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Seeking the EU 'Consumer' in Services of General Economic Interest (with a focus upon the Energy sector)

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I. INTRODUCTION

From a(n EU) Consumer Law perspective, we would typically understand the 'consumer' as a private, human (ie natural, non-body corporate) person who purchases goods or services for purposes outside their business, trade or profession.[1] Yet, as will become clear in what follows, case law and legislation in the field presently under consideration shows an often bewildering range of usages which may overlap and interact in a difficult, or at least unclear, fashion. Traditionally, many of the sectors covered by the idea of providing a service of general economic interest (SGEI) have fallen within the ownership, control or strong oversight of the state and public bodies: telecommunications, railways, postal services, electricity and gas all spring to mind as key, and often complex, illustrations. Yet movements to privatise and/or liberalise many such sectors have introduced more familiar EU law ideas

[1] See, among numerous possible examples: Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29 ('Unfair Terms in Consumer Contracts Directive'), Art 2; Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12 ('Consumer Sales and Guarantees Directive'), Art 1(2)(a); and Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights [2011] OJ L304/64 ('Consumer Rights Directive'), Art 2(1).

of free trade and competition, and have brought with them ideas of consumer welfare familiar to competition lawyers, with the concomitant advent of service recipients as customers and/or consumers. Alongside all of this remains the issue of how to ensure access to such goods and services once state control over their provision has been loosened and (largely) left to oversight by independent regulators. The combination of these goals and challenges has created an often difficult web of legislative provisions, lines of case law and guidance documents from national and European executive bodies, all of which form the substance of much of what will be discussed below.

It is noteworthy, however, that the focus of much of this activity has been upon the restructuring and reorganisation of such sectors, while paying rather less attention—at least originally—to the position and role of these 'new' consumers, their potential problems and contributions. Perhaps the overriding theme of the present paper is the general, structural presumption of much of what one might call 'traditional' EU Law that the interests of consumers will best be advanced via the processes of liberalisation and competition,[2] *unless* it can clearly be shown otherwise and that the pursuit of 'other' goals beyond competition, free trade and the like is in itself justifiable. Over time, various legislative developments have made inroads into this presumption. The purpose here is not to provide an exhaustive coverage of all of those situations where SGEI issues have concerned consumers or of the case law of the EU courts and decisional practice of the Commission on these topics; rather, first, terminological difficulties will be highlighted, followed by an attempt to trace developments in the energy sector in particular, with reference to where the EU law analysis has traditionally located consumer-related arguments and issues. This leads into consideration of how these topics have made their way to the EU level in Treaty amendments, case law and

[2] eg G Howells and S Weatherill, *Consumer Protection Law*, 2nd edn (Aldershot, Ashgate, 2005) 1–8.

particularly a raft of legislation concerning the Internal Energy Market (IEM) and related developments; finally, the specific example of energy retail price regulation is summarised, before some concluding thoughts are offered about the image(s) of the consumer which have emerged from the discussion. Those images are multi-faceted, sometimes conflicting in how they are portrayed, and may be valued for their own intrinsic worth but also relied upon to paint pictures with a rather broader brush on the national canvas, at least from time to time.

II. TERMINOLOGY, OVERLAPS, (LACK OF) CLARITY

One of the great difficulties presented by the combination of these two broad areas of EU law is the array of terminology used by courts, legislators and commentators, often in a mutually inconsistent or overlapping fashion. A myriad of Venn diagrams might be required to illustrate how these various terms might fit together or sit alongside one another, but this is not the place to offer such a swathe of diagrams. Rather, there follows a small sample of these terminological problems, drawn from various areas/sectors which have sought to address the position of consumers in the context of SGEI. These are places where the 'consumer' appears and: provokes intervention for them and them alone; acts as a basis for other policies, expanding out to 'protect' others; and/or is then hidden, subsumed or assumed within other terms, rules and goals.

Competition law has typically distinguished between consumers and their welfare,[3] on the one hand, and those undertakings which compete with each other to supply consumer demand, on the other. On occasion, competition law analysis uses the term 'consumer'

[3] While acknowledging that there is wide scope for disagreement and nuance about what exactly 'consumer welfare' means and how best it might be pursued. For discussion, see the contribution of Albertina Albors-Llorens and Alison Jones in this volume, and the references cited therein.

broadly to encompass all those who buy products or services, which is more akin to the more generic term 'customer'. At times, the relatively weak position of small and medium sized enterprises (SMEs) vis-à-vis larger undertakings has led to more lenient treatment under Competition Law for such entities, in the expectation that an enhancement in competition between producers might be enhanced on grounds of quality (of product or service), innovation, etc, or because it would maintain competition between supply chains. Certain national consumer laws have taken this insight concerning the weaker position of SMEs as grounds for extending the protection of Consumer Law to cover SMEs as well as traditional 'consumers'.[4] Where issues concerning SGEIs arise in the context of Competition Law—for example, attempts to reserve capacity on natural monopoly transmission lines or interconnection cables[5] or to conclude long-term power or gas purchase agreements[6]—then these notions of consumer welfare in the Competition Law sense (of maximising economic efficiency so as to generate a consumer surplus (ie gains which are shared fairly with consumers)) may need to be weighed against the pursuit of other goals of potential importance to consumer interests (such as ensuring constant and reliable energy supplies[7] to all, or at least vulnerable, customers).

In the energy sector (which will be discussed in more detail in section III, below), the early focus was upon customer choice as one of the key drivers of developing a well-

[4] See eg in the present context the extension in UK telecoms law of various consumer protection provisions to 'small business customers' (ie with 10 workers or fewer): General Conditions of Entitlement (GC) ss 9.3(a) and 14.

[5] eg Commission, 'UK-French electricity interconnector opens up, increasing scope for competition' (IP/01/341, 12 March 2001); Case C–17/03 *Vereniging voor Energie, Milieu en Water v Directeur van de Dienst uitvoering en toezicht energie* [2005] ECR I–4983 and the discussion in K Talus and T Wälde, 'Electricity interconnectors in EU law: energy security, long term infrastructure contracts and competition law' (2007) 32 *European Law Review* 125.

[6] eg Commission Decisions: *Electricidade de Portugal/Pego* (Case IV/34.598) Commission Decision [1993] OJ C265/3; and *Synergen* (Case COMP/E-4/37.732) Commission Decision [2002] IP 02/792; and discussion in K Talus, 'Long-term Natural Gas Contracts and Antitrust Law in the European Union and the United States' (2011) 4 *Journal of World Energy Law and Business* 260 and A Johnston and G Block, *EU Energy Law* (Oxford, Oxford University Press, 2012) paras 8.121–8.171.

[7] See Talus and Wälde (n 5) and K Talus, 'Long-term Gas Agreements and Security of Supply – Between Law and Politics' (2007) 32 *European Law Review* 535.

functioning Internal Energy Market (IEM).[8] More recently, the potential vulnerability[9] of some customers[10] has been acknowledged on various grounds (isolated locations, connection only to the electricity grid and not the gas network, etc) and the idea of 'Energy' and/or 'Fuel poverty'[11] has gained significance, as has the question of 'critical services' needing to continue to function in the event of a supply crisis. Some of these categories almost exclusively contain persons we would comfortably identify as 'consumers' (particularly the first two listed in the preceding sentence), while the providers of critical services will not themselves be consumers and yet will have claims to priority supply because of their need to provide goods and services for various key purposes (healthcare, heating, transportation),

[8] eg the lengthy debates over the definition of 'eligible customers' in the 1st Package IEM Directives in 1996 and 1998: see A Johnston, 'Maintaining the Balance of Power: Liberalisation, Reciprocity and Electricity in the European Community' (1999) *Journal of Energy and Natural Resources Law* 121, 125–27 and the references cited therein.

[9] On the notion of the 'vulnerable consumer' in EU Law, see Directive 2005/29/EC of the European Parliament and of The Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22 ('Unfair Commercial Practices Directive'), Art 5(3) and Rec 34 to the Consumer Rights where certain indicia (eg age, physical or mental infirmity) of vulnerability are identified; and see further the contribution of Norbert Reich in this volume.

[10] See the Second Package of EU IEM 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 [2003] OJ L176/37 ('Electricity Directive') and Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas [2003] OJ L176/57 ('Gas Directive'), under Art 3(5) of the former and Art 3(3) of the latter, which both refer to 'vulnerable customers' and indicate certain measures to protect such customers that might be 'appropriate'; in the 3rd Package, this protection is enhanced to an obligation on Member States to take such appropriate measures (see Arts 3(7) and 36(h) of the Third Electricity IEM 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 Arts 3(3)–(4), and 40(h) of the Third Gas IEM 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), while leaving it up to Member States to define the concept of 'vulnerable customers' for itself.

[11] See Rec 50 to the Third Electricity IEM Directive (n 10) and Rec 53 to the Third Gas IEM Directive (n 10). For discussion of the issue in the UK context, see B Boardman, *Fixing Fuel Poverty: Challenges and Solutions* (London, Earthscan, 2010); and for a broader economic overview, see L Chester, 'Energy Impoverishment: Addressing Capitalism's New Driver of Inequality' (2014) 48 *Journal of Economic Issues* 395. Note that while much (press) coverage on rising electricity prices is dedicated to blaming these on various environmental measures like the EU Emissions Trading System or subsidies to support the deployment of renewable energy generation, in other parts of the world the advent of renewables is viewed as a potentially vital contribution to ameliorating and even removing energy poverty: eg K Steiner-Dicks, 'The Socio-economic Power of Wind Energy in Remote Areas' (19 January 2015) <http://social.windenergyupdate.com/emerging-markets/socio-economic-power-wind-energy-remote-areas> accessed 6 April 2015, focussing upon South Africa and Latin America; and Out-Law, 'Renewable energy 'generating net financial benefit for South Africa', says study' (30 January 2015) <www.out-law.com/en/articles/2015/january/renewable-energy-generating-net-financial-benefit-for-south-africa-says-study> accessed 6 April 2015.

many of which are crucial because of the consumer's vital requirements, even though others will also benefit from such preference being given to critical services.

In the telecommunications sector, terms such as 'consumer' have regularly overlapped with other notions such as:

- 'subscribers'[12] (which could obviously encompass consumers who pay for their services via subscription);
- 'customers'[13] (including those providing telecoms services to those downstream, who pay for access to spectrum, wires/cables and the like: these intermediaries (for want of a better term) are clearly customers of the network owner); and
- 'end-users'[14] of telecoms services (which, again, is a category obviously covering both businesses and households, and thus consumers).

More broadly, across what is often called the 'utilities sector', various terms remain in use which hark back to earlier approaches to the provision of such services by the state or through state-owned or controlled entities, or to the transition from that situation to one of gradual liberalisation and privatisation. Thus, the very notion of a 'utility company' is closely connected to the idea of the supply of essentials to customers, such as water, light and heat; while the idea of 'Public Service Obligations' (PSOs) connotes the public importance of the provision of such goods and services, the fact is that the public authorities (ie government or similar) have specified these obligations, and that duties are imposed upon suppliers of such essentials to ensure that they are provided. These terms—'utility' and 'PSO'—are themselves

[12] Art 2 of the Electronic Communications (Universal Service) Order 2003/1904: 'any person who is a party to a contract with the provider of a public electronic communications service for the supply of such service'.
[13] See GC Part I, which covers those to whom a network or service is provided.
[14] Communications Act 2003, s 151 clearly covering customers of the provider *and* those who are authorised by a customer to make use of the service (eg family members in a household).

regularly a cover or proxy for consumer interests, while also containing the potential to be used for the achievement of other goals less obviously directed towards the welfare and benefit of all or even any consumers.

Finally, some regulatory regimes make a point of using broader categories than just 'consumers' when laying out the duties to be performed by a national regulatory authority (NRA). Thus, under its mandate the UK's Office of Communications (Ofcom)—created[15] to be a converged regulator of the electronic communications industries—is required to further both the interests of 'citizens in relation to communications matters' and of 'consumers in relevant markets, where appropriate by promoting competition'.[16] While this formulation clearly differentiates between consumers and citizens, Ofcom's mission statement sought to combine the two: 'Ofcom exists to further the interests of citizen-consumers through a regulatory regime which, where appropriate, encourages competition',[17] an approach based upon the idea 'that every individual affected by the communications sector and thus its regulation is both a citizen … and a consumer'.[18] The problems that might arise from this pair of duties and their potential inconsistency *inter se* (including the risk that too strong a focus on investment and competition might lead to neglect of the broader interest of citizens) were much debated when the Communications Bill faced Parliamentary scrutiny during 2002 and 2003,[19] and have also eventuated in practice in some cases.[20] The details listed in the Communications Act 2003 concerning Ofcom's duties are extensive. There are:

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[15] By the Office of Communications Act 2002.

[16] Communications Act 2003, s 3(1). See the discussion by Gareth Davies elsewhere in this volume, which touches upon the notion of the (EU) consumer treated purely as an individual actor and party to transactions, rather than addressing the broader, collective, societal interests that might be embodied in thinking of the individual as a citizen.

[17] Ofcom Annual Plan 2005/6, 9.

[18] Ofcom, *A Case Study on Public Sector Mergers and Regulatory Structures* (2006) <www.ofcom.org.uk/files/2010/07/public_sector_merger_case_study.pdf> 66, accessed 6 April 2015.

[19] ibid 4, 8, 17 and 44–45.

[20] In particular in the conduct of Ofcom's periodic reviews of Public Service Broadcasting across the UK: access to the relevant documentation is available at: <http://stakeholders.ofcom.org.uk/broadcasting/reviews-

- the 'things which … Ofcom are required to secure' (section 3(2));[21]
- the things to which it must have regard in all cases (*viz*. transparency, accountability, proportionality, consistency and need-targeted: section 3(3));
- those to which it must have regard where they appear relevant (section 3(4)(a)–(m)); and
- those specifically relevant to fulfilling the interests of consumers (choice, price, quality of service and value for money: section 3(5)).

