SGEI Framework. However, soft-law instruments can become binding if the Member State accepts them.[70]

Another question that arises is the legal compatibility of the SGEI Framework with existing EU law. The General Court has held in multiple judgments that Article 106(2) TFEU does not contain an efficiency or public procurement requirement.[71] For example, in *M6 and TF1 v Commission* the General Court held as 'inaccurate' the claim that Article 106(2) TFEU contains an economic efficiency element[72] and in *SIC v Commission* the General Court points out that Article 106(2) TFEU 'does not include

[66] ibid, para 51.
[67] Tim M Rusche, 'The Almunia Package: Legal Constraints, Policy Procedures, and Political Choices' in Erika Szyszczak and Johan Willem van de Gronden (eds), *Financing Services of General Economic Interest* (T.M.C. Asser Press, Springer 2013) 122.
[68] Commission, 'Community framework for State aid in the form of public service compensation' [2005] OJ C297/4.
[69] Case C-226/11 *Expedia* ECLI:EU:C:2012:795, para 29; Buendía Sierra and Panero Rivas (n 64) 130.
[70] Case C-121/10 *Commission v Council* ECLI:EU:C:2013:784, para 52; For a detailed discussion on the binding character of soft-law instruments related to State aid, see Andrea Biondi and Oana A Stefan, 'The Notice on the Notion of State Aid: every light has its shadow' (27 February 2017, Last Revised 1 May 2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2924954>.
[71] Ernst-Joachim Mestmäcker and Heike Schweitzer, *Europäisches Wettbewerbsrecht* (3rd, C.H. Beck 2014) 8. Kapitel, §37, para 73.
[72] T-568/08 *M6 and TF1 v Commission* [2010] ECR II-3397, para 132.

a requirement to the effect that the Member State must have followed a competitive tendering procedure for the award of the SGEI.'[73] In the more recent *CBI* judgment, the General Court explicitly states that it is against established case law to apply the fourth *Altmark* criterion under Article 106(2) TFEU.[74] Following from the case law, the Commission should not apply the 2012 SGEI Framework or, at least, cannot apply the 2012 SGEI Framework in a strict sense.

5.3 The application of *Altmark* and Article 106(2) TFEU in post and telecommunications

In the preceding section, the conditions of the *Altmark* test and the requirements under Article 106(2) TFEU were discussed. It was shown that the Commission has moved the conditions under Article 106(2) TFEU closer to the *Altmark* criteria and thereby diverged from the criteria set out by EU case law, and argued that the 2012 SGEI Framework goes beyond primary law and should therefore not be applied as such.

This section turns to Commission decisions to analyse the application of the *Altmark* and Article 106(2) TFEU in SGEI financing cases in the postal sector and in broadband.[75] The aim of the study is to identify in how many cases the compensation measure for the provision of SGEIs meets the *Altmark* criteria and is therefore not regarded as State aid within Article 107(1) TFEU, and in how many cases the measure does not meet *Altmark* but is compatible with the internal market; and furthermore, whether the introduction of the 2012 SGEI Framework has resulted in fewer cases being justified under Article 106(2) TFEU. The findings of this section draw from a

[73] *SIC v Commission* (n 32) para 145; See also *Olsen v Commission* (n 43), para 239.
[74] The General Court held, 'according to the settled case-law of the General Court, the fourth Altmark criterion is not taken into account for assessing the compatibility of aid measures under Article 86(2) EC, since the conditions for that compatibility are different from the criteria in the *Altmark* judgment, which were laid down in order to assess the existence of State aid'. *CBI v Commission* (n 40), para 292.
[75] Chapter 3 and Chapter 4 address the evolving nature of the scope of essential services in post and the tension between USOs and liberalisation. It was shown that the State aid regulatory framework is used to secure the level of services and to guarantee a level playing field between undertakings that deliver USOs and undertakings without such obligations. See above, Chapter 4, Section 4.5.

database compiled by Commission's State aid decision in postal services and broadband in the period between 25 July 2003 (after the *Altmark* judgment) and 31 May 2017.[76] The case study only includes State aid measures that concerned SGEIs.[77] Two sectors are analysed to find out whether the applicability of the *Altmark* and Article 106(2) TFEU may depend on the sector. Post and broadband were chosen because of their different infrastructure, and because in postal services external compensation for the provision of SGEIs is used to maintain the status quo, whereas in broadband it is used to increase access to the service.

5.3.1 State aid decisions concerning postal services

For this, 30 State aid decisions have been assessed, with some of the cases being prolongation of previous schemes.[78] All decisions concern compensation measures to the incumbent for providing SGEIs.

Almost all measures constitute State aid. There were just two exceptions and in only one decision concerning *Poste Italiane*, the Italian incumbent – the remuneration did not fall within the scope of Article 107(1) TFEU as all four *Altmark* conditions were fulfilled.[79] The decision was about compensation for the distribution of postal savings books and postal savings certificates which are regarded to be SGEIs in Italy. In this case an expert study was provided for the compensation of similar products. The Commission believed that the remuneration payment was market-

[76] For more information on how the case study was conducted, see Annex, section 1, Methodology.
[77] As shown in Chapter 2, PSOs and SGEIs are not identical, but the Commission and Courts do not distinguish between the concepts and uses SGEIs, PSOs and USOs interchangeably. Therefore, to be able to assess the approaches of the Commission and the European Courts to financing of SGEIs, this chapter follows the Commission's interpretation of the concepts.
[78] For a list of all State aid decisions that are included in the analysis, see below Annex, section 2, Table 6.
[79] See below Annex, section 2, Table 6, Commission Decision, State aid C49/2006, C(2008) 5585 final. The other measure that did not constitute State aid was about capital injections to the Belgium designated universal postal service provider, and in this case the market investor principle was met. Measure 3 of Commission Decision, State aid SA.14588 (C 20/2009), C(2012) 178 final.

conform as it was shown that similar costs would have been incurred by a benchmark undertaking.[80]

Furthermore, in five cases the Commission decided the State aid measure was justified under Article 107(2)(a) TFEU or Article 107(3)(d) TFEU. In each of those five decisions the Polish incumbent, *Poczta Polska* was compensated for the delivery of SGEIs connected to the provision of services that are statutorily exempt from postage fees, e.g. delivery of postal items for blind and partially-sighted users, or items for public libraries.[81] The aid was compatible with the internal market due to its social character and the cultural context of the State aid measure.

In three cases, Member States issued unlimited state guarantees to the designated service provider, which cannot be considered as compensation for financing the provision of universal postal service. Unlimited state guarantees may distort competition, as they improve the creditworthiness of the beneficiary and thus may create an uneven playing field between the incumbent and alternative service providers.[82] In these cases, the Member States did not prove that the *Altmark* test was fulfilled, in particular the fourth condition.[83] As the State guarantees are unlimited, they have an impact on all economic activities of the beneficiary and cannot constitute a pure compensation for the provision of universal postal service and therefore cannot be justified under Article 106(2) TFEU.[84]

In the remaining cases, the Commission concluded that the *Altmark* criteria, in particular the fourth condition, was not fulfilled. The Commission argued that the Member States did not demonstrate that the same costs would occur under an efficient undertaking, nor that the designation of the undertaking was not based on

[80] SA.14588 (n79) paras 185–187.
[81] See below, Annex, Table 6 (Commission Decision, State aid N462/2008 – Poland, C (2008) 8863 fin; Commission Decision, State aid N312/2010 – Poland, C(2010)7682 final; Commission Decision, State aid SA.33341 (N/2011) – Poland, C (2011) 6458 final; Commission Decision, State aid SA.36124 (2013/N) – Poland, C (2013) 3396 final; Commission Decision, State aid SA.42843, C(2015) 8562 final.
[82] Commission Decision, State aid E12/2005 – Poland, C (2007) 1757 fin, para 28.
[83] For example, see ibid, para 37.
[84] Commission, '*State aid: Commission completes its investigation into the unlimited guarantee for the French Post Office' (IP/10/51, 26 January* 2010) <http://europa.eu/rapid/press-release_IP-10-51_en.htm>.

a public procurement procedure. Nonetheless, the State aid measure in these cases was justified under Article 106(2) TFEU in conjunction with the 2005 or 2012 SGEI Framework.

Having outlined that the *Altmark* conditions and the requirements under the 2012 SGEI Framework have converged and are now similar, it appears to be surprising that the measures did not satisfy *Altmark* mainly because of the lack of a public procurement procedure or because the compensation was not based on the costs of an efficient benchmark undertaking but the measure was nevertheless justified under Article 106(2) TFEU in conjunction with the 2012 SGEI Framework. This suggests that the Commission interprets the public procurement requirement enumerated in the SGEI Framework differently to that in *Altmark*.

According to Paragraph 19 of the 2012 SGEI Framework,

> [a]id will be considered compatible with the internal market on the basis of Article 106(2) of the Treaty *only where the responsible authority, when entrusting the provision of the service to the undertaking in question, has complied or commits to comply with the applicable Union rules in the area of public procurement*. This includes any requirements of transparency, equal treatment and non-discrimination resulting directly from the Treaty and, where applicable, secondary Union law. Aid that does not comply with such rules and requirements is considered to affect the development of trade to an extent that would be contrary to the interests of the Union within the meaning of Article 106(2) of the Treaty.[85]

The wording of the paragraph suggests that a public procurement procedure is a prerequisite for the compatibility of the measure under Article 106(2) TFEU. However, in cases, where public procurement is a prerequisite, the compliance element applies. In other cases a public procurement procedure must not be followed. Such

[85] Commission, 'European Union framework for State aid in the form of public service compensation (2011)' para 19 (emphasis added).

exceptions are, for example, for technical reasons or the protection of exclusive rights, when the contract can only be discharged by a particular undertaking.[86]

In post, Member States have the choice to guarantee the provision of universal postal service through public procurement. Under the Postal Services Directive, a public procurement procedure is not compulsory but left to the discretion of the Member States.[87] Therefore Paragraph 19 of the 2012 SGEI Framework must be interpreted in such a way that the Commission only requires compliance with the Union public procurement rules in cases, in which Member States decide to hold a tender. In none of the analysed State aid decisions has the Member State chosen to follow a tendering procedure in order to find the most suitable and efficient service provider.[88] Hence the public procurement requirement can be omitted following the Member State's discretion. Following this, the Commission did not find a violation of public procurement rules in its assessment. [89] However, the Commission stated directly that the lack of applying a tendering procedure is due to the nature of the postal market as the entrusted service provider was the only undertaking whose network had the capacity and density to fulfil the SGEIs.[90] Hence, the Commission decided that all cases complied with the 2012 SGEI Framework.

[86] Directive 2014/24/EU, Article 32; Directive 2014/25/EU, Article 50(c); Pesaresi and others (n 54) 12.
[87] Consolidated Version of Directive 97/67/EC of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service [1998] OJ L15/14 as amended by Directive 2002/39/EC [2002] OJ L176/21 as amended by Regulation (EC) 1882/2003 [2003] OJ L284/1 as amended by Directive 2008/6/EC [2008] OJ/L52/3, Article 7(2).
[88] See below, Annex, Table 7.
[89] Commission Decision, State aid SA.38869 (2014/N) – Poland, C(2015)8236 final, para 138; See also, Commission Decision, State aid SA.35608 (2014/C) (ex 2014/N) – Greece, C(2014) 5436 final, para 177; Commission Decision, State aid SA.38788 (2015/N) – United Kingdom, C(2015) 1759 final, para 99.
[90] Commission Decision, State aid SA.31006 (N1/2013) – Belgium, C(2013) 1909 final, paras 137-138; Commission Decision, State aid SA.33054 (2012/N) – United Kingdom, C(2012) 1905 final, para 67; Commission Decision, State aid SA.36512 (2014/NN) – France, C(2014) 3164 final, paras 77-82.

5.3.2 State aid decisions concerning broadband

As shown above, only few Member States have included broadband in the scope of universal service in telecommunications.[91] The analysis of the Commission's decisions on State aid to broadband confirms that the concepts of Services of General Economic Interest and Universal Service Obligation play a less significant role in broadband than in post.[92] The majority of cases were cleared under Article 107(3)(c) TFEU in combination with the Broadband Guidelines.[93]

The concept of SGEI, and the compensation for the provision of SGEIs were discussed in more detail in seven Commission decisions. In two cases, the measure was not regarded to be a Service of General Economic Interest,[94] and in one case only a part of the measure was considered to be an SGEI.[95] The provision with broadband was in these cases addressed to businesses rather than to citizens.[96]

In three further cases, the Commission confirmed the existence of an SGEI.[97] In the French cases, the funding did not constitute State aid, as all four *Altmark* criteria were fulfilled and all service providers were selected based on a public tendering procedure.[98] In contrast, in an Estonian case the compensation measure

[91] See above, Chapter 3, Section 3.3.3. So far Belgium, Croatia, Finland, Spain, Sweden, Malta, Latvia (for disabled end-users only) have included broadband within the scope of universal service.
[92] See below, Annex, Table 8; European Commission, 'Broadband Guidelines: Commission decision on State aid to broadband' (10 April 2017) <http://ec.europa.eu/competition/sectors/telecommunications/broadband_decisions.pdf>.
[93] For more information on the application of the Guidelines on State aid to broadband, see above Chapter 4, Section 4.4.1.1.
[94] Commission Decision, State aid N284/2005 – Ireland, C(2006)436 final; Commission Decision, State aid N890/2006 – France, C(2007) 3235 final.
[95] Commission Decision, State aid SA.37183 (2015/NN) – France, C(2016) 7005 final.
[96] N284/2005 (n94) para 39; SA.37183 (n95); European Commission, 'State aid: Commission approves public funding of €2 million for high-speed network in France' (IP/07/1070, 11 July 2007) <http://europa.eu/rapid/press-release_IP-07-1070_en.htm?locale=en>.
[97] Commission Decision, State aid SA.29874 (N196/2010) – Estonia, C (2010) 4943 final; Commission Decision, State aid SA.21630 – France, C (2009)7426 final; Commission Decision, State aid N382/2004 – France, C (2005)1170 fin; Commission Decision, State aid N381/2004 – France, C (2004) 4343 fin. See below, Annex, Table 4.
[98] European Commission, 'State aid: Commission approves public financing worth €59 million for broadband project in the French Hauts-de-Seine department' (IP/09/1391, 30 September 2009) <http://europa.eu/rapid/press-release_IP-09-1391_en.htm>; European Commission, 'Commission approves public funding of broadband projects in Pyrénées-Atlantiques, Scotland and East Midlands' (IP/04/1371, 16 November 2004) <http://europa.eu/rapid/press-release_IP-04-1371_en.htm>; European Commission, 'State aid: Commission endorses public funding for broadband network in Limousin, France' (IP/05/530, 3 May 2005) <http://europa.eu/rapid/press-release_IP-05-530_en.htm>.

constituted State aid within Article 107(1) TFEU, as the fourth *Altmark* element was not met due to the fact that Estonia did not choose the undertaking through an open tender.[99] Nonetheless, the State aid was compatible with the internal market under Article 106(2) TFEU in conjunction with the 2005 SGEI Framework as the SGEI was clearly defined, the parameters for the calculation were set out and no overcompensation occurred.[100]

5.3.3 Conclusion

The case studies have highlighted that external compensation measures are, especially in postal services, an important instrument to ensure the provision of SGEIs. Furthermore, it can be observed that the majority of the compensation measures are compatible with the internal market; this is, however, for different reasons. Whereas in broadband, compensation measures for the provision of SGEIs often met the *Altmark* criteria and were therefore not considered as State aid, in postal services the Member States did not – except for one case – successfully comply with the four *Altmark* criteria, in particular with the fourth condition. In postal services, the measures either were compatible with the internal market pursuant to Article 107(2) or (3) TFEU, or they were justified under Article 106(2) TFEU.

Moreover, with revision of the SGEI Framework the Commission's approach towards the justification for compensation of SGEIs under Article 106(2) TFEU became stricter by, for example, introducing a public procurement requirement. Nevertheless, the assessment of the State aid postal services cases has shown that the requirement did not result in a lower compatibility rate for two reasons. First, the Member States are not obliged to select their service provider via a tendering procedure,[101] even though the 2012 SGEI Framework reads as if the compliance

[99] SA.29874 (n97) para 61.
[100] SA.29874 (n97) paras 63-73.
[101] Consolidated Version of Directive 97/67/EC, Article 7(2).

requirement is a non-discretionary obligation.[102] Second, the Commission itself emphasised that, due to the peculiarities of the postal sector a tendering procedure is not a necessity as the designated service provider, incumbent, was the only service provider who could satisfactorily deliver SGEIs nation-wide. In such a case a negotiated procedure without prior publication is sufficient.[103] The Commission emphasises the fact that in some sectors the use of public procurement rules can be fulfilled, while in others a tender would not be successful. This finding has implications for the *Altmark* test. If there is no other undertaking in the sectors with a similar network that can provide the SGEI at the same quality and quantity, then the Member State will not hold a public procurement procedure, and the Member State can also not meet the second alternative of the fourth *Altmark* criterion, as in such a case there is no other benchmark undertaking to compare with.

This suggests that the Commission's strict and successful application of *Altmark* depends on the sector, and the *Altmark* test is not a suitable test for all sectors. This finding is supported by the case study, as the possibility of fulfilling the *Altmark* criteria is higher in broadband than in post, which is due to the network characteristics in each sector.

Altmark was established in a case for Public Service Obligations and not for Services of General Economic Interest and, as discussed in Chapter 2, these two concepts are not identical; thus it is difficult for SGEI compensation measures to meet the *Altmark* criteria.[104] The *Altmark* test was established in a case concerning compensation for the provision of Public Service Obligations to a local bus transport company. Local bus transport is limited to a specific region of a country; it is not necessary to have a nation-wide network in order to provide the service at a standard

[102] Albert Sanchez Graells, 'The Commission's Modernisation Agenda for Procurement and SGEI' in Erika Szyszczak and Johan Willem van de Gronden (eds), *Financing Services of General Economic Interest* (T.M.C. Asser Press, Springer 2013) 170.
[103] 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 [2004] OJ L134/114, Article 31(1)(b); as repealed by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L97/65, Article 32(2)(b).
[104] See above, Chapter 2.

that meets the needs of its users. The physical network can be smaller and should only be sufficient to operate in a specific area. Because of this, it is possible that there is competition for the market, and then competition within the market, as the barriers to entry are lower. In regional bus transport more than one undertaking may have the essential network to ensure the provision of the service at the required level; therefore, selecting the service provider on the basis of a public tender may increase efficiency and secure a high level of service as the sunk costs in the bus sector are lower than building a nation-wide postal services network of sufficient density to fulfil national universal postal service requirements.

The same applies for a regional broadband network that provides Internet access for a whole community within a limited territory of a Member State,[105] whereas in the postal sector a designated service provider is usually required to deliver SGEIs across the whole Member State.[106] Nonetheless, Member States believe that a nationwide-network is required to discharge universal postal service in all areas of the country (urban and rural) at a satisfactory standard.[107] The Court of Justice also held in *Chronopost* that the requirement for postal networks that deliver SGEIs go beyond a 'market network'[108] as the entrusted service provider 'had to acquire, or was afforded, substantial infrastructures and resources ("the postal network"), enabling it to provide the basic postal service to all users, even in sparsely populated areas where the tariffs did not cover the cost of providing the service in question.'[109]

[105] See below, for example, N381/2004 (n97); State aid SA.21630 (n 97).
[106] However, according to Article 8(1) of the Consolidated Version of Directive 97/67/EC a Member State can designate more than one undertaking as service provider that is able to operate in different parts of the country or that is responsible for the delivery of different services.
[107] Commission Decision, State aid SA.38788 (2015/N) – United Kingdom, C(2015) 1759 final, para 101.
[108] Joined Cases C-83/01P, C-93/01P; C-94/01P *Chronopost v Ufex and Others* [2003] ECR I-6993, para 36.
[109] ibid, para 35; Bovis argues the *Chronopost* judgment acknowledged the 'existence of *sui generis markets*' which differ from private ones. Christopher H Bovis, 'The Conceptual Links between State Aid and Public Procurement in the Financing of Services of General Economic Interest' in Markus Krajewski, Ulla B Neergaard and Johan Willem van de Gronden (eds), *The changing legal framework for services of general interest in Europe: Between competition and solidarity* (T.M.C. Asser 2009) 167.

5.4 Conclusion

The *Altmark* test is firmly associated with the assessment of compensation of SGEIs. The Court of Justice introduced a more market-based approach to the compensation of the delivery of PSOs in public bus transport sector. The Commission and the General Court expanded the strict *Altmark* test by applying it also to the concept of SGEIs. However, the case studies have shown that the successful application of the four *Altmark* conditions is rather sector-specific and is not universally applicable to all compensation cases concerning SGEIs.[110] This was noted by the General Court in *BUPA*, where it was held that a strict application of the *Altmark* test was not suitable and introduced a more flexible interpretation of the criteria. However, the Commission diverged from this shift in policy and maintained the strict approach, applying the four *Altmark* criteria in a stringent way. In so doing, the Commission affirmed that it was serious about its aim to introduce more competition in newly liberalised sectors while ensuring a high standard of the provision of the essential service and over time reducing the amount of State aid.[111] And in the other cases, where the financing of the SGEIs would not comply with the *Altmark* test, the Commission maintained control over the compensation measure and was thus able to ensure through its assessment that no overcompensation occurred.

In practice, *Altmark* did not reduce the award of State aid in the European Union, as the majority of the State aid cases were either exempted or justified under Article 106(2) TFEU. The revision of the SGEI Framework suggests that the Commission was aware of the fact that *Altmark* is not the landmark case that prevents Member States from awarding State aid. It appears that the new 2012 SGEI Framework was supposed to correct this, as the adoption of new justification requirements reduced the scope of Article 106(2) TFEU, in particular by introducing a public procurement requirement. Regardless of the fact that the conformity of the 2012 SGEI Framework with established Union case law is questionable, the application of public procurement rules in financing SGEI raises further questions

[110] See also, Hancher and Larouche (n 7) para 762; Klasse (n 6) 36.
[111] Sanchez Graells (n 102) 164.

regarding the Commission's understanding and application of these in compensating entrusted undertakings for discharging SGEIs.[112]

The Court of Justice held that the undertaking 'chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community' meets the fourth *Altmark* condition.[113] In the past, the Commission had restricted this concept to the 'lowest price' offer but, with the revision of the SGEI Package, the Commission turned to a less restrictive, more flexible approach by allowing a choice based on 'the best quality-price ratio'[114] to align the requirement more with public procurement rules.[115] The Commission further emphasised that a Member State cannot escape the classification of the Commission State aid control if the designation of the undertaking is based on a negotiated procedure.[116] However, existing discrepancies between the new SGEI Framework and public procurement rules did not have the effect that Member States introduced more competition for the market in all sectors to provide SGEIs. The Commission seemed to be determined to encourage Member States to comply with all four *Altmark* criteria and thus reduce the negative distortionary effects that State aid can create. In 2016, the Commission published a Notice on the notion of State aid,[117] in which the Commission achieved more adherence between the public procurement requirements in the State aid framework and the Public Procurement Directives to prevent Member States from awarding State aid to entrusted service providers.[118]

[112] A detailed analysis of EU public procurement rules exceeds the scope of this thesis.
[113] *Altmark Trans* (n 22) para 93.
[114] Sinnaeve (n 36), 353
[115] Sanchez Graells (n 102) 165.
Public procurement is not part of the scope of this thesis and therefore this issue is not discussed in detail.
[116] Commission (n 17) para 66.
[117] Commission, 'Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union' [2016] OJ C262/1.
[118] Grith Skovgaard Ølykke, 'Commission Notice on the Notion of state aid as referred to in article 107(1) TFEU - is the conduct of a public procurement procedure sufficient to eliminate the risk of granting state aid?' [2016] Public Procurement Law Review 197, 200, 205

Nonetheless, despite the fact that the Commission has aligned the State aid framework with public procurement rules, there are still legal loopholes from the public procurement requirements for SGEIs. For example, if there are statutory exemptions from the tendering procedure - as under the Postal Services Directive – the State aid measure is assessed under the 'basic' Article 106(2) TFEU. However, this brings us back to the beginning of the problem and the distortionary effect of State aid on competition.

