

SERVICES OF GENERAL INTEREST IN EC LAW: MATCHING VALUES TO REGULATORY TECHNIQUE IN THE PUBLIC AND PRIVATISED SECTORS^{*}

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Abstract

All the European Union Member States have long traditions of state activity in providing key services (such as the utilities, health and education) to their citizens and underpinning both such direct provision and provision of services by non-state actors with certain administrative or legal guarantees. In European Community doctrines they are referred to as ‘services of general interest’ within which is a narrower class of ‘services of general economic interest’. The diverse national public service traditions have been challenged both by the requirements of the single market and by other pressures such as fiscal crisis and broader public sector reform. This article examines the means by which services to which special principles should be applied can be identified and focuses on the range of sometimes contradictory values denoted by the term ‘services of general interest’, examining the range of regime-types (based on hierarchical, competition-based and community forms) by which those values might be pursued. The concluding section suggests the matching of values to techniques should not be made according to the importance of the values to be pursued, but rather by reference to which techniques are likely to be effective given the configuration of interests and capacities and existing culture within the target domain.

1. Introduction

All the European Union Member States have long traditions of state activity in providing key services to their citizens and underpinning both such direct provision and provision of services by non-state actors with certain administrative or legal guarantees. Comparatively recent European Community policy in many of these service areas has highlighted the fact that the particular regimes adopted in Member States for pursuit of public interest objectives are liable to have adverse side effects for the project of European

market integration. What we might call the 'traditional' service delivery regimes have come under pressure from other sources too. European public administration has been swept by enthusiasm for displacing traditional structures of public administration with the so-called 'New Public Management' (NPM). Fiscal stress has caused Member States to re-evaluate the extent and nature of their service providing commitments. Finally, a first-principles evaluation of those traditional structures has found them to be inefficient and unresponsive.

As a response to this crisis one of the central themes of public sector reform generally in the past twenty years has been the shift from a welfare or provider state model to a post-welfare¹ or regulatory state² model of governance. States are no longer seen primarily as providers of services, but rather as arms-length regulators of the provision of services by others. They steer rather than row.³ This transformation has resulted in the development of a variety of new structures for the provision of public services. They include agency regulation (often linked to privatization); structural separation of policy making and service delivery sections of both central and local government (including contracting out and the creation of internal markets); franchising; and increased reliance on industry self-regulation (in a variety of forms). Some see this as the creation of a hybrid,⁴ third⁵ or public service⁶ sector

¹ M. Freedland 'Law, Public Services and Citizenship – New Domains, New Regimes?' in M. Freedland and S. Sciarra *Public Services and Citizenship in European Law* Oxford, Oxford University Press, 1998. p28.

² G. Majone 1994 'The Rise of the Regulatory State in Europe', *West European Politics* 17(3): 77-101; F. McGowan and H. Wallace 'Towards a European Regulatory State' (1996) 3 *Journal of European Policy* 560-576; M. Loughlin and C. Scott, 'The Regulatory State', in P. Dunleavy, I. Holliday and G. Peele (eds) *Developments in British Politics* 5, London, Macmillan, 1997.

³ Osborne, D. and Gaebler, T. 1992 *Reinventing Government*, Reading, MA: Addison-Wesley.

⁴ Scott, C. 1993 'Privatisation, Control and Accountability', in S. Picciotto, J. McCahery and C. Scott (eds) *Corporate Control and Accountability*, Oxford: Clarendon Press.); Scott, C. 1998 'Juridification of Regulatory Relations in the UK

which is quite distinct both from traditional government activity and from traditional private enterprise, subject to both special principles and special regulatory structures.

The development of new structures for the provision of public services presents both dangers and opportunities. The key danger is that the 'public interest', the *raison d'être* for state involvement in services will be displaced by the pursuit of other interests or values, either because core public interest values are marginalised within new arrangements, or because these arrangements have less capacity to deliver public interest outcomes.⁷ Conversely, the opportunities presented by these changes are to engage in a thorough evaluation of the range of values to be pursued in the context of services of general interest, and to design regimes capable of securing the achievement of those values. Accordingly this article examines the means by which services to which special principles should be applied can be identified and focuses on the range of sometimes contradictory values denoted by the term 'services of general interest', examining the range of regime-types by which those values might be pursued. The concluding section suggests the matching of values to techniques should not be made according to the importance of the values to be pursued, but rather by reference to which techniques are likely to be effective given the configuration of interests and capacities and existing culture within the domain which is the target of intervention.

2. Identifying Services of General Interest

Utilities Sectors', in J. Black, P. Muchlinks and P. Walker (eds) *Commercial Regulation and Judicial Review*, Oxford: Hart Publishing; Black, J. 1996

'Constitutionalising Self-Regulation', *Modern Law Review* 59(1): 24-55.