Where such duties may conflict *inter se* in any given case, the 2003 Act instructs Ofcom 'to secure that the conflict is resolved in the manner they think best in the circumstances' (section 3(6)), subject to a requirement to give priority to some specific duties over others (in particular, those duties arising under EU Law (sections 4 and 25)). The wide range of matters to be taken into account in fulfilling its functions and meeting its various duties create difficult challenges—both for Ofcom in performing these functions and for those affected by Ofcom's approach—not least since this myriad of overlaps and interactions, even in the definitional question of whose interests should be upheld, protected and/or advanced (consumers or citizens), makes the formulation of concrete arguments difficult. This brief excursion into some detail concerning the UK's telecoms rules hopefully provides an idea of the way in which arguments about the goals to be pursued by regulatory regimes intended to secure the provision of SGEIs become embodied in the legislative instruments which then guide and govern such NRAs when carrying out their functions. This point about the content

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investigations/public-service-broadcasting/psb-review-3/> accessed 14 April 2015. At the time of writing, Ofcom's consultation has closed on its Third Review on this subject and a Report is awaited.

[21] A long list, including: optimal use of the spectrum (s 3(2)(a)); availability of a wide range of various services across the UK (s 3(2)(b) and (c); and maintaining a plurality of providers (s 3(2)(d)).

and consistency of legislative instruments (both internally and *inter se*) is one to which we will return below in the energy law context (section III.D below).

Others contributions to this volume have looked in detail at various elements which address some of these questions: I highlight these questions of terminology here because their challenges and uncertainties have been witnessed in some aspects of utilities liberalisation, PSOs and SGEI. Uncovering the very notion of the 'consumer' and how (if at all) it is used in this area is thus already something of a tricky challenge on many issues; and that is before one starts to examine both the similarities and differences between the various sectors which might fall under the heading of SGEI, with each of their different and difficult balancing acts between various competing goals and interests. Of necessity here, I will focus mainly on one of these sectors—energy—but will endeavour in places to make cross-references to other sectors where these may prove illuminating.

III. SERVING THE 'BEST INTERESTS' OF CONSUMERS

A. SGEIs

First, however, a prior question needs to be addressed: what counts as a Service of General Economic Interest under EU Law?[22] The term appears in Article 106(2) TFEU, which provides that:

[22] For general terminological discussion, see U Neergaard, 'Services of General Economic Interest: The Nature of the Beast' in M Krajewski and others (eds), *The Changing Legal Framework for Services of General Interest in Europe: Between Competition and Solidarity* (The Hague, TMC Asser Press, 2009) ch 1.

> Undertakings entrusted with the operation of services of general economic interest … shall be subject to the rules contained in this Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

In its earliest paper on the subject in 1996,[23] the Commission defined SGEIs as 'market services which the Member State subject to specific public service obligations by virtue of a general interest criterion' (as distinct from the broader notion of services of general interest (SGIs), which encompass both market and non-market services). In 2000, it added the point that SGEIs are 'different from ordinary services in that public authorities consider that they need to be provided even where the market may not have sufficient incentives to do so.[24] This is not to deny that in many cases the market will be the best mechanism for doing so'.[25]

Such services have been said to involve characteristics of continuity, universality and equality, and for some they also concern issues of transparency and even affordability.[26] The last of these elements has often been viewed as controversial in some contexts, although

[23] Commission Communication, 'Services of general interest in Europe' [1996] OJ C281/03.
[24] On which see: D Helm, J Kay and D Thompson, 'Energy Policy and the Role of the State in the Market for Energy' in P Stevens (ed), *The Economics of Energy*, vol 2 (Cheltenham, Edward Elgar, 2000) 415; and L Hancher and S Janssen, 'Shared Competences and Multi-Faceted Concepts – European Legal Framework for Security of Supply' in B Barton and others (eds), *Energy Security – Managing Risk in a Dynamic Legal and Regulatory Environment* (Oxford, Oxford University Press, 2004) 87–88.
[25] Commission, 'Services of General Interest in Europe' (Communication) COM (2000) 580 final, s 14.
[26] Case C–265/08 *Federutility v Autorità per l'energia elettrica e il gas* [2010] ECR I–3377, Opinion of AG Ruiz Jarabo Colomer, paras 54–55: this led him to conclude (para 56) that 'the objective of preventing undesirable and disproportionate price rises which would be detrimental to consumers constitutes grounds for 'general economic interest' which, provided [that Directive 2003/55/EC's] other conditions are met, would justify public intervention in respect of prices for the supply of natural gas'. We will return to this question of affordability and 'reasonable prices' below (section III.D.i.b).

affordability consistently appears in definitions of universal service obligations (USOs),[27] which are typically viewed as a 'classical case' of defining an SGEI mission.[28] These attempts at generalising the criteria are clearly ripe to cover what one might term 'conventional utilities' such as the supply of electricity (*Almelo*),[29] gas (*Federutility*),[30] water[31] and telecommunications,[32] and the basic postal service (eg *Corbeau*),[33] but recent cases have expanded the potential scope for SGEIs to areas such as pension schemes (*Albany*),[34] ambulance services (*Ambulanz Glöckner*)[35] and private medical insurance (*BUPA*).[36]

Now we are in a position to address the analytical location of EU law arguments concerning SGEIs, PSOs and the like, to set up the position for assessing how the protection of the 'consumer' (in whichever of her many guises) might be viewed under EU law.

B. The Classical Route

i. Introduction

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[27] eg H Cremer and others, 'Universal Service: An Economic Perspective' (2001) *Annals of Public and Cooperative Economics* 5, 7, and generally paying close attention to the restrictions which USOs impose upon an undertaking's pricing policy: without such restrictions, high-cost service recipients would simply not be served as it would be uneconomic to do so. This also clearly shows the presumption of cross-subsidisation involved in meeting USOs in the face of heterogeneity of service recipient profiles.

[28] COM (2000) 580 (n 25), s14.

[29] Case C–393/92 *Municipality of Almelo and others v NV Energiebedrijf Ijsselmij* [1994] ECR I–1477.

[30] See citations at (n 26).

[31] Commission Decision of 4 November 1982 amending Decision 82/371/EEC relating to a proceeding under Art 85 of the EEC Treaty [1982] OJ L167/65.

[32] See 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 networks and services [2002] OJ L107/51 ('Universal Service Directive'), esp ch 4.

[33] Case C–320/91 *Criminal proceedings against Paul Corbeau* [1993] ECR I–2533.

[34] Case C–67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I–5751.

[35] Case C–475/99 *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] ECR I–8089.

[36] Case T–289/03 *British United Provident Association Ltd (BUPA), BUPA Insurance Ltd and BUPA Ireland Ltd v Commission* [2008] ECR II–81.

Typically, national measures which have sought to secure the provision of SGEIs have raised the matter of justifying Member State rules which prima facie raise competition or free movement problems. Nihoul has provided a very helpful thematic analysis of the positive and negative aspects for (various types of) consumers of the introduction of competition in the utilities sectors at the heart of our discussion of SGEIs.[37] Thus, the introduction of competition has enabled consumers to change their supplier in search of better prices and/or service, with a concomitant improvement in a consumer's bargaining position vis-à-vis businesses due to the possibility of shifting to another provider. As a result, companies are pushed to perform better on price, customer relations, quality of service and the like: in short, innovation and productivity are incentivised and rewarded. Further, consumers are encouraged to become more active in enquiring into, and looking after, their own interests with regard to the supply of such goods and/or services. All of these consequences of the liberalisation process can be said to be benefits provided (or at least encouraged) by the introduction of competition into the provision of such services, along with the various rights (eg to choose supplier, to move to a new supplier) and protections (eg availability of information concerning prices, terms and conditions, and access to networks to enable various different service providers to have access to consumers) needed to facilitate such competition.

At the same time, the simple availability of the option for a consumer to shift supplier does not resolve any pre-existing problems or disputes. Looking forward, problems may still

[37] P Nihoul, 'The Status of Consumers in European Liberalisation Directives' (2009) 4 *Yearbook on Consumer Law* 67 (esp s 2, 'Principles'), which this and the subsequent paragraph summarise; and see further: P Nihoul and P Rodford, *EU Electronic Communications Law*, 2nd edn (Oxford, Oxford University Press, 2011) chs 4 (on USOs, etc) and 5 (User Protection and Dispute Resolution); and E Newman, 'Consumer Protection and Telecommunications' in I Walden (ed), *Telecommunications Law and Regulation*, 4th edn (Oxford, Oxford University Press, 2012) ch 9.

subsist for consumers even after the introduction of competition. Companies faced with new competitive pressures may succumb to seeking revenues, even at the expense of treating consumers better (in the hope of attracting new, or retaining existing, business); this may even extend to illegal behaviour where competitive pressure is strong and the ease and credibility of enforcement measures against such action are weak. A different version of this behaviour involves what one might term 'over-promising' all kinds of bells and whistles to the consumer (such as über-rapid broadband speeds) to tempt them to switch, but then failing to deliver such performance in providing the service (whether at all or at best only inconsistently). Finally, it is clear that in this competitive environment the service provider is engaging with consumers in order to earn revenue (whether to turn a profit as a privatised, commercial entity, or at least to cover the overall costs of providing the service on an ongoing basis): some consumers are better placed than others to pay the prices demanded and in a timely fashion, and are thus are the more attractive targets of such competition for business. Other consumers may thus not see the expected benefits of competition at all, or at least only to a much lesser degree. Where service providers would not otherwise choose to supply such consumers where it would be unprofitable/uneconomic to do so, intervention is required to ensure that access to essential services is maintained.[38]

ii. Locating the Analysis

Returning to the location of such arguments within the Treaty framework, such measures have thus regularly been ranged against other 'fundamental' or 'primary' EU law rules, which have as their own basic raison d'être the promotion of trade and competition to

[38] For a relatively early, and admirably clear, identification of the issue in the energy sector, see W Patterson, 'Can Public Service Survive the Market? Issues for Liberalised Electricity' (1999) 4 *Royal Institute of International Affairs Briefing Paper, New Series*; see also the references in (n 24) above.

enhance consumer (and thus, it is argued,[39] overall societal) welfare. One example among many is provided by the case of *RTT v GB-Inno-BM*: there, laying down the telephone equipment specifications which had to be met for connection of equipment to the national network had been delegated to the incumbent and monopoly public telephone operator.[40] It was found that this had assisted the incumbent in facilitating the restriction or elimination of competition in an ancillary activity, and thus amounted to a breach of competition law, to the detriment of consumer choice, price and quality competition.

Therefore, since such an analysis locates such national measures as derogations from fundamental Treaty rules, justifying such measures has sometimes proved difficult due to the Court's tendency to construe the scope of such derogations narrowly, limiting them to what is strictly necessary to safeguard the justifiably protectable interest in question.[41] So, in the *Commission v Netherlands (Energy import/export)* case, the Court baldly stated: '[b]eing a provision permitting derogation from the Treaty rules, Article [106](2) TFEU must be interpreted strictly'.[42] To provide a flavour of the kinds of national measures involved, in that same case Article 34 of the Dutch Electricity Act 1989 prohibited the importation of electricity into the Netherlands except where this was carried out by the SEP, which was the association of cooperating electricity producers. This prohibition was clearly at odds with Article 37 TFEU, which forbids all discrimination concerning the conditions of sale and supply. The Dutch government relied upon Article 106(2) TFEU to justify this statutory prohibition on imports, arguing that without such a prohibition the planning of electricity supply within the Netherlands would be rendered excessively difficult. The other *Energy Import/Export cases* decided in 1997 involved very similar measures concerning electricity

[39] As discussed at length by the contribution of Albors-Llorens and Jones in this volume.
[40] Case C–18/88 *RTT v GB-Inno-BM* [1991] ECR I–5941.
[41] See its judgments on Treaty derogations in general, such as: Case C–451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I–2941, para 45.
[42] Case C–157/94 *Commission v Kingdom of the Netherlands* [1997] ECR I–5699, para 37.

and also gas in some countries.[43] Various cases have shown an unwillingness on the part of the Court to accept Member State derogations in such sectors: a clear set of examples is provided by the slew of 'Golden Shares' judgments handed down by the Court over the past 15 years: typically, these have concerned the restrictions that such shares held by Member States place upon the free movement of capital (but sometimes also the impact upon freedom of establishment);[44] and, in almost all cases,[45] the Commission's complaint against the Member State has been upheld by the Court.[46] The Member State assertion in such cases is generally that there is a need for a special share held by the public authorities (or some similar regime of control or authorisation) to ensure that changes in shareholdings and overall ownership do not operate so as to endanger the essential supply of key public goods or services (such as energy supplies). On some occasions, the Member State has failed to show that the actual goal was really pursued by its golden share or equivalent rules,[47] while in other cases the Court has rejected the restrictions created by such regimes as disproportionate in nature (eg because their trigger threshold was too low, or prior authorisation was required

[43] Case C–157/94 *Commission v Kingdom of the Netherlands* (n 42); Case C–158/94 *Commission v Italian Republic* [1997] ECR I–5789; Case C–159/94 *Commission v French Republic* [1997] ECR I–5819, and Case C–160/94 *Commission v Kingdom of Spain* [1997] ECR I–5851 (collectively, '*Energy Import/Export cases*').

[44] See Case C–326/07 *Commission v Italian Republic* [2009] ECR I–2291 (discussed by J van Bekkum, 'Golden Shares: A New Approach' (2010) 7 *European Company Law* 13).

[45] The exception is Case C–503/99 *Commission v Kingdom of Belgium* [2002] ECR I–4809.

[46] Case C–376/98 *Federal Republic of Germany v European Parliament and Council* [2002] ECR I–4731 and Case C–483/99 *Commission v French Republic* [2002] ECR I–4781 (decided, along with Case C–503/99 (n 45) separately but handed down on the same day, by a Full Court of 11 judges) (noted by H Fleischer in (2003) 40 *Common Market Law Review* 493); then Case C–463/00 *Commission v Kingdom of Spain* [2003] ECR I–4581, and Case C–98/01 *Commission v United Kingdom* [2003] ECR I–4641, Case C–174/04 *Commission v Italian Republic* [2005] ECR I–4933; Joined cases C–282 and 283/04 *Commission v Netherlands* [2006] ECR I–914; Case C–112/05 *Commission v Federal Republic of Germany* ('*Volkswagen*') [2007] ECR I–8995 (Gr Ch); Case C–274/06 *Commission v Kingdom of Spain* [2008] ECR I–26 (Summ.), Case C–207/07 *Commission v Kingdom of Spain* [2008] ECR I–111 (Summ), and *Commission v Italian Republic* (n 44); see, inter alia, the discussions by: A Emch, 'News from Luxembourg – Is the New EU Investment Law Taking Shape?' (2008) 9 *Journal of World Investment & Trade* 497; M O'Brien, 'Annotation of Case C–326/07' (2010) 47 *Common Market Law Review* 245; and more broadly, S Gerner-Beuerle, 'Shareholders Between the Market and the State – The VW Law and Other Interventions in the Market Economy' (2012) 49 *Common Market Law Review* 97, and J van Bekkum, 'Cross-border Investments in Undertakings and the Future of EU Company Law' (2014) 25 *European Business Law Review* 811.