Hence, it appears to be time for a major overhaul of the way SGEI financing is assessed, moving from a general approach to a more individual approach[119] and taking into account sector-specific elements to ensure the on-going delivery of SGEIs; this would also secure a level playing field between different operators by reducing the negative distortionary effects of State aid and increasing competition.

[119] Sanchez Graells (n 102) 179.

Annex 1: Case study of Commission State aid decisions in post

Methodology

The case study comprises State aid cases collected from the Commission's website with the help of the Commission's internal search engine.[120] Postal service cases were selected on the basis of a search through economic sectors provided by the search engine, 'H.53 – Postal and courier activities'was selected. Broadband cases were collected from the Commission's website, which listed 149 decisions on State aid to broadband.[121]

The search focussed in both sectors on State aid decisions for the compensation of undertakings for discharging SGEIs in a period between 25 July 2003 (after the *Altmark* judgment) and 31 May 2017. Other cases not listed as a result of the online search, but which are known through a review of the relevant literature or based on free search, are also part of the case study. Cases that were withdrawn by the Member State before the Commission reached a preliminary decision are not part of the assessment; cases that were withdrawn at a later stage, e.g. after the decision to initiate a formal investigation procedure, are included, if the Commission had discussed *Altmark*, Article 106(2) TFEU or Article 107(2) or (3) TFEU in its preliminary decisions. Subsidies that were part of the decision but not related to compensation of a service provider for the delivery of SGEI are not taken into consideration, such as subsidies that concern pension costs or other social security contributions. As this chapter seeks to evaluate the role of *Altmark* and Article 106(2) TFEU, this chapter only considers State aid decisions regarding broadband, in which the concept of Services of General Economic Interest was applied or taken into consideration. It was not necessary to distinguish between the concept of SGEI and

[120] European Commission, 'Search competition cases (all policy areas)' <http://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy_area_id=3>
[121] European Commission, 'Broadband Guidelines' (10 April 2017) <http://ec.europa.eu/competition/sectors/telecommunications/broadband_decisions.pdf>.

USO as the Commission treats both concepts as alike[122] and applies *Altmark* and Article 106(2) TFEU to both.

All case studies focus on the legal means of justification for external funding – *Altmark,* Article 106(2) TFEU, or Article 107(2) or (3) TFEU – to establish their applicability for the two sectors.

[122] See above, Chapter 2.

Annex 2: Commission State aid decisions in post and broadband - Tables

Table 7: Commission decisions regarding the compensation of an undertaking for the delivery of SGEIs in postal services

No	Case number	Member State	Measure under assessment	Date of last Decision	Decision and legal basis
1	SA.14588 C20/2009 Commission opens in-depth investigation after General Court's annulment of previous 2003 decision N763/2002 and then the Kingdom of Belgium appealed: C-148/09P appeal dismissed by ECJ; T-413/12 Appeal dismissed by General Court;	Belgium	1. Pension relief (not part of this case study) 2. Compensation for public service costs 3. Capital injections 4. State guarantee	25.01.2012	1. Pension costs are not part of this case study 2. State aid within Article 107(1) TFEU as fourth *Altmark* criterion is not met; Unlawfully implemented in breach of Article 108(3) TFEU; Not compatible with the internal market as overcompensated and thus not justified under Article 106(2) TFEU; 3. No State aid within Article 107(1) TFEU as measure is conform with Market Economy Investor Principle[1] 4. Unlawfully implemented in breach of Article 108(3) TFEU; Not compatible with the internal market

[1] According to the Market Economy Investor Principle an investment is not regarded to be State aid when a public body spends public money in an undertaking under similar norms and conditions a private investor. See, Slocock, 'The Market Economy Investor Principle' (Competition Policy Newsletter, Number 2, 2002) 23 <http://ec.europa.eu/competition/publications/cpn/2002_2_23.pdf> .

No	Case number	Member State	Measure under assessment	Date of last Decision	Decision and legal basis
	T-412/12 Appeal discontinued				
2	N1/2013 (SA.31006)	Belgium	Compensation for discharging SGEI (distribution of newspapers and periodicals , home delivery of pension, basic banking services, maintenance of widespread network) for 2013-2015	02.05.2013	Measure is State aid within Article 107(1) TFEU as fourth *Altmark* criterion is not satisfied; Measure compatible with the internal market on the basis of Article 106(2) TFEU (and 2012 SGEI Framework)
3	C56/2007 (C49/2007 and E15/2005) Case T-154/10 (General Court confirmed Commission decision) Case C-559/12P (Appeal dismissed by ECJ)	France	Unlimited State guarantees for La Poste (La Poste is universal service provider)	26.01.2010	State aid within Article 107(1) TFEU Unlimited State guarantee does not constitute compensation for financing universal postal service, thus does not meet the *Altmark* test and cannot be justified under Article 106(2) TFEU; To be removed by 31 March 2010 (Commission believes that conversion of La Poste into a public limited company will remove measure automatically)
4	SA.34027	France	1. Tax relief for funding territorial presence over 2008-2012 2. Subsidy for transport and distribution press over 2008-2012	25.01.2012	Measures constitute State aid within Article 107(1) TFEU as fourth *Altmark* criterion is not met; Measures compatible with the internal market under Article 106(2) TFEU (and 2005 SGEI Framework)

No	Case number	Member State	Measure under assessment	Date of last Decision	Decision and legal basis
5	SA.36512	France	1. Tax relief to La Poste to ensure high density of postal services for the years 2013-2017 2. Subsidy to fund transport and delivery of press for 2013-2015	26.05.2014	Measures constitute State aid within Article 107(1) TFEU as fourth *Altmark* criterion is not met; Measures compatible with the internal market under Article 106(2) TFEU (and 2012 SGEI Framework)
6	SA.17653 C36/2007 (ex NN 25/2007) Appeal by Germany T-143/12 and Deutsche Post T-152/12; Commission appealed to ECJ C-674/13, appeal was accepted	Germany	1. Pension subsidy (not part of this study) 2. Compensation for universal service	20.11.2013	1. Pension costs are not part of this case study; 2. Measure constitutes State aid within Article 107(1) TFEU as fourth *Altmark* criterion is not satisfied; Measure compatible with the internal market under Article 106(2) TFEU (and 2005 SGEI Framework) Commission referred case to the Court of Justice as Germany failed to comply with the Commission Decision
7	N183/2003	Greece	Compensation for delivery of SGEIs (postal and basic banking)[2]	11.11.2003	Measure constitutes State aid within Article 107(1) TFEU but compatible with the internal market under Article 106(2) TFEU
8	SA.32562	Greece	Prolongation of State aid measure N183/2003 (Compensation for discharging SGEIs)	25.01.2012	Measure constitutes State aid within Article 107(1) TFEU as fourth *Altmark* criterion is not satisfied; Measure compatible with the internal market under Article 106(2) TFEU (and 2005 SGEI Framework)
9	SA.35608 (2014/C)	Greece	1. Compensation through direct subsidy for delivery of universal	01.08.2014/ 24.11.2016	1. Measure constitutes State aid within Article 107(1) TFEU as fourth *Altmark* criterion is not met;

[2] Commission Decision, State aid N183/2003 (ex NN 151/2003, NN 152/2003) – Greece, C(2003)4084 fin, paras 20-24.

No	Case number	Member State	Measure under assessment	Date of last Decision	Decision and legal basis
			postal service between 2013 and 2014 (or 2015) 2. Compensation for the net costs incurred for the delivery of universal postal service over 2015 to 2019 (or 2016- 2020) is financed from a compensation fund through contributions of other competitors which can be complemented if necessary with direct subsidies from the Greek State		Measure compatible with the internal market under Article 106(2) TFEU (and 2012 SGEI Framework); 2. European Commission has decided to open formal investigations on the basis that is may lead to serious distortions of competition as compensation amounts granted higher than the relevant threshold of € 15 million covered by the 2012 SGEI Decision. [On 24.11.2016 formal investigation procedure was closed after withdrawal of notification by Greece]
10	NN51/2006	Italy	Compensation for Poste Italiane for discharging SGEIs between 2000 and 2005	26.09.2006	Measure constitutes State aid within Article 107(1) TFEU as fourth *Altmark* criterion is not met; Unlawfully implemented in breach of Article 108(3) TFEU; Measure compatible with the internal market under Article 106(2) TFEU
11	NN24/2008	Italy	Compensation for discharging USOs between 2006 and 2008	30.04.2008	Breach of Article 108(3) TFEU; Measure constitutes State aid within Article 107(1) TFEU as fourth *Altmark* criterion is not satisfied; Measure compatible with the internal market under Article 106(2) TFEU (and 2005 SGEI Framework)
12	C49/2006 (NN65/2006)	Italy	1. Remuneration for distribution of postal savings books (SGEI since 2004) 2. Remuneration for distribution of postal savings certificates in	21.10.2008	1. No State aid within Article 107(1) TFEU as all four *Altmark* criteria are satisfied; 2. No State aid within Article 107(1) TFEU as all four *Altmark* criteria are satisfied

No	Case number	Member State	Measure under assessment	Date of last Decision	Decision and legal basis
			the period of 2000-2006 (SGEI since 2004)[3]		
13	SA.33989	Italy	1. Compensation for the delivery of universal service between 2009 and 2011 2. Compensations for reduced tariffs offered to publishers, not-for-profit organisations and electoral candidates from 2009 until 2011	20.11.2012	Measures constitute State aid within Article 107(1) TFEU as the second and fourth *Altmark* criteria are not met; Unlawfully implemented in breach of Article 108(3) TFEU; Measures compatible with the internal market under Article 106(2) TFEU (and 2012 SGEI Framework)
14	E12/2005	Poland	Unlimited State guarantee in favour of Poczta Polska (Poczta Polska is universal service provider)	24.04.2007	State aid within Article 107(1) TFEU Unlimited State guarantee does not constitute compensation for financing universal postal service, thus does not meet the *Altmark* test and cannot be justified under Article 106(2) TFEU; To be removed by 30 June 2008
15	N462/2008	Poland	Compensation of costs incurred for the provision of services which are statutorily exempted from postage fees until 2010 1. for blind and partially sighted persons 2. of items containing 'the compulsory library copies '	18.12.2008	Measures constitute State aid within Article 107(1) TFEU 1. Measure compatible with the internal market under Article 107(2)(a) TFEU; 2. Measure compatible with the internal market under Article 107(3)(d) TFEU
16	C21/2005	Poland	State compensation for potential net losses carrying out universal	15.12.2009	Measure is State aid within Article 107(1) TFEU as fourth *Altmark* criterion is not satisfied;

[3] Assessment limited to period after *Altmark* from 2004-2006.

No	Case number	Member State	Measure under assessment	Date of last Decision	Decision and legal basis
			postal services between 2006-2011		Measure compatible with the internal market on the basis of Article 106(2) TFEU (and 2005 SGEI Framework)
17	N312/2010	Poland	Prolongation of the scheme to compensate costs of services statutorily exempted from postage fees for 2011-2012 1. for blind and partially sighted persons 2. of items containing 'the compulsory library copies'	04.11.2010	All measures constitute State aid within Article 107(1) TFEU; 1. Measure compatible with the internal market under Article 107(2)(a) TFEU 2. Measure compatible with the internal market under Article 107(3)(d) TFEU
18	SA.33341	Poland	Extension of the scheme N312/2010 compensating costs of postage services following the new Act on Elections allowing disabled persons to vote by sending emails	12.09.2011	Measure constitutes State aid within Article 107(1) TFEU but compatible with the internal market under Article 107(2)(a) TFEU
19	SA.36124	Poland	Prolongation of the scheme N312/2010 to compensate costs of services statutorily exempted from postage fees for 2013-2015 1. for blind and partially sighted persons and the exemption from postage fees for services connected with postal voting by disabled persons including clearance, transport and delivery	31.05.2013 (18.11.2013 Corrigendum)	All measures constitute State aid within Article 107(1) TFEU; 1. Measure compatible with the internal market under Article 107(2)(a) TFEU; 2. Measure compatible with the internal market under Article 107(3)(d) TFEU

No	Case number	Member State	Measure under assessment	Date of last Decision	Decision and legal basis
			of 'voting packages' and consignment of return envelopes 2. of items containing 'the compulsory library copies'		
20	SA.38869 (2014/N)	Poland	Compensation for the net costs for the provision of USOs	26.11.2015	Measure constitutes State aid within Article 107(1) TFEU as fourth *Altmark* criterion is not met; Measure compatible with the internal market pursuant to Article 106(2) TFEU (and the 2012 SGEI Framework)
21	SA.42843 (2015/N)	Poland	Prolongation of the scheme SA.36124 Compensation for the provision of SGEIs between 2016-2021	27.11.2015	Measures constitute State aid within Article 107(1) TFEU Measure compatible with the internal market under Article 107(2)(a) TFEU and Article 107(3)(d) TFEU
22	SA.37977 (2016/C) (ex-2016/NN)	Spain	Compensation for discharging USOs between 2004 and 2010	11.02.2016	Measure constitutes State aid within Article 107(1) TFEU as third and fourth *Altmark* criteria are not met; Unlawful aid, the 2012 SGEI Framework applies only in principle; European Commission has decided to initiate formal investigation procedure on the basis that measure resulted in overcompensation of service provider
23	N642/2005	Sweden	Compensation for basic banking services (SGEIs) over 2006-2007	22.11.2006	Measure constitutes State aid within Article 107(1) TFEU as the fourth *Altmark* criterion is not met; Measure compatible with the internal market under Article 106(2) TFEU (and 2005 SGEI Framework)

No	Case number	Member State	Measure under assessment	Date of last Decision	Decision and legal basis
24	N515/2007	Sweden	Compensation for basic banking services (SGEIs) for 2008 (Prolongation of the scheme N642/2005)	11.12.2007	Measure constitutes State aid within Article 107(1) TFEU as the fourth *Altmark* criterion is not met; Measure compatible with the internal market under Article 106(2) TFEU (and 2005 SGEI Framework)
25	N166/2005	United Kingdom	Compensation for SGEI provision (maintaining the rural non-commercial post offices branches from 2006/7 till 2007/8)	22.02.2006	Measure is State aid within Article 107(1) TFEU as fourth *Altmark* criterion is not satisfied; Measure compatible with the internal market on the basis of Article 106(2) TFEU (and 2005 SGEI Framework)
26	N822/2006	United Kingdom	Extension of funding for Post Office Ltd to provide public services (SGEIs) for financial year 2007/8	07.03.2007	Measure constitutes State aid within Article 107(1) TFEU as fourth *Altmark* criterion not satisfied; Measure compatible with the internal market under Article 106(2) TFEU (and 2005 SGEI Framework)
27	N388/2007	United Kingdom	1. Compensation for the net costs of maintaining network of post offices branches between 2008 and 2011 (SGEI provision) 2. Compensation for additional net costs of providing SGEIs under transformation programme in 2008 3. Compensation to provide basic banking services (SGEIs)	28.11.2007	All measures constitute State aid within Article 107(1) TFEU as fourth *Altmark* criterion is not satisfied; Measures compatible with the internal market under Article 106(2) TFEU (and 2005 SGEI Framework)
28	N508/2010	United Kingdom	1. Continuation of compensation for the net costs of maintaining network of post offices branches	23.03.2011	All measures constitute State aid within Article 107(1) TFEU as fourth *Altmark* criterion is not satisfied;

No	Case number	Member State	Measure under assessment	Date of last Decision	Decision and legal basis
			in financial year 2011/12 (SGEI provision) 2. Extension of rolling working capital facility to provide basic banking services (SGEIs)		Measures compatible with the internal market under Article 106(2) TFEU (and 2005 SGEI Framework) and partly Annex I of the Postal Services Directive
29	SA.33054	United Kingdom	1. Financing net costs of SGEI Network between 2012 and 2015 2. Capital for extension of working facility network for 2012-2015	28.03.2012	1. Measure constitutes State aid within Article 107(1) TFEU as fourth *Altmark* criterion not satisfied; Measure compatible with the internal market under Article 106(2) TFEU (and 2012 SGEI Framework); 2. Measure does not constitute State aid within Article 107(1) TFEU as complies with normal market conditions
30	SA.38788 (2015/N)	United Kingdom	Compensation to Post Office Ltd to provide SGEIs between 2015 and 2018	19.03.2015	Measure constitutes State aid within Article 107(1) TFEU as fourth *Altmark* criterion not satisfied; Measure compatible with the internal market under Article 106(2) TFEU (and 2012 SGEI Framework)

Table 8: Commission decisions regarding the compensation of an undertaking for the delivery of SGEIs in broadband

No	Case number	Member State	Measure under assessment	Date of last Decision	Decision and legal basis
1	N381/2004	France	Co-funding of public open access broadband communications network to residential users, businesses and public authorities	16.11.2004	Project constitutes SGEI; No State aid within Article 107(1) TFEU as all four *Altmark* criteria are satisfied
2	N382/2004	France	Public co-funding of an open broadband infrastructure	05.05.2005	Project constitutes SGEI; No State aid within Article 107(1) TFEU as all four *Altmark* criteria are satisfied
3	N890/2006	France	Aid for high-speed network for a limited territory, mainly business parks	10.07.2007	Project does not constitute a SGEI within the meaning of Article 106(2) TFEU as measure is not designed for whole community, therefore *Altmark* is not applicable; Measure constitutes State aid within Article 107(1) TFEU but measure is compatible with the internal market under Article 107(3)(c) TFEU
4	SA.21630 (N331/2008) Case T-79/10 (Appeal by Colt Télécommunications France to General Court, Appeal was dismissed) Case T-258/10 (Appeal by Orange to General Court, Appeal	France	Co-funding of a passive, neutral and open broadband network covering the entire French department Hauts-de-Seine, including non-profitable areas	30.09.2009 (Corrigendum 16.12.2009)	Project constitutes SGEI; No State aid within Article 107(1) TFEU as all four *Altmark* criteria are satisfied

No	Case number	Member State	Measure under assessment	Date of last Decision	Decision and legal basis
	dismissed); Appeal to ECJ Case C-621P, Appeal was dismissed Case T-325/10 (Appeal by Iliad and Others to General Court, Appeal dismissed); Appeal to ECJ Case C-624/13P, Appeal was dismissed				
5	SA.37183 (2015/NN)	France	Regional broadband development Plan France très haut débit	07.11.2016	Parts of the project concerning the modernisation of the telephone network constitutes SGEI; No State aid within Article 107(1) TFEU as all four *Altmark* criteria are satisfied; Other parts of the project that fall outside the scope of SGEI; Measure constitutes State aid within Article 107(1) TFEU but is justified under Article 107(3)(c) TFEU
6	SA.29874 (N196/2010)	Estonia	Establishment of sustainable infrastructure permitting Estonia-wide broadband internet connection (EstWin project)	12.10.2010	Project constitutes SGEI Measure constitutes State aid within Article 107(1) TFEU as fourth *Altmark* criterion not satisfied; Measure compatible with the internal market under Article 106(2) TFEU (and 2005 SGEI Framework)
7	N284/2005	Ireland	Subsidy for regional broadband programme	08.03.2006	Project does not constitute a SGEI as no designated undertaking (no entrustment act) but rather a public-private-partnership relationship, not in the interest of citizens but large businesses[4] *Altmark* is not applicable;

[4] Commission Decision, State aid N284/2005 – Ireland, C(2006)436 final, paras 38-39.

No	Case number	Member State	Measure under assessment	Date of last Decision	Decision and legal basis
					Measure constitutes State aid within Article 107(1) TFEU, but measure is compatible with the internal market under Article 107(3)(c) TFEU

Chapter 6

Renewable energy policy and State aid: State aid - The miracle cure?

6.1 Introduction

Having discussed in Chapter 3 – 5 the provision of essential services in two communications sectors and the financing of these services in order to guarantee their provision on a long-term basis, this chapter turns to access to essential economic services in the electricity sector. It examines how European Institutions, in particular the European Commission and the Member States seek to guarantee essential services in a changing environment by relying on State aid as a regulatory tool.

Energy is considered to be an essential economic service. According to Article 3(2) of the 2009 Electricity Directive[1] Member States can impose public service obligations (PSOs) on electricity undertakings, if this is in the general economic interest. The Directive states

- security, including security of supply,
- regularity,
- quality and price of supplies and
- environmental protection, including energy efficiency, energy from renewable sources and climate protection

as PSOs.[2]

Over the last twenty years the awareness of environmental protection has been increased and with the adoption of the 2020 package Member States are required to

[1] Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55.

[2] Directive 2009/72/EC, Article 3(2). An equivalent provision exists for the gas sector (Article 3(2) of Directive 2009/73/EC).

ensure that by 2020 a mandatory minimum share of 20% of the overall energy consumption will be produced from renewable sources.[3] As discussed in Chapter 2 the concept of PSO in energy is to be interpreted in a narrower (PSO Type II) and broader (PSO Type I) sense. [4] PSO Type I refer to obligations that are not restricted to a certain Member States, such as environmental protection, while, for example, security of supply falls into the PSO Type II category.[5]

The concepts of PSO and/or SGEI[6] have therefore become more important in the field of energy with the year 2020 approaching. The Union has set itself the target of generating 20% of its gross final energy consumption from renewable sources by 2020.[7] The 20% target not only includes electricity from renewable sources but, according to Article 5(1) of Directive 2009/28/EC, it also includes the gross final consumption of energy from renewable sources for heating and cooling and the final consumption of energy from renewable sources in transport. Energy generation from renewable sources can raise concerns about security of supply caused by the variability of renewable sources that makes it difficult to balance supply and demand.[8] A significant amount of investment is needed to tackle these issues and ensure security of supply in a transforming energy market. The market alone is in the majority of Member States not able to achieve the required share of renewable energy and therefore relies on state intervention.