⁵ Freedland *op cit* n.1.

⁶ H.W. MacLauchlan 'Public Service Law and the New Public Management' in M. Taggart (ed) *The Province of Administrative Law* Oxford, Hart, 1997.

⁷ G. Teubner 'After Privatization? The Many Autonomies of Private Law' [1998] *Current Legal Problems* 393.

The term 'services of general interest' is a juridical conception, the chief purpose of which is to delineate activities deserving of special treatment within the European Community legal system from those which must submit to all the rules of the internal market.⁸ The term has developed a special role in debate about EC policy as coalitions have been formed to balance the liberalising tendencies of the European Commission with alternative socially oriented policies.⁹ The distinction between services falling within the group and those falling outside is premised on the nature of the service rather than the status or ownership of the service provider, and thus it transcends a traditional juridical public-private divide.¹⁰ This concept provides a central mechanism through which the social and economic aspirations of the European Community are mediated.¹¹ It is a culturally constructed doctrine, a product of the time and context in which it was devised, and which has subsequently been developed and amplified through the official pronouncements of the various EC institutions.¹²

The term 'services of general interest' is closely linked to the doctrines in various of the Member States which impose special obligations on the operators of certain essential services, for example in France under the rubric *Service Public* and in Italy the *Servizio Pubblico*. As with the EC legal doctrine, the French *Service Public* doctrine plays a central role in distinguishing those services to which special obligations apply from other

⁸ This is particularly true for the 'services of general economic interest' which are the subject matter of an limited exception to the general principle that EC competition and internal market rules should apply to public undertakings: Article 86(2) EC.

⁹ J. Pelkmans 'Utilities Policy and the European Union' in P. Vass (ed) *CRI Regulatory Review 1997* London, Centre for the Study of Regulated Industries 1997.

¹⁰ European Commission Communication *Services of General Interest in Europe* COM (96) 443 Final, 11 September 1996 para 11.

¹¹ COM (96) 443 paras 15, 35.

¹² Notably COM (96) 443 and the decisions of the European Court of Justice in Case C-320/91 *Corbeau* [1993] ECR I-2533 and Case C-393/92 *Almelo* [1994] ECR I-1477, Case T-106/95 *Fédération Française des Sociétés des Assurance v European Commission* [1997] ECR II-229.

services.¹³ Summarising the literature on the French doctrine one commentator has suggested that it has no agreed meaning. In particular the term refers both to public sector institutional structures and to the materialised principles which apply to the provision of public services.¹⁴ It is the latter which is of interest here, but it is very difficult to discern a precise normative content to the *Service Public* doctrine, as opposed to the identification of the policy domains to which the ill-defined doctrine applies.¹⁵ 'Rolland's laws', the principles of continuity, equality and adaptability outlined by Professor Rolland in the 1930s, have been supplemented by new rules established by Parliament. These newer rules include provision relating to quality of service and transparency, parallel to the principles of EC law, and are not universally applied to all public services.

The related common law doctrine of common callings¹⁶ has been virtually obliterated by over a century of sector specific legislation in the United Kingdom and Ireland,¹⁷ though it is still remembered in the United States under the duties of common carriage, and the juridical definition of public utility services which has a key role in delineating the capacity of the state for intervention in the utility sectors.¹⁸ A useful, but largely forgotten concept

¹³ E. Cohen and C. Henry *Service Public, Sectuer Public* Report of the Conseil d'Analyse Economic, Paris, La Documentation Française, p18.

¹⁴ E. Malaret Garcia 'Public Service, Public Services, Public Functions, and Guarantees of the Rights of Citizens: Unchanging Needs in a Changed Context' in ' in M. Freedland and S. Sciarra *Public Services and Citizenship in European Law* Oxford, Oxford University Press, 1998., p62.

¹⁵ I derive this conclusion from Malaret Garcia's analysis (*op cit* n.14 pp62-63) which has descriptive clarity but evades the question of normative definition.

¹⁶ G. Amato 'Citizenship and Public Services – Some General Reflections' ' in M. Freedland and S. Sciarra *Public Services and Citizenship in European Law* Oxford, Oxford University Press, 1998, p146-150; D. Oliver *Common Values and the Public-Private Divide* London, Butterworths, 1999, pp201-206.

¹⁷ Craig, P. P. 1991 'Constitutions, Property and Regulation', *Public Law* [1991]: 538-554.

¹⁸ M. Taggart has argued that for the New Zealand case, where only minimal regulatory structures were established to accompany privatization, that there is

within the common law doctrines is that of 'businesses affected with a public interest'.¹⁹ It is useful because it provides the basis for demarcating according to function services which might receive special treatment (either in the form of special rights or special obligations) but in a somewhat plural manner, capable of comprehending more than one distinctive form of public interest.