[47] eg *Commission v Italian Republic* (n 44) para 46 ff.

rather than ex post facto opposition to any particular action by the company).[48] Thus, despite acceptance that such goals *may* be justifiable in general terms, the practical application of such derogations would seem to have left relatively little leeway to Member States.

However, in light of the evolving case law across a wide range of areas, one could argue that the last 25 years have seen at least to some extent a gradual shift of the balance back in favour of Member State choice and discretion in this area. Thus, in those same *Energy Import/Export cases*,[49] the Court required more of the Commission in discharging its burden of proof that the Member State's rules were incompatible with the common market:[50] the touchstone was whether the enterprise would not be able to fulfil its public duties, not the much higher threshold that the Member State must show that the enterprise's financial viability would be threatened as the Commission had argued in its submissions.[51] The Court also emphasised—in the context of those cases, which involved Article 258 TFEU enforcement actions brought by the Commission—that it was for the Commission to prove the allegation that EU law obligations had not been met by the Member State(s) concerned:

> Whilst it is true that it is incumbent upon a Member State which invokes Article [106](2) to demonstrate that the conditions laid down by that provision are met, that burden of proof cannot be so extensive as to require the Member State, when setting

[48] See the differences in the results in *Commission v French Republic* (n 46) above and *Commission v Kingdom of Belgium* (n 45): the French rules in the former case required prior authorisation of company decisions and granted very wide discretion to the Minister without publication of possible grounds for approval or refusal; the Belgian rules in the latter case, meanwhile, laid out objective criteria and were subject to effective judicial review (see, further, Fleischer (n 46) for discussion).

[49] See K Talus, *EU Energy Law and Policy: A Critical Account* (Oxford, Oxford University Press, 2013) 33–38 for an account of the various facets of these cases, their implications and place in the evolution of such issues in EU Energy Law.

[50] ibid; and see, further, the annotation by PJ Slot, 'Annotation' (1998) 35 *Common Market Law Review* 1183. This approach is now reflected in the text of Art 14 TFEU, which obliges the EU and the Member States to 'take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions'.

[51] Case C–157/94 *Commission v Kingdom of the Netherlands* (n 42), para 43.

> out in detail the reasons for which, in the event of elimination of the contested measures, the performance, under economically acceptable conditions, of the tasks of general economic interest which it has entrusted to an undertaking would, in its view, be jeopardized, to go even further and prove, positively, that no other conceivable measure, which by definition would be hypothetical, could enable those tasks to be performed under the same conditions.[52]

Further, and in a similar vein, the Court in *Altmark* provided a series of criteria that must be satisfied by Member States if State aid scrutiny for compensation for providing public services is to be avoided,[53] which bear a strong resemblance to a combination of procurement rules and the substance of what is now Article 106(2) TFEU. Thus, where an undertaking receives compensation from the state for the performance of public services, and is obliged under PSOs to provide such services,[54] then that remuneration does not amount to State aid, provided that:

> 89. [f]irst, … the recipient undertaking … actually [has] public service obligations to discharge, and the obligations [are] clearly defined]. …
>
> 90. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner …

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[52] ibid.

[53] Case C–280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* [2003] ECR I–7747.

[54] Which might include security of energy supply: Spain's imposition of an obligation to purchase domestic coal to reduce import dependence (alleging the risk of import disruptions was a supply security problem) was recently accepted in *Public Service Compensation Linked to a Preferential Dispatch Mechanism for Indigenous Coal Power Plants* (State Aid Case 178/2010) Commission Decision <http://ec.europa.eu/competition/state_aid/cases/236267/236267_1150043_151_1.pdf> accessed 9 April 2015 and, when challenged, the General Court as a PSO which could be adopted under Art 106(2) TFEU: Case T–57/11 *Castelnou Energía, SL v Commission*, judgment of 3 December 2014.

> 92. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. …
>
> 93. Fourth, where the undertaking … 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 … 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 those obligations.

The significance of importing these ideas into the definition of what counts as 'State aid' for the purposes of what is now Article 107(1) TFEU was that this relieved the Member State of the obligation to notify to the Commission for approval such measures offering compensation in return for public service provision. While the criteria are relatively specific, their general thrust has been to provide Member States with more room to manoeuvre when entrusting the task of public service provision to various actors at national level. In the specific issues considered in what follows, it will emerge that this relative freedom has proved easier to exercise in some ways than others.

iii. Some More Specifics

a. Freedom to Define

To break some of these case law points down further, it must first be noted that it is for Member States to define what qualifies as an SGEI (*France v Commission* (*Telecoms terminal equipment*)[55] and *Commission v Netherlands* (*Energy Import/Export*).[56] A wide discretion is available to Member States in doing so, as was held by the CFI in *Fred Olsen v Commission*,[57] and this point was cited and emphasised in the *BUPA* case,[58] where the CFI made a clear link to shared and even very limited EU competence, in a subsidiarity-like approach:

> 167. That prerogative of the Member State concerning the definition of SGEIs is confirmed by the absence of any competence specially attributed to the Commission and by the absence of a precise and complete definition of the concept of SGEI in Community law. The determination of the nature and scope of an SGEI mission in specific spheres of action which either do not fall within the powers of the Community … or are based on only limited or shared Community competence … remains, in principle, within the competence of the Member States.

This freedom has also been emphasised by the Commission:[59]

> In areas that are not specifically covered by [EU] regulation Member States enjoy a wide margin for shaping their policies, which can only be subject to control for

[55] Case C–202/88 *French Republic v Commission* [1991] ECR I–1223, para 12.
[56] Case C–157/94 *Commission v Kingdom of the Netherlands* (n 42), paras 39–40.
[57] Case T–17/02 *Fred Olsen, SA v Commission* [2005] ECR II–2031, para 216.
[58] *British United Provident Association* (n 36), para 166.
[59] eg Communication from the Commission on services of general interest in Europe [2001] OJ C17/4, para 22.

> manifest error. Whether a service is to be regarded as a service of general interest and how it should be operated are issues that are first and foremost decided locally.

Where, however, EU legislation *does* regulate a given area, then that Member State margin of discretion can be narrowed, often significantly if the EU rules are far-reaching and detailed in their coverage.

b. Justifiable Goals

Nevertheless, the *goals* or *objectives* pursued by the Member State must be assessed for compatibility with EU law: thus, in the *Dusseldorp* case[60] the protection of the environment had to be accepted at the EU level as an appropriate objective for national measures, both in general and abstract terms, *and* in the specific goal(s)[61] pursued by such measures. Similarly, in the *Energy Import/Export cases* and the various *Golden Shares* judgments, the Court was careful to draw upon earlier cases where goals like security of energy supply had been pleaded and accepted.[62] Further, later Commission documents concerning SGEIs have drawn upon the *Altmark* case[63] to assert that

> the entrustment of a 'particular public service task' implies the supply of services which, if it were considering its own commercial interest, an undertaking would not

[60] Case C–203/96 *Chemische Afvalstoffen Dusseldorp v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* [1998] ECR I–4075, concerning protection of the environment as such an objective.
[61] ibid, which there concerned the Netherlands' goal of ensuring the incineration of dangerous waste, a task entrusted to a particular undertaking and which was to be supported by national measures (including an export ban, resulting in an obligation to use that undertaking's disposal services) to ensure the economic viability of that undertaking (paras 12–22 and 62–68).
[62] Like Case 72/83 *Campus Oil Limited v Minister for Industry and Energy* [1984] ECR 2727 and *Almelo* (n 29).
[63] Itself not strictly about Art 106(2) but rather about the definition of whether compensation promised to an undertaking providing a public service (*in casu* bus transport in a German city) qualifies as State aid within Art 107(1) TFEU.

> assume or would not assume to the same extent or under the same conditions. … [I]t would not be appropriate to attach specific public service obligations to an activity which is already provided or can be provided satisfactorily and under conditions, such as price, objective quality characteristics, continuity and access to the service, consistent with the public interest, as defined by the State, by undertakings operating under normal market conditions. As for the question of whether a service can be provided by the market, the Commission's assessment is limited to checking whether the Member State has made a manifest error.[64]

This is consistent with the assessment of Vedder and Holwerda[65]—examining the application of the *Altmark* case in subsequent CJEU judgments—that greater deference is shown to Member State autonomy so far as the *creation* of SGEIs is concerned[66] than where the Court is faced with questions about the *operation* of such SGEIs, in particular where public service activities are undertaken in combination with, or within the sphere of, commercial and competitive activities.[67]

c. Types of Proceedings and Procedures

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[64] Commission, On the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest COM (2011) 9404 final, paras 47–48; for essentially identical wording, see also Commission, European Union framework for State aid in the form of public service compensation, COM (2011) 9406 final.

[65] H Vedder and M Holwerda, 'The European Courts' Jurisprudence after *Altmark*; Evolution or Devolution?' in E Szyszczak and JW van de Gronden (eds), *Financing Services of General Economic Interest: Reform and Modernization* (The Hague, TMC Asser Press, 2011) ch 3.

[66] Citing the *BUPA* judgment (n 36). See also M Klasse, 'The Impact of *Altmark*: The European Commission Case Law Responses' in Szyszczak and van de Gronden (n 65), who doubts that the Commission's decisional practice concerning the *Altmark* criteria either: provides clear guidance for Member States and public service providers as to the stability of their arrangements; or allows for the possible flexibility evinced by the *BUPA* judgment concerning the question of the efficiency required of the (hypothetical) comparator undertaking.

[67] Using the example of Case C–209/10 *Post Danmark A/S v Konkurrencerådet*, judgment of 27 March 2012, which involved an allegation of abuse of dominant position under what is now Art 102 TFEU, in the context of a postal undertaking which was also subject to a USO with regard to some categories of mail.

Also, it should be emphasised that such questions may arise under various types of different EU law proceedings; this will have a concomitant impact upon the burdens of proof to be satisfied in any litigation, as well as affecting the approach likely to be taken to satisfying the requirement that such national measures are proportionate in their impact upon the *prima facie* EU Law rule or goal. First, where a Member State has notified a national SGEI measure for clearance under the State aid rules, it is clear that that Member State must satisfy the Commission that the relevant criteria are met if the sums to be paid are to be justified: eg under the *Altmark* criteria, either an effective and transparent competitive tendering process must be used[68] or the compensation payable for the performance of the service must be determined on the basis of a well-run and adequately equipped undertaking (ie a benchmarking or comparison exercise with an efficient undertaking). The latter criterion has caused many and notorious difficulties[69] for Member States, the Commission and the EU courts,[70] chiefly because there will rarely be any real-life appropriate comparator to utilise, so that other proxies must be found, based—in the Commission's view,[71] at least—upon not simply actual costs in a given sector but some attempt objectively to establish the costs of an (hypothetical) efficient undertaking. The case law and decisional practice have tended to show a stricter attitude adopted by the Commission, leaving Member States less room for manoeuvre, and a somewhat more lenient approach taken by the EU courts, perhaps particularly the CJEU.

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[68] eg *Security of Supply Ireland (CADA)* (Case N 475/2003) Commission Decision [2003] OJ C34/3, esp para 57.

[69] eg JD Braun and J Kühling, 'Article 87 EC and the Community courts: from revolution to evolution' (2008) 45 *Common Market Law Review* 465.

[70] eg Joined cases C–341/06 P and C–342/06 P *Chronopost SA and La Poste v Union française de l'express (UFEX)* [2008] ECR I–4777, where the CJEU rejected the CFI's approach because there was no possibility of comparing the incumbent La Poste's position with a private sector undertaking: this necessitated an assessment of the level of compensation provided by reference to those cost elements which were objective and verifiable, covering appropriate variable and fixed costs, as well as an adequate return on capital invested. See also the judgment of the CFI in *BUPA* (n 36). Both of these cases showed a departure from strict efficiency assessments and comparisons due to the context involved. Contrast *DSB* (Case C 41/08) Commission Decision [2011] OJ L7/1, para 284 ff, where the difficulty of drawing comparisons was used to justify a finding that the Member State had not proved that its approach met the efficiency requirement.

[71] See Commission Decisions: *Postbus Lienz* (Case 16/2007) Commission Decision [2009] OJ L/306/26, para 86; and *Southern Moravia Bus Companies* (Case 3/2008) Commission Decision [2009] OJ L97/14, paras 82–83.

Then, one should compare Article 258 TFEU enforcement actions with references for a preliminary ruling. Under the former, the Commission must positively establish its case that national rules concerning, here, SGEIs amount to a breach of EU Law; under the latter, as a result of the jurisdictional division under Article 267 TFEU,[72] it will typically[73] be for national courts to assess justifiability on the facts. A useful illustration of the operation of Article 267 is provided by the judgment of the Dutch court in the *Gemeente Almelo* case,[74] which rejected reliance upon the SGEI justification on the facts when the case returned to the national level from the Court of Justice.[75] This has knock-on consequences for the need to engage with 'less restrictive alternatives' to the measures/rules actually adopted by a Member State in the case in question, under the proportionality rubric: there is some evidence that national courts have generally proved more lenient than the Court in finding that national measures are justifiable and proportionate,[76] which might lead one to think that greater leeway from the Court concerning SGEIs (as highlighted previously in this section) would be used even more broadly at national level.[77]

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[72] Case 104/79 *Pasquale Foglia v Mariella Novello (No 1)* [1980] ECR 745; Case 244/80 *Pasquale Foglia v Mariella Novello (No 2)* [1981] ECR 3045; and see Case C–206/01 *Arsenal Football Club plc v Matthew Reed* [2002] ECR I–10273 and, overturned on appeal, *Arsenal Football Club plc v Matthew Reed* [2003] EWCA Civ 696.

[73] Although sometimes the Court will assert that it has all of the information required to reach a conclusion on a particular point, thus effectively taking the decision on the facts for the national court: eg Case C–169/91 *Council of the City of Stoke-on-Trent v B & Q* [1992] ECR I–6654, paras 12–17. For a very recent example of some ambivalence on this issue, see Case C–518/13 *The Queen, on the application of Eventech Ltd v Parking Adjudicator*, judgment of 14 January 2015 (compare paras 57 and 61).