Public intervention, such as renewable support schemes, has become an important means to control the way in which Member States seek to fulfil their

[3] Directive 2009/28/EC of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC 5 June 2009 [2009] OJ L [2009] OJ L 140, 16 (hereinafter also DIR 2009/28/EC or 2009 RES Directive), Article 3(1).
[4] For a more detailed discussion, see Chapter 2, section 2.2.3.
[5] See, two State aid decisions concerning Malta and Lithuania, Commission Decision, State aid SA.45779 (2016/NN) – Malta, C(2017) 2 final, paras 103-109; Commission Decision, State aid SA.36740 (2013/NN) – Lithuania, C(2013) 7884 final, paras 203-210. As discussed in Chapter 2 sections 2.2.3. and 2.3., the 2009 Energy Directives refer to Public Service Obligations but in practice no distinction between the concepts of SGEI and PSO are made.
[6] As discussed in Chapter 2 sections 2.2.3. and 2.3., the 2009 Energy Directives refer to Public Service Obligations but in practice no distinction between the concepts of SGEI and PSOs are made.
[7] Directive 2009/28/EC, Article 3(1).
[8] Bengt Johansson, 'Security aspects of future renewable energy systems-A short overview' (2013) 61 Energy 598.

renewable obligations. This chapter focuses particularly on the European Union's laws and policies governing the measures promoting electricity from renewable sources as, with the year 2020 approaching, the effectiveness of those measures has become more and more important. It analyses which role the European Commission plays in this whole process and the way in which the Commission controls European policy and steers national policies by examining the importance of State aid and, in particular, renewable support schemes in the electricity sector.[9]

Renewable support schemes may constitute State aid within Article 107(1) TFEU, and the Commission uses the State aid framework to ensure that Member States aim to achieve the 2020 environmental targets as well as to minimise the distortionary effect of those support measures by introducing a more market-based approach.

Furthermore, the Commission uses the State aid regime not only to achieve the 2020 and the even more long-term and ambitious 2030 green electricity[10] targets, but also to shape the structure of the electricity market by favouring electricity from renewable sources over fossil fuels and putting the latter at a competitive disadvantage. State aid appears to be an effective means to pursue public policy objectives such as environmental protection and, in particular, to tackle climate change by increasing the share of electricity from renewable sources in the electricity sector.[11] So far, the literature has addressed the problems concerning the lawfulness and compatibility of various support schemes,[12] and in the economic literature the effectiveness of support schemes has been discussed.[13] This chapter seeks to

[9] This chapter does not analyse the role of State aid in heating and cooling or the transport sector, which will be part of future research. See above, Chapter 7, section 7.2.
[10] The terms 'green electricity' and 'electricity from renewables or renewable sources' are used interchangeably in this chapter.
[11] Peter D Cameron, *Competition in energy markets: Law and regulation in the European Union* (2nd edn, OUP 2007) para 17.10.
[12] Thomas Lübbig and Marie-Christine Fuchs, 'The German Renewable Energy Act (EEG) - Unlawful State Aid?' (2014) 2 ENLR 121; Andreas Haak and Michael Brüggemann, 'Compatibility of Germany's Renewable Energy Support Scheme with European State Aid Law - Recent Developments and Political Background' (2016) 15 EStAL 91; Daniel P Rodriguez, 'Electricity Generation and State Aid: Compatibility is the Question' (2016) 15 EStAL 207.
[13] C Hiroux and M Saguan, 'Large-scale wind power in European electricity markets: Time for revisiting support schemes and market designs?' (2010) 38 Energy Policy 3135; Corinna Klessmann

contribute to the existing literature by analysing how the Commission pursues the ambitious objectives of increasing the share of renewables in the electricity sector while taking into account judgments of the European Courts and the limitation of primary legislation.

This raises the question of whether or not the Commission's prioritisation of renewable electricity has jeopardised the long-term objective of achieving a well-functioning internal European electricity market. The underlying hypothesis of this research question is that the two objectives – achieving an internal energy market and increasing the share of green electricity – are at odds with each other. Environmental policies are often regarded as a challenge for competition policies, as they intervene in the market and may lead to a reduction of competition.[14]

The answer to this question is provided in two stages.

First, the approach of the Union and the Commission towards green electricity will be examined. It will be shown that this approach has changed over a long period rather than ad hoc; in order to do so, it has been essential to provide the context by analysing the legislation that has governed the direction of the European Commission and has resulted in the current legislative framework.

Therefore, the change in primary law will be addressed and it will be shown how environmental protection has become part of electricity policy and then merged into one single objective in Article 194 TFEU with the Treaty of Lisbon[15] entering into force. This integrated approach combines energy and environmental policy and highlights the European objective of achieving an internal sustainable energy market.

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and others, 'Status and perspectives of renewable energy policy and deployment in the European Union—What is needed to reach the 2020 targets?' (2011) 39 Energy Policy 7637; Brigitte Knopf, Paul Nahmmacher and Eva Schmid, 'The European renewable energy target for 2030 – An impact assessment of the electricity sector' (2015) 85 Energy Policy 50.

[14] Laguna de Paz and José Carlos, 'Protecting the Environment without Distorting Competition' (2012) 3 Journal of European Competition Law & Practice 248; Jean-Michel Glachant and Sophia Ruester, 'The EU internal electricity market: Done forever?' (2014) 31 Utilities Policy 221; Helm comes to the conclusion that the EU's energy and climate policies are ineffective and only result in higher prices and a reduction of competitiveness, Dieter Helm, 'The European framework for energy and climate policies' (2014) 64 Energy Policy 29, 34.

[15] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/1.

An important part of the European Union's sustainable energy market is the development of renewable forms of energy, which are the subject of this chapter.[16]

The reasons will also be explored why the Union relies on the State aid regime to achieve environmental goals and a higher share of green electricity and not, for example, on regulations or directives. To explain this issue, it is essential to examine Article 194 TFEU and the competence between the Union and Member States in energy policy.

The second stage examines the way the Commission has operationalized these changes in their policy documents and set different competitive standards depending on the electricity source. This is done by an analysis of the use of State aid and the governing Commission policy documents, such as the *Guidelines on State aid for environmental protection and energy 2014-2020* (2014 State aid Guidelines)[17], showing that the Commission uses soft-law to favour and support green electricity and to regulate and shape the design of the energy market. For example, it states under point 90 of the 2014 State aid Guidelines:

> Aid for environmental purposes will by its very nature, tend to favour environmentally friendly products and technologies at the expense of other, more polluting ones and that effect of aid will, in principle, not be viewed as an undue distortion of competition, since it is inherently linked to the very objective of the aid, that is to say making the economy greener. When assessing the potential negative effects of environmental aid, the Commission will take into account the overall environmental effect of the measure in relation to its negative impact on the market position, and thus on the profits, of non-aided firms. In doing so, the Commission will consider in particular the distortive effects on competitors that likewise operate on an environmentally friendly basis, even without aid. Likewise, the lower the

[16] Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C115/47 (hereinafter TFEU), Article 194(1)(c).
[17] Commission, 'Guidelines on State aid for environmental protection and energy 2014-2020' [2014] OJ/C 2001/1.

> expected environmental effect of the measure in question, the more important the verification of its effect on competitors' market shares and profits in the market.[18]

The Guidelines introduce three different levels of competition between undertakings operating in the electricity market: the first level is the favouring of undertakings generating electricity from renewables, the second level is competition between green undertakings, and the third level is the presumption that the aid has no undue distortionary effect on conventional producers of electricity.

By applying point 90 of the 2014 State aid Guidelines the Commission deprives State aid of its original purpose of ensuring a level playing field as set out in Article 107(1) TFEU and instead uses the State aid framework primarily to achieve environmental protection. Although environmental protection has been established in Article 107(3) TFEU as an exception from the general rule that State aid is not compatible with the internal market, it does not mean that any aid granted under Article 107(3) TFEU is automatically compatible with the internal market.[19] Article 107(3) TFEU requires a balancing test between the negative distortionary effect of the State aid measure on competition and the positive effect of achieving environmental protection.[20] By analysing State aid decisions concerning green electricity, this chapter will show that the balancing act is of less significance than claimed by the Commission.

Nevertheless, the Commission is aware of the fact that a complete free-flow of State aid support even for environment purposes is against primary law and therefore the Commission has restricted the application of State aid by introducing a more market-based approach between competitors that generate electricity from

[18] ibid, point 90.
[19] Article 107(3) TFEU states that 'aid may be considered to be compatible with the internal market' if the prerequisites contained in the subparagraphs are satisfied.
[20] Alison Jones and Brenda Sufrin, *EU Competition Law* (State aid chapter, available at <http://global.oup.com/uk/orc/law/competition/jones_sufrin6e/>, 5th edn online chapter, OUP 2014), 113.

renewable sources. However, even then the distortionary effect of a measure depends on the respective position and share of renewables in each Member State.

First, the development of the electricity law at European level is examined by looking at the development and harmonisation of laws and policies in energy and environmental protection and examining the growing role of renewables in the electricity sector (section 6.2.). Section 6.3. discusses the reasons why the Union actually relies on the State aid framework instead of adopting a detailed legislative act to influence Member States' behaviour in order to achieve the 2020 targets. The role of State aid within renewables is then analysed, with a particular focus on the balancing test contained in Article 107(3)(c) TFEU and its practical applicability in Commission State aid decisions with regard to the support of renewables (section 6.4.). The chapter concludes with section 6.5., which argues that the State aid framework has to be used carefully, but it is currently the most effective framework to control the way in which Member State seek to meet their renewable obligations.

6.2 The changing approach towards green electricity at European level

In this section, the approach of the European Union and, in particular, the approach of one of its institutions – the Commission – towards electricity generated from renewable sources will be examined by analysing the changes in the underlying legislation governing green electricity. Renewable energy law falls into two categories: it is part of energy law, but it is also part of environmental law. [21] It will be shown that the change of the regulatory approach has been an on-going process for more than 20 years. Despite having started out as an almost parallel development aimed at achieving an internal European electricity market on the one hand and

[21] This raises the question, what is actually meant by environmental law? The term environment is broad and no definition is provided by the Treaties. However, Article 191(1) TFEU and Article 192(2) TFEU list areas that are covered by European environmental law and policies, such as: human beings, natural resources, climate change, town and country planning, water resources and waste management. Ludwig Krämer, *EC Environmental Law* (6th edn, Sweet & Maxwell 2007) 1.

greater environmental protection on the other hand, it finally merged into one objective with Article 194 TFEU entering into force.

This section provides the necessary theoretical basis and understanding for the second stage in order to better understand the current direction of the European Commission, as the action of the Commission with regard to achieving an internal electricity market and increasing the share of renewables is, directed by primary legislation.

6.2.1 The evolution of primary law governing the liberalisation of the electricity sector

In the middle of the 1980s, the creation of an internal market was one of the priorities on the Community's agenda. The European Economic Community (EEC or Community) wanted to influence the European energy policy and create a harmonised common energy policy framework instead of having segregated national energy policies.[22]

The adoption of the Single European Act (SEA) in 1986[23] was an important step towards achieving this goal. The key objective of the SEA was to create greater European unity.[24] To achieve this objective, the SEA authorised the Community to adopt legal measures to establish an internal market across different sectors by the end of 1992.[25] This legislative change enabled the Community to actively pursue the

[22] Alberto Tonini, 'The EEC Commission and European Energy Policy: A Historical Appraisal' in Rossella Bardazzi, Maria G Pazienza and Alberto Tonini (eds), *European Energy and Climate Security: Public Policies, Energy Sources, and Eastern Partners* (Lecture Notes in Energy 31, Springer 2015) 13–14.

[23] Single European Act [1987] OJ L 169/1.

[24] Article 1 of the SEA.

[25] Article 13 of the SEA. Article 13 of the SEA required that an Article 8a had to be introduced in the EEC Treaty. Article 8a of the EEC Treaty as amended by the SEA states that: 'The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with the provision of this Article and of Articles […] and without prejudice to the other provision of this Treaty. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provision of this Treaty.'

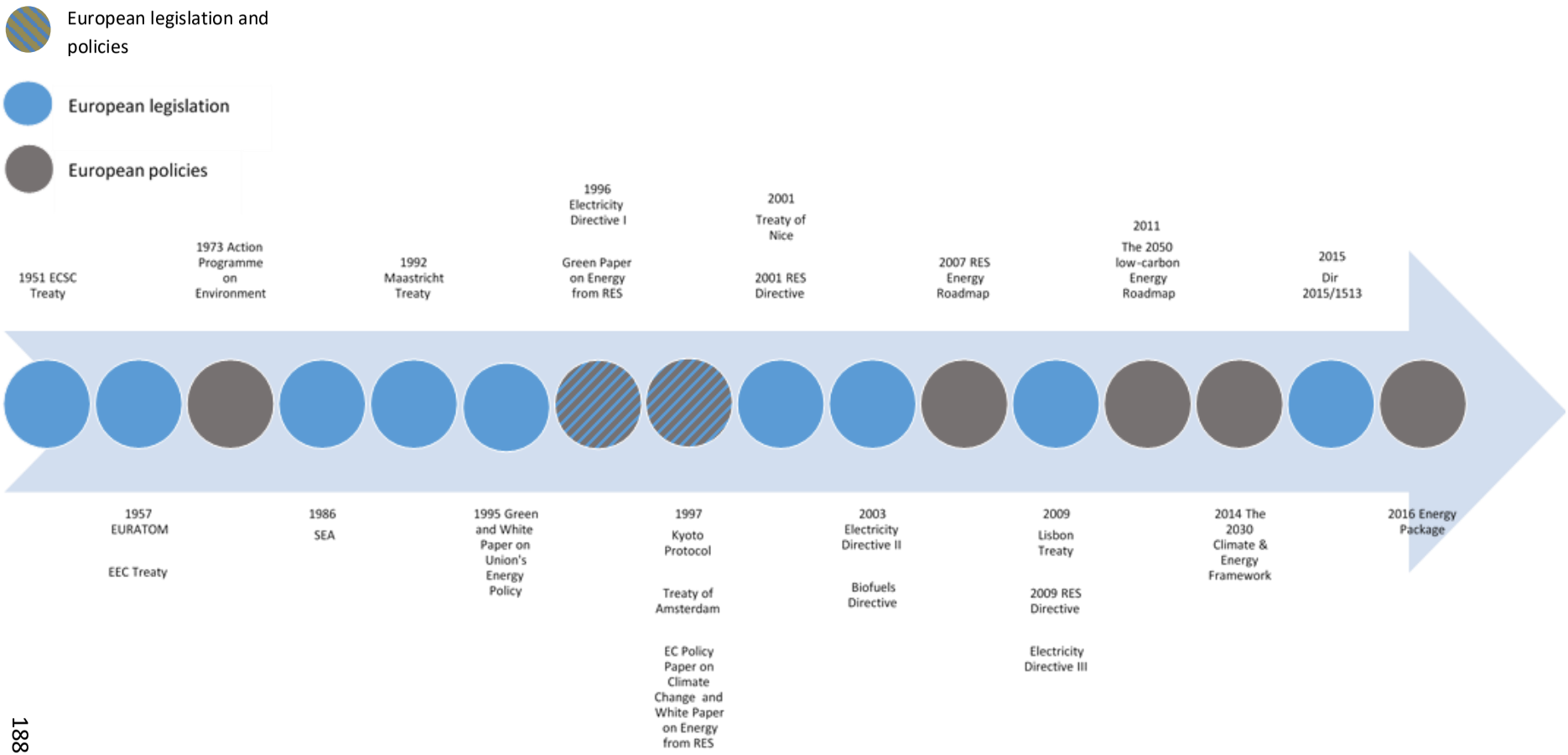
opening up of regulated sectors, for example electricity and gas, postal services, telecommunications.

However, it took another Treaty amendment – the Maastricht Treaty[26] – to assign competence in the field of energy to the Community.[27] In order to open up monopolised markets, such as the electricity sector, primary law was changed and the Community was equipped with new competence. In the field of energy those competence were based on non-specific provisions[28] such as environmental protection,[29] approximation of laws[30] and consumer protection[31] rather than on specific energy provisions. This enabled the European institutions, particularly the European Commission, to progress with the liberalisation process.

To achieve a common electricity market, the Community (now European Union or Union) has relied upon harmonisation of laws and policies.[32] An overview of the Union's energy and environmental laws and policies that are of relevance for this chapter can be found in Figure 5.

[26] Treaty on European Union, as signed in Maastricht on 7 February 1992 [1992] OJ C 191, 1.
[27] Articles 2 and 3(t) of the Consolidated Maastricht Version of the Treaty establishing the European Community [1992] OJ C 224/1.
[28] See Martha M Roggenkamp and others (eds), *Energy law in Europe: National, EU, and International Regulation* (3rd edn, OUP 2016) para 4.21.
[29] Article 6 of the Consolidated Nice Version of the Treaty establishing the European Community [2002] OJ C 325/33 (hereinafter Consolidated Nice Version of the EC Treaty).
[30] Article 95 of the Consolidated Nice Version of the EC Treaty.
[31] Article 153 of the Consolidated Nice Version of the EC Treaty.
[32] For example, three important electricity Directives were adopted; Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity [1997] OJ L 27/20 (1996 Electricity Directive), which was repealed by 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 [2003] OJ L176/37 (2003 Electricity Directive), which was replaced by Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ J211/55 (2009 Electricity Directive). Equivalent Directives were adopted for gas; Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas [1998] OJ L204/1 (1998 Gas Directive), which was repealed by 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 [2003] OJ L176/87 (2003 Gas Directive), which was repealed by Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L211/94 (2009 Gas Directive).

Figure 5: Overview of this chapter's relevant Union's energy and environmental laws and policies



6.2.2 The parallel development of the Union's green energy laws and policies

Next, the development of the Union's renewable legislation and policies will be discussed.

A first step is to clarify and define the term 'renewables', or 'electricity from renewable sources' or 'green electricity'. These terms are used interchangeably in this chapter. Unlike electricity from 'traditional' or 'conventional' sources such as nuclear and fossil fuels (coal, oil and natural gas), renewables are not depleted but are recharged after power has been generated from them.[33] According to Article 2(a) of the Renewable Energy Directive (2009 RES Directive)[34] renewable energy can derive from wind, solar, aerothermal, geothermal, hydrothermal and ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases. It can be argued that only fully renewable sources ought to be included in the definition of 'renewables'. This narrower definition would exclude electricity from biomass and geothermal sources, as they are only renewable as long as the earth has the capacity to replace them.[35] However, this chapter will use the definition provided by the 2009 RES Directive, as it is the law governing the Union's and Member States' renewable policies.

[33] Edwin Woerdman, Martha M Roggenkamp and Marijn Holwerda (eds), *Essential EU climate law* (Edward Elgar Publishing 2015) 127.
[34] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L140/16 (hereinafter 2009 RES Directive or DIR 2009/28/EC).
[35] Woerdman, Roggenkamp and Holwerda (n 33) 127.

6.2.2.1 The development of environmental protection as core aim in the European Union

In the early years of the European Community environmental policy was 'no more than a niche' in the fields of policy-making.[36] Originally, under the Treaty of Rome, environmental policy was not part of the competence awarded to the Community, as it was founded to establish a common economic market between its members.[37] Knill and Liefferink describe the 1972 Paris Summit meeting 'as the beginning of an independent EU environmental policy.'[38] At this meeting the EEC members adopted a Council Declaration on environmental policy [39] that enabled the European Commission to design an Action Programme on the Environment, laying down the foundation for the future environmental policy of the Union.[40]

The 1973 Action Programme provided an interpretation of Article 2 of the Treaty of Rome,[41] stating that the heads of the governments of the founding states of the EEC had intended to include environmental protection as one of the Treaty's objectives in Article 2, since the protection of the environment is one means to achieve economic growth and increase the living standards across all Member States.[42]

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[36] Andrea Lenschow, 'Studying EU environmental policy' in Andrew Jordan and Camilla Adelle (eds), *Environmental policy in the EU: Actors, institutions and processes* (3rd edn, Routledge 2013) 51.
[37] Andrew Jordan and Camilla Adelle, 'EU environmental policy' in Andrew Jordan and Camilla Adelle (eds), *Environmental policy in the EU: Actors, institutions and processes* (3rd edn, Routledge 2013) 1.
[38] Christoph Knill and Duncan Liefferink, 'The establishment of EU environmental policy' in Andrew Jordan and Camilla Adelle (eds), *Environmental policy in the EU: Actors, institutions and processes* (3rd edn, Routledge 2013) 13.
[39] Council Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment [1973] OJ C112/1; Knill and Liefferink (n 38) 13–14.
[40] Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety, 'Environment Action Programmes' <http://www.bmub.bund.de/en/topics/sustainability-international/europe-and-environment/environment-action-programmes/>.
[41] Article 2 of the Treaty establishing the European Economic Community [1957] states,'[t]he Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.'
[42] Council Declaration (n 39) 5.

So the heads of the governments agreed – without changing the Treaty – to retrospectively assign competence in the field of environmental protection to the Union. The aim was to harmonise 'national policies' and create 'coordinated' environmental policies for all Member States.[43] This was only possible because of Article 235 EEC Treaty, that enabled the Community to adopt legislation if necessary.[44]

Then, with the SEA entering into force, a Title governing the environment was added.[45] After the amendment by the SEA, the Community was authorised to take action on environmental protection and the sustainable utilisation of natural resources.[46] The amended Article 130r(4) of the EC Treaty confirmed what was already emphasized in the 1973 Action Programme, namely, that environmental protection can be better achieved through harmonised measures adopted at Community level rather than through individual national policies. It is interesting to note that environmental protection thought to be best embedded in other policy areas, Article 130r(2) of the EEC Treaty.

The Union's competence regarding environmental protection were further strengthened with every Treaty change. For example, environmental protection was added to Article 2 of the EC Treaty as one of the Union objectives.[47] While agreeing, at the 1972 Paris summit, that environmental protection can be best achieved across Europe through harmonised laws and policies, the Member States enabled the Union

[43] ibid, Part I, Title II, point 11.
[44] Ingmar von Homeyer, 'The Evolution of EU Environmental Governance' in Joanne Scott (ed), *Environmental Protection: European Law and Governance* (OUP 2009) 8.
[45] Article 25 of the SEA.
[46] Article 130r (1) and (2) of the EEC Treaty.
[47] The Treaty of Maastricht added the phrase 'sustainable and non-inflationary growth respecting the environment' to Article 2 of the EC Treaty, which then was even further emphasised by the Treaty of Amsterdam to 'sustainable development of economic activities, […], a high level of protection and improvement of the quality of the environment'. The Treaty of Lisbon repealed Article 2 of the EC Treaty and replaced it in substance by Article 3(3) and (5) of the Treaty on Union and increasing the importance of environmental protection for the European Union and the world by changing the wording to 'sustainable development of Europe' and 'sustainable development of the Earth'; the latter highlights the Union's ambition to become a global leader in tackling climate change. For more information on the EU's leadership role in the battle against climate change, see Sebastian Oberthür and Claire Roche Kelly, 'EU Leadership in International Climate Policy: Achievements and Challenges' (2008) 43 The International Spectator 35. For more information on the evolution of environmental policies through Treaty changes, see Jordan and Adelle (n 37).

to coordinate, centralise and regulate environmental policies. Homeyer argues that one of the reasons why the Community was awarded with new competence in the field of environmental protection in the 1970s was that this period is related to combating and reducing 'acute threats to human health and the environment […] rather than improving the environment more generally'.[48]

6.2.2.2 The role of renewables within European policies

From the early 1980s the amount of European secondary legislation governing the environment increased significantly, with a peak in 2001 when nearly 120 instruments were adopted.[49] As mentioned above, the term 'environment' is very broad, and action against climate change is only one aspect of environmental protection. However, even climate change policies range from, for example, waste management, air pollution, water protection, soil protection and civil protection to noise pollution, but also integrate other policies, such as transport and energy.[50]

Due to the vast amount of legislation, and the restricted scope of this chapter as set out in the introduction, this paragraph will focus on the legislation and policies related to electricity from renewable sources. Figure 5 gives an overview of the relevant instruments.