The EC law term, 'services of general interest' accords loosely with the welfare economics conception of public and quasi-public goods,²⁰ extending from services which are typically provided in some kind of market with payment at point of use, such as the utility services (more specifically identified in Arts 16 and 86(2) as 'services of general *economic* interest' (my italics)) to include services which might be provided through markets, but often are provided by the state directly where the market would not provide in sufficient quantity, and/or at sufficient quality, at a price affordable to all (for example health care and education) to services which are regarded as solely within the state's responsibility either because they are unmarketable (for example social security payments) and/or because they are matters which the state would never want to trust to anyone else (for example issue of passports, registration of birth, deaths and marriages, administration of taxation systems and punishment of citizens).²¹ We can thus think of three types of service of general interest: the economic (as recognised by the EC Treaty); the social; and the strategic.²² When all three classes of service are considered together it is clear that there is no single set of public interest issues at stake. In some cases the presence of monopoly or the essential

considerable scope for developing the old common law principles to provide appropriate principles of public service: 'Public Utilities and Public Law', in P. Joseph (ed) *Essays on the Constitution*, Wellington: Brookers, 1995. See also on this issue G. Teubner 'After Privatization? The Many Autonomies of Private Law' [1998] *Current Legal Problems* 393, 411-412.

¹⁹ Oliver *op cit* n.16 204.

²⁰ cf Malaret Garcia *op cit* n14 pp 64-64.

²¹ Though we may note that some member states have been experimenting with the contracting out of tax collection systems and prisons.

quality of the service makes it ripe for special treatment. In others the general well-being of society or the effective administration of key state functions may be at stake. Accordingly it is helpful to adopt the concept 'services affected with a public interest' and recognise that there are least three different forms of public interest at issue. The services contained within each category are not static, and there is currently a push by the European Commission to have basic banking services and internet services recognised as falling into the social and economic categories respectively.²³ This paper considers the range of values and regime-types for regulation of all such services, in particular for the hybrid third sector located between traditional governmental activity/enterprise and the pure private sector.²⁴

3. Conflicting Values in Regulating Services

Orthodox accounts of the essential regulatory requirements for public services typically place most emphasis on universal service requirements, that is, requirements that service providers should make services available to all who demand them, at affordable costs and with reasonable quality. These ideas are linked to the meta-ideas of social interdependence or social cohesion.²⁵ The universal service obligation, developed in the context of utility services, cannot fully apply to services such as health and education because

²² Malaret Garcia (*op cit* n 14 pp66-67) notes only the economic and social types, to which I have added the third strategic type of service.

²³ European Commission *Consumer Policy Action Plan 1999-2001* pp15; Speech by M. Manfredi of the Health and Consumer Protection Directorate General to the Conference on Consumer Protection and Services of General Interest, Helsinki, September 1999. For a very full discussion of these issues in the UK banking sector see the report by D. Cruickshank *Competition in UK Banking* (London, HM Treasury, 2000) Chapter 7.

²⁴ The analysis of competing values and possible techniques does not offer a means to evaluate effectiveness of law in any particular policy setting: T. Daintith *Regulation* in R Buxbaum and F. Madl (eds) *International Encyclopedia of Comparative Law* (Vol XVII, Mohr Siebeck, Tübingen) p12, para 22

²⁵ Malaret Garcia *op cit* n14 p64.

they are often provided without charge at the point of use. This latter group of services present singular difficulties both of scarcity and assessment of quality, with value judgements necessarily being made over each issue. Consequently the development of a universal service conception for services of general interest as a whole is highly problematic. While much effort has been devoted to the expression of universal service obligations in the juridical form of directives (as with telecommunications and postal services) a juridical definition of universal service obligations in the health and education sectors would be virtually impossible. Accordingly soft law and political discretion are likely to be features mediating issues of access and quality in these sectors.

Conceptions of universal service do not exhaust the range of values which are applied in the Member States to public services. If we apply a meta-level analysis of public service values (i.e. a classificatory frame which purports to contain within it the entire set of values which *might* be applied to any particular public service activities) we would certainly want to highlight the importance of economic values concerned with promoting efficiency and reducing waste. In his analysis Christopher Hood supplements the social/procedural or 'Theta-type' values ('keep it honest and fair') and the economic or 'Sigma-type' values ('keep it lean and purposeful') with a third classification of security/continuity or 'Lambda-type' values ('keep it robust and resilient').²⁶

This third set of values is represented by concerns within the provision of public services for security of supply and the achievement of safety. The pursuit of these values often causes public service providers to 'over-provide' for security of supply and safety, for example through the introduction of failsafe mechanisms which a market actor might not think valid on purely commercial grounds. Thus this characteristic of redundancy is threatened by

²⁶ C. Hood 'A Public Management for All Seasons?' (1991) 69 *Public Administration* 3-19, 11; C. Harlow 'Public Service, Market Ideology and Citizenship' in M. Freedland and S. Sciarra *Public Services and Citizenship in European Law* Oxford, Oxford University Press, 1998, pp 51-2; Oliver *op cit* n16 Chapter 3.

shifting decision making about public services from the public to the commercial sphere.