[74] *Municipality of Almelo* (n 29) , and see L Hancher's annotation (1997) 34 *Common Market Law Review* 1509 also covering the national court's decision on the return of the case from the ECJ.

[75] The Arnhem court held (judgment of 22 October 1996, rolnr 87/280) that the parties had not adduced any evidence on which it could be concluded that the statutory task (electricity distribution) would have been impossible to carry out in the absence of the conclusion of the exclusive contracts.

[76] See the discussion in M Jarvis, *The Application of EC Law by National Courts: The Free Movement of Goods* (Oxford, Oxford University Press, 1998), esp chs 6 (on the 'rule of reason') and 7 (on Art 36 EC, now Art 36 TFEU): both offer evidence and criticism of national courts' ready acceptance of the justifiability of national measures on the basis of skimpy evidence and scant reasoning. See also H Micklitz, *The Politics of Judicial Co-operation in the EU: Sunday Trading, Equal Treatment and Good Faith* (Cambridge, Cambridge University Press, 2005) ch 2 (esp 126 ff, on the attitudes of the national judges which sent the references for a preliminary ruling to the Court and then dealt with the Court's answers).

[77] Although it should be acknowledged that there are examples of national courts refusing on the facts to uphold the State's reliance upon such derogations—see *Almelo* (n 29)—and sometimes the CJEU's own reasoning

Further, it must not be forgotten that—assuming that EU competence exists and other hurdles such as subsidiarity, proportionality and fundamental rights under EU Law can be surmounted—EU harmonisation legislation can effectively cover this field in certain sectors, by stating the policy objectives in that sector, and even providing detailed rules on which PSOs may or even must be adopted, as well as requiring consumer protection measures to be implemented at national level (see further below, section III.D).

Cases which explicitly refer to the position of consumers and requirements of consumer protection under the heading of 'SGEIs' and/or 'PSOs', however, are really very small in number, and such references are often at best oblique or implicit. So, in the *Corbeau* case[78] reliance was placed upon the universal postal service obligations of the Belgian Post Office as concerning serving less accessible areas or providing essential services not otherwise economically viable under normal market conditions. The implication is that some vulnerable consumers (including those in remote areas) would see adverse effects. A similar point about universal service and the need for uninterrupted electricity supplies to consumers was assumed in *Gemeente Almelo*;[79] and in *Albany* one might view the obligation for employers to affiliate to a sectoral pension scheme—and the associated exclusive right granted to sectoral pension funds to manage such supplementary schemes—as having been seen as necessary to protect the collective (consumer) interest in affordable pension provision

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offers a route which allows national courts to protect individuals affected by (eg) trade-restrictive national rules while still leaving room for the State to implement correctives or palliatives to satisfy the proportionality requirement. On this latter point, see Case C–142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* [2009] ECR I–4273, paras 36–43, discussed by M Derlén and J Lindholm, 'Article 28 EC and Rules on Use: a Step Towards a Workable Doctrine on Measures Having Equivalent Effect to Quantitative Restrictions' (2010) 16 *Columbia Journal of European Law* 191, esp 228.

[78] *Corbeau* (n 33).

[79] *Almelo* (n 29); here, the term 'consumers' is used explicitly by the Court (para 48). However, the Court seems to understand this tern to include 'local distributors or end-users', suggesting that the assumption that the USO involved was only partly in service of 'consumers' understood in the narrower sense prevalent in modern consumer (protection) law (as discussed in section II, above): while distribution networks are of course the crucial conduit for serving the genuine consumer, they also serve commercial customers and public bodies too.

to supplement the limited State pension available.[80] Otherwise, the general assumption underlying the case law generated by the provisions on free movement, competition and State aid seems to be that free trade, competition and liberalisation are what is needed to defend and advance (inter alia) consumer welfare, which is seen as synonymous with the interests of consumers. Where positive, particular instances have arisen where such forces fail to protect or empower the consumer sufficiently, this has led to a range of reactions at EU level, to which we now turn.

C. Leading to Various EU-level Reactions

As experience grew case-by-case with the assessment of national measures concerning SGEIs—whether through State aid notifications under Article 108 TFEU or case law coming before the EU courts via Articles 258, 263 and 267 TFEU—this generated a range of reactions on the EU legal and policy level, with a view to clarifying the EU Law requirements faced by Member States in this field. The Commission contributed to this process by the adoption of various decisions, sometimes of general application but mainly on specific cases. It developed a range of Guidelines for Member States, and adopted Communications, both on the basis of the experience gained. Regulation (re State aid and SGEIs).

The Member States, meanwhile, pursued various additions to the founding Treaties in the field of SG(E)Is at different stages and via different routes. Since 1997 there has been a specific provision on SGEIs, now to be found in Article 14 TFEU:

[80] *Albany International* (n 34), paras 103–22.

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

The *italicised* text was added by the Treaty of Lisbon.[81] After the introduction of Article 16 EC (as it was first numbered) by the Treaty of Amsterdam in 1997 but prior to the Lisbon Treaty, there had been debate about whether this provision was mere window dressing, adding little to the substantive provisions (like Article 106 TFEU) already contained within the Treaties or whether it amounted (or would amount, in time) to a genuine 'constitutionalisation' of public services within the Treaty framework, enhancing MS autonomy and even serving to guide future EU legislation.[82] The entry into force of the Treaty of Lisbon in December 2009 amended the provision in various ways. First, the text of Article 14 TFEU now specifies that the relevant conditions crucial to fulfilling the functions of SGEIs concern economic and financial matters; second, it now includes legislative powers

[81] And the final italicised sentence concerning legislative competence is much softer in tone and content than the original wording in the now defunct Treaty Establishing a Constitution for Europe [2004] OJ C310/1, which simply read: 'European laws shall define these principles and conditions' (Art III-6).

[82] For discussion, see eg M Ross, 'Article 16 EC and Services of General Economic Interest: From Derogation to Obligation' (2000) 25 *European Law Review* 22 and W Sauter, 'Services of General Economic Interest and Universal Service in EU Law' (2008) 33 *European Law Review* 172.

for the EU. It has been suggested[83] that this leaves the EU with two—potentially competing—legal bases upon which to adopt measures concerning SGEIs: Articles 14 and 106(3) TFEU, the former for the Council and European Parliament, and the latter for the Commission. To this, the present author would add a further category, which concerns the pursuit of internal market goals where these overlap with sectors appropriate to SGEIs. In some areas, this category will be covered by Article 114 TFEU (as evinced by the 2009 IEM Directives' reliance, in part, upon the old Article 95 EC,[84] and by the continuing reliance upon Article 95 EC for universal service measures in the telecoms sector);[85] in future, Eu measures in the energy sector will surely be based upon Article 194 TFEU. As will be discussed further below (section III.D), the IEM Directives contain a range of PSOs which should be understood as safeguarding the provision of certain key aspects of SGEIs in the energy sector and it seems highly unlikely that the advent of the new last sentence of Article 14 TFEU will cause the EU legislature to shift away from its reliance upon sector-specific competences.[86]

The Lisbon Treaty also served to attach Protocol No. 26 on SGIs to the TEU and TFEU, which clarifies in its Article 1 that the 'shared values' referred to in Article 14 TFEU:

> include in particular:

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[83] Sauter (n 82).
[84] eg Directive 2009/72/EC (n 10), which employs Arts 47(2), 55 and 95 EC.
[85] ibid, as most recently amended 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: both are based solely upon Art 95 EC (now Art 114 TFEU).
[86] See Case C–490/10 *European Parliament v Council of the European Union*, judgment of 6 September 2012, and the discussion of the potential difficulties which may be encountered under the new Art 194 TFEU in A Johnston and E van der Marel, '*Ad Lucem*? Interpreting the New EU Energy Provision, and in particular the Meaning of Article 194(2) TFEU' (2013) 22 *European Energy and Environmental Law Review* 181, and the references cited therein.

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

At the same time the EU Charter of Fundamental Rights acquired legally binding force by virtue of Article 6(1) TEU.[87] Article 36 of that Charter—originally included by the Convention which drafted the Charter back in 1999–2000[88]—addresses the question of *access* to SGEIs:

> The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the [TFEU], in order to promote the social and territorial cohesion of the Union.

As one commentator has noted, '[i]t is difficult to see what the contribution of Article 36 of the Charter is in view of the general Treaty exemptions to the free movement rules, the

[87] Charter of Fundamental Rights of the European Union [2010] OJ C83/389.
[88] Charter of the Fundamental Rights of the European Union of the European Parliament, the Council and the Commission [2000] OJ C364/8; on which process, see: C McCrudden, 'The Future of the EU Charter of Fundamental Rights' *Jean Monnet Working Papers* 2001/10; and J Schönlau, *Drafting the EU Charter: Rights, Legitimacy and Process* (Basingstoke, Palgrave Macmillan, 2005).

mandatory requirements and Article 106(2) TFEU'.[89] In any event, its emphasis chimes harmoniously with the approach of Article 14 TFEU, both in its wording and its reference to Article 4 TEU: the role of SGEIs in general has been emphasised and strengthened in the Treaties and some EU role in this field is acknowledged, with a more explicit recognition of the social dimension;[90] *but* the framers of the Treaties have also been anxious to emphasise that the primary role is played by the Member States, even if the substance of their additions and self-reassurances is viewed as relatively unclear and imprecise,[91] and the implications thereof were—and remain—difficult to predict with great confidence.[92]

D. Beginning to Incorporate Elements within EU (Sectoral) Legislation

Whatever the frustrations of this Treaty framework and its application by the Commission and the EU judicature, the foregoing discussion has served to sharpen the need to focus upon the evolution and detail of sector-specific EU legislation which concerns SGEIs in general, and the position of consumers in particular. Here, this will be examined primarily through the lens of the evolution of this issue in the EU's internal energy market (IEM) *acquis*, although reference will be made to other areas to offer comparisons or developments on some topics.

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[89] PJ Slot, 'Public Distortions of Competition: The Importance of Article 106 TFEU and the State Action Doctrine' in U Neergaard and others (eds), *Social Services of General Interest in the EU* (The Hague, TMC Asser Press, 2013) ch 10, esp 249.

[90] U Neergaard, 'Services of General (Economic) Interest: What Aims and Values Count?' in U Neergaard and others (eds), *Integrating Welfare Functions into EU Law – From Rome to Lisbon* (Copenhagen, DJØF Publishing, 2009) 206. This insight, allied with cases arising concerning social services (such as healthcare and pension provision) has generated a growing literature focussing upon SG(E)Is and PSOs as part of a broader shift in focus in the EU Treaties towards recognition of values of solidarity and social market economy. See eg M Ross, 'The Value of Solidarity in European Public Services Law' in Krajewski and others (n 22) ch 4 and M Ross, 'SSGIs and Solidarity: Constitutive Elements of the EU's Social Market Economy?' in Neergaard and others (eds), *Social Services of General Interest* (n 89) ch 5; and U Neergaard, 'In Search of the Role of "Solidarity" in Primary Law and the Case Law of the European Court of Justice' in U Neergaard and others (eds), *The Role of Courts in Developing a European Social Model – Theoretical and Methodological Perspectives* (Copenhagen, DJØF Publishing, 2010).

[91] A point enhanced or exacerbated (depending upon one's inclinations) in the energy sector by the wording and structure of Art 194 TFEU: see Johnston and van der Marel (n 86).

[92] Sauter (n 82) 173.

In general that the EU-level starting point in the energy sector very much focussed upon the consumer welfare gains to be achieved through the liberalisation process and the introduction of customer choice of supplier and competition where possible throughout the energy value chain.[93] Further, where Member State energy systems were organised under state ownership and/or control, electricity or gas suppliers provided a public service ensuring supply to consumers, so that references to consumer protection and PSOs were very much expected to remain at national level. Thus, references to such concepts in EU-level measures were limited, and slow to develop. Yet as experience with the implementation and application of each package of IEM measures has been gathered, the subsequent measures have contained more extensive and detailed references to consumers or issues of importance for consumer protection in liberalising energy markets.

i. Tracking the Evolution of More Far-reaching Liberalisation in the Energy Field, in Parallel with Growing Reference to Position of Consumers / Customers[94]

a. The Customer as (Simply) a Market Participant

In the early years, there was an acknowledgment in EC legislation that the free play of market forces might not guarantee the achievement of other important goals such as, inter alia,

[93] eg Commission, 'Staff Working Paper: First benchmarking report on the implementation of the internal electricity and gas market' SEC (2001) 1957, generally and esp 3 and 5 (concerning price levels as indicators of competitive activity).

[94] Note here that the analysis has been developed on the basis of the English language versions of the relevant legislation: I am well aware that a full coverage of the definitional questions will require a more wide-ranging treatment of the terminology used across the EU's official languages. Yet confining oneself to looking purely at the English usage in the relevant materials already provides ample evidence to substantiate the general point concerning consistency, coherence and interactions, as I hope will be shown in what follows hereafter.

consumer protection. This led to the inclusion of a provision which acknowledged that Member States could impose PSOs upon energy companies.[95] Article 3(2) of Directive 96/92/EC provided that:

> Having full regard to the relevant provisions of the Treaty, in particular Article 90 [EEC, now Article 106 TFEU], Member States may impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies and to environmental protection. Such obligations must be clearly defined, transparent, non-discriminatory and verifiable; they, and any revision thereof, shall be published and notified to the Commission by Member States without delay. As a means of carrying out the abovementioned public service obligations, Member States which so wish may introduce the implementation of long-term planning.[96]

In practice, this essentially sought to replicate the main conditions established by the Court in its case law, although the various possible interests which could be protected by such PSOs were specified, presumptively limiting the scope for Member State PSOs to pursue other goals in this sector.[97] Indeed, allied with the requirement that information on such national

[95] eg Recs 9, 13, 17 and 19 to 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 L27/20, and Recs 12–16 to 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.

[96] In the subsequent First Gas IEM Directive 98/30/EC (n 95), there was added to the end of its Art 3(2): 'taking into account the possibility of third parties seeking access to the system', showing already an evolution in concerns to ensure access for competitors to the networks to contribute to the development of competition in the sector. This is now reflected in the current version of the text of Art 3(2) in both the Third Electricity IEM Directive 2009/72/EC (n 10) and Third Gas IEM Directive 2009/73/EC (n 10).