So Commission policy papers[51] emerged with strategies on the promotion of electricity from renewable sources and the reduction of carbon dioxide emissions, which are generated during the incineration process of fossil fuels (coal, oil and natural gas). Carbon dioxide (CO_2) is the main Greenhouse gas. In 2010, almost 80%

[48] Homeyer (n 44) 8.
[49] AM Farmer (ed), 'Environmental Policy Instruments' in AM Farmer (ed), *Manual of European Environmental Policy* (Routledge 2012) 2 <https://ieep.eu/understanding-the-eu/manual-of-european-environmental-policy>.
[50] EUR-Lex, 'Environment and climate change' <http://eur-lex.europa.eu/summary/chapter/environment.html?root_default=SUM_1_CODED%3D20>.
[51] For example, Commission of the European Communities, 'Energy for the Future: Renewable Sources of Energy: Green Paper for a Community Strategy' (Green Paper) COM(96) 576 final; Commission of the European Communities, 'The Energy Dimension of Climate Change' (Communication) COM(97) 196 final; Commission, 'Energy for the Future: Renewable Sources of Energy' (White Paper for a Community Strategy and Action Plan) COM(97) 599 final.

of the world's Greenhouse gas emissions stemmed from CO_2.[52] The Union intended to become a global leader in global climate change policy.[53] Therefore it was committed to relying more on clean energy from nuclear and renewable sources in order to cut the energy share of CO_2 emission created by mainly fossil fuels.[54]

In 1996, the Commission published a Green Paper on renewables which served as discussion paper and set out different strategies on how to increase the share of renewables by establishing a harmonised European approach, and increase Member States' commitment as well as establishing their reliance on financial support programmes.[55] The Commission set out the goal that 12% of the gross energy consumption at Community level should derive from renewables by 2010, compared to 5.4% in 1994,[56] in order to cut greenhouse gas emissions.[57]

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[52] Other greenhouse gases are methane, nitrous oxide and fluorinated gases (hydrofluorocarbons, perfluorocarbons, sulphur hexafluoride). See, EPA - United States Environmental Protection Agency, 'Gobal Greenhouse Gas Emissions' (7 May 2017) <https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data>.

[53] Oberthür and Roche Kelly (n 47). According to Eurostat data, in 2010 greenhouse gas emission in the European Union were nearly 23% lower than in 1990, Eurostat, 'Greenhouse gas emission statistics' (December 2016) <http://ec.europa.eu/eurostat/statistics-explained/index.php/Greenhouse_gas_emission_statistics#Further_Eurostat_information>.

[54] Commission of the European Communities, 'An Energy Policy for the European Union' (White Paper) COM(95) 682 final, para 44.

[55] Commission of the European Communities, COM(96) 576 final (n 51) 4, 11-12, 18, 21-22.

[56] Commission of the European Communities, COM(96) 576 final (n 51) 4, 10, 12.

[57] By adopting the Kyoto Protocol the Union set itself the binding target to reduce the emissions of the six main greenhouse gases (carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulphur hexafluoride) to 8% below the 1990 level for the first Kyoto commitment period which lasted from 2008-2012, United Nations Framework Convention on Climate Change, 'Kyoto Protocol' <http://unfccc.int/kyoto_protocol/items/3145.php>; European Commission, 'Kyoto 1st commitment period (2008-12)' <http://ec.europa.eu/clima/policies/strategies/progress/kyoto_1/index_en.htm>.
The Union broke down the overall target into individual legally binding targets for its Member States. The Union consisted of 15 Member States (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom) by the time the Kyoto Protocol was adopted. The commitment to reduce greenhouse gas emissions was also assigned to later joining countries, except for Malta and Cyprus. Council Decision 2002/358/EC of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder [2002] OJ L130/1; Commission Decision 2006/944/EC of 14 December 2006 determining the respective emission levels allocated to the Community and each of its Member States under the Kyoto Protocol pursuant to Council Decision 2002/358/EC [2006] OJ L 358/87; Commission Decision 2010/778/EU of 15 December 2010 amending Decision 2006/944/EC determining the respective emission levels allocated to the Community and each of its Member States under the Kyoto Protocol pursuant to Council Decision 2002/358/EC [2010] OJ L332/41; Commission Implementing Decision 2013/644/EU of 8 November

As already mentioned, renewable sources play a key role in tackling climate change, as far less carbon dioxide is emitted during the energy production process from renewable sources than from fossil fuels.[58] Therefore the Union has been determined to increase the share of renewables.

In 2001, the first directive on the promotion of electricity produced from renewable energy sources in the internal electricity market (Directive 2001/77/EC, also often called RES Directive) was adopted,[59] aiming to promote renewables in the liberalised electricity market, reduce Greenhouse gas emissions and foster energy security.[60] Two years later, the directive on the promotion of biofuels (Directive 2003/30/EC) followed.[61] Both Directives were repealed by the 2009 RES Directive (Directive 2009/28/EC).[62]

The 2009 RES Directive lays out the legislative framework that is necessary in order to achieve, Union-wide, a 20% share of energy from renewables by 2020, as previously introduced by the 2007 Renewable Energy Roadmap.[63] It further

2013 amending Decision 2006/944/EC to include the emission level allocated to the Republic of Croatia under the Kyoto Protocol [2013] OJ L301/5.
Over the years the goals of the EU in cutting carbon emissions have become more and more ambitious. In March 2007 the Union adopted the '2020 climate & energy package'. It contained the objective to reduce greenhouse gas emissions to at least 20% below 1990 levels. Commission, 'Energy 2020 A strategy for competitive, sustainable and secure energy' (Communication) COM(2010) 639 final 2; European Commission, '2020 climate & energy package' <http://ec.europa.eu/clima/policies/strategies/2020/index_en.htm>.
Seven years later, in October 2014, the European Council adopted the '2030 climate & energy framework'. The 2030 framework expands on the 2020 package and takes a step further. The 2030 framework aims for a 40% reduction of CO_2 emissions by 2030 from 1990s levels. European Commission, '2030 climate & energy framework' <http://ec.europa.eu/clima/policies/strategies/2030/index_en.htm>.
Furthermore, the European Commission has established the future-orientated, (at the moment) not legally binding, 2050 low-carbon economy roadmap' in order to meet the Union's long-term objectives to achieve a decrease of carbon emission to 80% below 1990s level. European Commission, '2050 low-carbon economy' <https://ec.europa.eu/clima/policies/strategies/2050_en>.

[58] Woerdman, Roggenkamp and Holwerda (n 33) 128.

[59] Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market [2001] OJ L283/33.

[60] Directive 2001/77/EC, Recital 1.

[61] Directive 2003/30/EC of the European Parliament and of the Council of 8 May 2003 on the promotion of the use of biofuels or other renewable fuels for transport [2003] OJ L123/42.

[62] Directive 2009/28/EC (n 3).

[63] Commission, 'Renewable Energy Road Map: Renewable energies in the 21st century: building a more sustainable future' (Communication) COM(2006) 848 final, 10.

established the goal that 10% of transport fuels must be derived from renewable sources.[64]

Although the target of 20% is mandatory at EU level, it does not mean that each Member State has to deliver one fifth of their energy commodities from renewable sources: the 20% is an overall Union-wide objective, which is split into individual national targets depending on national conditions (see Figure 6).[65]

Figure 6: The Union's and Member States' actual % share of energy from renewable sources in gross final consumption of energy and their aspired targets for 2020 and 2030 [66]

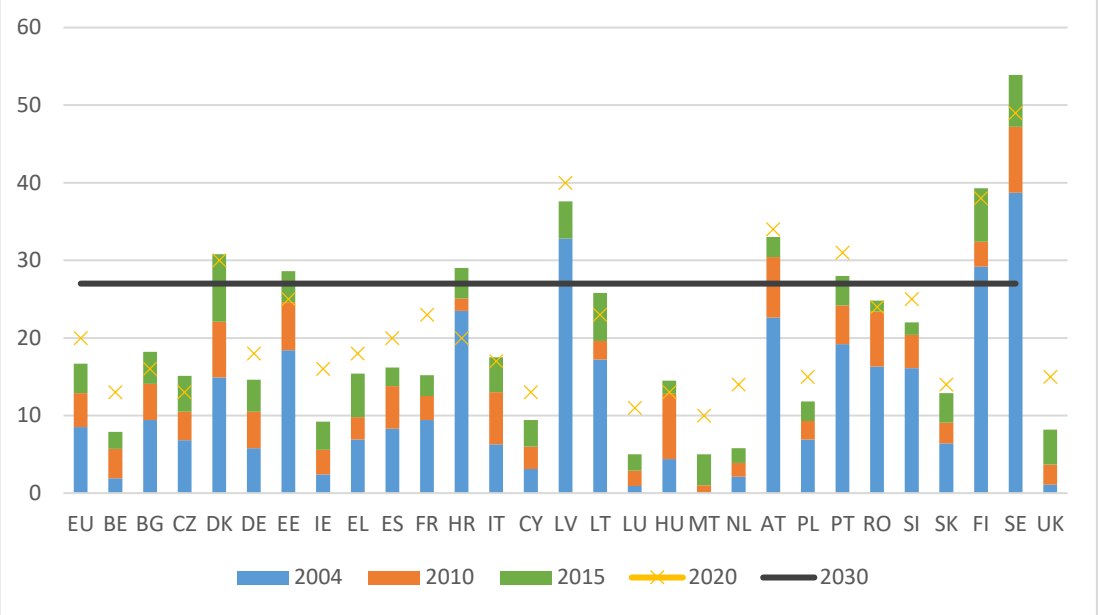

Figure 6 gives an overview of the actual share of energy from renewable sources for all Member States of the European Union for the years 2004, 2010 and 2015.[67] The bars illustrate the actual state for three points in time (2004, 2010 and 2015). The

[64] Directive 2009/28/EC, Recital 8 and 9. The role of renewables in the transport sector is not part of the scope of this chapter.
[65] Directive 200928/EC, Article 1 and Article 3(1) in conjunction with part A of Annex I.
[66] Eurostat, 'Share of energy from renewable sources' (14 March 2017) <http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=nrg_ind_335a&lang=en>; Annex I of Directive 2009/28/EC; European Commission, 'Europe 2020 in Croatia' <http://ec.europa.eu/europe2020/europe-2020-in-your-country/hrvatska/progress-towards-2020-targets/index_en.htm>.
[67] The 2010 value for Latvia is not represented as there was a decline compared to the previous period. However, by 2015, Latvia had achieved and even exceeded the target set for 2020. Figure 6 does not show a value for Malta (MT) for the year 2005 as the energy consumption from renewables was with 0.2% negligible.

yellow markers reflect the individual national targets set out by the 2009 RES Directive in order to meet the 2020 objectives of a Union-wide share of 20% of energy from renewable sources in gross final consumption. It shows that the target share differs from one Member State to another. The years 2004 and 2015 mark the first and last years of which data for the Union and European Member States is available at Eurostat. Figure 6 shows that some Member States have already achieved and exceeded their targets (e.g. Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Hungary, Lithuania, Finland, Romania and Sweden), others are nearly there (e.g. Latvia, Austria and Slovakia), whereas some Member States still have a long way to go (e.g. Belgium, Ireland, Luxembourg, France, The Netherlands, Poland and the United Kingdom). The European Environment Agency (EEA)[68] confirmed that the majority of Member States will meet the 2020 targets, except for France, Ireland, Malta, the Netherlands, Poland and Portugal.[69]

Furthermore, the black line indicates that the aspired share of renewables for 2030 has increased to a minimum of 27% at European level.[70] The Commission's 2050 Energy Roadmap regards it as feasible that the share of renewables in gross final consumption of energy will reach as high as 75% (a minimum of 55%), and the share of renewables in electricity consumption could be even higher, at nearly 100% (97%), on the condition that significant electricity storage is made available to manage effectively supply of electricity from renewables and changes in demand.[71] There is still a long way to go until the majority of the Union's electricity is produced from renewable sources, for example, in 2015 about 29% of the EU's electricity was green

[68] The EEA is an agency of the European Union.

[69] European Environment Agency, 'Renewables continue to grow in the EU, but Member States need to step up ambition on energy savings' (1 December 2016) <http://www.eea.europa.eu/highlights/renewables-continue-to-grow-in>.

[70] European Commission, '2030 climate & energy framework' <http://ec.europa.eu/clima/policies/strategies/2030/index_en.htm>. The United Kingdom is not included in 2030, as it is unlikely that it will comply with EU objectives after leaving the European Union.

[71] European Commission, 'Energy Roadmap 2050' (Communication) COM(2011) 885 final 4, 7. According to Article 2(f), the term 'gross final consumption of energy' is defined as 'the energy commodities delivered for energy purposes to industry, transport, households, services including public services, agriculture, forestry and fisheries, including the consumption of electricity and heat by the energy branch for electricity and heat production and including losses of electricity and heat in distribution and transmission'.

electricity. Figure 7 provides an overview of the Union's actual share of electricity from renewables and for each of the Member States in 2004, 2010 and 2015.

Figure 7: The Union's and Member States' actual % share of energy from renewable sources in electricity[72]

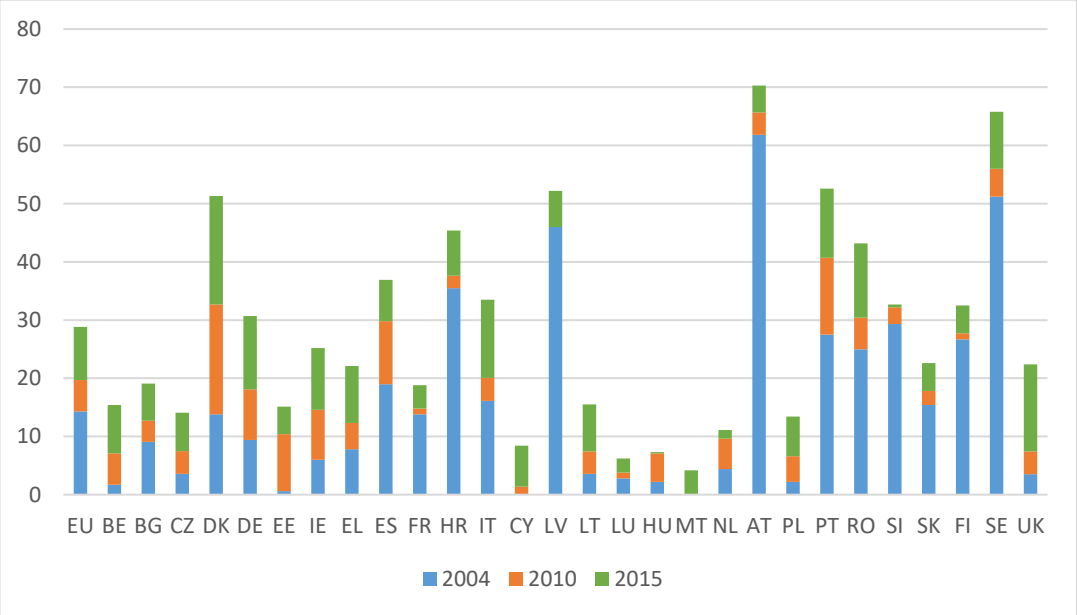

Figure 7 shows that some Member States (e.g. the Czech Republic, Denmark, Latvia, Portugal and Sweden) get more than half and Austria almost two-thirds of their electricity from renewable sources, whereas in Cyprus, Luxembourg, Hungary and Malta not even 10% is green electricity.[73] A comparison between Figure 6 and Figure 7 shows a correlation between achieving the national 2020 target and generating more electricity from renewables.

6.2.3 The merger of environmental protection and energy markets in primary law

As shown, for years environmental protection and energy were treated separately in the Treaties. The creation of an internal energy market has been one of the core

[72] Eurostat (n 66).

[73] The share of renewable energy in electricity was 0% for Cyprus in 2004 and for Malta in 2010.

objectives of the Union and pursuant to the Maastricht Treaty, environmental policies were to be integrated in other policy areas.[74]

The successful integration of renewables policies is particularly important in order to achieve an internal European electricity market as, otherwise, environmental laws and policies may have a negative effect on competition within the electricity sector.

After years of a virtually parallel existence, this situation changed with the entry into force of the Treaty of Lisbon and the establishment of Article 194 TFEU.[75]

For the first time, the Union was awarded a specific competence in the field of energy in order to establish a union-wide harmonised competitive and sustainable energy policy.[76] According to Article 194(1) TFEU, the Union's energy policy consists of three core underlying principles:

- establishment and functioning of the internal market;
- environmental improvement; and
- solidarity between Member States.[77]

In addition to these three core principles, Article 194(1) TFEU mentions the functioning of the energy market, security of energy supply, the promotion of energy efficiency and energy savings as well as the development of energy from new and renewable sources and the promotion of the interconnection of energy networks as objectives of the European energy policy.[78] According to Article 194(2)(1) TFEU, the European Parliament and the Council are responsible adopting the necessary measures, e.g. secondary legislation to achieve those objectives.

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[74] Lenschow (n 36) 323; See above, section 6.2.2.1.
[75] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/1, point 147, Article 176A.
[76] Christian Calliess, 'Article 194 AEUV' in Christian Calliess and Matthias Ruffert (eds), *EUV/AEUV: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta Kommentar* (5th edn, C.H. Beck 2016) para 1.
[77] Jens Hamer, 'Article 194 TFEU' in Hans v d Groeben and others (eds), *Europäisches Unionsrecht: Vertrag über die Europäische Union, Vertrag über die Arbeitsweise der Europäischen Union, Charta der Grundrechte der Europäischen Union* (7th edn, Nomos 2015) para 9.
[78] Article 194(1) TFEU.

Article 194(1) TFEU combines, therefore, competition interests as well as environmental protection in one statute. The Treaty does not favour one principle or one objective over the other. The statute does not mention a priority, therefore the objectives have to be treated on an equal footing.[79] The Commission highlighted, in its 2006 Green Paper,[80] that some of the principles and objectives support each other: for example, a competitive and liberalised market can increase security of supply by offering investment incentives or solidarity between Member States; it also increased security of supply by providing the necessary information and collaboration.[81] This is in line with the overall benefits of competition, which are increased efficiency, a fostering of innovation, and the reduction of costs due to on-going pressure from other forces operating in the market to enhance consumer welfare.[82]

Looking at the benefits of competition, the same relation does not necessarily apply between competition and environmental protection. It may be more the case that they are at odds with each other.

The Commission does not seem to prefer one goal over the other, but opts for a balancing act between sustainability, competition objectives and security of supply[83] to ensure the further development of electricity from renewable sources, increase energy efficiency and secure affordability of energy prices, as well as reducing the reliance on imported energy from outside the European Union.[84]

This supports the argument that the Commission regards the objectives as equally important.[85] Grabitz et al argue that, because of different interests of the Member States, a prioritisation between the objectives will not take place, and they come to a similar conclusion as that contained in the 2006 Green Paper, as they

[79] Calliess (n 76) para 4.
[80] Commission, 'A European Strategy for Sustainable, Competitive and Secure Energy' (Green Paper) COM(2006) 105 final.
[81] ibid 8.
[82] Cameron (n 11) para 1.06.
[83] Commission, COM (2006) 105 final, 9, 13, 14.
[84] ibid 17–18.
[85] Calliess (n 76) para 4; Martin Nettesheim, 'Article 194 AEUV' in Eberhard Grabitz, Meinhard Hilf and Marco Nettesheim (eds), *Das Recht der Europäischen Union* (60th edn, C.H. Beck 2016) para 26.

suggest a balancing act to combine all the different interests of the Member States underlying European electricity policy.[86]

So far, it seems that there is no primary objective at European level, but all principles support each other.

6.2.4 Conclusion

Over the years, there has been a change in European primary law governing energy and environmental protection. The Union has been pursuing the liberalisation of the electricity market, while environmental protection has grown in importance. In both areas, the Union has been awarded more competence to achieve a harmonised approach across all Member States of the European Union.

Energy and environmental protection are closely linked with each other. This is highlighted in Article 194 TFEU, which embeds the principles of the functioning of the electricity market, environmental protection and solidarity in one provision. In the matter of electricity, the battle against climate change has become one of the key environmental objectives.

To be effective in the battle against climate change, the Union noted the importance of renewables, resulting in the adoption of the 2020 and 2030 targets. There seems to be the awareness at European level that competitiveness and sustainability are two principles that do not necessarily support but may, instead, interfere with each other. Nonetheless, the principles and objectives contained in Article 194 TFEU are of equal importance. The European Commission therefore suggested, in its 2006 paper, a balance between competitiveness and environmental protection. So despite taking up the battle against climate change, there is no clear preference of one goal over the other.

[86] Nettesheim (n 85) para 26.

6.3 The need to rely on State aid rules in order to achieve environmental goals

Before this chapter turns to the discussion of the practical applicability of the State aid regulatory framework in relation to renewable support schemes, this section addresses why the European Commission has to rely on State aid rules in the first place in order to achieve its environmental goals in energy as set out in the previous section.

One could argue that this approach deprives State aid of its original purpose of ensuring a level playing field between different undertakings operating in the market. Yet it will be shown that this approach is the only effective means to address the failure of the market to produce enough electricity from renewables. By relying on State aid rules, the Union seeks to control and to ensure cooperation amongst the Member States to comply with EU law governing renewables. Ultimately, the need to fall back to State aid rules can be explained by the Treaty's allocation of competence between the Union and the Member States and the subsidiarity principle.

6.3.1 Enforcement of renewable laws and policies

This sections shows the limited means of the European Commission to ensure enforcement of laws and the need to rely on the Member States' cooperation to comply with EU law.

The 2009 RES Directive sets out binding national overall targets for the share of energy from renewable sources (Annex I of Directive 2009/28/EC). The Renewable Directive had to be transposed into national law by the end of 2010.[87] Each Member State is required to set up a national action plan which will then be reviewed by the Commission.[88] If they are not appropriate to achieve the national target, the

[87] Directive 2009/28/EC, Article 27(1).
[88] Directive 2009/28/EC, Article 4.