The main sources for the expression of these competing values in EC law are the Treaties, legislation and 'soft law' made thereunder and policy documents. The 1997 Amsterdam Treaty amended the Treaty of Rome to create duties on both the Community and the Member States to 'take care that [services of general economic interest] operate on the basis of principles and conditions which enable them to fulfil their missions.' (Art 7d). These provisions are to be implemented 'with full respect for the jurisprudence of the Court of Justice, inter alia as regards the principles of equality of treatment, quality and continuity of such services.'²⁷ The key European Commission statement on the issue emphasises the role of public services in 'ensuring that needs are met, protecting the environment, economic and social cohesion, land-planning and promotion of consumer interests.'²⁸ This is a blend of the social-procedural and the continuity-security value-types. An analysis of EC utilities legislation reveals that the core public service values are universal service, transparency, non-discrimination and regulatory separation.²⁹ The social-procedural orientation is not limited to the utilities sectors, and finds expression in other aspects of EC legislation, especially where dealing with consumers.³⁰

The strong social-procedural orientation is balanced by the development of a rather different mix of values in the legislation in other sectors. Thus the expenditure programmes of the EC, though ostensibly directed towards rather similar meta-values of social cohesion and economic integration, are strongly

²⁷ Declaration to the Final Act; Freedland 1998 *op cit* n1 p19.

²⁸ COM (96) 443, para 7.

²⁹ cf. P. Nihoul 'Competition or Regulation for Multi-Media' (1998) 22 *Telecommunications Policy* 207-218.

³⁰ For example requirements that: consumers be given written agreements (87/102/EEC art 4); written notice of such matters as rights to cancel (86/577/EEC art.4); and that contracts should not contravene principles of good faith (93/13/EEC art.3).

suffused with the economic values relating to efficiency and probity.³¹ In the field of consumer safety we find a strong orientation towards the continuity/security values, represented, for example, by the complex web of overlapping self-regulatory and legislative rules operating both horizontally (across sectors) and vertically at both national and EC-level (i.e. a marked tendency towards redundancy, which is in tension with core economic values).³²

It is immediately apparent that there is considerable scope for conflict between the values which are applied to public services. Even within a narrow universal service definition a balance has to be struck between quality and affordability. Thinking about the wider values, concerns with efficiency are likely to be in a constant tension with social-procedural and continuity-security values. Accordingly regulatory regimes should be seen not simply as consisting of techniques to apply the various desirable values to public services, but rather as providing mechanisms by which to mediate the inherent tensions between such values. This is one of the principal reasons why governments and ministers have found it difficult to create wholly independent service provision or regulatory mechanisms for public services. A particular problem for public service law, as opposed to administration, is the difficulty of adapting legal norms historically concerned with controlling state activity (the so-called red light theory of administrative law³³) to the creation of

³¹ Though we should note considerable evidence of redundancy even in the core oversight mechanisms for oversight of expenditure of EC funds: C. Hood, C. Scott, O. James, G. Jones and T. Travers *Regulation Inside Government* Oxford, Oxford University Press, 1999 pp170-174. The term redundancy is used in this context to refer to a system within which there is a superfluidity of control mechanisms, such that no one control mechanism is necessary, as its function would be taken up by another were it not there.

³² See, in particular, the hierarchy of standards created by the General Product Safety Directive (92/59/EEC art.4).

³³ C. Harlow and R. Rawlings *Law and Administration* London, Butterworths, 1997 2nd ed chapter 1; D. Oliver *Common Values and the Public-Private Divide* London, Butterworths, 1999, 1-2.

facilitative norms 'requiring substantial human and financial resources.'³⁴The role of public authorities in resolving tensions between competing values is explicitly recognised by the European Commission.³⁵ The definition, adjustment and reconciliation of public service values are political tasks *par excellence* and even where politicians attempt to remove themselves from the decision making sphere circumstances or opportunism are likely to cause them to want to intervene.