[97] On the nature of this list as indicative, rather than exhaustive, see AG Ruiz-Jarabo Colomer in *Federutility* (n 26), para 45, and the discussion of C Suykens and B Delvaux, 'Price Regulation in the Energy Sector in the EU – Here to Stay?' in B Delvaux, M Hunt and K Talus (eds), *EU Energy Law and Policy Issues*, vol 4 (Antwerp, Intersentia, 2013) ch 9, esp 224–26.

measures concerning PSOs and USOs be provided to the Commission, this facilitates the gathering of information on the operation of the energy sector in general, and provides the basis for assessing whether further measures need to be taken at the EU level (whether to ensure high standards of public service or to address market foreclosure which might be caused or exacerbated by PSO measures).[98] Otherwise, in line with the competition and liberalisation paradigm, references to categories which might include consumers were typically to 'customers', with a focus upon their eligibility to choose between suppliers.[99] This functioned as a measure of the degree of market opening under the First and Second Package Directives, and was part of the design to bring the benefits of choice and competition to energy customers.

Then, from the Second IEM package onwards, the focus shifted to addressing how to facilitate customers in switching their supplier, to ensure such choice could be exercised and competition could be effective. The Second Electricity[100] and Gas[101] IEM Directives specifically instructed the Commission to report on the extent of actual customer switching and tariff renegotiation,[102] and various Commission[103] and other[104] documents emphasised the importance of this topic now that the category of customers eligible to do so would

[98] See Talus (n 49) 89–91 and the references cited therein.
[99] See Art 19 of Directive 96/92/EC (n 95) and Art 18 of Directive 98/30/EC (n 95), and note that Art 3(3) in both Directives specifically identifies a 'Community interest' (in the context of what is now Art 106(2) TFEU) as 'competition with regard to eligible customers'.
[100] 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 – Statements made with regard to decommissioning and waste management activities [2003] OJ L176/37.
[101] Directive 2003/55/EC (n 10).
[102] Arts 29(3) (Electricity (n 10)) and 31(3) (Gas), respectively.
[103] eg: Commission, 'Completing the internal energy market' (Communication) COM (2001) 125, 8; and the extensive references to this competition indicator throughout the Commission's 'First benchmarking report' (n 93) and in its 'Second benchmarking report on the implementation of the internal electricity and gas market, SEC (2002) 1038 (updated in SEC (2003) 448).
[104] ERGEG, 'Obstacles to Supplier Switching in the Electricity Retail Market – Guidelines of Good Practice and Status Review' (10 April 2008), which emphasised that a mere declaration that all customers are eligible to switch will not in fact ensure that this is possible if network operators (especially at the distribution level) do not enable this to happen and instead act obstructively so as to protect their interests as market actors, rather than market facilitators (at 4).

continue to grow and ultimately encompass all customers, including those at household level. In the Third Package, this issue: has been added to the objectives[105] and duties[106] of the National Regulatory Authority; has found a place in Articles 3(3) (Electricity) and 3(7) (Gas), which impose an obligation upon Member States to 'ensure that the eligible customer is in fact able easily to switch to a new supplier'; and features in Articles 3(5)(a) (Electricity) and 3(6)(a) (Gas), where Member States are obliged to ensure that contractually-compliant switching by a customer must be effected by the operators concerned within three weeks. All of this underlines switching's key role[107] in empowering the customer so that the anticipated benefits of competition can be realised. These elements suggest that EU-level energy legislation had begun strongly to acknowledge the role played by the customer, but tended to view that role as market participant and agent of liberalisation.

b. More Protective Provisions

Yet it must also be emphasised that other important (protective) issues and values began to be recognised and addressed more specifically and in greater detail, particularly from the Second IEM Package onwards. One key contribution in this regard was the establishment of a universal service requirement[108] in electricity (but not gas) supply for all household

[105] viz, 'contributing to the compatibility of necessary data exchange processes for customer switching' (Directive 2009/73/EC (n 10), Art 40(h)).
[106] viz, 'monitoring the level and effectiveness of market opening and competition at wholesale and retail levels, including … switching rates' (Directive 2009/73/EC (n 10), Art 41(1)(j)).
[107] For discussion of the details of the switching process, see Johnston and Block (n 6), paras 7.46–7.57.
[108] The Postal sector, too, typically involves the imposition of a USO on the former incumbent monopoly (in the UK, Royal Mail) but not new market entrants, which typically cherry-pick profitable market segments: the cost of maintaining USOs in postal services have come under increasing scrutiny as competition in other market segments has increased, undercutting the scope for cross-subsidy of the USO from other activities. For discussion in the UK context (where the reduction in physical mail and its replacement with e-letters, combined with growing competition in the direct delivery market, has since 2008 raised questions about the ongoing viability of the 6-days-a-week direct delivery USO), see: Harker and others, 'CCP Consultation Response on Competition in the UK Postal Sector'

customers, as well as (where the Member States 'deem it appropriate') small enterprises. Where both categories are protected by such a universal service obligation (USO), recital 45 to the Third Electricity IEM Directive allows Member States to distinguish between measures aimed at households and small enterprises. Article 3(3) of the Second Electricity IEM Directive explained that such universal service involves 'the right to be supplied with electricity of a specified quality within their territory at reasonable, easily and clearly comparable and transparent prices'. To that end, 'Member States shall impose on distribution companies an obligation to connect customers to their grid', and a supplier of last resort may be appointed to ensure such universal service.[109] These provisions have been maintained largely unchanged in the current legislation, although it is now emphasised in Article 3(3) of the Third Electricity IEM Directive that prices must also be 'non-discriminatory'.

It is worth highlighting here that these USO provisions offer a broad conception of supply security, encompassing regular supply of specified quality and at a reasonable price, which is a matter of some contention in wider discussions of the concept of security of energy supply;[110] further, recital 47 to the third Directive links the content and further strengthening of PSOs (including the USO) to ensuring that 'all consumers, especially vulnerable ones, are able to benefit from competition and fair prices'. This last statement potentially conflates a

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<http://competitionpolicy.ac.uk/documents/8158338/8261737/CCP+Response+-+BIS+-+Competition+for+UK+Postal+Sector.pdf> accessed 10 April 2015.

[109] For discussion of the pros and cons of such suppliers of last resort, see ERGEG, 'Status review of the definitions of vulnerable customer, default supplier and supplier of last resort' (E09-CEM-26-04, 16 July 2009), esp 7–8 and 31. In essence, the danger is that the incumbent supplier is usually the one designated and time limits upon how long they can serve in that capacity for any given customer are not usually imposed. This may serve to limit and even discourage competition among suppliers in a national system.

[110] On which see Johnston and Block (n 6), paras 9.01–9.20, and the references cited therein. Contrast the position under 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment [2006] OJ L33/22 (Electricity Security of Supply Directive) (and indeed the Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply [2010] OJ L295/1 ('Gas Supply Security Regulation')), which do not seem to encompass a notion of supply at reasonable prices within their conceptions of 'security of supply': see the definition of 'security of electricity supply' in Art 2(b) of Directive 2005/89/EC. NB, further, that the specific measures in Art 3(2) and Annex I of the Third IEM Directives do not address broader 'security of supply' notions, but focus upon continuity, quality and reliability of supplies. For analysis of these measures, see Johnston and Block (n 6), para 10.12 ff.

number of different issues and terms: we will come to the definition of the 'vulnerable' category in a moment, but the notion of 'fair prices' here is linked directly to the benefits of 'competition', which might be thought at least potentially to conflict with the idea that prices must be 'reasonable'. By all accounts, the prevalence in many Member States of state intervention in regulating energy prices suggests that some national governments and regulators share the perception that some final customers need protection from competitive prices if the amounts they are to pay are to remain 'reasonable'. This issue of price regulation will be discussed briefly below (section III.D.iv). Finally, with regard to the USO, it should be noted that the advent of this category is beneficial for *some* categories of customer, insofar as it might otherwise not be economic to supply them with electricity, but for the remainder the impact is to pass on to them the costs of supplying those protected by that USO, effectively socialising the cost of such supplies. This is consistent with the broad terms of Articles 3(10) (Electricity) and 3(7) (Gas), which instruct Member States to 'implement appropriate measures to achieve the objectives of social and economic cohesion and environmental protection': specific reference is made here to 'adequate economic incentives … for the maintenance and construction of necessary network infrastructure', which are clearly crucial for meeting the USO in electricity and various other PSOs in both electricity and gas, but which leave it to the Member States to define which categories of customers might need such extra attention or protection.

With regard to various sub-categories of customers, the later iterations of the EU's IEM Directives have begun to acknowledge that it may be justifiable for Member States to maintain or introduce special rules for the protection of what are almost always referred to as

'vulnerable customers'.[111] The word 'vulnerable' is nowhere to be found in the First Package legislation, but began to be of significance from the Second Package onwards,[112] and the vulnerable customer appears at many points in the Third Package Directives, in the contexts of PSOs and the objectives of the NRA.[113] Yet still no definition has been offered of the category of 'vulnerable customers':[114] this was due to the difficulties of allowing for those who use energy sources other than gas and electricity as a heat source, and the volatility of energy prices relative to income levels, meaning that measures like the proportion of income spent on energy would not provide a consistent and coherent standard.[115] Thus, the definition of the vulnerable customer is left to the Member States, although they are *obliged* to define that concept—'which may refer to energy poverty and, inter alia, to the prohibition of disconnection … to such customers in critical times'—and 'appropriate measures' must be taken and 'adequate safeguards' implemented. Again, no definition is offered of 'energy poverty' or 'critical times'[116] in the Third Package Directives, so while the categories of issues which are to be addressed by Member States are relatively clearly defined, significant discretion remains at the national level both in choosing the methods to be used to address

[111] For treatment of the notion of the 'vulnerable consumer' in EU law more broadly, see Norbert Reich's contribution in this volume, and the references cited therein.
[112] See Recs 2 and 24, and Art 3(5) of the Second Electricity IEM Directive (n 10), and Rec 2 and Art 3(3) of the Second Gas IEM Directive (n 10).
[113] Recs 37, 45, 50 and 53, Arts 3(7) and (8), and 36(h) (Electricity (n 10)); and Recs 33, 47 and 50, and Arts 3(3) and (4), and 40(h) (Gas (n 10)).
[114] For a definitional attempt in the biomedical ethics sphere, but drawing upon a much more general (and often legal) philosophical approach to the issue, see N Tavaglione and others, 'Fleshing Out Vulnerability' (2015) 29 *Bioethics* 98: '[o]ne can define vulnerable persons as those having a greater likelihood of being wronged—that is, of being denied adequate satisfaction of certain legitimate claims' (98), before going on to develop what might count as 'legitimate claims' (particularly interestingly in the contexts of 'social provision' (102–03) and 'communal belonging' (104–05)), while acknowledging the need for further thought concerning what amounts to 'special protection' and how to address problems of allocating resources and choosing between requirements when they cannot all be satisfied (106).
[115] C Jones (ed), *EU Energy Law – Volume I: The Internal Energy Market – The Third Liberalisation Package*, 3rd edn (Leuven, Claeys and Casteels, 2010) 417.
[116] In the UK, eg Ofgem has set up 'Guaranteed Standards of Performance', under which payments will be made to customers who face long power cuts during severe weather incidents: these led to significant payments to customers after the Christmas 2013 storms and inadequate response thereto from two southern distribution network operators – Ofgem, 'SSE and UKPN pay out £8 million following Christmas storms (24 July 2014).

such issues[117] and in defining those customers whose positions are covered by such measures and safeguards.[118] Another such category concerns customers in 'remote areas', which have moved from an optional category in the Second Package Directives which Member States 'may' protect[119] to a positive *obligation* under Articles 3(7) (Electricity) and 3(3) (Gas) under the current rules; again, there is no EU-level definition of such 'remoteness', leaving Member States to specify where exactly will be covered.

More generally, growing levels of detail have been provided in EU energy legislation concerning the position of consumers. Some of these are found in the main body of the Directives, while a wide range of others appear under the label: 'measures on consumer protection' in Annex I of the Third Electricity and Gas IEM Directives, although in the same vein as section II (above) we must highlight that the wording of the remainder of that Annex refers mostly to 'customers' when expounding the various protections envisaged.[120] This is, perhaps, an unhelpful terminological elision, not least since Article 3 of each Directive refers to 'customer protection' in its title, and Articles 3(7) (Electricity) and 3(3) (Gas) specifically refer to the measures in Annex I as the minimum which must be implemented with regard to 'household customers'. These infelicities make the scope of some of these provisions in themselves more difficult to apply, and that is before one moves to ask how they might interact with other EU legislative measures specifically directed towards protecting the 'consumer', where that individual is identified as a term of art rather than what in the Third Package Directives sometimes seems little more than a stylistic choice.

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[117] eg it has emerged that Ofgem may use the proceeds from fines to benefit charities and funds for vulnerable customers: 'Ofgem penalises three energy firms a total of £4.6m' *Financial Times* (London, 12 December 2014) (concerning fines imposed for breach of environmental (not consumer) obligations).
[118] For some discussion, see Johnston and Block (n 6,), paras 7.84–7.96.
[119] Second IEM Directives: Arts 3(5) (Electricity (n 10)) and 3(3) (Gas (n 10)).
[120] The exceptions are to be found in paras 1(f) and (h), and 2 of Annex I to each of the Third IEM Directives (n 10): see Table 1 in the text for details of their substance.