Commission can 'issue a recommendation'.[89] The 2009 RES Directive does not stipulate any scenarios or other sanctions if the targets are not achieved at national or European level. The Commission has therefore limited means to ensure implementation.[90] In the case of the 2009 RES Directive, if a Member State fails to take appropriate steps to achieve the targets set out in the Directive, the Commission can initiate infringement proceedings[91] under Article 258 TFEU. A list of all published infringement proceedings concerning Directive 2009/28/EC can be found in Annex 1 of this chapter.[92] The data is based on Commission information publicly available on the Commission's homepage.[93] The early infringement proceedings were often initiated because Member States (e.g. Belgium, Estonia, Hungary, Latvia, Poland and Slovakia) did not notify the Commission of their national renewable energy action plans as required under Article 4(1) and (2) of the 2009 RES Directive. Another group of infringement proceedings resulted from the failure to fully transpose the Directive. Member States mainly failed to comply with the requirements with respect to the sustainability criteria applying to biofuels in the transport sector. For example, the Commission took Poland to the Court of Justice twice so far, but each time withdrew

[89] Directive 2009/28/EC, Article 4(5).

[90] Andrew Jordan and Jale Tosun, 'Policy Implementation' in Andrew Jordan and Camilla Adelle (eds), *Environmental policy in the EU: Actors, institutions and processes* (3rd edn, Routledge 2013) 258.

[91] In cases in which a Member State fails to comply with EU law, the Commission sends a letter of formal notice and requests information from the Member State. If the Commission is not convinced of the reasons for the Member State's failure, it can issue a reasoned opinion and in cases, where the Member States still does not comply, the Commission can go to the Court of Justice. If the Member States fails to comply with the judgment, it can take the matter to the Court of Justice again and a penalty payment may be imposed (Article 260(2) TFEU). See for more detailed information, European Commission, 'General Information' <https://ec.europa.eu/taxation_customs/infringements/general-information_en>.

[92] The list may not be complete as the first stage of the proceedings – requesting information from the Member State – is general confidential. ibid. The list of infringement proceeding in Annex 1 (see below) includes all published infringement proceedings concerning the 2009 RES Directive but highlights if the reason for the proceedings is related to green electricity. In some cases no further details are known due to a lack of publication by the Commission.

[93] European Commission, 'Enforcement of laws: Latest Commission decisions on energy infringements' <https://ec.europa.eu/energy/en/topics/enforcement-laws>; European Commission, 'April infringements package: key decisions' (Brussels, 27 April 2017) <http://europa.eu/rapid/press-release_MEMO-17-1045_en.htm> and via the search option using the term 'Directive 2009/28EC' in the title option on the European Commission's website: European Commission, 'European Commission at work - Infringement decisions' <http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&r_dossier=&noncom=0&decision_date_from=&decision_date_to=&active_only=0&title=Directive+2009%2F28%2FEC&submit=Search>.

the case after Poland amended its legislation; however, Poland still does not meet the requirement set out in the 2009 RES Directive, and therefore the Commission has issued an additional Reasoned Opinion. The majority of the (published) cases were dissolved at the second stage, after the Commission issued a Reasoned Opinion.

As for now, the 2030 target will only be legally binding at EU level. When drafting the policy framework, the Commission did not want to enforce a fully legally-binding instrument on Member States and hence left open for public consultation the decision of whether or not national targets should be established.[94] The consultation received a broad response, including replies from 14 Member States,[95] companies operating in the energy sector and energy-intensive industries, 'renewable' companies, NGOs, trade unions and citizens.[96] There were mixed opinions about the idea of mandatory national targets. The majority of Member States endorsed the idea of having legally-binding target set by the Union,[97] but with the facility to negotiate change. NGOs, trade unions, and companies that operate in the renewables' sector were also in favour of legally binding targets for renewables. Whereas the United Kingdom and the Czech Republic opposed the idea.[98] Not surprisingly, the energy sector and energy-intensive industries were also against the idea of establishing binding targets for renewables.[99] So, the Commission concluded

[94] European Commission, 'Consultation on climate and energy policies until 2030' (2013) <https://ec.europa.eu/energy/en/consultations/consultation-climate-and-energy-policies-until-2030>.

[95] Austria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Lithuania, Poland, Portugal, Romania, Slovenia, Spain and United Kingdom European Commission, 'Green Paper 2030: Main outcomes of the public consultation' (2013) 1 <http://ec.europa.eu/energy/sites/ener/files/documents/20130702_green_paper_2030_consulation_results_0.pdf>.

[96] ibid 3–4.

[97] The Commission only speaks of 'binding targets' but does not distinguish between different (EU, national, regional, sectoral) levels. ibid.

[98] European Commission, 'Green Paper 2030: Main outcomes of the public consultation' (n 95); For a more detailed discussion on the diverging interests of the Member States, see Jakob Skovgaard, 'EU climate policy after the crisis' (2014) 23 Environmental Politics 1.

[99] The Commission published a proposal for a revised Renewable Directive, which ensures that the 2030 target of at least 27% at European level will be met. European Commission, 'Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources' (Corrigendum) COM(2016) 767 final/2.

in its 2014 policy document that the 2030 target for renewables will only be binding at Union level with each Member States contributing to achieve the share of 27%.[100]

6.3.2 The limitation of the Union's competence

Next will be examined how the Treaty and, in particular, Article 194 TFEU limits the enforcement powers of the Union in the field of energy.

The reason behind those limited enforcement powers is that the Union does not have the exclusive competence in the area of energy, including renewable energy policy,[101] but both the Union and Member States share their competence.[102] In areas in which the Treaty has established shared competence, both the Union and the Member State can exercise their legislative rights and adopt legally binding acts.[103]

However, the second and third sentences of Article 2(2) TFEU limit the legislative rights of Member States, as they can only act if the Union has not, or will not, exercise its competence. According to this, the Union could exercise its legislative competence and adopt measures in order to ensure that the Member States achieve their 2020 target by adopting a Union-wide, more detailed and harmonised regulatory framework (e.g. through secondary legislation), instead of relying on the State aid rules. Besides gaining more control over the Member States, a harmonised framework would also have the advantage of creating greater legal certainty among investors: they would know what to expect over the next years and could plan their investment, which may increase their willingness to invest in renewables. A uniform framework could decrease administrative costs and may foster cross-border projects between Member States.[104]

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[100] European Commission, 'A policy framework for climate and energy in the period from 2020 to 2030' COM(2014) 15 final 4–5.
[101] European Commission, 'Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources' (n 99) 6.
[102] Article 4(2)(i) TFEU.
[103] First sentence of Article 2(2) TFEU.
[104] European Commission, 'Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources' (n 99) 7.

According to Article 2(6) TFEU the actual scope for the Union's competence is then determined by area – related Treaty provisions which, in the case of renewable energy policy, is the new energy-specific Article 194 TFEU. According to the first sentence of Article 194(2) TFEU, the Union has the competence to adopt measures governing renewable energy policy.[105] The referred legal act can be binding or non-binding, [106] and power can be conferred upon the Commission to adopt supplementary non-legislative acts.[107]

In some cases it can be difficult to determine on which Treaty provision the competence of the Union is based. Article 194(2) TFEU contains the possibility to base the competence on other Treaty provisions. It may not be clear on which provision the competence of the Union is based with regard to renewables. They could also fall within the scope of Articles 191-193 TFEU and the responsibility may be based on legal norms on environmental protection as measures against climate change fall within the scope of Article 191(1) TFEU and renewables play a significant role in combatting climate change. This is of importance for the further legislative procedure. According to Article 192(2)(c), TFEU the Council must act unanimously if a measure affects a Member State's choice between different energy sources and the supply structure, while Article 194(2) TFEU contains a limitation of the Union's competence.[108] In a case of a horizontal competence conflict,[109] the conflict will be decided based on the key objective of the measure.[110] On the one hand, for the use of Articles 191-193 TFEU speaks that renewables are essential in the fight against climate change because of their low emission rates[111] but, on the other hand, the term climate change is broad and covers more than renewables, which speaks

[105] The Member States' exclusive competence as contained in No 35 of the Declarations annexed to the final act of the intergovernmental conference, which applies in situations of serious national crisis as laid down in Article 347 TFEU, is not considered.
[106] See, Article 288 TFEU (regulations, directives, decisions, recommendations and opinions) and all other non-binding acts. Nettesheim (n 85) para 27.
[107] Article 290(1) TFEU. Hamer (n 77) para 23.
[108] For more information, see Nettesheim (n 85) para 36.
[109] Sophie Bings, 'Article 194' in Rudolf Streinz (ed), *EUV, AEUV: Vertrag über die Europäische Union und Vertrag über die Arbeitsweise der Europäischen Union* (2nd edn, C.H. Beck 2012) para 38.
[110] Bings (n 109) para 39; Nettesheim (n 85) para 35.
[111] See above, section 6.2.2.2.

against relying on these legal norms.[112] Furthermore, the fact that renewables are explicitly mention in Article 194(1)(c) TFEU is an argument against them. Article 194 TFEU should therefore be used as basis for secondary legislation governing the support of renewables.[113]

The competence of the Union is not without limitations. At first it can be restricted by general principles, such as the principle of conferral and the principles of subsidiarity and proportionality.[114] According to Article 5(2) TEU, which contains the principle of conferral, the Union is only allowed to act within the competences that were conferred on it by the Member States. Furthermore, the principle of subsidiarity, Article 5(3) TEU, stipulates that the Union can only act in areas of non-exclusive competence, if the objective cannot be achieved to at least the same extent by the Member States;[115] also the Union's measures must be proportional and cannot exceed what is absolutely necessary to achieve the desired objective.[116]

In addition to these general limitations, Article 194(2) TFEU contains more energy-specific limitations. Member States have the exclusive competence to determine the conditions for the exploitation of their national resources, they can autonomously choose between different energy sources (e.g. coal, nuclear, water etc.) and they maintain the right to structure their energy supply.[117] In particular, the latter two are relevant with respect to the deployment and growth of renewables. Member States have the freedom to decide their energy mix. The Union cannot

[112] See above, section 6.2.2.2. Climate change policies can include waste management, air pollution, water protection, soil protection, civil protection and noise pollution but also integrates other policies, such as transport and energy. EUR-Lex (n 50).
[113] Hamer (n 77) para 18. This is in line with the opinion of the Commission, as the proposal for a Renewable Directive after 2020 is based on Article 194(2) TFEU. Commission, COM(2016) 767 final/2, 6. Some even argue that Article 194 TFEU is lex specialis with regard to renewables compared to Articles 191, 192 TFEU but others disagree and argue the actual competence depends on the main focus of the measure in each individual case. Wolfgang Kahl, 'Die Kompetenzen der EU in der Energiepolitik nach Lissabon' (2009) 44 EuR 601, 619; Bings (n 109) 38–39; Nettesheim (n 85) paras 35–36.
[114] Consolidated version of the Treaty on European Union [2008] OJ C115/13 (hereinafter TEU), Article 5(1).
[115] Article 5(3) TEU.
[116] Article 5(4) TEU.
[117] Second paragraph of Article 194(2) TFEU. See also Nettesheim (n 85) para 30, Hamer (n 77) para 27.

directly force Member States to rely on a particular source of energy, e.g. renewables, or even on a particular type of renewable: this would intervene with the Member States' autonomy.

In order to avoid conflicts with Member States on the one hand, but, on the other hand, to still increase the share of renewables in order to achieve the 2020 targets, the Union must influence the national energy mixes indirectly.[118] This is the reason why the 2009 RES Directive contains only national renewable shares and not specific conditions on how to achieve those objectives, and why the Union does not restrict Member States to certain renewables but offers discretion in that area. By thus using an indirect regulatory framework, such as State aid, the Union can avoid a competence conflict with the Member States but still influence the national energy mix and promote growth of renewables.

6.4 Operationalising the State aid rules in the light of environmental protection

Having discussed the underlying theoretical framework governing the direction of the Union's environmental objectives in energy, as well as the need in general to rely on State aid rules in order to achieve those goals, this section examines the Commission's use of the State aid rules in order to increase the share of renewables in practice. It will be shown that the Commission intentionally prioritises environmental protection over competitiveness in order to achieve the 2020 target, while trying not to completely lose sight of competitive concerns by creating different levels of competition in the electricity market.

The assessment will be done by analysing Commission State aid decisions related to the promotion of the share of electricity from renewable sources. A particular focus is thereby placed on the balancing act between the functioning of the market and the aim to increase the Member States' share of renewables.

[118] Nettesheim (n 85) paras 32–33.

6.4.1 Types of measures to achieve a sustainable energy market in Europe

Before analysing the State aid decisions, it is necessary to set out the regulatory framework governing the promotion of renewables and the Commission's approach in State aid decisions.

The 2009/28/EC Directive establishes the regulatory framework for the generation of green energy in Europe. Article 3(1) of the 2009 RES Directive in conjunction with part A of Annex I states that each Member State must achieve a mandatory national target for the share of energy from renewables,[119] and that all national targets combined must result in an overall Union share of renewable energy of at least 20%.[120] The Union even strives to increase those shares over the next decades and aims for a minimum share of 27% by 2030,[121] rising to at least 55% by 2050.[122] In order to achieve those targets, Member States are expected to establish effective measures.[123]

This raises the question of which measures fall under the scope of the Renewable Directive. The 2009 RES Directive offers the Member States some discretion as to which type of measures they regard as effective. As under the 2001 RES Directive, Member States are allowed to design and use their own national support schemes to promote the growth of renewables and/or Member States may apply joint measures with third countries, Article 3(3) of Directive 2009/28/EC.

The term 'support scheme' is defined in Article 2(k) of Directive 2009/28/EC as

[119] See above, Figure 6.
[120] In March 2007 the European Council agreed on climate objectives for the year 2020, the so-called '20-20' goals: reduction of greenhouse gas emissions by at least 20% compared to the levels in 1990; increasing the share of renewables in the EU to 20%; and a 20% improvement in energy efficiency from 1990 levels. Commission, COM(2010) 639 final 2, 2. For more information, see Kati Kulovesi, Elisa Morgera and Miquel Munoz, 'Environmental Integration and Multi-faceted International Dimensions of EU Law: Unpacking the EU's 2009 Climate and Energy Package' (2011) 48 Common Market Law Review 829.
[121] At the end of 2016 the Commission published a proposal for a revised RES Directive, which increases the share of energy from renewable source to a minimum of 27% by 2030. Commission, COM(2016) 767 final/2, Article 3(1).
[122] Commission, COM(2014) 15/final, 4; Commission, COM(2011) 885 final, 7.
[123] Directive 2009/28/EC, Article 3(2).

> 'any instrument, scheme or mechanism by a Member State or a group of Member States, that promotes the use of energy from renewable sources by reducing the cost of that energy, increasing the price at which it can be sold, or increasing, by means of a renewable energy obligation or otherwise, the volume of such energy purchased. This includes, but is not restricted to, investment aid, tax exemptions or reductions, tax refunds, renewable energy obligation support schemes including those using green certificates, and direct price support schemes including feed-in tariffs and premium payments'.[124]

The Member States are entitled to use a variety of means. The main instruments used in the European Union are investment grants, fiscal aids, feed-in tariffs (FiT),[125] feed-in premiums (FiP),[126] quota obligations[127], net-metering schemes and tenders.

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[124] Directive 2009/28/EC, Article 2(k).

[125] FiTs guarantee a fixed price paid to eligible generators of electricity from renewable sources over a certain duration. Feed-in tariffs have especially proven to be an attractive means for investors and they are the most commonly used scheme in the EU. According to a 2012 report for the German Ministry for the Environment, Nature Conservation and Nuclear Safety, even more Member States used to rely on feed-in tariffs in 2012 than now (24 out of 27 Member States). Mario Ragwitz and others, 'Recent developments of feed-in systems in the EU – A research paper for the International Feed-In Cooperation' (January 2012) 16 <http://www.feed-in-cooperation.org/wDefault_7/download-files/research/101105_feed-in_evaluation_update-January-2012_draft_final_ISI.pdf>.
The price does not depend on the market price and as the fixed price is guaranteed over a long period of time, the risk for investors is low as they know what to expect. M. Kanellakis, G. Martinopoulos and T. Zachariadis, 'European energy policy—A review' (2013) 62 Energy Policy 1020, 1022.
FiTs are therefore a key reason why the generation from renewables has significantly increased in Europe. From 1999 till 2009, around 80% of the total renewable electricity was produced by Member States using FiTs. For more information, see Ragwitz and others (n 118) 6.

[126] The take-up rate of FiP schemes has increased and they are used either as stand-alone scheme or in combination with other financial instruments, mainly feed-in tariffs. Under a FiP-scheme, generators receive an additional payment (premium) on top of the market price. Climate Policy Info Hub, 'Renewable Energy Support Policies in Europe' <http://climatepolicyinfohub.eu/renewable-energy-support-policies-europe>. The premium can be designed in different ways, e.g. fixed premium, floating premium or a premium with a cap and floor. Anne Held and others, 'Design features of support schemes for renewable electricity: Task 2 report' (27 January 2014) 38 <http://www.eesc.europa.eu/resources/docs/2014_design_features_of_support_schemes--2.pdf>. The different designs of FiPs will not be explained in more detail in this chapter; for an explanation and overview of examples, see ibid 39–43.
FiPs follow a more market-based approach than FiTs and therefore carry a greater risk for investors. ibid 38–39.

[127] Quota obligations in combination with tradable green certificates are a less frequently used instrument. This regulatory framework obliges suppliers to provide electricity customers with a minimum but steadily increasing amount of electricity from renewable sources. Generators receive green certificates, which they can sell to suppliers if they do not sell the required amount of green

In the electricity sector, these various types of support schemes can be differentiated into main and supportive instruments and 'others'. The main support schemes based on Article 3 of the 2009 RES Directive are FiTs, FiPs and CfDs, while, e.g. investment grants, fiscal aids or low interest loans are considered to play only a supportive role in the electricity sector, as they are generally used in combination with the main support schemes.[128] The remaining support schemes (e.g. tender,[129] net-metering[130]) are grouped as 'Others' in this chapter.

6.4.2 Support schemes used in European Member States

This section provides an overview of the support schemes used in Europe by different Member States to show that almost all Member States have taken the opportunity to establish support schemes in order to achieve the national 2020 targets. Table 9 provides an overview of the different support schemes used across the European Union.

electricity and meet their quota. The green certificate is then sold on top of the competitive market price of electricity sold. There is no fixed price for the green certificates. As quota obligations comply with the market principles they increase the competitiveness but also reduce the certainty for investors and increase their revenue risk. ibid 74.

[128] ibid 82–83.

[129] Tenders are regarded to be 'a common design option' which 'is used to allocate financial support cost-effectively to the RE-technologies.' ibid 51.

[130] Net-metering is a special scheme for natural or legal persons generating electricity from solar plants. If the PV system produces more electricity than they actual use during the day, the surplus is passed into the grids and the credit will be offset against their electricity consumption at night. SEIA - Solar Energy Industries Association, 'Net Metering' <http://www.seia.org/policy/distributed-solar/net-metering>.

Table 9: Direct financial support schemes used by Member States to promote electricity from renewable sources in 2017[131]

Member State	Feed-in tariff	Feed-in premium	Quota obligations with tradable green certificates	Others (e.g. tenders, net-metering scheme)	Supportive schemes
Austria	x				
Belgium			x		x
Bulgaria	x				
Croatia	x	x			x
Cyprus				x	x
Czech Republic	x	x			
Denmark		x		x	x
Estonia		x			x
Finland		x			x
France	x	x		x	x
Germany	x	x		x	x
Greece	x	x		x	x
Hungary	x	x		x	x
Ireland	Stopped 31.12.2015				
Italy	x	x		x	x
Latvia	X (on hold until 1.1.2020)			x	x
Lithuania		x		x	x

[131] European Commission, 'Legal Sources on Renewable Energy' <http://www.res-legal.eu/home/>.Table 9 does not include support schemes for heating and cooling purposes and the transport sector as this is outside the scope of this chapter as laid down in the introduction of this chapter.

Member State	Feed-in tariff	Feed-in premium	Quota obligations with tradable green certificates	Others (e.g. tenders, net-metering scheme)	Supportive schemes
Luxembourg	x	x			x
Malta	x				x
The Netherlands		x		x	x
Poland	x	x	x (choice for installations launched before 1.7.16)		x
Portugal	x			x	
Romania			x (installations launched until 31.12.2016)		x
Slovakia	x				x
Slovenia	x	x			x
Spain				x	x
Sweden				x	x
United Kingdom	x	x	x		x

Table 9 clarifies that, apart from Ireland, all Member States still rely on support schemes for renewables in the electricity sector. The aim of the support schemes is to allow renewables to grow and flourish. They have served that purpose. As shown

above,[132] the share of renewables has increased in all Member States, even though some Member States will most likely not meet their 2020 target.

FiTs used to be the most commonly used support scheme across the European Union and are therefore responsible for the high take-up rate of renewables. Table 9 shows that the majority of Member State still uses them. As FiTs are the least risk-averse scheme and offer certainty to investors, they proved to be popular, and Member States that have relied on FiTs have been doing well in increasing their shares of renewables.

Despite their effectiveness, FiTs can be very costly for governments and they are the least competitive scheme. For example, in Germany, Spain and Italy the use of FiTs has led to the disproportionate growth of solar systems.[133] Therefore many governments have changed their regulatory framework. For example, after a reform of the German Renewable Act, in general only small installations that were commissioned after 31 December 2015 and that generate no more than 100kw are eligible for FiTs,[134] and the Member States introduced FiPs for bigger installations. Sixteen Member States now use various types of feed-in premiums. The growing popularity shows that there is a rising awareness at Member State level that support schemes are necessary to increase the share of electricity from renewable s, but with an increasing share the support of renewables becomes too expensive and therefore a move to a more market-based approach is necessary.

Although quota obligation is the most competitive scheme and follows the market-based approach, it has been the least successful one in practice. It does not provide enough incentive for investors, as electricity is sold at a competitive price

[132] See above, Figure 6 and Figure 7.
[133] Held and others (n 126) 35.
[134] Section 37 (2) no 4 of the EEG 2014 (Gesetz für den Ausbau erneuerbarer Energien - Renewable Energy Resources Act). The EEG 2014 has been revised but the cap still applies under the current EEG 2017, see section 19(1) no 2 in conjunction with section 21(1) no 1 of the EEG 2017. According to the EEG 2017 bigger installations (over 100kW are also eligible for FiTs in exceptional cases for a maximum of three consecutive months and no longer than six months per calendar year, section 19(1) no 2 in conjunction with section 21(2) no 2).

and therefore increases the revenue risk.[135] In 2017, only two Member States (down from six in 2014)[136] still use quota obligation for both old and new installations.

As Table 9 shows, all Member States, with the exception of Ireland, use at least one type of support scheme. Many Member States have several schemes in place, and 21 rely on the additional assistance of supportive schemes. Table 9 illustrates the fragmentation of the national renewable policies. Member States use their discretion and each has developed its own unique scheme, which makes harmonisation of renewable policies very difficult.[137] The strong fragmentation of the policy schemes requires some sort of control at Union level to guarantee the effective growth of electricity from renewable sources.