A central advantage of removing the operational aspect of service provision from the public sphere, for example through privatization, contracting out or franchising, is that responsibility for pursuit of the economic values will fall chiefly to private sector actor providing the services. However, such removal of economic values from the public sphere is often only partial. For example, the legislation which provided for the privatization of the UK utilities services created primary obligations on both ministers and regulatory offices to ensure that service providers could finance their services. These obligations had to be balanced against obligations to ensure continuity in supply and universal service.³⁶ Separation of operations from oversight may have advantages for the pursuit of social/procedural values, in the sense that cross-subsidy may be more easily identified and targeted towards those in need. Related to this, the breaking up of monolithic structures may improve the transparency of the various disaggregated activities. On the other hand, the security/continuity values are perhaps most threatened by programmes of privatization and related changes, since the relatively high degree of slack commonly found within traditional public services (which creates redundancy among failsafe systems and promotes employment) is a key target for

³⁴ Malaret Garcia 1998 n14 p69. An outstanding question is whether it is appropriate or possible for a legal system to protect 'third generation' or social rights (eg to housing, education, etc of a certain quality); T.H. Marshall 'Citizenship and Social Class' in Marshall and T.Bottomore *Citizenship and Social Class*. 1992 (essay originally published in 1950).

³⁵ COM (96) 443 para 15.

³⁶ C. Graham *Regulating Public Utilities: A Constitutional Approach*, Oxford, Hart Publishing, 2000, pp27-31.

efficiency gains. UK experience of privatization and related processes has highlighted the dangers of reductions in excess capacity in electricity generation, staffing on trains and telecoms repairs.

4. Regulatory Regimes: Pure and Hybrid Forms

Regulation is conceived of in orthodox accounts as a form of control in which powers are given to an agency to oversee the conduct of a sector or industry. Whilst this is one institutional form of regulation, common in the United States, it does not exhaust the set of regulatory regime-types which might be applied to public services. Regulatory capacities are often not located in a single agency. It is more helpful to think about regulatory regimes which consist of three essential functions: standard setting, monitoring and behavioural modification. Any effective regulatory regime must have all three elements: a mechanism by which standards are set; processes by which compliance with the standards is monitored; processes by which regulatees who diverge from the standards are brought back into line.³⁷

Working with this functional definition of a regulatory regime, we can see that a wide range of regime-types for control of the public sector are available. I group these into hierarchical, market, and community-based forms and hybrids. We should note that each of these relatively simple classifications has within it a wide range of possible forms. The pure forms for each mechanism are so classified where the standard setting, monitoring and behaviour modification mechanisms are each of the same type. For example

³⁷ R. Baldwin, C. Scott and C. Hood *Reader on Regulation* Oxford, Oxford University Press, 1998, pp2-4. States actually use a wide a range of instruments in order to seek control over state and non-state activities. Policy analysis of these instruments can be used to place these in four classes: centrality to an information network; wealth (or treasure); legal authority (or force) and organization (physical capacities to act through various organizations). The various mechanisms for regulation deploy one or more of these key resources in different ways: Daintith *op cit* n24 p13, para 25; C. Hood 1983 *The Tools of Government*, London: Macmillan

a pure hierarchical regime is one in which standard-setting, monitoring and behavioural modification are each hierarchical in character.

(a) Hierarchical Models (**A**)

Hierarchical regulatory processes are those most commonly identified as simple regulation, and the processes which have been at the forefront of EC activity associated with the re-regulation of the utilities sectors. Hierarchical regulation chiefly deploys the state's authority resources, with a more limited role for its wealth, informational and organizational capacities. For example the EC utilities regimes anticipate that Member States will set up independent National Regulatory Authorities (NRAs),³⁸ with powers to issue licences or authorizations subject to certain conditions (standards), dealing with such matters as access,³⁹ quality, affordability and universality.⁴⁰ Some form of

³⁸ Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment OJ L131/73, 27.05.88, Art 6; Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services OJ L192/10, 24.07.90, Art 7 ; 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 OJ L 027, 30/01/1997 p. 0020, Art 22: 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 OJ L 204, 21/07/1998 p. 000, Art 22; Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service OJ L 015, 21/01/1998 p. 0014 , Art 22.

³⁹ Electricity Directive (96/92/EC) Art 7(2); Gas Directive (98/30/EC) Arts 5, 16-21; Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on Interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) (OJ L199/32, 26.07.97) Art 3

⁴⁰ Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision (ONP) to voice telephony and on

legal instrument, authorizations and/or general rules, is used to set standards. National regulators will monitor service providers, whether publicly or privately owned, for compliance with these standards and apply or seek sanctions for those which are in breach. This model is also widely used in respect of safety requirements, for example in the work place.⁴¹

Less formal hierarchical models are also common within the public services. Centralised control over education and health care commonly gives to ministers powers to set standards and to monitor for their compliance and apply formal or informal sanctions to bring defaulters back into line.