Then, we must not that some of these ostensibly protective provisions also interact with others, in the interests of providing the customer with the requisite information to ensure the proper functioning of the competitive process, and avoiding that its operation might in fact operate in a manner exploitative of the consumer.[121] So, Member States must ensure that there is access to information concerning a consumer's consumption data (see Articles 3(5) (Electricity) and 3(6) (Gas)), allied with various provisions in Annex I concerning: services, prices, tariffs and conditions (1(a)), the means of accessing information on various topics (including the switching procedure itself) and the fact that there may be no charge for changing supplier. As the Commission has noted, '[t]aken together, these new provisions … are designed to make it easier for consumers to understand their own consumption, to use this information either to compare it with offers from other energy suppliers, or to allow other suppliers to have access to their consumption data so as to provide them with a new offer of supply'.[122]

As for the other, important, elements of Annex I in the two current Directives, Table 1 summarises the relevant rights and obligations concerning consumer protection, to provide an overview of their substance and evolution from the Second to the Third Package legislation. Many of these relate to transparency and information provision requirements,[123] typically in

[121] Note the link here to Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services [2006] OJ L114/64, which requires that 'final customers' have made available to them a 'reasonable amount of information … in clear and understandable terms … in or with their bills [etc]', encompassing a wide range of issues (Art 13 *juncto* Recs 12 and 29). This may also be conceptualised more broadly as empowering consumer choice 'in which their active participation as an agent of change within the energy market is to be encouraged on the basis of efficiency and ecology' rather than simply as a coldly lowest-cost, economically rational actor (J Davies, *The European Consumer Citizen in Law and Policy* (Basingstoke, Palgrave Macmillan, 2011) 160 (where Crouch is also cited on the citizenship concept of choice: 'if one is part of a universe defined by a certain citizenship, then one is entitled to participate in the choices which it makes available': C Crouch, 'Citizenship and Markets in Recent British Education Policy', in C Crouch and others (eds), *Citizenship, Markets and the State* (Oxford, Oxford University Press, 2001) 125))).

[122] Commission, 'Interpretative Note on Directive 2009/72/EC concerning Common Rules for the Internal Market in Electricity and Directive 2009/73/EC concerning Common Rules for the Internal Market in Natural Gas: Retail Markets' Staff Working Paper (22 January 2010) 5.

[123] Including a single point of contact through which customers can access such information: Arts 3(12) (Electricity (n 10)) and 3(9) (Gas (n 10)).

response to consumer complaints about poor and sometimes obstructive practices by suppliers in the years following the Second IEM Package,[124] and overall 'high levels of consumer protection' are to be ensured (Articles 3(7) (Electricity) and 3(3) (Gas)).

[INSERT TABLE CONCERNING EVOLUTION OF ANNEX I PROVISIONS HERE OR AS NEAR AS POSSIBLE.]

These developments have taken place hand-in-hand with a growing enhancement of the role of the NRA in each Energy Package, in particular with regard to national retail markets and consumer protection measures. This is not the place to offer a detailed account of this evolution; suffice it here[125] to note that the key focus has been upon specifying more fully the objectives, duties and powers of the NRA to ensure that they can fulfil their enhanced role[126] with regard to the retail market under the Third Package IEM Directives of 'ensuring that customers benefit from the efficient functioning of their national market, of promoting effective competition, and of helping to ensure consumer protection'.[127]

c. Links to Specific EU Rules on Consumer Protection?

[124] See Johnston and Block (n 6) 177.
[125] See, further, ibid, ch 5 and paras 7.112–7.117.
[126] See Arts 37(1)(j) (Electricity (n 10)) and 41(1)(j) (Gas (n 10)) concerning market opening, and competition at wholesale and retail levels, covering (inter alia): prices, prepayment systems, switching and disconnection rates, complaints, and distortions of competition, including bringing relevant cases to the competition authorities. Again, much of this provision relates directly to the customer/consumer as market participant and the NRA's function in developing that role.
[127] Arts 36(1)(g) (Electricity (n 10)) and 40(1)(g) (Gas (n 10))

Annex I in each of the Third Package IEM Directives makes clear that its provisions are to operate 'without prejudice to the EU rules on consumer protection', so that the various rules on unfair terms, distance selling, doorstep selling, unfair commercial practices (etc) all continue to apply to energy consumers.

Yet there is some experience in the telecommunications sector in the UK that these did not adequately protect consumers against misselling. Ofcom took action by introducing various General Conditions on sales and marketing of fixed-line and mobile services, eventually leading to a general Code of Practice concerning domestic and SME customers on sales and marketing (May 2005). This, in turn, led in 2007 to mobile network operators adopting their own voluntary code on misselling, and eventually to the inclusion of provisions in the general conditions for both mobile (2009) and fixed-line (2010) services, providing a tougher regime.[128]

In the UK energy sector, Ofgem has more recently been active in this area of misselling as well, imposing fines on various energy supply companies (eg Npower in December 2008[129] and SSE in April 2013).[130] As of mid-2013, 14 full-scale investigations had been conducted by Ofgem under various consumer law powers (doorstep selling, distance selling, and the licence condition requiring operators to have procedures in place to prevent misselling), leading to over £35m in fines and £6m in redress payments to consumers.

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[128] Operators must not engage in dishonest, misleading, deceptive or aggressive conduct, or contact the customer in an in appropriate manner; staff must be trained and it must be ensured that agents also comply. See, generally, the discussion by Newman (n 37).

[129] Ofgem Press Release, 'Ofgem Fines Npower for Misselling of Energy' (22 December 2008) <https://www.ofgem.gov.uk/ofgem-publications/76436/221208ofgem38.pdf > accessed 10 April 2015 (with a fine of £1.8m imposed).

[130] Ofgem Press Release, 'Ofgem Fines SSE £10.5 Million for Misselling' (3 April 2013) <https://www.ofgem.gov.uk/ofgem-publications/76232/sse-press-release.pdf> accessed 10 April 2015. The £10.5m fine was the largest yet imposed by Ofgem for misselling.

In this area, we now have two recent CJEU judgments on the interaction between the consumer protection provisions of the IEM Directives (there, the Second Package provisions) and the Unfair Terms in Consumer Contracts Directive 93/13/EEC: *RWE Vertrieb*[131] and *Schulz and Egbringhoff*.[132] These judgments have started to clarify the relationship between these provisions and the impact upon that relationship of national mandatory rules (evident in the analysis in both cases and applied on the facts in *Schulz*). In *RWE Vertrieb*, the Court first pointed out that, as found by the national courts, the relevant national mandatory rules laid down in the relevant national regulation (the AVBGasV,[133] which empowered a gas supplier unilaterally to vary gas prices without giving reasons for doing so) actually did not apply to the contracts in question. Rather, the terms and conditions incorporated into those contracts referred to the AVBGasV, but the regulation's material scope did not cover those special contracts but only applied to standard tariff contracts. As a result, Article 1(2) of the Unfair Terms in Consumer Contracts Directive 93/13/EEC[134] could not operate so as to allow the existence of national mandatory statutory or regulatory rules to exclude the application of that Directive to the present special contracts: the rationale for such exclusion is that, in passing such rules, 'it may legitimately be supposed that the national legislature struck a balance between all the rights and obligations of the parties to certain contracts'.[135] On the facts in *RWE Vertrieb*, that legislative balance did not extend to the intention of the parties to apply those rules to a contract beyond the scope of—here—the AVBGasV, especially when the legislature had specifically chosen not include such special contracts thereunder.[136]

[131] Case C–92/11 *RWE Vertrieb v Verbraucherzentrale Nordrhein-Westfalen*, judgment of 21 March 2013.
[132] Joined cases C–359/11 and C–400/11 *Schulz v Technische Werke Schussental* and *Egbringhoff v Stadwerke Ahaus*, judgment of 23 October 2014.
[133] *Verordnung über Allgemeine Bedingungen für die Gasversorgung von Tarifkunden* (21 June 1979, BGBl 1979 I, p 676).
[134] Unfair Terms in Consumer Contracts Directive (n 1).
[135] *RWE-Vertrieb* (n 131) para 28.
[136] ibid, paras 29 and 33.

Otherwise, it would be too straightforward for suppliers to circumvent the review of the unfairness of non-individually-negotiated terms safeguarded by the Directive.[137] The Court then went on to offer guidance on how to assess whether such a term allowing price variation complied the requirements of good faith, balance and transparency laid down in Articles 3 and 5 of the unfair terms Directive and Article 3(3) of the Second Gas IEM Directive 2003/55/EC, concluding that:

> it is of fundamental importance:
>
> > – whether the contract sets out in transparent fashion the reason for and method of the variation of those charges, so that the consumer can foresee, on the basis of clear, intelligible criteria, the alterations that may be made to those charges. The lack of information on the point before the contract is concluded cannot, in principle, be compensated for by the mere fact that consumers will, during the performance of the contract, be informed in good time of a variation of the charges and of their right to terminate the contact if they do not wish to accept the variation; and
> >
> > – whether the right of termination conferred on the consumer can actually be exercised in the specific circumstances.[138]

From the facts set out in the judgment, it seemed tolerably clear that the terms in the special contracts involved would not meet these requirements, although of course the Court left it to the national court to apply these principles to the facts of the case. It was also notable that the

[137] ibid, para 30–31.
[138] ibid, para 55.

Court used Article 3(3) and the relevant provisions of Annex A to the Second Gas IEM Directive to provide the energy supply context and further details with which the assessment under the Unfair Terms Directive should be conducted.[139] The Court expressly acknowledged the recognition by the EU legislature that there may be a legitimate interest in the supplier being able to alter the prices it charges for providing gas to consumers in such ongoing and indeterminate contractual relationships,[140] but confirmed that such a standard term was still subject to the consumer protection requirements laid down by both of those Directives.

Meanwhile, the relevant contracts in the *Schulz* case *were* subject to the AVBGasV: thus, consistently with the ruling in *RWE Vertrieb*, the Unfair Terms Directive could not assist Ms Schulz in her defence against her gas supplier's claim for payment of sums owing, which included the four times that the supplier had increased gas prices during the period from 1 January 2005 to 1 January 2007. Instead, she relied upon Article 3(3) of the Second Gas IEM Directive, in conjunction with its Annex A. In the parallel *Egbringhoff* case, the claimant sought reimbursement of the extra sums charged and which he had paid (without prejudice), with interest, after his supplier had increased electricity[141] and gas prices on several occasions. He relied upon that same provision, as well as Article 3(5) of the Second Electricity IEM Directive 2003/54/EC *juncto* its Annex A. In its judgment concerning the 'rights of customers',[142] the Court emphasised the need to ensure a high level of consumer protection with regard to the transparency of contract terms and conditions, and even emphasised that '[c]consumer protection concerns underpin the provisions of Directives

[139] ibid, paras 50–54.
[140] ibid, para 46, referring to the second sentence of point 2(b) and point (d) of the Annex to Unfair Terms in Consumer Contracts Directive (n 1) and from point (b) of Annex A to Gas Directive (n 10).
[141] In which sector there existed the AVBEltV (*Verordnung über Allgemeine Bedingungen für die Elektrizitätsversorgung von Tarifkunden* (21 June 1979, BGBl 1979 I, 684)), which was replaced by the StromGVV (*Verordnung über Allgemeine Bedingungen für die Grundversorgung von Haushaltskunden und die Ersatzversorgung mit Elektrizität aus dem Niederspannungsnetz, Stromgrundversorgungsverordnung* (26 October 2006, BGBl 2006 I, 2391)), which together applied to Mr Egbringhoff's situation across the time period in question and fulfilled the same mandatory rules function as that performed by the AVBGasV in *Schulz*.
[142] NB, not 'consumers', in accordance with the wording of most of the provisions of each Annex A.

2003/54 and 2003/55 … . Those concerns are closely linked both to the liberalisation of the markets in question and to the objective, also pursued by those directives, of ensuring a stable electricity and gas supply'.[143] It then went on to hold that:

> 47. … in order to be able to benefit fully and effectively from those rights and to take an informed decision as to whether to terminate the contract or to challenge the adjustment of the supply price, customers must be given adequate notice, before that adjustment takes effect, of the reasons and preconditions for the adjustment, and its scope.
>
> 48. Consequently, national legislation such as that at issue in the main proceedings, which does not ensure that, in those circumstances, the information referred in the preceding paragraph is communicated to a household customer with adequate notice does not meet the requirements set out in Directives 2003/54 and 2003/55.

This approach, and the inapplicability on these facts of the unfair terms Directive, underscore the important contribution of the development of consumer protection provisions *within* the framework of the second IEM Directives, which have been enhanced by the third IEM package Directives in 2009: even national mandatory rules may be subjected to a measure of scrutiny with regard to various customer rights. At the same time, it should be remembered that the full panoply of such consumer protection offered by the rest of the EU consumer law *acquis* will apply only insofar as it does not contain exceptions like those found in Article 1(2) of the Unfair Terms Directive: in this regard, the Consumer Rights Directive

[143] *Schulz* and *Egbringhoff* (n 132) para 40.

2011/83/EU[144] expressly applies to contracts for the supply of gas and electricity (Article 3(1))—although where more specific requirements exist in the Third IEM Directives (concerning in particular information provision) then these take priority (Article 3(2)). And it seems clear that the Commission will continue to emphasise its potential significance for the energy sector, as well as aiming to develop further information provision initiatives and guidelines.[145]

Also here, we should emphasise the acknowledgment by the CJEU in *Schulz* and *Egbringhoff* that, where mandatory national rules apply due to the need to provide for a supplier of last resort so as to ensure that a USO is respected (as was indeed the case on the facts of both of those cases):

> [a]s those suppliers of electricity and gas are required, in the framework of the obligations imposed by the national legislation, to enter into contracts with customers who request this and who are entitled to the conditions laid down in that legislation, *the economic interests of those suppliers must be taken into account in so far as they are unable to choose the other contracting party and cannot freely terminate the contract*.[146]

While this point does not receive any attention in the remainder of the judgment, it may yet prove of no little significance for suppliers faced in the future with arguments based upon the reasoning in *Schulz*: the willingness of the Court to accept the need to consider the supplier's economic interests here shows potential interactions with the approach taken to PSOs in the

[144] Consumer Rights Directive (n 1).
[145] See Commission, A European Consumer Agenda – Boosting Confidence and Growth, COM (2012) 225 final, paras 4.3 and 4.4, where energy is emphasised as a key focus.
[146] *Schulz* and *Egbringhoff* (n 132), para 44 (emphasis added).

cases under Article 106(2) TFEU (and, indeed, *Altmark*) discussed above (sections III.B.i and III.B.ii). One could speculate whether the Court's reasoning in the *Alemo-Herron* judgment[147] concerning the inclusion of freedom to conduct a business—and its incorporation of the principle of freedom of contract—in Article 16 of the Charter of Fundamental Rights of the EU[148] might be used to bolster claims that such supplier interests be respected in a proportionate fashion. This might seem no less paradoxical an argument here in the consumer protection scenario than in the employee protection context of *Alemo-Herron* itself,[149] and typically the Court has shown a willingness to interpret EU consumer legislation to provide far-reaching protection for the consumer,[150] as well as a refusal to give much weight to the argument in consumer cases to date.[151] Still, the link to the need to ensure 'the performance, under economically acceptable conditions, of the tasks of general economic interest which [the Member State] has entrusted to an undertaking'[152] would be relevant in a situation such as that in *Schulz*, where the energy supplier concerned has been appointed as a supplier of last resort (as discussed above, both in this section and in section III.D.i.b).

ii. Yet There Are Still Shortcomings

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[147] Case C–426/11 *Alemo-Herron v Parkwood Leisure*, judgment of 18 July 2013, discussed (critically) by J Prassl, 'Freedom of Contract as a General Principle of EU Law? Transfer of Undertakings and the Protection of Employer Rights in EU Labour Law' (2013) 42 *Industrial Law Journal* 434.