6.4.3 The role of State aid in renewables

As the previous section has shown Member States heavily rely on many different types of support schemes in order to increase the national share of renewables to comply with the targets set out in the 2009 RES Directive.[138] The use of State aid is highly encouraged to achieve greater environmental protection at European Level. But when do renewable support schemes constitute State aid and fall within the scope of Article 107(1) TFEU?

The Court of Justice of the European Union (ECJ) and the General Court have identified a vast number of cases where a measure constitutes State aid. Nonetheless, there are not many cases that explicitly address the question under which conditions renewable support schemes meet the requirements of Article 107(1) TFEU. So far there are four cases (three judgments and one order) that are of relevance for this chapter and these will be discussed next.

[135] Held and others (n 126) 74, 76.
[136] Held and others (n 126) 75.
[137] Sebastian Strunz, Erik Gawel and Paul Lehmann, 'The political economy of renewable energy policies in Germany and the EU' (2016) 42 Utilities Policy 33, 34.
[138] See, for example, Table 9.

An early case that laid the foundation for the assessment of renewable support schemes was the 1998 *PreussenElektra* case.[139] In *PreussenElektra*, the ECJ had to decide if the obligation to purchase electricity from renewable sources at a higher price than the actual market value in order to compensate generators of green energy for their additional costs, imposed on an electricity supplier by national law, constitutes State aid. The German national court referred the question to the ECJ and asked whether such a statutory obligation is to be regarded as advantage granted by the state.[140] The Court of Justice affirmed that such an obligation constitutes an economic advantage for generators of green electricity within the meaning of Article 107(1) TFEU.[141] However, the Court of Justice then concluded that, in this particular case, the advantage was neither directly nor indirectly granted by Germany because the compensation was directly imposed on private undertakings.[142] The fact that the obligation is based on a statutory provision is not sufficient to satisfy the condition required under Article 107(1) TFEU.[143]

More than 10 years later, the ECJ again had to consider whether or not the obligation for an electricity undertaking to purchase wind-power generated electricity above the actual market price was to be regarded as an intervention by the State or through State resources (C-262/12 *Vent De Colère and Others*).[144] Initially, those additional costs were covered in full by a public service fund but after a legislative change they were passed onto the final consumers.[145] Under French law, the supplier could retain the amount necessary to cover the additional costs, and was obliged to pass the difference to a non-profit operating public body that was managing those funds before distributing it to other operators. And if the contributions, which were either to be annually determined by the French energy ministry or were to increase automatically, did not cover the expenses, the

[139] Case C-379/98 *PreussenElektra AG* [2001] ECR I-2099.
[140] ibid, para 58.
[141] ibid, para 54.
[142] ibid, para 59.
[143] ibid, para 61.
[144] Case C-262/12 *Vent De Colère and Others* [2013] ECLI:EU:C:2013:851, para 14.
[145] ibid, para 11.

outstanding amount would be covered by the French state.[146] The ECJ considered this was the main difference to *PreussenElektra* as the collected money remained under the control of the public body.[147] The cumulative conditions of Article 107(1) TFEU were met and the French obligation to purchase electricity from renewable sources at a higher price than the market price was deemed to fall within the scope of Article 107(1) TFEU.[148]

The Court confirmed its position in C-275/13 *Elcogás S.A. v. Administración del Estado and Iberdrola S.A*.[149] A Spanish power plant generator produced electricity by the gasification of coal and other alternative fuels and required additional funding.[150] The Court of Justice held that, because the contribution was determined by a ministerial order every year and had to be paid by all final electricity consumers, and because the charge was distributed by a state authority, the situation was identical to *Vent De Colère and Others* and the measure was regarded to be State aid.[151]

In the most recent case, T-47/15 *Germany v Commission*,[152] the General Court had to decide whether the renewable support scheme (EEG surcharge) contained in the German Act on the Development of Renewable Energy Sources (EEG 2012) constitutes unlawful State aid. One of the objectives of the EEG 2012 was to increase the share of renewable energy sources. According to the German Act on the Development of Renewable Energy Sources, the local low or medium-voltage distribution system operators were required to pay a market premium to green

[146] ibid, paras 23, 26-28, 30, 32.
[147] ibid, para 33.
[148] ibid, para 45.
[149] Case *C-275/13 Elcogás S.A. v. Administración del Estado and Iberdrola S.A.* [2014] ECLI: EU: C: 2014: 2314.
[150] ibid, para 9.
[151] ibid, paras 27-30. For a more detailed discussion on the reasoning of Case C-262/12 *Vent De Colère and Others* and Case C-275/13 *Elcogás S.A. v. Administración del Estado and Iberdrola S.A.*, see Rodriguez (n 12), 211–212.
[152] Case T-47/15 *Germany v Commission* [2016] ECLI:EU:T:2016:281. The case is pending under appeal at the Court of Justice, Case C-405/16 P. Two different measures were part of the judgment. Only the first measure will be discussed here. The second measure was about the compatibility of reductions of the EEG surcharge for electricity-intensive undertakings in the manufacturing sector and railways. ibid [para 126].

electricity producers after purchasing electricity from them. The distribution system operators then had to transmit the electricity into the transmission network and were compensated by the transmission network operator. Three out of four transmission network operators were private undertakings, which were then obliged, under the EEG 2012, to sell their electricity on the spot market. If they received a price that did not cover the additional costs, the transmission network operators were allowed but not required to recover the difference from the final customers based on sales volumes. The EEG 2012 referred to this scheme as 'EEG surcharge'.[153] The Commission initiated a formal investigation procedure against Germany, and came to the conclusion that the renewable support schemes which guaranteed producers of electricity from renewables a higher price than the market price, constitute State aid but are compatible with the internal market.[154]

Germany applied for annulment of the Commission Decision, as it was of the opinion that the EEG surcharge did not constitute State aid: the EEG surcharge, which was passed on to final consumers, was administered by private undertakings and therefore could not be imputable to the state.[155]

However, the General Court dismissed Germany's pleadings for the following reasons. The General Court concluded that the EEA surcharge falls within the scope of Article 107(1) TFEU. The funds generated by the EEG surcharge qualify as a State resource because, under the EEG, the transmission system operators are obliged to collect the surcharge. The EEG also lays down the legislative framework for the TSOs to administer the funds in a special joint account subject to monitoring by state bodies[156], thereby '[the TSOs] do not act freely and on their own behalf, but as administrators, assimilated to an entity executing a State concession, of aid granted through State funds'.[157] It is not necessary for the funds generated by the EEG

[153] ibid, paras 2–9.
[154] ibid, paras 16-17; Commission Decision, State aid SA.33995 (2013/C) (ex 2013/NN) - Germany, C(2014) 8786 final.
[155] *Germany v Commission* (n 152), paras 35-42.
[156] ibid, paras 107-108, 117.
[157] ibid, para 127.

surcharge to actually pass through the State budget.[158] The case is still pending under appeal at the Court of Justice.[159]

After analysing the judgments, it can be concluded that the main deciding factor as to whether or not a support scheme for electricity from renewables is regarded to be State aid, is the way in which the particular instrument is organised and the involvement of the state. The measure must make use of state resources directly or indirectly to fall within the scope of Article 107(1) TFEU.[160]

In *PreussenElektra*, the scheme to promote electricity from renewables did not constitute State aid, whereas in the later cases the Court held that the award granted constitute state resources and therefore meet the criteria of Article 107(1) TFEU. As soon as a public body is – directly or indirectly – involved in the administration of the collected funds, it is most likely that the support scheme will be regarded as State aid as defined by Article 107(1) TFEU. However, as the French *Vent de Colère and Others* case and the German case show, even though the schemes are regarded as State aid, they are also most likely to be lawful aid if, additionally, the notification requirement in Article 108(3) TFEU is met. The way national legislators design the regulation of renewable support schemes determines whether or not they are regarded to be State aid. The two more recent judgments show that it will be increasingly difficult for a Member State to escape Article 107(1) TFEU. To be on the safe side, the Member State will probably choose to inform the Commission before awarding the scheme, as only notified aid, and aid that has not been awarded before the Commission had made a decision, is lawful aid.[161]

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[158] ibid, paras 118.

[159] Case C-405/16 P *Federal Republic of Germany v European Commission*, Appeal brought 19 July 2016 by the Federal Republic of German against the judgment of the General Court of 10 May 2016 in Case T-47/15.

[160] Jones and Sufrin (n 20) 12.

[161] Article 108(3) TFEU.
The Commission invites the Member States to submit a draft notification of the State aid measure. This informal pre-notification discussion between the Commission and the Member States is not part of the notification requirement under Article 108(3) TFEU but it allows the Commission to assess the aid and issue guidance on the compatibility of the aid, which then enables Member State to tailor the measure, if necessary, before submitting a formal notification and thereby reducing the risk that the measure is not compatible with the internal market. Dörte Fouquet and Jana Viktoria

Unlawful aid, or not-notified aid, is not necessarily incompatible with the internal market. However, it has far-reaching consequences for Member States. The second sentence in Article 108(3) TFEU contains a directly effective standstill clause[162] that can be enforced by national courts until the Commission has reached its final decision.[163] In addition, the Commission can adopt interim measures, such as information, suspension and recovery injunctions.[164] The Commission can thus issue an injunction requiring the Member State to suspend any unlawful aid until it has come to a final conclusion[165] and under certain conditions (no doubts about the aid character, urgency to act and serious risk of damaging a competitor) the Commission is empowered to order the Member State to provisionally recover any unlawful aid until a final decision has been made.[166] If the Commission is in doubt about the compatibility of the unlawful aid, it can initiate formal investigations, and in the case

Nysten, 'The Legal Helpdesk Understanding State aid in European Law' <http://keepontrack.eu/contents/virtualhelpdeskdocuments/update-state-aid.pdf>; European Commission, 'State Aid Manual of Procedure' (2013) <http://ec.europa.eu/competition/state_aid/studies_reports/sa_manproc_en.pdf>.
However, in Case C-329/15 *ENEA* ECLI:EU:C:2017:233, a request for a preliminary ruling by the Polish Supreme Court, the Advocate General opined that the obligation to supply 'Combined Heat and Power electricity' imposed by national rules does not constitute State aid within Article 107(1) TFEU. The state-owned company ENEA was required by national law to sell a minimum quota of 15% of electricity generated from co-generation to its consumers (15% of the total quantity of its electricity sold in the year 2006). The quota could be achieved by generating the CHP electricity by the undertaking itself or by buying it from other producers. The purchase price was freely determined between the two parties. The sale price to the final customer was approved by the national regulatory authority, ibid, para 11, 21-24.
The national measure is comparable to the one discussed in *PreussenElektra* and does not involve a transfer of State resources, ibid, paras 81-86. The Advocate General emphasised that the 'obligation […] must be classified not as an obligation to purchase but as supply obligation', ibid, para 38.
It remains to be seen whether the Court of Justice will follow the opinion of the Advocate General. See, Gian Marco Galletti, 'AG Saugmansgaard ØE in C-329/15: Towards a Novel approach to the State Resources Criterion' (*European Law Blog*, 18 April 2017) <https://europeanlawblog.eu/2017/04/18/ag-saugmandsgaard-oe-in-c-32915-towards-a-novel-approach-to-the-state-resources-criterion/>.

[162] Case 6/64 *Costa v ENEL* [1964] ECR 1141; Case 120/73 *Lorenz GmbH v Germany* [1973] ECR 1471; Jones and Sufrin (n 20) 233.

[163] Case C-354/90 *Fédération nationale du commerce extérieur des produits alimentaires and Others v France* [1991] ECR I-5505. The national court can only decide if a measure constitutes State aid or not and the national court acts as safeguarding institution for individuals, here mainly to protect the rights of competing undertakings.

[164] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L 248/9, para 24.

[165] Council Regulation (EU) 2015/1589, Article 13(1).

[166] Council Regulation (EU) 2015/1589, Article 13(2).

of a negative decision, the Member State must recover the aid, plus an interest rate, from the beneficiary.[167]

The *PreussenElektra* case dealt with renewable support schemes when they were in their early stages and before Member States were required to achieve a compulsory national share of energy from renewables by the year 2020. The judgment dates back to March 2001 and concerns the interpretation of the 1990 German 'Law on feeding electricity from renewable energy sources into the public grid', amended by the 'New law for the energy industry of 1998'.[168]

With an increasing environmental awareness at European and national level the national laws – for example, the German one governing renewable support schemes – have evolved and become more complex, and with the pressure on the Member States to achieve their national targets it is unlikely that states will reduce their control, as they will wish to ensure they reach the 2020 environmental goals. For this reason, it will become more and more difficult for a measure not to fall under Article 107(1) TFEU as it will only be in rare circumstances that the measure will not be attributable to the State or not be considered as financed from State resources.

6.4.4 Exceptions of Article 107(1) TFEU and the balancing test in Article 107(3) TFEU

Having discussed under which conditions renewable support schemes are to be regarded as State aid, this section examines the assessment criteria the Commission applies so that support schemes for green electricity fall under one of the Treaty exceptions and may therefore still be compatible with the internal market.

[167] Council Regulation (EU) 2015/1589, Articles 15(1), 16(1) and (2). For more information on unlawful aid, see Phedon Nicolaides, Mihalis Kekelekis and Maria Kleis, 'Chapter III: State Aid Procedures' in Phedon Nicolaides, Mihalis Kekelekis and Maria Kleis (eds), *State aid policy in the European Community: Principles and practice* (vol 16, 2nd edn, Kluwer Law International 2008) 99–102.
[168] *PreussenElektra AG* (n 139).

A measure that falls within the scope of Article 107(1) TFEU is incompatible with the Treaty, unless stated otherwise in the Treaty. Article 107(2) and (3) TFEU provides such exceptions. A measure that meets the requirements set out in Article 107(2) TFEU is compatible with the internal market, therefore the Commission has no further discretion but must declare the aid as compatible with the internal market.[169] Under Article 107(3) TFEU the Commission has discretion and assesses the compatibility by weighing up the positive effects of achieving public interest objectives against the distortive effect on competition, taking into account the principle of proportionality (so-called balancing test).[170]

Environmental protection and other horizontal policy objectives fall under Article 107(3)(c) TFEU,[171] including aid for electricity generated from renewable sources.[172] Taking the Commission's discretion into account, it can only declare aid compatible with the internal market if it was necessary to increase the share of renewables.[173] It requires the Member State to show that the competitive market fails to provide the necessary level of environmental protection (market failure). Motta, for example, argues that competitive markets are not sufficient to provide public goods, such as climate policy objectives. He states, that:

> [t]his does not imply that objectives or public policy considerations other than economic efficiency are not important, but more simply that if a government wanted to achieve them, it should not use competition policy but resort to policy instruments that distort competition as little as possible.[174]

[169] Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, para 17; Case T-268/06 *Olympiaki Aeroporia Ypiresies AE v Commission* [2008] ECR II-1091, para 51.
[170] Commission of the European Communities, 'State Aid Action Plan: Less and better targeted state aid: a roadmap for state aid reform 2005-2009' COM(2005) 107 final, paras 10–11, 19; Phedon Nicolaides, Mihalis Kekelekis and Maria Kleis, 'Chapter II: Exceptions under Article 87 EC' in Phedon Nicolaides, Mihalis Kekelekis and Maria Kleis (eds), *State aid policy in the European Community: Principles and practice* (vol 16, 2nd edn, Kluwer Law International 2008) 50; Jones and Sufrin (n 20) 101.
[171] Nicolaides, Kekelekis and Kleis, 'Chapter II: Exceptions under Article 87 EC' (n 170) 49.
[172] Article 107(3)(c) TFEU states that 'aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest' can be justified.
[173] For the general rule of necessity, see *Philip Morris v Commission* (n 169) para 17.
[174] Massimo Motta, *Competition policy* (Cambridge University Press 2004) 30.

Robinson and Marshall examine market failure in energy markets in particular, and they highlight that competitive markets are driven by short-term objectives rather than long-term ones.[175] According to them, government action to protect the global environment and tackle climate change is widely acknowledged. Nonetheless, there is the danger of government failure in cases where a government's actions are not simply directed by the welfare of their citizens but by their own political interests.[176] To justify state intervention, the Member State must therefore demonstrate that the desired share of green electricity cannot be achieved through the market alone, and that market failure can only be amended by state intervention.[177] The Member State must also determine how the aid will improve the situation and show whether it has enacted other measures to address the same market failure and that the particular aid will not interfere with those other measures.[178]

Under Article 107(3) TFEU, the Commission is allowed to adopt guidelines which set out views, principles and objectives of the Commission's policies with the intention to help Member States to design State aid measures that meet the balancing test and hence are compatible with the internal market.[179]

The Commission adopted the *Guidelines on State aid for environmental protection and energy 2014-2020*[180] (2014 Guidelines) for, e.g., the interpretation of state aid schemes in the field of electricity from renewable sources.[181]

The revised Guidelines focus on the cost-effective delivery and generation of energy from renewables through market-based instruments, such as auctioning or a

[175] Colin Robinson and Eileen Marshall, 'The regulation of energy: issues and pitfalls' in Michael A Crew and David Parker (eds), *International handbook on economic regulation* (Edward Elgar 2008) 329. Robinson and Marshal also warn that the state promotion of renewables may lead to an increase of final energy prices and affordability issues in cases where renewables are not yet ready to compete with fossil fuels. ibid 332.
[176] ibid 334–337.
[177] Commission, [2014] OJ/C2001/1, (n 17), para 34.
[178] ibid, para 36.
[179] For more detailed information, see Nicolaides, Kekelekis and Kleis, 'Chapter II: Exceptions under Article 87 EC' (n 170) 49.
[180] Commission, [2014] OJ/C 200/1, (n 17), replacing the 2008 Guidelines on State aid for environmental protection [2008] OJ C82/1.
[181] ibid, para 18(e), section 3.3.

competitive bidding process.[182] Despite recognising the success of feed-in tariffs in increasing the share of energy from renewables, the Commission sets out that, from the beginning of 2016 an operating aid measure is only to be compatible with the internal market if feed-in tariffs are replaced by feed-in premiums.[183] In addition, from the beginning of 2017, aid must be granted in a competitive bidding process, although exceptions apply.[184] The Commission makes exceptions from the market-based approach for small producers.[185]

To be compatible with the internal market and comply with Article 107(3)(c) TFEU, the positive impacts of the aid must exceed the potential negative effects on trade and competition.[186] This will be fulfilled if the measure satisfies the following common assessment criteria:

1. Increasing the level of environmental protection;[187]
2. Necessitating state intervention to correct market failures;[188]
3. Using the most appropriate instrument to achieve the required target;[189]
4. Providing an incentive to change the behaviour of the beneficiary of the aid;[190]
5. Keeping aid to the minimum (proportionality);[191]
6. Limiting the negative effects on competition and trade;[192]
7. Ensuring the transparency of the aid.[193]

The common assessment criteria require the Member State to show that the aid will contribute to an increased level of environmental protection, in particular to the

[182] ibid, para 109.
[183] ibid, para 124(a); Erika Szyszczak, 'Time for Renewables to Join the Market: the New Guidelines on State Aid for Environmental Protection and Energy' (2014) 5 Journal of European Competition Law & Practice 616, 617.
[184] Commission, [2014] OJ/C 200/1, (n 17), para 126.
[185] ibid, paras 125 and 127.
[186] ibid, para 26.
[187] ibid, paras 30 and 27(a).
[188] ibid, paras 27(b) and 34.
[189] ibid, paras 27(c) and 41, 45.
[190] ibid, paras 27(d) and 49-50.
[191] ibid, paras 27(e) and 69-70.
[192] ibid, paras 27(f) and 88.
[193] ibid, paras 27(g) and 104.

fulfilment of the 2020 targets.[194] Member States must 'identify the market failures hampering an increased level of environmental protection or a well-functioning secure, affordable and sustainable internal energy market'[195] and show that it can be effectively addressed by State aid; there must not be another means that is equally effective but has a lesser distortionary impact on the market; and the State aid measure cannot go beyond the strict minimum necessary.[196] Furthermore, under the common assessment criteria it is required that the measure provides an actual incentive to increase environmental protection or help to achieve a secure, affordable and sustainable energy market. If the aid is used merely to reimburse the undertaking for its normal business activities, it does not meet the common assessment criteria and is therefore not compatible with the internal market.[197] Member States must also ensure that, within six months of the aid being granted, information relevant to the measure (e.g. name of the scheme, information related to the beneficiary, the amount and type of the aid) are published online.[198]

Interestingly, the Commission adds another balancing test (point 6) to the overall balancing test. To distinguish between these tests, the second one will be called the narrower balancing test. The Commission considers the narrower test satisfied if 'the negative effects of the aid measure in terms of distortions of competition and impact on trade between Member States [are] outweighed by the positive effects in terms of contribution to the objective of common interest'.[199]

The wording of the two balancing tests is identical. So why has the Commission introduced a balancing test within the balancing test?

Having a second balancing can give the impression that the Commission is particularly concerned about avoidance of undue negative effects on competition and trade in the energy market, in order not to hinder the creation of one internal

[194] ibid, section 3.2.1.
[195] ibid, para 35.
[196] ibid, paras 34, 35, 40, 69.
[197] ibid, para 49.
[198] There is no requirement to publish such relevant information for State aid measures that were granted before 1 July 2016 or are below EUR 500,000. ibid, paras 104-106.
[199] ibid, paras 27(g) and 88.

energy market across all Member States. It appears a very high standard for a State aid measure to meet. According to the 2014 Guidelines, the Commission will in particular consider the product market distortions and potential negative effects on location.[200]

However, this seemingly strict approach set out by the Commission has to be considered within the context of point 90 of the 2014 Guidelines,[201] which sheds a different light on the actual importance of the (narrower) balancing test. It reads:

> Aid for environmental purposes will by its very nature, tend to favour environmentally friendly products and technologies at the expense of other, more polluting ones and that effect of the aid will, in principle, not be viewed as an undue distortion of competition, since it is inherently linked to the very objective of the aid, that is to say making the economy greener. When assessing the potential negative effects of environmental aid, the Commission will take into account the overall environmental effect of the measure in relation to its negative impact on the market position, and thus on the profits, of non-aided firms. In doing so, the Commission will consider in particular the distortive effects on competitors that likewise operate on an environmentally friendly basis, even without aid. Likewise, the lower the expected environmental effect of the measure in question, the more important the verification of its effect on competitors' market shares and profits in the market.[202]

This suggests that no real balancing test takes place for aid awarded to promote environmental protection, e.g. aid awarded to undertakings generating electricity from renewables. It seems the Commission neglects the balancing act. The 2014 Guidelines contain the presumption that such aid does not, in general, have a distortionary effect on competition, if it helps to achieve the 2020 targets.[203]

[200] ibid, para 89.
[201] ibid, para 90.
[202] ibid, para 90.
[203] ibid, para 116.