Such hierarchical models have come under considerable pressure over recent years. Regulation over private sector activity has been criticised from a variety of theoretical perspectives as excessive, inefficient or corrupt. Hierarchical structures within public sector bureaucracies have been identified with inefficiency and a lack of dynamism and responsiveness to users in public services.⁴² A rejection of traditional models has been accompanied by a search for alternatives by which to execute each of the three regulatory functions. A significant regulatory reform movement sees its task as one of maintaining or improving effective regulation, while reducing the costs.⁴³ One option is to retain hierarchical structures but reduce the dependence on

universal service for telecommunications in a competitive environment (replacing European Parliament and Council Directive 95/62/EC) (98/10/EC; OJ L101/41, 01.04.98), Art 5 (mandatory); Postal Services Directive (97/67/EC) Arts 3,4 (Mandatory); Electricity Directive (96/92/EC) Arts 2, 10 (Permissive); Gas Directive (98/30/EC) Art 9 (Permissive).

⁴¹ Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work OJ L 183, 29/06/1989 p. 0001.

⁴² Malaret Garcia *op cit* n14 p69.

⁴³ I. Ayres and J. Braithwaite *Responsive Regulation* Oxford, Oxford University Press, 1992; OECD *Regulatory Reform* 2 Volumes, Paris, OECD 1997.

detailed or materialized rules or standards. One way to pursue this is to displace detailed technical regulation, with normative structures closer in character to competition law.⁴⁴ More radical solutions seek to exploit the quite different institutional structures implied by market-type, community-type and hybrid regimes.

(b) Competition Models **(B)**

Competition in the market can also be thought of as a regulatory regime, in the sense that it has mechanisms for setting standards, for example in relation to price and quality, mechanisms for monitoring compliance and for applying sanctions to those who deviate from those standards.⁴⁵ In contrast with the hierarchical models, each of these capacities is dispersed among the buyers and sellers in the market, through endowment with private law rights, with reflexive or responsive development of standards and monitoring mechanisms.⁴⁶ To describe the private rights mechanism as a regulatory system in this way makes certain assumptions about the buyers: that they have good information about price and quality, that they will punish those suppliers who deviate by buying elsewhere and have effective remedies for default. In practice most markets are less than perfect. Notwithstanding such imperfections in markets there has been a considerable movement towards exploiting the regulatory capacities associated with the activities of dispersed groups of purchasers, using variously contractual documents, contract specification and contract remedies. Such developments have occurred both at what might be referred to at the wholesale and retail stages of service provision.

⁴⁴ OECD 1997 Vol. 1, chapter 1; C.Scott 'The Proceduralization of Telecommunications Law' (1998) 22 *Telecommunications Policy* 243-254.

⁴⁵ H. Collins *Regulating Contracts* Oxford, Oxford University Press, 1999, pp62-65.

⁴⁶ *ibid* 65-69.

Competition-based forms of regulation at the wholesale stage include privatization of public enterprises and shifting them towards market forms of governance in respect of the availability of capital and senior staff (each linked to the market for corporate control⁴⁷). A different form is to create internal markets within public sector provision as with the UK National Health Service, with health authorities (purchasers) separated from hospitals (providers), and allocation of resources shaped by purchasing decisions made using quasi-contracts. A third form is the contracting out of services and the deployment of tendering, contract specification and contract compliance to secure enhancement to public services. Indeed the use of the state's contracting power, a deployment of the capacities derived from its wealth, has a long pedigree as a form of competition-based regulation for both social and economic purposes.⁴⁸

Private liability rules already apply to many public sector activities and operate as a market-type incentive, for example to provide services safely,⁴⁹ or at appropriate quality.⁵⁰ Liberalization of former monopoly sectors creates a form of market regulation over such issues as price and quality, as has occurred in the utilities sectors. At the retail stage market forms of regulation include developing contractual incentives to public service providers to improve performance (eg the introduction of contractual or quasi-contractual penalties for poor service). The EC telecommunications regime requires that all telecommunications operators supply services to their customers under contracts,⁵¹ thus requiring those Member States which had maintained an administrative basis to the provision of service to replace this with a market element. Privately provided educational and health services are typically

⁴⁷ C. Scott, 'Privatisation, Control and Accountability', in S. Picciotto, J. McCahery and C. Scott (eds) *Corporate Control and Accountability*, Oxford: Clarendon Press, 1993.

⁴⁸ T. Daintith. 1979 'Regulation by Contract: The New Prerogative', *Current Legal Problems* [1979]: 41.

⁴⁹ A.M.Linden 'Tort Law as Ombudsman' (1973) 51 *Canadian Bar Review* 155.

⁵⁰ Collins *op cit* n46.

⁵¹ Amended Voice Telephony Directive (98/10/EC) art 10.

provided on a market basis, with contractual rights for customers (though they may also be subject to some form of hierarchical or community-based regime for quality and safety). Market forms of regulation have typically sought to enhance the capacities of purchasers to exercise regulatory functions and/or to inject competition in the provision of services. The drawing up of performance league tables for schools in England and Wales provides an example of a mechanism which is intended to have both effects. On the supply side schools are supposed to enhance their performance so as to achieve a good place in the league table, and to avoid being 'named and shamed' as failing, while on the demand side parents are to use the information in league tables to select which school to send their child too, creating the possibility that ultimately there will be no demand for underachieving schools. This is the market process of natural selection.