[148] [2010] OJ C83/389.

[149] Eg in other recent cases, the Court has emphasised that 'the freedom to conduct a business is not absolute, but must be viewed in relation to its social function [and may] be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest' (Case C–281/11 *Sky Österreich v Österreichischer Rundfunk* (CJEU, 22 January 2013), paras 45–46. In *Alemo-Herron* (n 147), the distinction relied upon by the Court was that the UK measure adversely affected the 'core content' (*Sky Österreich*, para 49) or 'very essence' (*Alemo-Herron* (n 147), para 35) of that freedom, in a way that it had not found in the *Sky Österreich* case.

[150] eg H Unberath and A Johnston, 'The Double-headed Approach of the ECJ Concerning Consumer Protection' (2007) 44 *Common Market Law Review* 1237, esp 1252 ff and, generally: S Weatherill, *EU Consumer Law and Policy*, 2nd edn (Cheltenham, Edward Elgar, 2014); and N Reich and others, *European Consumer Law*, 2nd edn (Antwerp, Intersentia, 2014).

[151] See Case C–12/11 *Denise McDonagh v Ryanair Ltd*, judgment of 31 January 2013, paras 60–64, where the EU objective of ensuring a high level of protection for consumers was emphasised.

[152] Case C–157/94 *Commission v Kingdom of the Netherlands* (n 42), para 43: see the discussion in section III.B.ii, above.

In spite of this clear development over time towards greater concern for and attention to the position of what we might style 'genuine' consumers (see the discussion in section II, above) within the EU's energy legislation, various difficulties remain with the *acquis* as it stands. First, many such 'protections' are in reality concerned with creating and facilitating the competitive process (on the assumption that consumers will benefit therefrom), *rather* than real *protection* for consumers. (This also links to questions of energy *prices*, set by market forces or regulated in some way and for some categories of customer: see, below, section III.D.iv.)

Second, the adoption of secondary legislation can (and does, to an extent) add greater specification of what types of interest should/must be protected via PSOs, *but*, due to the overall goals of liberalisation, trade and competition in the EU energy sector being pursued by that legislation, it also *limits* the range of issues on which MS are *allowed* to adopt PSOs: see Article 3(2) in both of the Third IEM Directives.[153] This operates to restrict some of the points made in the foregoing analysis (see section III.B.iii.a, above) concerning Member State freedom to define and adopt PSOs. Of course, for some this is less of a problem and more a welcome degree of guidance from EU level about which sorts of measures are allowed to be introduced by Member States, thus reducing the scope for unilateral national action to hinder trade and competition. For others, these developing EU law incursions into national regulatory autonomy on sensitive topics such as public service provision and the protection of weaker, vulnerable and/or remote consumers are: politically (democratically) less legitimate and responsive than national regulation; and rendered potentially less effective

[153] There is some debate about this: compare Suykens and Delvaux (n 97) with T Deruytter, W Geldhof and F Vandendriessche, 'Public Service Obligations in the Electricity and Gas Markets' in B Delvaux, M Hunt and K Talus (eds), *EU Energy Law and Policy Issues*, vol 3 (Antwerp, Intersentia, 2012) ch 3.

due to their framing by market liberalisation goals in the EU's energy legislative *acquis* (as discussed in section III.B above).

Third, the substantive detail of such matters in EU legislation can leave much to be desired, often as a result of the compromises necessary among Member States, and between Council and European Parliament, to secure passage of a given measure. In some cases, this serves to preserve a significant measure of Member State autonomy, while at the same time leaving a risk that national measures may not adequately address the consumer protection issues in a given area. This is exemplified by the failure to define at EU level what certain categories might include: eg the notion of 'vulnerable customer' in the Third IEM Directives is highlighted, but exactly who qualifies under this category is left to Member States to define. Once such customers have been identified by national law, the Third IEM Directives do at least provide a range of 'appropriate measures' that Member States might take, but the language of these provisions is more hortatory than prescriptive. In other cases, references in different EU legislative instruments across the energy field can be to similar categories, yet the usage may be inconsistent and potentially confusing when considered alongside each other. So, 'household customers' appear in Article 3(7) of the Third IEM Directives in reference to possible Member State 'consumer protection' measures as listed in Annex I (for a summary, see Table 1, above). They also appear as 'protected customers' in Article 1(1) of Regulation 994/2010/EU on Gas Supply Security, where Member States are allowed to add others[154] to that category: protected customers are then used by the Regulation in defining the 'supply standard' required of gas supply undertakings (Article 8 of the Regulation), which obliges gas supply undertakings to ensure gas supply in the face of particular serious events concerning extreme weather or the disruption of the single largest piece of gas infrastructure.

[154] Specifically, SMEs, essential social services and district heating installations: Art 2(1) of Regulation (EU) No 994/2010 (n 110).

Here, such customers are used as a yardstick for obligations imposed upon undertakings, with a view to protecting the continuity of gas supplies to households: while this may not confer rights upon household customers to such supplies (the point has never been tested before a court), it would seem to establish protection for that group of customers. Yet Article 8(4) of that Regulation provides that these supply standards may not impose an undue burden upon undertakings, and Article 8(6) requires that supplies to protected customers must not prejudice the functioning of the internal market and should be at a price which respects the market value of the supplies. Here, then, the notion of security of supply being safeguarded for household customers would not necessarily seem to include a notion of fair or reasonable prices (compare the discussion of the USO in electricity above).[155]

iii. Broader Questions Concerning the Interaction Between Various Different Pieces of EU Legislation and Policy, and their Implications for the Position of Customers/Consumers

Of course, these questions arise in sectors other than energy, as evinced (for example) by the work of Nihoul looking at the status and protection of consumers (mainly) within the telecoms/e-communications sector,[156] alongside the more UK-focussed work of Newman on telecommunications.[157] But coverage of these issues in the energy sector has been relatively limited to date, hence the reason to focus upon that sector here. As discussed above (in section III.D.i.c), one area of uncertainty in EU Energy law concerned the interaction between general EU consumer law and the sector-specific rules developed in each of the (to date) three IEM legislative packages. The *RWE Vertrieb* and *Schulz* cases have brought a measure of clarity on these questions, as outlined in the preceding section.

[155] See the text at (n 110) and ff.
[156] Nihoul (n 37); and see, further, Nihoul and Rodford (n 37) esp chs 4 and 5.
[157] Newman (n 37).

To put matters of interaction into the broader sectoral context, the final impact of various environmental and supply security policies has raised wide-ranging questions concerning energy supply. Various actors in the debate have questioned:

- the functioning of the energy market, and infrastructure investment and development (alleging collusion or at least structural problems leading to price co-ordination);
- energy regulatory (un)certainty and its impacts upon the raising of finance and making investment decisions; and/or
- subsidy levels offered to support various energy activities, and their implications for State finances, the competitiveness of domestic businesses and the concomitant increase in the cost of living for households (both specifically concerning energy prices and more broadly, given the contribution of energy costs as an input into most other goods and services in one way or another).

These phenomena can be observed in different ways and to different degrees of intensity across the EU,[158] and are open to various interpretations depending upon the particular national legal, political and economic contexts in which they have arisen.

[158] To take but one example, both the UK and Spain sought retrospectively to change the rules applicable to certain subsidies for renewable energy generation: the former failed in the courts (*Secretary of State for Energy and Climate Change v Friends of the Earth* [2012] EWCA Civ 28) due to the interpretation of the relevant primary legislation as not having conferred such a power to make retrospective changes (ibid paras 41–52, *per* Moses LJ), but the latter succeeded in the face of judicial challenges (various judgments of the Supreme Court, most recently JUR2014/14099 (13 January 2014), and the Constitutional Court: SSTC 109/2014 (26 June 2014) and Case 96/2014 (12 June 2014)). The difference seems to lie in the fact that the UK scheme in question was relatively small-scale, and had a limit on the amount of funding made available by the Treasury, whereas the Spanish scheme was much broader and involved subsidies paid from the State budget, which raised very serious financial questions at a time of austerity in Spain in the wake of the financial crisis, spiralling government debt and costs of bond issues, etc. Thus, for the Spanish courts, the connection made to a situation of economic urgency justified the retrospective changes made to subsidy levels. I am grateful to Ms Irene Maria Ruiz Olmo for our discussions on these Spanish cases.

In the present, consumer-related context, however, recent years have seen a sharpening focus upon subsidy levels and their *impact upon prices*, both for consumers/household customers *and* for business customers. These effects can be enhanced or exacerbated (depending upon your point of view) by *national-level choices* as to how to pursue EU and/or national environmental policy goals: for example, in general the price for an emissions allowance under the EU's Emissions Trading System sets the carbon price applicable to those installations which have obligations under the system,[159] but in the UK the view was taken that this led to a carbon price which was both too low and too volatile to encourage low-carbon investments. As a result, the UK introduced a tax designed to create a carbon price floor, working in conjunction with the EU ETS:[160] yet fears that the price pressure that this added to customers' energy (particularly electricity) bills led to the freezing of that tax regime at 2014 levels (instead of escalating as planned) less than a year after it had entered into operation.[161] Similarly, subsidies offered to encourage more rapid deployment of renewable electricity generation installations may add to the prices ultimately paid by customers where they are set up so that costs are passed through from generators, via network companies at transmission and distribution level, to final customers (both business and consumer). The Court's judgment in the famous *PreussenElektra* case[162] facilitated this route

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[159] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community [2003] OJ L275/32, as amended by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community [2009] OJ L140/63.

[160] For discussion, see A Johnston, 'United Kingdom Report' in J Laffranque (ed), *The Interface between the Energy, Environment and Competition Rules of the European Union*, 541–45.

[161] HM Revenue and Customs, 'Carbon price floor: reform and other technical amendments' (19 March 2014) <https://www.gov.uk/government/publications/carbon-price-floor-reform> accessed 10 April 2015: '[t]his measure caps the UK-only element of the CPF at £18 per tCO2 from 2016-17 until 2019-20 to support UK business competitiveness and helps to restrain increases in household energy bills, while still maintaining the incentive to invest in low-carbon generation'. For comment see eg M Hope, 'Budget 2014: Why freezing the carbon price floor is a symbolic blow to the UK's climate commitment' *The Carbon Brief* (18 March 2014) <http://www.carbonbrief.org/blog/2014/03/budget-2014,-why-shed-a-tear-the-unloved-carbon-price-floor> accessed 10 April 2015.

[162] Case C–379/98 *PreussenElektra AG v Schleswag AG* [2001] ECR I–2099; the Court also refused to hold that the national purchasing obligation plus feed-in tariff amounted to an unjustifiable restriction upon the free movement of goods under Art 34 TFEU, and recent judgments (while engaging in more detailed assessment of

for Member States—thanks to its conclusion that carefully designed national systems in which the state played no role in collecting, channelling or allocating the funds collected in order to subsidise renewables, and where the customer ultimately paid for that cost (so that the funds were provided neither by the state nor through state resources)—meant that such subsidies did not amount to notifiable State aid under Article 107 TFEU.[163]

In response to criticisms about the price implications of such energy policy measures, debates have developed about whether price increases are solely or even mainly due to such policy decisions and support instruments, or whether other causes might be (more) important. Thus, there may be:

- technical difficulties in incorporating new technologies into an older grid system; or
- rising wholesale prices of inputs (natural gas) or when wholesale prices on the spot markets appear to be falling then those companies which have entered into longer-term contracts to ensure gas supplies may see delays before sufficient proportions of their supplies benefit from such price drops, so as allow energy prices to customers to be reduced; or
- issues created by national market design (eg in the UK, gas-fired electricity generation tends to set the market price, which can both over-compensate some generators where gas prices and electricity demand are high, but also under-compensate where gas prices are low); or

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the reasons why, and conditions under which, this would be justifiable) have not changed its approach on the free movement aspect of the question either: Case C–573/12 *Ålands vindkraft AB v Energimyndigheten*, judgment of 1 July 2014 and Joined cases C–204 to 208/12 *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits - en Gasmarkt*, judgment of 11 September 2014.

[163] For analysis, see Johnston and Block (n 6) 12.173–12.178, augmented by coverage of more recent cases in A Johnston, 'The Impact of the New EU Commission Guidelines on State Aid for Environmental Protection and Energy on the Promotion of Renewable Energies' in T Sveen (ed), *EU Renewable Energy Law: Legal Challenges and New Perspectives* (Oslo, MarIus 446, 2014) 23–31.

- anti-competitive or market-manipulative behaviour on the part of energy supply companies. There have been various allegations of this in the UK, which have led to investigations,[164] and in 2014 a reference for investigation of the supply and acquisition of energy in Great Britain to the new Competition and Markets Authority,[165] in the wake of criticisms that have gone as far as to call for structural remedies to break up the big energy supply companies.

It should be noted that pressure to investigate the energy supply system more broadly in the UK is coming from consumers/households and representative groups, regulators[166] and political parties[167] (particularly as electioneering has ground into high(er) gear from late 2013 onwards),[168] but also from businesses complaining about energy input costs harming their competitiveness within Europe and indeed the wider world economy. It is clear that business pressure to improve competitiveness of domestic goods and services was a key driver behind the freezing of the UK's carbon tax in March 2014, for example. Thus, even here, while elements influencing political and regulatory responses to the functioning and development of the energy supply system are often clearly focussed upon the need to protect the position

[164] eg Ofgem, 'Addressing Market Power Concerns in the Electricity Wholesale Sector – Initial Policy Proposals' (Ref 30/09, 30 March 2009), after Ofgem had abandoned a Competition Act investigation into SSE and Scottish Power practices (on 19 January 2009); and OFT, 'Off-Grid Energy – Decision not to make a market investigation reference to the Competition Commission' (OFT 1401, 21 December 2011), concerning domestic heating oil.