Furthermore, the Commission sets the degrees of competition it would like to achieve in the electricity sector in the Union: firstly, the limitation of competition for environmental purposes is acceptable; secondly, competition between green undertakings is desirable; thirdly, competition between green undertakings and undertakings generating electricity from fossil fuels is not intended.

6.4.5 Commission decisions: Practical applicability of the narrower balancing test

Having discussed the requirements of the narrower balancing test within the context of the 2014 Guidelines, this section will analyse in more detail the practical applicability of the narrower balancing test and its actual importance by examining State aid decisions regarding renewable support schemes to see whether or not the Commission examines the potential negative effects of the measure on trade and competition.

There is a vast number of Commission State aid decisions available,[204] and in total 45 separate decisions were analysed.[205] The Commission considered all aid

[204] Cases that fall under the General Block Exemption Regulation (Council Regulation (EU) 2015/1588) are not captured in this section, as the Member States can assess those cases themselves by applying the GBER criteria and if those conditions are met, the aid is compatible with the internal market and exempted from the notification requirement and does not require approval from the Commission prior the implementation of the measure; therefore the Commission is not involved in the assessment of that specific aid. *De minimis* aid is also not covered, as it falls outside the control of the European Commission: the aid amount is regarded to be too small to have a distortionary effect on competition. European Commission, *State Aid: Commission adopts revised exemption for small aid amounts (de minimis Regulation)* (2013). A refined case search through the State aid register on the European Commission website of relevant State aid decisions European Commission, 'State aid Cases' <http://ec.europa.eu/competition/state_aid/register/> resulted in 218 cases for the period between 13 March 2001 (*date of PreussenElektra judgment*) and 9 May 2017. The search was done by choosing the Commission's economic sector code 'D.35 for electricity, gas, steam and air conditioning supply' and Article 107(3)(c) TFEU as primary legal basis for the decisions. However, not all cases shown are related to renewable support schemes. The search was then further restricted to decisions that applied the 2014 Guidelines as this section of the chapter focuses on the practical applicability of the balancing test. This limited the search to 88 decisions. However, the number of actual decisions is smaller, as, for example, Germany submitted 20 schemes (under the case number SA.39722 – SA.39742), which were assessed in a single decision by the Commission. Furthermore, not all cases concerned measures for electricity from renewable sources. So in total 45 decisions were analysed. A list of all decisions taken into consideration is available in Annex 2.

[205] For a list of all decisions taken into consideration, see below Annex 2.

schemes to be compatible with the internal market.[206] This can be regarded as a success from a Commission perspective, as all Member States appear to follow the approach contained in the 2014 Guidelines.

The analysis of the State aid decisions shows that all notified national renewable support schemes were so designed that the measure is imputable to the state and thus fall within the scope of Article 107(1) TFEU.

The Commission then continues with the compatibility assessment of the measure. It seems that the Commission puts a bigger emphasis on the criteria of necessity, proportionality and transparency than on the balancing act. It does not appear to be very difficult to pass the hurdle of the balancing test for a renewable support scheme. For example, in two decisions related to aid granted for green certificates, the Commission refers to its presumption that aid to renewables satisfies the balancing test if all other criteria, e.g. no overcompensation, necessity of the aid and not hindering the beneficiary from becoming more competitive,[207] are met.[208] So the Commission approves the balancing act by referring to other common assessment requirements but does not conduct a balancing test itself.

The likelihood that the scheme is 'linked to its very objective' – increasing the proportion of green electricity and thereby helping the Member States to achieve their 2020 targets – proves to be sufficient in order to pass the test.[209] The Commission presumes that the market still fails to provide a satisfactory level of electricity from renewables, so the Member States need only provide information that, under the current market conditions, investment in renewables is unlikely.[210]

[206] See below, Annex 2.
[207] Commission, [2014] OJ/C 200/1, (n 17), para 136.
[208] Commission Decision, State aid SA.37177 (2015/NN) – Romania, C(2015) 2886 cor; Commission Decision, State aid SA.37345 (2015/NN) – Poland, C(2016) 4644 final.
[209] Commission Decision, State aid SA.44666 – Greece, C(2016) 7272 final; Commission Decision, State aid SA.36196 (2014/N) – United Kingdom, C(2014) 5079 final; Commission Decision, State aid SA.36023 (2014/NN) – Estonia, C(2014) 8106 final; Commission Decision, State aid SA.36518 (2016/NN) – Poland, C(2016) 6099 final.
[210] Commission Decision, State aid SA.36204 (2013/N) – Denmark, C(2014) 8004 corr.

The Commission declares that there is no undue distortion of competition, if the Member State can show that the undertaking is not overcompensated by applying cost control mechanisms and the other conditions.[211] In cases, where the Commission analyses the market power of the beneficiary, it comes to the conclusion that, for example, in the case of wind farm projects electricity generated from renewables is only a 'small fraction' of the total generated electricity[212] or that the increase of market share of the beneficiary is not significant.[213]

An assessment of the balancing test took place in a French case where the beneficiary was the French incumbent EDF, but the Commission declined a potential distortionary effect on competition because of legal unbundling within the EDF group.[214]

It is noticeable that the Commission, in the practical assessments, does not distinguish between the two tests. Even then, the Commission does not conduct a thorough balancing test. It refers to the presumption that aid to renewables has a limited distortionary effect if all other conditions are met (point 116 of the 2014 Guidelines), and as long as it is linked to its environmental objective there is no undue distortion of competition (point 90 of the 2014 Guidelines). This confirms the assumption that environmentally-friendly operating undertakings are favoured over undertakings generating electricity from fossil , as the Commission does not take the latter interests into account when applying the balancing test. Therefore, it is not surprising that all schemes are approved.[215]

[211] Commission Decision, State aid SA.46898 (2016/N) – France, C(2016) 8605 final; Commission Decision, State aid SA.46655 (2016/NN) – France, C(2016) 8604 final; Commission Decision, State aid SA.43780 (2015/N) – France, C(2016) 8798 final.
[212] Commission Decisions, State aid SA.39722-36 and SA.39738-42 – Germany, C(2015) 2580 final.
[213] Commission Decisions, State aid SA.38758, SA.38759, SA.38761, SA.38763, SA.38812 – United Kingdom, C(2014) 5074 final.
[214] Commission Decision, State aid SA.41528(2015/NN) – France, C(2017) 1090final; Commission Decision, State aid SA.46898(2016/N) – France.
[215] See also Rodriguez (n 12) 215–218.

6.4.6 Conclusion

Having examined both the 2014 Guidelines and the State aid decisions, it becomes clear that the overall objective of the Commission is to increase the share of renewables and achieve the Union's and Member States' 2020 targets as set out in the 2009 Renewable Directive. State aid is used to allow green electricity to grow in the market and to achieve environmental objectives.

The Commission does not appear to be concerned about favouring environmentally-friendly undertakings over fossil-fuel ones in order for them to grow and to become more mature so that over time fossil fuels will be displaced from the market.

However, the Commission does not follow a complete free-flow approach towards renewable support schemes. It limits the application of state aid rules by introducing a more market-based approach[216] and competition between different renewable technologies depending on their level of maturity. It seems to be the case that by introducing a more market-based approach through the Guidelines and steering the Member States away from FiT, the discretion that is offered under Article 3 of the 2009 RES Directive is being limited by State aid rules.[217]

The level of maturity of different technologies depends very much on the situation in each Member State and on the share of the renewables in the respective country; for example, in Italy photovoltaic energy is considered to be economically viable without incentives,[218] while in Malta solar photovoltaic and on-shore wind installations are not mature, as Malta has not achieved the necessary renewable

[216] For example, by limiting the duration of the aid to 10 years. Commission, [2014] OJ/C 200/1, (n 11) para 121. The 2014 Guidelines focus on the cost-effective delivery and generation of energy from renewables through market-based instruments, such as auctioning or a competitive bidding process, ibid. para 109; Despite recognising the success of FiT in increasing the share of energy from renewables, the Commission sets out that from the beginning of 2016 an operating aid measure is only to be compatible with the internal market if Feed-in tariffs are replaced by FiPs, ibid, para 124(a); and from the beginning of 2017 aid must be granted in a competitive bidding process, exceptions apply, ibid, para 126; however, the Commission makes exceptions from the market-based approach for small producers, ibid, paras 125 and 127; furthermore, the 2014 Guidelines only apply for new aid schemes and do not affect existing ones.

[217] Szyszczak (n 183) 616, 623.

[218] Commission Decision, State aid SA.43756(2015/N) – Italy, C(2016)2726 final.

energy targets yet.[219] Furthermore, there is no requirement for Member States to provide the same state support for different types of renewables.[220]

6.5 Conclusion

In this chapter the use of the State aid framework to achieve environmental goals has been considered.

It has been shown that European renewable energy policy has not been changed overnight but has been carefully developed over more than two decades. In order to achieve these ambitious 2020 goals the European Commission has to rely on the cooperation of all Member States.

It has been argued that the State aid framework is the only effective means to ensure that every Member State plays its part in achieving the overall 2020 targets. Due to the Union's competence restrictions, Member States have maintained discretion regarding their energy mix. The Commission has therefore no tool to achieve the same outcome with a lesser impact on the current competitive market structure. There is the danger that without guidance from the Commission, the energy market would be fragmented in the future and adverse effects on competition would be even higher.[221]

Furthermore, it has been shown that the Commission has widened the scope of application of the State aid rules. The Commission sees the State aid framework no longer just as a control mechanism in order to prevent a distortion of competition and an abuse of State aid resources, but the State aid rules have become a means to achieve public interest goals, e.g. to promote environmental protection and to influence national policies. State aid is used, on the one hand, to increase the share of electricity from renewables across the European Union, and, on the other hand, it

[219] Commission Decision, State aid SA.43995 (2015/N) – Malta, C(2016) 5423 final. In this case Malta is able to introduce FiT for smaller and FiP for larger installations.
[220] Commission Decision, State aid SA.44840 (2016/NN) - Bulgaria, C(2016) 5205 final, para 100.
[221] Commission, COM(2016) 767 final/2 (n 91).

is used in conjunction with the 2014 Guidelines to achieve a more-market based approach with regard to green electricity.

Using the State aid framework to shape energy markets is not necessarily without dangers. State aid can have a reverse effect on the achievement of a truly internal energy market with a high share of renewables.[222] However, as long as the interests of the Member States will differ from each other, [223] a harmonised Union-wide regulatory framework based on regulations or directives will be hard to achieve in practice due to Article 194(2) TFEU. [224]

In fact, it can be argued that the initial hypothesis is only partially correct. Achieving an internal electricity market and achieving the 2020 objectives by the means of State aid can only be seen at odds with each other when one just considers the status quo.

It is true that the way in which the Commission uses the State aid rules in its decisional practice may lead to a distortion of the level playing field between fossil fuels and renewable energy sources. However, at the same time, the Commission aims to protect the competitive process and the level playing field amongst generators of green energy with the introduction of a more market-based approach, which should be applied in the context of the 2014 Guidelines.

It can, therefore, be argued that the Commission does not distort competition by favouring renewable energy sources but rather, has taken the conscious decision

[222] In Case C-573/12 *Ålands vindkraft AB v Energimyndigheten* [2014] ECLI:EU:C:2014:2037 the ECJ decided that, because the Union does not provide a harmonised framework for renewable support schemes, Member States can restrict the access to their support schemes. The Court of Justice was of the opinion that 'such a territorial limitation may in itself be regarded as necessary in order to attain the legitimate objective pursued in the circumstances, which is to promote increased use of renewable energy sources in the production of electricity' ibid, para 92.

[223] For more information, see Nettesheim (n 85) para 26. Nettesheim describes the diverging interests of the Member States in energy policy, for example energy security for countries from Eastern and Central Europe and the transition from nuclear to renewables sources of energy in Germany, ibid; LpB - Landeszentrale für politische Bildung Baden-Württemberg, 'Die Energiewende 2011' <http://www.lpb-w.de/energiewende.html>.

[224] For the reasons of the limitations of the Union's competence, see above, section 6.3.2.

to reshape the current mixed fuel energy market into a green energy market, which it then ensures is subject to the competitive process.

Annex 1: Infringement proceedings concerning the implementation of Directive 2009/28/EC into national law

This table includes infringement proceedings concerning the 2009 Renewable Directive. According to Article 258 TFEU, the Commission has the right to initiate infringement proceedings if a Member State has failed to meet an obligation under the Treaty and has not fully or correctly transposed the directive into national law.[225]

Table 10 is based on publicly available information from the Commission's website.[226] As the first stage of the proceedings – requesting information from the Member State – is general confidential not all proceedings may be listed.[227]

If published, the particular legal aspect which resulted in the failure to transpose or fully implementation of Directive 2009/28/EC is given. In some cases the Commission does not provide detail information. Not all infringement proceedings must be necessarily related to green electricity, as the 2009 RES Directive contains rules governing energy from renewables in heating and transport too.[228]

Furthermore, not all infringement proceedings concern electricity from renewable sources. The list in Annex 1 includes all published infringement proceedings concerning the 2009 RES Directive and mentions the reasons if known, and highlights if the reason for the proceedings is related to green electricity. In some cases no further details are known as they have not been published by the Commission.

[225] Koenraad Lenaerts and others (ed), *European Union Law* (Sweet & Maxwell 2011), para 13-063.
[226] European Commission, 'Enforcement of laws: Latest Commission decisions on energy infringements' (n 93); European Commission, 'April infringements package: key decisions' (n 93); European Commission, 'European Commission at work - Infringement decisions' (n 93).
[227] European Commission, 'General Information' (n 91).
[228] Directive 2009/28/EC, Articles 1 and 2(f).

Table 10: Infringement proceedings concerning Directive 2009/28/EC

Decision Date (Month/Year)	Member State	Type of decision	Reason for failure to comply
April 2017	Poland	Additional Reasoned Opinion	Poland does not meet the sustainability criteria applying to biofuels in the transport sector. The Commission sent a letter of formal notice in February 2014, a Reasoned Opinion in April 2015.[229] The Commission referred the case to the Court of Justice in May 2016 but Commission adapted assessment after Poland had made changes to national legislation.[230]
April 2016	Portugal	Reasoned Opinion	Portugal does not meet the sustainability criteria applying to biofuels in the transport sector.[231] The Commission issued a letter of Formal Notice to Portugal in November 2014.[232]
September 2015	Czech Republic	Closing of the Case	The Czech Republic did not meet the requirements on access to the electricity distribution system as originally introduced by Directive 2003/54/EC but then replaced by

[229] Commission, 'Commission refers Poland to Court of Justice of the EU because of restrictions to some imported biofuels and biofuel raw materials' (Brussels, 26 May 2016) <http://europa.eu/rapid/press-release_IP-16-1824_en.htm>.
[230] Commission, 'April infringements package: key decisions' (n 93).
[231] Commission, 'April 2016: Renewable energy: Commission urges PORTUGAL to comply with the Renewable Energy Directive' (2016) <https://ec.europa.eu/energy/en/april-2016-renewable-energy-commission-urges-portugal-comply-renewable-energy-directive>.
[232] Commission, 'European Commission at work - Infringement decisions' (n 93).

Decision Date (Month/Year)	Member State	Type of decision	Reason for failure to comply
			Directives 2009/72/EC and 2009/28/EC. The Commission issued a Letter of Formal Notice in November 2013.[233]
March 2015	Spain	Letter of Formal Notice	Spain does not meet the sustainability criteria applying to biofuels in the transport sector.[234]
February 2015	Poland	Commission withdraws case from Court of Justice	Poland has agreed to transpose the obligations set out by Directive 2009/28/EC into national law. Poland notified the Commission of full transposition in January 2015 after a letter of formal notice in January 2011, a reasoned opinion in March 2012. The case was referred to the ECJ in March 2013.[235]
July 2014	Cyprus	Withdrawal	Cyprus did not fully transpose the 2009 RES Directive. A letter of Formal Notice was issued in November 2011, a Reasoned Opinion in June 2012. The case was referred to the Court in March 2013.[236]

[233] ibid.
[234] Commission, 'March 2015: Energy: SPAIN asked to correctly apply the Renewable Energy Directive' (2015) <https://ec.europa.eu/energy/node/2331>.
[235] Commission, 'February 2015: Commission withdraws Court case against POLAND for failing to transpose EU rules' (2015) < https://ec.europa.eu/energy/node/2285>.
[236] Commission, 'European Commission at work - Infringement decisions' (n 93).

Decision Date (Month/Year)	Member State	Type of decision	Reason for failure to comply
January 2014	Ireland	Referral to Court of Justice	Ireland's transposition of the 2009 RES Directive does not comply with the rules on easier grid access for green electricity, the provisions to the national 10% target for renewables in transport, and Ireland does not meet the sustainability criteria applying to biofuels and bioliquids. Commission sent a letter of Formal Notice in January 2011 and a Reasoned Opinion in June 2012.[237]
November 2013	Czech Republic	Closing of the case	Failure to notify the Commission of the National Renewable Energy Action Plan. The Commission issued a Reasoned Opinion in September 2012.[238]
May 2013	Belgium and Estonia	Reasoned Opinions	Belgium and Estonia did not inform the Commission about the full transposition of the 2009 RES Directive.[239]
April 2013	Portugal	Closing of the case	Portugal did not inform the Commission about the full transposition of the 2009 RES Directive.

[237] Commission, 'Renewable Energy: Commission refers Ireland to Court for failing to transpose EU rules' (Brussels, 21 January 2014) <https://ec.europa.eu/energy/sites/ener/files/documents/IP-14-44_EN.pdf>.
[238] Commission, 'European Commission at work - Infringement decisions' (n 93).
[239] Commission, 'May 2013: Renewable Energy: Belgium and Estonia called upon to comply with EU renewable energy rules' (2013) <https://ec.europa.eu/energy/en/may-2013-renewable-energy-belgium-and-estonia-called-upon-comply-eu-renewable-energy-rules>.

Decision Date (Month/Year)	Member State	Type of decision	Reason for failure to comply
			The Commission issued a letter of Formal Notice in November 2011.[240]
February 2013	Malta	Closing of the case	Malta did not inform the Commission about the full transposition of the 2009 RES Directive.[241] The Commission issued a Letter of Formal Notice in November 2011 and a Reasoned Opinion in June 2012.[242]
January 2013	Latvia and The Netherlands	Reasoned Opinions	The Netherlands and Latvia did not inform the Commission about the full transposition of the 2009 RES Directive.[243]
November 2012	Hungary and Luxembourg	Reasoned Opinions	Hungary and Luxembourg did not inform the Commission about the full transposition of the 2009 RES Directive.[244]
November 2012	Denmark	Closing of the case	Denmark did not inform the Commission about the full transposition of the 2009 RES Directive.

[240] Commission, 'European Commission at work - Infringement decisions' (n 93).
[241] Commission, 'Renewable energy: national legislation in 4 Member States still not in line with EU rules' (Brussels, 21 June 2012) < http://europa.eu/rapid/press-release_IP-12-640_en.htm?locale=fr>.
[242] Commission, 'European Commission at work - Infringement decisions' (n 93).
[243] Commission, 'January 2013: Renewable Energy: Commission sends Reasoned Opinions to Latvia and The Netherlands' (2013) <https://ec.europa.eu/energy/node/2315>.
[244] Commission, 'November 2012: Renewable Energy: Commission sends Reasoned Opinions to Hungary and Luxembourg' (2012) <https://ec.europa.eu/energy/node/2319>.

Decision Date (Month/Year)	Member State	Type of decision	Reason for failure to comply
			The Commission issued a letter of Formal Notice in November 2011.[245]
September 2012	Austria and Bulgaria	Reasoned Opinions	Austria and Bulgaria did not inform the Commission about the full transposition of the 2009 RES Directive.[246]
June 2012	Slovenia	Reasoned Opinions	Slovenia did not inform the Commission about the full transposition of the 2009 RES Directive.[247]
March 2012	Finland, Greece, Poland	Reasoned Opinions	Finland, Greece and Poland did not inform the Commission about the full transposition of the 2009 RES Directive.[248]
November 2011	France and Czech Republic	Reasoned Opinions	France and the Czech Republic did not fully transpose the 2009 RES Directive, including obligations on grid access for electricity from renewable sources and sustainability criteria of biofuels.[249]

[245] Commission, 'European Commission at work - Infringement decisions' (n 93).
[246] Commission, 'Renewables: Legislation in Austria and Bulgaria still not in line with EU rules' (2012) <https://ec.europa.eu/energy/sites/ener/files/documents/infringement-decisions-27-09-2012_0.pdf>.
[247] Commission, 'Renewable energy: national legislation in 4 Member States still not in line with EU rules' (n 239).
[248] Commission, 'Renewable energy: Finnish, Greek and Polish legislation still not in line with EU rules' (Brussels, 22 March 2012) <http://europa.eu/rapid/press-release_IP-12-278_en.htm?locale=fr>.
[249] Commission, 'Renewable energy: French and Czech legislation still not in line with EU rules' (Brussels, 24 November 2011) <http://europa.eu/rapid/press-release_IP-11-1446_en.htm?locale=en>.

Decision Date (Month/Year)	Member State	Type of decision	Reason for failure to comply
February 2011	Estonia and Hungary	Closing of case	Failure to notify the National Renewable Action Plan according to Article 4 of Directive 2009/28/EC The Commission issued a Formal Notice to Estonia and Hungary in September 2010.[250]
January 2011	Belgium, Latvia, Poland and Slovakia	Closing of the case	Failure to notify the Commission of the National Renewable Energy Action Plan. The Commission issued a Formal Notice to Belgium, Latvia, Poland and Slovakia in September 2010.[251]

[250] Commission, 'European Commission at work - Infringement decisions' (n 93).
[251] ibid.