(c) Community-Based Models (C)

Notwithstanding the economic orthodoxy, which places markets in opposition to hierarchies, there is a third model of regulation not adequately captured in either term, based upon mechanisms of community.⁵² We can think of this as a form of informal social control, exercised through the development of groups, associations and the like which have informal, or sometimes formal standards of conduct and mechanisms by which deviants are brought back into line. The higher echelons of the public service in the UK have often been observed to regulate themselves by such community-based mechanisms.⁵³ Additionally the state has implicitly or explicitly relied on the

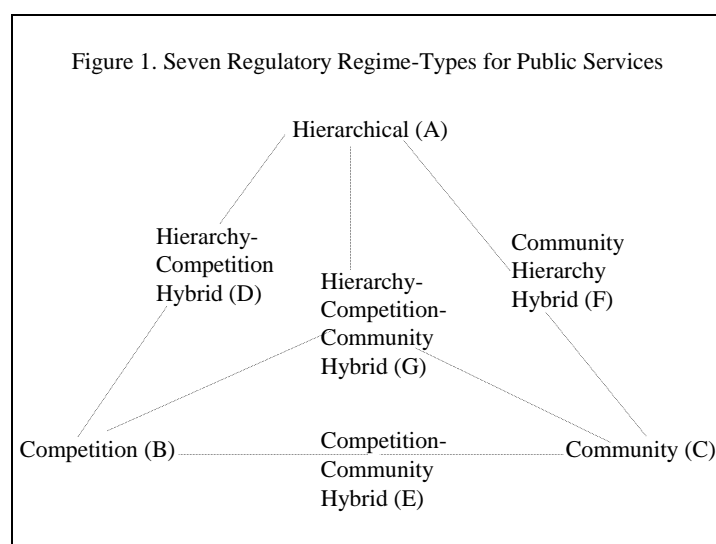
⁵² This analysis has been much influenced by the pioneering work of my colleague Christopher Hood, who labels community-based mechanisms as mechanisms of mutuality. See, in particular, Hood, C. 'Control Over Bureaucracy: Cultural Theory and Institutional Variety' (1996) 15 *Journal of Public Policy* 207-230. Hood refers to a fourth form of oversight, randomness, which I have excluded from this analysis.

⁵³ C.Hood, C.Scott *et al Regulation Inside Government* Oxford, Oxford University Press, 1999, chapter 4.

various non-state legal systems⁵⁴ established by associations and groups for the regulation of their members.

The potential of such community-based mechanisms has recently been exploited through the development of somewhat more formal self-regulatory regimes. Key examples are to be found in the UK retail sector where associations of traders have developed codes of practice which include standards and mechanisms for monitoring and enforcing compliance.⁵⁵ Pure community-type regimes rely on informal understandings and subtle monitoring and enforcement pressures. Self-regulatory regimes which mimic state command-and control regulation are better classified as hybrids.

The development of any one of the three 'pure' models noted above for the regulation of European public services is not very plausible given the long traditions of public ownership and control. What is more likely is that hybrid models combining two more of the pure models will be developed. The relationship between the pure and hybrid forms is shown in Figure 1.



(d) Hierarchy-Competition Hybrid (D)

⁵⁴ Daintith 1997 *op. cit.* n24 p20-21 paras 39-40.

⁵⁵ C. Scott and J.Black *Cranston's Consumers and the Law*, London, Butterworths, 3rd ed, 2000, chapter 2.

The hierarchy-competition hybrid is likely to have one or more central oversight institutions, such as a regulatory agency, but under conditions where there is considerable scope for the play of market or quasi-market forces. A key example is provided in the wholesale telecommunications market by the model for interconnection within the EC Open Network Provision regime. Member State regimes are to provide for the determination of interconnection terms and conditions by the commercial actors in the first instance, and only if they are unable to reach agreement is the NRA to intervene to settle the terms. The apex of the 'regulatory pyramid' is found in a procedure within which if the NRA is unable to resolve matters then a further layer of hierarchy is introduced by the EC ONP Committee's⁵⁶ capacity to resolve disputes.⁵⁷ A further example is provided by franchising of rail services in the UK, which combine regulatory oversight of compliance with franchise requirements with the disciplines of retail and wholesale contracts for train operating companies. The retail contracts are themselves effectively hybrids, since government has mandated the introduction of contract-type penalties to be paid to customers for delays and cancellations in services.