[165] CMA, 'Energy market investigation' (Opened, 26 June 2014; case page: <https://www.gov.uk/cma-cases/energy-market-investigation> accessed 10 April 2015); a final report is currently expected in November or December 2015.

[166] eg Austria's E-Control criticising high energy retail margins in the household sector: see NERA, 'Global Energy Regulation' Issue 187 (December 2014) 3.

[167] Perhaps as a reflection of public criticisms of government for failings which government would ascribe to undertakings in the privatised, liberalised energy sector, reflecting a perception of being held accountable for behaviour which has been shifted from the State's control to that of market forces and associated (but independent) regulators (in competition law and various sectors, such as energy). For use of this disconnect to oppose privatisation in general, see A Dorfman and A Harel, 'Against Privatization as Such' (29 January 2015) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2557409> accessed 10 April 2015.

[168] eg: 'Labour would freeze energy prices until 2017, says Ed Miliband' *The Guardian* (London, 24 September 2013); 'Politicians lost in energy wilderness' *The Times* (London, 17 October 2013); the debate on energy price freezes held at the Labour Party conference in September 2014 (see <https://www.youtube.com/watch?v=qGayT970Zz8> accessed 10 April 2015); and the comments of D Helm, 'Electricity and Energy Prices' Energy Futures Network (13 February 2014) <http://www.dieterhelm.co.uk/node/1374> accessed 10 April 2015.

of consumers, many of the key decisions seem only to be taken once pressure has been brought to bear by businesses: benefits may then flow through to the consumer in the form of lower prices (or at least more modest price increases) of both energy and other goods and services.

This focus on energy prices sets up a short case study of energy retail price regulation as an example of the tensions in using PSOs to justify national 'protective' measures, complicated by the presence of now quite extensive secondary legislation.

iv. Energy Retail Price Regulation and EU Law

This is not the place for a detailed analysis of the legal requirements for, and restrictions upon, energy retail price regulation by the state under EU law.[169] In brief summary, such price regulation may take various forms: most commonly, it consists of state approval of prices and/or the imposition of price caps upon energy supplies at the retail stage. The most common feature of retail price regulation is that prices are set at levels equal to or *below* competitive market prices, with the goal of ensuring that eligible customers are provided with energy at a 'reasonable' price. Within retail price regulation, one can distinguish between:

- 'general' or 'blanket' price regulation, where all customers within a defined group (households, SMEs) receive regulated prices (usually with a possibility to opt out and

[169] Ongoing joint work involving the present author is nearing completion, upon which the summary here is based. For a useful and succinct summary of price regulation in public utilities more generally, see A Heimler, 'Antitrust Enforcement and Regulation: Different Standards but Incentive Coherent?' in TK Cheng and others (eds), *Competition and the State* (Stanford, Stanford University Press, 2014) ch 6, esp 110–12 (and the references cited therein).

seek a better deal on the market, although given the price levels set, this is rarely an attractive option); and

- 'targeted' price regulation, which is focussed on specific, narrowly defined categories of customers: eg the vulnerable, the elderly, and/or those in receipt of social assistance.

Such energy retail price regulation can have various distortive effects. It has various impacts upon market functioning and competition in general (eg where price components are set too low and the proportion of customers covered is too large that competition is restrained), as well as resulting effects upon investment and new market entry: such entry or investment may be discouraged, delayed and/or misdirected. These effects can be felt at the level of network infrastructure (eg delaying or mis-planning grid reinforcement, new interconnections, and the development of smart grids) and at other levels (eg discouraging or delaying the construction of new generation capacity,[170] or the development and deployment of smart metering). Also, retail price regulation may damage consumer interests in the longer term,[171] when contrasted with the often painfully short-term focus of political accountability and processes.

As far as EU law is concerned, it is clear that the underlying assumption of the EU's internal energy market regime is that market forces and competition will deliver 'reasonable prices', even though there are no explicit provisions on retail price regulation in the *acquis* (by contrast with, eg, detailed rules concerning network access (pricing, terms and conditions, the role of NRAs, etc)). In the judgments in the *Federutility*[172] and *ENEL produzione*[173]

[170] Which may also endanger supply security if (eg) adequate electricity generation capacity is not maintained.
[171] Raising problems about the difficulty of comparison with the unprovable, counterfactual 'what might have been' scenario, had there been no competition and market opening.
[172] *Federutility* (n 26).

cases, the Court relied upon the structure and logic, purpose and scheme of the EU's IEM Directives (there, from the Second Package)[174] to conclude that they required that retail energy supply prices must be set by supply and demand, through the mechanisms of eligible customers having a choice of supplier, and suppliers with the right to deliver across networks to their customers.[175]

One might pause for a moment here, and consider how one might conceive of the 'reasonableness' of prices in this context. Price-setting by the operation of market forces could be seen as 'fair' (in an 'input legitimacy' or procedural sense), although this depends upon confidence in the well-functioning of the market in any system: as noted above, in the UK doubts have been expressed about this recently, with wide-ranging potential consequences. Yet even with a functional market, such prices may still be viewed as 'unreasonable' (in an 'output legitimacy' / substantive sense), if one were to focus upon absolute cost levels (especially as a proportion of household disposable income): this assessment is likely to be exacerbated by the ongoing difficult economic situation in many EU Member States.

In any event, the approach in *Federutility* thus leaves state retail price regulation as an exception to the basic rule, and thus in need of proper justification by any Member State intending to impose such regulation. This is because of the damage that price regulation can cause in otherwise competitive markets: in particular, artificially low regulated prices will

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[173] Case C–242/10 *ENEL produzione v Autorità per l'energia elettrica e il gas* [2011] ECR I–13665.
[174] But it is clear that, with the various enhancements concerning unbundling, third party access and NRAs, the Court's analysis seems all the more apposite under the Third Package IEM Directives (n 10).
[175] This is bolstered by Art 3(1) of the Third Package IEM Directives (n 10), requiring Member States to implement the Directives' provisions with a view to achieving 'a competitive, secure and environmentally sustainable market'.

discourage supplier switching by customers,[176] affecting new market entry incentives and ossifying market conditions to the detriment of new entrants. Thus, while it is acknowledged that high market concentration may translate into excessive end-user prices, justifying a measure of price regulation, there is also a danger that price regulation can create or cement such market concentration. The legislative framework does recognise that there is a need for adequate protection for energy customers: as discussed above (section III.D.i.b), Article 3 of the Third IEM Electricity and Gas Directives clearly covers the imposition of PSOs upon energy undertakings, which may include the 'price of supplies'. Member States must respect the Treaty (especially Article 106 TFEU) when doing so. The exceptional status of such price regulation is confirmed by wording of the provisions in the Third Electricity IEM Directive making such regulation possible: Article 3(3) emphasises that Member State PSOs must not impede market opening; and Article 3(2) makes clear that PSOs must guarantee equal access for EU-based electricity undertakings to national customers.

With regard to such justifications under EU law, the case law (the *Federutility* and *ENEL produzione* cases) to date has focussed upon the issues of necessity and proportionality. It is, first, for the Member State to show the *need* to impose PSOs (under Article 106(2) TFEU) to ensure retail prices remained at a reasonable level.[177] Then, to establish the proportionality of such national rules and their effect upon the competitive market:

- the *duration* of PSOs must be limited to that necessary to achieve the objective. The Court emphasised that one way of showing this would be for the national law to

[176] As State-set prices will be lower than those available on the open market; this shows the likely conflict between retail price regulation and the strong focus—especially in the Third Package (n 10)—of the EU energy *acquis* on facilitating and encouraging customers in switching supplier, as discussed in section III.D.i.a of this chapter.
[177] *Federutility* (n 26), para 32.

require periodic reassessment by the NRA or government of the ongoing need for such intervention via price regulation. The inclusion of a 'sunset clause' which would end the operation of such price regulation might be a suitable device in this regard, particularly in conjunction with periodic reviews and the possibility of ending such price regulation earlier than originally provided for by the national rules;[178]

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- the *scope* of coverage of such PSOs must also be justified clearly, both *ratione personae* and *ratione materiae*. For example, can the Member State justify price regulation which would set the same prices for households as large industrial customers?[179] Presumptively, this may be a real challenge to justify.[180] *Ratione materiae*, the key issue will be whether the method of intervention chosen actually address the cause(s) of the problem(s) identified. In particular, the Member State regulatory measure should be limited to the price component 'directly influenced upwards by those specific circumstances' falling within the measure's objectives.[181]

What are the implications of this brief analysis for the justifiability of energy retail price regulation? First, the conditions laid down by the Court point towards the need to restrict national measures in this area to targeted, and not across-the-board, price regulation. Second, these judgments suggest that there are concerns about using price regulation for the 'protection' of large and medium-sized companies: it would surely be better to reform markets. Such businesses find it much easier to participate strongly in markets and there is an express reference to 'households' and SMEs in Article 3(3) of the Third IEM Electricity

[178] See Suykens and Delvaux (n 97) 236–38.
[179] *Regulated electricity tariffs in France – extension of the procedure* (State Aid Case 17/07) Commission Decision 2009/C 96/08 [2009] OJ C96/18.
[180] See Commission, 'Energy infringements, Country Fact Sheets – Portugal' cited in Suykens and Delvaux (n 97) 231.
[181] *ENEL Produzione* (n 173), para 48.

Directive, which provides the foundation for such PSOs. Third, even some household and/or consumer-focussed regulation might prove problematic, if it could be shown that less onerous and more precisely targeted measures were available: for example, such interests might be better protected through the taxation and/or social welfare systems.[182] This is all dependent upon the flexibility or intrusiveness of the approach adopted under the proportionality test at EU level and in possible national court cases. As was highlighted in section III.B above, one can compare the more permissive standards applied in the *Energy Import/Export cases* with the stricter line taken in (inter alia) the *Dusseldorp* case. After legislative developments in the energy sector, the strength of the focus on market opening, competition and customer choice creates a strong presumption against such state regulation, as evinced in the reasoning in *Federutility* and *ENEL Produzione*.[183] All of this shows that certain consumer protection concerns *may* be accommodated by the EU's energy *acquis* in the form of state interventions to regulate retail prices, but also that the design of such national measures must be carefully focussed and limited if they are to be proportionate in their effects; it also indicates that Member States have often tended to seek to maintain broader price regulation schemes covering a wider range of customers than might be justifiable, and that the Commission is alive to these practices and views them with no little suspicion.

IV. CONCLUSIONS: UNCOVERING THE 'IMAGE OF THE CONSUMER' IN LIBERALISING SECTORS

[182] It should be noted that this reliance upon alternative protective mechanisms may be criticised where such systems are not well developed or organised at national level: where, eg, there is very widespread electrification in a country, while tax systems face fraud and corruption and social welfare rules are at best nascent, then the broad coverage of the electricity supply system may be a better way of reaching those who are vulnerable to high electricity retail prices: I am grateful to participants in the conference where this paper was first presented for raising this point.

[183] Although it should be noted that, on the facts, the Court held in *ENEL Produzione* that the relevant legislation did not preclude the relevant Italian measures: ibid, para 89.

After these often difficult points of detail from legislation and case law alike, what is the 'image of the consumer' which we are beginning to uncover in areas involving services of general economic interest, in particular in the energy sector? Where the consumer is referred to directly (on which see sections II and III above), they regularly appear in legislation, competition and free movement case law as the 'trickle-down' beneficiary of the proper working of markets, competition and trade, and at times little more than that. A number of so-called 'consumer protection' measures discussed above are really more about market building, monitoring and facilitation (via NRA duties and powers, etc), rather than involving any real attempt to address the disadvantageous position of the consumer in the ways to which we have become accustomed in the EU's broader consumer law *acquis*.

Or is this evaluation too harsh? A careful examination of the material discussed above would—it is submitted—suggest that EU law in this area (in conjunction with national practice under that framework) is slowly evolving to provide a more nuanced picture of the consumer as an (economic) actor who needs information, clarity and mechanisms to facilitate market participation, while still needing protection of their more vulnerable characteristics and sub-groups.[184] Thus, EU legislation has: obliged Member States to ensure that universal service is provided in the electricity sector; required Member States to offer protection for vulnerable customers; maintained the application of 'ordinary' EU consumer law in such sectors; and provided the framework within which such protection can be expanded at national level in codes of practice and formal licence conditions. At the same time, EU law has highlighted the need for careful and ongoing regulatory scrutiny and enforcement, both of

[184] Davies (n 121) esp ch 5, would, one feels, go further, and suggest that the myriad of information provision, dispute settlement and consultative or representative fora being developed in the sector show a relatively developed (if clearly still develop*ing*—eg environmental awareness and contributions are, for him, still nascent) picture of the 'European Consumer Citizen', focussed on access and choice rights, as well as duties and obligations as market actors (ibid, chs 1–4).

the market-actor-facilitating measures and of those aimed at protecting the consumer against misselling and other unsavoury practices which may be employed by energy suppliers in an attempt to sign up more customers. The national- and EU-level measures and actions discussed in sections III.D.i.b and III.D.i.c, above, illustrate growing and often significant contributions in these areas.

At the same time, there is also evidence that (some) Member States (sometimes) may seek to use the (perceived and genuine) woes of the consumer to justify broader state interventions, pursuing policy goals extending to SMEs and even large businesses as energy customers. This emerges most clearly from the energy retail price regulation example discussed above (section III.D.iv), from which it becomes clear that there may be difficult, broader questions to answer about the energy market liberalisation process in general. The Court's case law and the Commission's practice would suggest that there is a pressing need for Member States to refocus carefully upon categories of consumers to be protected and the goals which their national measures seek to achieve. Yet broader reactions by commentators, regulators and politicians might indicate that such Member State price regulation is symptomatic of a wider loss of trust in competition and markets to deliver such sensitive 'essential services'. And the cynic might suspect that such arguments involve thinly disguising a desire to regain political control over subjects capable of generating significant criticism of the national government and/or parliament. This last point links back to the implications of price regulation for NRA independence, which is required under the Third IEM Directives: the theory is that such independence puts the NRA in a position to avoid political fads, whims and short-termism, aiming to exercise its functions in the interests of liberalisation, trade and competition, while also protecting the consumer. Yet a political desire to be seen to champion the interests of the consumer—particularly in times of

economic recession or stagnation, budget cuts and austerity—may run the risk of undermining the functioning of these crucial systems in the future, whether such politics reflect genuine consumer concerns or unfulfillable promises made in the search for votes as elections loom.