Annex 2:

Table 11: Commission State aid decisions concerning renewable support schemes and applying the 2014 Guidelines for State aid on environmental protection

No	Case number(s)	Member State	Decision date	Project	Commission decision and legal basis
1	SA.34992	Finland	24.06.2015	Upfront investment, gasifier premium	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections
2	SA.36023	Estonia	25.10.2014	Change to support scheme for promotion of electricity from RES sources and from highly efficient cogeneration	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections

No	Case number(s)	Member State	Decision date	Project	Commission decision and legal basis
3	SA.36196	United Kingdom	23.07.2014	Restructuring of support schemes and the replacement of Renewable Obligations by Contract for differences	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections
4	SA.36204	Denmark	17.12.2014	Aid to photovoltaic installations and other renewable energy installations	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections
5	SA.36518	Poland	16.06.2014	Aid scheme for high-efficient co-generation operators	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014

No	Case number(s)	Member State	Decision date	Project	Commission decision and legal basis
					Guidelines apply; positive decision not to raise any objections
6	SA.37122	Denmark	17.12.2014	Aid to household wind turbines and offshore wind turbines with an experimental aspect	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections
7	SA.37177	Romania	28.07.2015	Amendments to green certificates support scheme for promoting green electricity	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections

No	Case number(s)	Member State	Decision date	Project	Commission decision and legal basis
8	SA.37232	Luxembourg	16.09.2014	Support schemes (FiT and others) for green electricity producers	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections
9	SA.37345	Poland	02.08.2016	Support system for green electricity based on certificates of origin and reduction of burden arising from certificates for energy-intensive industries	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections
10	SA.38406	Croatia	01.09.2015	Renewable support scheme	State aid within Article 107(1) TFEU but

No	Case number(s)	Member State	Decision date	Project	Commission decision and legal basis
					Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections
11	SA.38428	Finland	06.11.2014	Aid to offshore windfarm demonstration project	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections
12	SA.38758, SA.38759, SA.38761, SA.38763, SA.38812	United Kingdom	23.07.2014	Support for five off-shore windfarms	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply;

No	Case number(s)	Member State	Decision date	Project	Commission decision and legal basis
					positive decision not to raise any objections
13	SA.38760	United Kingdom	19.12.2016	Support scheme for biomass conversion of power plant	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections
14	SA.38762	United Kingdom	01.12.2015	Support scheme for biomass conversion of power plant	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections

No	Case number(s)	Member State	Decision date	Project	Commission decision and legal basis
15	SA.38796	United Kingdom	07.07.2015	Support for biomass project	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections
16	SA.38968	Greece	31.03.2016	Aid to provide transitory electricity flexibility remuneration mechanism	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections
17	SA.39347	Portugal	23.04.2015	Aid to promote technologies for renewable generation	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014

No	Case number(s)	Member State	Decision date	Project	Commission decision and legal basis
					Guidelines apply; positive decision not to raise any objections
18	SA.39399	The Netherlands	07.04.2015	Modification of renewable support scheme	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections
19	SA.39722 SA.39723, SA.39724, SA.39725, SA.39726, SA.39727, SA.39728, SA.39729, SA.39730, SA.39731, SA.39732, SA.39733,	Germany	16.04.2015	Aid for offshore windparks	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections

No	Case number(s)	Member State	Decision date	Project	Commission decision and legal basis
	SA.39734, SA.39735, SA.39736, SA.39738, SA.39739, SA.39740, SA.39741, SA.39742				
20	SA.40227	Portugal	23.04.2015	Aid for windfloat project	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections
21	SA.40349	France	10.02.2017	Support for small photovoltaic installations	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to

No	Case number(s)	Member State	Decision date	Project	Commission decision and legal basis
					raise any objections
22	SA.40713	France	10.12.2015	Support for installations producing electricity from mine gas	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections
23	SA.40912	Germany	19.04.2016	Modification of renewable support scheme	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections
24	SA.41528	France	10.02.2017	Support scheme for solar power	State aid within Article 107(1) TFEU but

No	Case number(s)	Member State	Decision date	Project	Commission decision and legal basis
					Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections
25	SA.41539	Lithuania	19.09.2016	Aid for high-efficiency cogeneration power plant	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections
26	SA.41694	Portugal	04.05.2016	Support scheme for financing renewable technologies	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply;

No	Case number(s)	Member State	Decision date	Project	Commission decision and legal basis
					positive decision not to raise any objections
27	SA.41998	Slovenia	10.10.2016	Support scheme to electricity from renewable energy sources and combined heat and power installations, and reductions from support scheme contributions for electro-intensive users	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections
28	SA.42218	Finland	15.02.2016	Operating aid for forest chips fired power plants	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to

No	Case number(s)	Member State	Decision date	Project	Commission decision and legal basis
					raise any objections
29	SA.42838	France	27.07.2016	Support for tidal energy plant	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections
30	SA.43182	Czech Republic	24.10.2019	Support to small hydro power plants	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections
31	SA.43451	Czech Republic	24.10.2016	Support to heat production from biogas	State aid within Article 107(1) TFEU but

No	Case number(s)	Member State	Decision date	Project	Commission decision and legal basis
					Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections
32	SA.43719	France	08.08.2016	Scheme to support combined heat and power plants	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections
33	SA.43751	Denmark	03.10.2016	Support for offshore wind project	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply;

No	Case number(s)	Member State	Decision date	Project	Commission decision and legal basis
					positive decision not to raise any objections
34	SA.43756	Italy	28.04.2016	Support to electricity from renewables	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections
35	SA.43780	France	12.12.2016	Support to small hydroelectric plants	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections

No	Case number(s)	Member State	Decision date	Project	Commission decision and legal basis
36	SA.43995	Malta	26.08.2016	Support to renewable energy installations	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections
37	SA.44840	Bulgaria	04.08.2016	Aid for renewable energy generation	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections
38	SA.45461	Germany	20.10.2016	Modification of renewable support scheme	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014

No	Case number(s)	Member State	Decision date	Project	Commission decision and legal basis
					Guidelines apply; positive decision not to raise any objections
39	SA.45974	Denmark	28.03.2017	Support to offshore wind farm	State aid within Article 107(1) TFEU but Article 107(3)(c) TFEU and 2014 Guidelines apply; positive decision not to raise any objections
40	SA.46259	France	10.02.2017	Hydropower support scheme	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections

No	Case number(s)	Member State	Decision date	Project	Commission decision and legal basis
41	SA.46655	France	12.12.2016	Aid for onshore windfarms	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections
42	SA.46898	France	12.12.2016	Support scheme for electricity generation installations using biogas	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections
43	SA.47205	France	05.05.2017	Support scheme for onshore wind production	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014

No	Case number(s)	Member State	Decision date	Project	Commission decision and legal basis
					Guidelines apply; positive decision not to raise any objections
44	SA.47267	United Kingdom	16.02.2017	Amendment to Contract for differences scheme	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections
45	SA.47623	France	05.05.2017	Support scheme for small-scale photovoltaic installations in buildings	State aid within Article 107(1) TFEU but Article 107(3)(c)TFEU and 2014 Guidelines apply; positive decision not to raise any objections

Chapter 7

Concluding chapter

7.1. Findings and policy recommendations

This thesis has sought to explore the Union's and national approaches to essential economic service post liberalisation and the role of State aid to achieve and protect public interest objectives. In doing so, it has analysed the European and national legal frameworks governing the concepts of essential services across different sectors, with a particular focus on telecommunications, postal services and electricity.

Liberalisation of network industries has been a European policy objective for decades. However, this created tensions between the opening-up of the markets and the promotion of competition, on the one hand, and consumer protection, on the other hand. In order to ensure access to essential services and avoid social exclusion for vulnerable groups of consumers, several concepts, such as Services of General Interest (SGI), Services of General Economic Interest (SGEI), Public Service Obligation (PSO) and Universal Service Obligation (USO) were introduced.

However, these concepts are surrounded by a lack of clarity. The thesis starts in Chapter 2 by analysing the underlying European regulatory framework of the four concepts. It explains the different concepts and assesses the relation between them. It shows that the lines between the different concepts have been blurred, and in many cases no distinction between the concepts is made. However, this chapter identifies that the concepts cannot be used interchangeably. It argues that, according to the assessment of the EU legislation, the concept of Public Service Obligation is to be understood in a broader and narrower sense – PSO Type I and PSO Type II. PSO Type I refers to broader public interest objectives (e.g. environmental protection), while the concept of PSO Type II is used in relation to services that provide consumers with the possibility to use them. The other three concepts (SGI, SGEI and USO) also

relate to the provision of access to essential services, with USO being the narrowest of them.[1] However, the findings show the differentiation made between SGEIs, USOs and PSO (Type II) in the legislation, does not appear to be important in practice. A simplification of the framework is therefore suggested: PSO (Type I), SGI, SGEI and USOs.[2] This would add clarity and legal certainty.

The undifferentiated use of the concepts has the practical effect whereby the Commission introduces the *Altmark* test into the compensation assessment of SGEIs. Nevertheless, the majority of cases do not meet the *Altmark* conditions, and the Commission then continues with the compatibility assessment under the State aid framework. The compensation measure is therefore subject to the Commission's scrutiny as the Member States are required to notify the Commission pursuant to Article 108(3) TFEU. The Commission can thereby ensure that a potentially distortionary effect of the measure is kept to a minimum.

Furthermore, in Chapter 3, a comparative case study of the concept of Universal Service Obligation in the postal service sector and in telecommunications at European and at national level (Belgium, France, Germany and the United Kingdom) based on an extensive comparative legal analysis and qualitative survey data has shown that the concept of USOs is partially dated, at least in these two communications sectors.

On the one hand, the demand for traditional universal postal services, e.g. letters and traditional telecommunications services, such as public phone boxes, has declined due to the rapid development and increasing take-up rate of new communication services (mobile phone services and the Internet) and, on the other hand, revenues in other segments of the sector have declined due increasing competition. This is a potential threat to the sustainability of essential services in post and telecommunications.

In order to guarantee access to essential services for all consumers at an affordable rate, the evolving nature of the concepts has to be taken into account, and the scope of universal service must be adjusted to the change in consumer

[1] For an overview of the relation between the different concepts, see Chapter 2, Figure 2.
[2] For the simplified framework, see, Chapter 2, Figure 3.

behaviour which is influenced by modern technology. So far, both the Postal Services Directive and the Universal Service Directive set out a comprehensive legal framework governing USOs, leaving Member States with a low level of discretion. However, it appears to be time to introduce more flexibility and allow the Member States to adopt the nature of universal services to their individual needs depending on societal, geographical and technological circumstances.

This may mean that an alternative, technology-neutral approach to universal service – one that even combines postal services and telecommunications – is necessary. It should also be borne in mind that the concept of universal service was established to create a safety-net and to prevent social exclusion for certain groups of consumers. The reduction in scope of universal service is a politically-sensitive, but necessary, topic, as, without significant changes to it, the sustainability of universal service will be at risk in the long term.

It was shown that the tension arising from opening up the markets, and the protection of essential services, may put a significant burden on the universal service provider (USP), as it can create a 'cherry-picking' situation, whereby the USP is left with less-profitable consumers, leaving the undertaking unable to cover the costs for the delivery of universal service. Hence, universal service providers in postal services and telecommunications often rely on external compensation to finance the provision of USOs.

Both the Universal Service Directive and the Postal Services Directive contain sector-specific compensation mechanisms that stipulate the requirements in great detail. However, Chapter 4 has identified that the State aid framework, as laid down in Article 107 TFEU, is used to compensate the providers for their additional costs instead of relying on the rules contained in the European Directives, which put a strong emphasis on the protection of USOs.

By using the State aid regime, the Commission maintains control over the Member States' discretion towards the protection of universal service. Even though the reliance on State aid allows the Commission to ensure the service provider is not overcompensated, and that the compensation does not have a distortionary effect on competition, it is not suitable to protect the concept of universal service.

External financing of service providers for the provision of essential services may prevent a level playing field between the designated service provider and alternative providers operating in the market. Under EU law, payments are considered to be compatible with the internal market if they fulfil the four *Altmark* conditions, in which case they constitute a pure compensation measure, or if they fall under one of the categories in Article 107(2-3) TFEU or are justified under Article 106(2) TFEU.

Even though the *Altmark* test was initially established for PSO in the regional bus transport sector, the General Court and the Commission extended it to SGEIs. The research of this thesis has shown in Chapter 5 that *Altmark* is not suitable for universal application. To increase its applicability, the General Court relaxed the criteria. Nonetheless, the Commission maintained its strict approach towards the *Altmark* test, which did not have the desired effect of minimising the amount of State aid awarded to SGEI providers, at least in postal services. As such, the undertaken case study in postal services has shown that the vast majority of compensation measures constitute State aid within Article 107(1) TFEU and is then justified under Article 106(2) TFEU, which established requirements proved to be of a lower threshold. In 2012, the Commission issued a new SGEI Framework in order to increase competition. The 2012 SGEI Framework set out new conditions for Article 106(2) TFEU, which only partially correspond with established case-law and, in particular, a newly-introduced public procurement element and efficiency incentive which appear to be contentious. It was identified that the effect of the SGEI Framework is limited, e.g. in postal services, and does not reduce the amount of State aid awarded by Member States to undertakings for discharging SGEIs. It is therefore suggested that, in order to limit State aid, it is time to turn away from a general cross-sectoral approach and towards a rather individual approach – one that is able to reflect sector-specific circumstances.

Chapter 6 evaluates the use of the State aid regime in order to promote electricity from renewable sources. During the liberalisation process of the electricity market, the awareness of environmental protection has also increased over time. The newly-established Article 194 TFEU emphasises the correlation between the

creation of a functioning electricity market and environmental protection, but the Union's competence is restricted in the field of energy, which makes it difficult to influence the Member States' energy mix directly. The Commission therefore relies on the State aid regime as an alternative and indirect means to ensure that the Member States pursue the 2020 targets set out in Directive 2009/28/EC. In doing so, the Commission uses the State aid framework as a harmonisation instrument. Even though the objective 'a greener electricity market' is in the public interest, State aid must be used cautiously. In order to minimise the distortionary effect of State aid, the Commission produced *Guidelines on State aid for environmental protection and energy 2014-2020* to introduce a more market-based approach.

This chapter has shown that the Commission intends to ensure competition only between producers of electricity from renewables, but makes the deliberate decision to allow the favourable treatment of renewables over traditional sources of energy.

Ultimately, the following key points can be drawn from this thesis:

- The current approach towards access to essential services is partially dated.
- State aid is used as a regulatory tool to achieve public policy objectives, but on a long-term basis this may not be successful.
- Therefore, it is recommended that a more sector-specific approach towards essential services be followed. This would enable the Commission to achieve the difficult balance between securing public policy objectives and competition policy goals.

7.2. Future research

The thesis examined, from different perspective, the access to essential services and the role of State aid in financing such services.

It has been stated in the Introduction (Chapter 1) that one of the limitations is the small number of Member States used for the case study in Chapter 3, and the

national approaches towards the implementation of the European legislative framework into national laws.

The role of SGEIs in Eastern and Southern European Member States is still under-researched. The needs of these Member States and the existing conditions must therefore further addressed and analysed. The consumer behaviour and demand often differs from Western European Countries, for example in postal service, the letter post volume and the parcel segment are lower.[3]

This research would complement the detailed policy framework and further substantiate the scope of universal service in post and telecommunications in the future. An extension of the case study would, therefore, contribute to the overall understanding of the concepts and their importance for the whole of the European Union.[4] Chapter 3 can be extended by undertaking further empirical research using online surveys addressed to (i) more companies operating in postal service and telecommunications, and (ii) end-users of such essential services across Member States. The survey for the companies would be based on the one used in this thesis, but would reach out to designated service providers in Eastern European and Southern European Member States as well as more alternative operators. The survey, addressed to end-users, would focus on issues related to those services that users consider to be essential, and the quantity and quality of those services, to evaluate the actual needs of the users in order to design European policy frameworks for universal service in post and telecommunications or a combined framework for both services. Such surveys have been conducted, but were limited to particular Member States (e.g. Portugal and Romania) and therefore do not allow a general conclusion to be drawn from them. In 2016, the European Regulators Group for Postal Services

[3] Alex Kalevi Dieke and others, 'Main Developments in the Postal Sector (2010-2013): Study for the European Commission, Directorate General for Internal Market and Service' (WIK-Consult, Final Report 2013) 167, 223-5 <https://publications.europa.eu/en/publication-detail/-/publication/2a435533-0c31-40a3-b5a4-e3d26b7c467f>.

[4] See, for example, Liszt and Malnar who point out that the concept of SGEI is lacking clarity and suffers from inconsistencies which creates legal uncertainty. Maijana Liszt and Vlatka Butorac Malnar, 'SGEI in Croatia: The Legal Framework for Economic Necessity' (2016) 15 EStAL 622.

has pointed out that there is a demand for 'standardized user surveys and a standardized research methodology' so that general conclusions can be drawn.[5]

Another potential research project relates to the State aid case study undertaken in Chapter 5 of this thesis. It would be interesting to extend the case study related to the financing of Services of General Economic Interest to other sectors, e.g. waste, energy, land and air transport, to analyse whether the Commission has applied a similar approach as in postal services. It has been shown that the Commission's divergence from established EU law has not reduced the amount of State aid awarded to USPs in post.

The transport sector will be particularly interesting as the initial *Altmark* judgment concerned the financing of PSO in the regional public passenger bus transport sector. External compensation for the provision of PSOs constitutes State aid if the *Altmark* criteria are not fulfilled but can then be justified. In the transport sector, Article 106(2) TFEU does not apply, but State aid is compatible with the internal market if Article 93 TFEU is satisfied. However, for passenger transport by rail,[6] for example, such an assessment may prove to be difficult, as there may only be a few State aid decisions available and from these it may not be possible to draw a general conclusion. The reason for this is, that, according to Article 9(1) of Regulation (EC) No 1370/2007, a Member State is exempted from the pre-notification requirement as stated in Article 108(3) TFEU if the measure complies with the 2007 Regulation. In such a case, the compensation is regarded as compatible with the internal market.[7]

Chapter 5 has highlighted that the Commission's strict application of the *Altmark* test resulted in only very few compensation measures not satisfying the

[5] European Regulators Group for Postal Services (ERGP), 'ERGP report Universal Services in light of changing postal end users´ needs' (21 December 2016) 38 <http://ec.europa.eu/growth/sectors/postal-services/ergp_en>.

[6] Union-wide rail passenger services were open to competition in 2010. Not all national markets for passenger transport are fully open yet. According to Article 8 of Regulation (EC) No 1370/2007 as amended by Regulation (EU) 2016/2338 of the European Parliament and of the Council of 14 December 2016 Member States must fully open their domestic passenger transport markets to competition by December 2019. Regulation (EU) 2016/2338 will enter into force on 24 December 2017, Article 2 of Regulation (EU) 2016/2338.

[7] No amendment is made to Article 9 of the 2007 Regulation.

State aid criteria under Article 107(1) TFEU; however, more quantitative empirical legal research is needed to assess the 'effectiveness' of the *Altmark* test in order to reveal gaps, and thereby develop a method of ensuring the delivery of essential services which will have only a very limited distortionary effect on competition.[8]

Chapter 6 evaluated the use of the State aid regime for the promotion of electricity from renewable energy sources. However, in order to tackle climate change effectively, it is not enough just to increase the share of green electricity. Hence, the 2009 Renewable Directive sets out the mandatory targets to achieve: (i) an overall share of 20% of energy from renewable sources which, in addition to green electricity, also includes energy from renewable sources for heating and cooling;[9] and (ii) a 10% share of energy from renewable sources in the transport sector (e.g. through the use of biofuels) by 2020.[10] While the share of electricity from renewable sources has increased significantly in many Member States due to specific support schemes, the transport sector and the heating and cooling sector is underperforming.[11] The Commission emphasised that Member States have to do more to comply with the targets set out in the 2009 Renewable Directive. The importance of external financial support schemes, e.g. for renovation of buildings, will further increase.[12]

Finally, therefore, it would be interesting to assess the role of State aid and compare it with the outcome in Chapter 6, in order to conclude whether the objective of achieving a well-functioning internal energy market is 'temporarily' suspended, and whether the Commission is willing to accept a greater level of distortion of competition in return for increasing environmental protection – and to

[8] For more information on the influence of empirical legal research on policy-making, see Martin Partington, 'Empirical Legal Research and Policy-making' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010).
[9] Increasing the share of energy from renewables in the heating and cooling sector is essential to meet the 2020 target. James Crisp, 'EU will fail Paris climate challenge unless it tackles heating and cooling' (21 June 2017) <https://www.euractiv.com/section/energy/news/eu-will-fail-paris-climate-challenge-unless-it-tackles-heating-and-cooling/>.
[10] Directive 2009/28/EC, Recital 13 and Article 5(1).
[11] Commission, 'Towards reaching the 20% energy efficiency target for 2020, and beyond' (1 February 2017) <http://europa.eu/rapid/press-release_MEMO-17-162_en.htm>
[12] ibid.

secure its self-proclaimed 'global climate change leadership',[13] particularly now that, the United States has announced its intention to withdraw from the Paris climate change agreement.[14]

[13] Charles F. Parker and Christer Karlsson, 'Assessing the EU's global climate change leadership: From Copenhagen to the Paris agreement' (1 March 2017) <http://blogs.lse.ac.uk/europpblog/2017/03/01/climate-change-from-copenhagen-to-paris/>.
[14] Michael D Shear, 'Trump will withdraw U.S. from Paris Climate Agreement' (1 June 2017) <https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html>.

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Statement

This thesis includes material that has previously been published in jointly-authored reports and journal articles.

Parts of Chapter 3 are based on a joint Report with Professor Michael Harker and Professor Catherine Waddams conducted for the Centre for Regulation in Europe (CERRE),[967] and a jointly-authored literature review with Dr Richard Cadman, Professor Michael Harker and Professor Catherine Waddams for the Office of Communications (Ofcom).[968]

Chapter 4 is joint work with Professor Michael Harker, which has been recently published in the peer-reviewed European Competition Journal.[969]

Kreutzmann-Gallasch A, Cadman R, Harker M and Waddams C, 'Criteria to define essential telecoms services' (Literature Review for Ofcom, November 2013) <http://competitionpolicy.ac.uk/documents/8158338/8264594/Ofcom+Lit+Review+Essential+Services_final_updated+title.pdf/68cfe355-a5dd-4450-a982-a3455fbe1077>:

> I contributed to the grant application of this project and was the principal investigator. I therefore collected and analysed a substantial amount of literature for the report. A significant part of the report was written by me. The conclusions are based on joint discussions between the authors. Overall percentage of work 70%.

[967] Michael Harker, Antje Kreutzmann and Catherine Waddams, 'Public service obligation and competition' (February 2013) <http://www.cerre.eu/sites/cerre/files/130318_CERRE_PSOCompetition_Final_0.pdf> accessed 10 January 2014.

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[969] Michael Harker and Antje Kreutzmann-Gallasch, 'Universal service obligations and the liberalization of network industries: Taming the Chimera?' (2016) 12(2-3) European Competition Journal 236.

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> I collected a substantial part of the literature (at least 50%) for the literature review in section 2 of the Report. The literature review was then written by the other co-authors. I collected the data for section 3 and wrote up most of this section, except for section 3.5.1., which was written by Michael Harker.
>
> The questions for the surveys of the Report were compiled in joint discussions. I collected the responses to the questionnaire. This section was then written up by Catherine Waddams.
>
> Section 5 was written by Michael Harker.

Harker M, and Kreutzmann-Gallasch A, 'Universal service obligations and liberalization of network industries: taming the Chimera' (2016) 12 European Competition Journal:

> Each author contributed equally to the paper. The literature review underlying this research has been undertaken jointly. The legal analysis was discussed between the authors throughout the entire process of writing this paper.

List of Publications

Harker M, and Kreutzmann-Gallasch A, 'Universal service obligations and liberalization of network industries: taming the Chimera' (2016) 12 European Competition Journal 236.

Kreutzmann-Gallasch A, 'Competition in the UK postal sector: Universal service on the rocks?' (Winter 2014) CCP Research Bulletin, Issue 28, 6-7, <http://competitionpolicy.ac.uk/publications/ccp-research-bulletin>

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