(e) Competition-Community Hybrid (E)

Within the competition-community hybrid a typical pattern will be the formation of more than one community-based group to operate some form of self-regulation, such that the self-regulatory groups will compete both for membership of the group and for recognition by customers in the market.⁵⁸ The effect is to discipline the self-regulators to balance the interests of their members with those of customers, because customers and firms each have a

⁵⁶ Under the terms of the Communications Review 1999 the ONP Committee is to be replaced by a Communications Committee (CoCom).

⁵⁷ W. Sauter 'The System of Open Network Provision Legislation and the Future of European Telecommunications Regulation' in C.Scott and O Audeoud (eds) *The Future of EC Telecommunications Law* Cologne, Bundesanzeiger, 1996.

⁵⁸ A. Ogus, 1995 'Rethinking Self-Regulation', *Oxford Journal of Legal Studies* 15: 97.

choice. A key example is provided by the competition among travel agents' trade associations both for members (which would, other things being equal tend to pull self-regulatory standards downwards) and for the good reputation which will bring consumer to their members (which will tend to pull self-regulatory standards upwards). Further examples of mixing some element of competition with community include the practice of insurers whose contractual agreements often include provision for monitoring the track records of claims of their clients, where control of insureds is based essentially on community-based relations with insurers, but where standards set by insurers are likely to be shaped by the insurers' participation in markets.

(f) Community-Hierarchy Hybrid (F)

The mutuality-hierarchy hybrid involves some element of oversight or mandating by the state over community-based regimes. The most famous theoretical example is Ayres and Braithwaite's 'enforced self-regulation' model within which regulatees are required to draw up self-regulatory rules and have them approved by a regulatory agency, which subsequently monitors the performance of the self-regulatory regime.⁵⁹ A variant on this style of regulation occurs where states takes responsibility for setting rules which are enforced by voluntary associations, or for enforcing rules which have been set by voluntary associations. A key form of enforced self-regulation developing over public services in Europe is the production of user's charters – documents produced by service providers which set down performance standards and rights to redress. This has been an important technique in reorienting public services towards the needs of immediate users, as opposed to the wider collectivity.⁶⁰

The charter technique is exemplified by the UK Citizen's Charter programme (now renamed 'Service First') under which public service providers and government departments are required to publish their standards

⁵⁹ Ayres and Braithwaite *op cit*, chapter 2.

⁶⁰ Malaret Garcia *op cit* n14 p80.

of service and offer redress when things go wrong.⁶¹ This programme was widely thought to reduce political accountability for public services and to overstate the rights of citizen as consumer and downplay rights to participate in shaping public services collectively.⁶² Under the Blair Government elected in 1997 there is some evidence that these deficiencies in the programme, renamed Service First, will be addressed.⁶³ An example of the technique in action is in the UK telecoms sector, where the regulator, OFTEL, has required telecommunications operators (TOs) (both fixed link and mobile) to draw up customer codes dealing with such matters as time to install lines and fix faults. In truth this is a hybrid of all three models (**G**), since it creates a form of contractual penalty for breach of the requirements of the codes.

5. Matching Values to Techniques

We have seen that there is a range of values for which we might want to regulate services 'affected with a public interest' and a range of techniques by which this might be achieved. It might be assumed that where the values to be pursued are really important that it is appropriate to use the most hierarchical, command and control-type regulatory techniques. This

⁶¹ Cabinet Office *The Citizen's Charter* Cm 1599 London, HMSO, 1991; *The Citizen's Charter: First Report* Cm 2101 London, HMSO, 1992; *The Citizen's Charter: Second Report* Cm 2540, London, HMSO, 1994; *The Citizen's Charter: The Facts and Figures*, CM 2970, London, HMSO, 1995; *The Citizen's Charter – Five Years On* Cm 3370, London, HMSO, 1996 For evaluations see Public Service Committee, 3rd Report (The Citizen's Charter), Session 1996-97 HC 78.

⁶² Bynoe, I. *Beyond the Citizen's Charter: New Directions for Social Rights* London, Institute for Public Policy Research 1996; J. Chandler (ed) *The Citizen's Charter* London, Dartmouth, 1997; C. Willett (ed) *Public Sector Reform and the Citizen's Charter* London, Blackstone, 1996.

⁶³ Cabinet Office *Service First: The New Charter Programme* London, Stationery Office; C. Scott 'Regulation Inside Government: Re-Badging the Citizen's Charter' [1999] *Public Law* 545.

assumption is rather strong in both civilian legal systems⁶⁴ and the EC legal system. In fact the importance of the values to be pursued has nothing to tell us about the relative effectiveness of different regulatory techniques in pursuing those values. To take an example, key EC safety standards are set by private sector groups, within a community-based regime, rather than by governments and their agencies. This example demonstrates the capacity for flexibility of approach within EC regulatory regimes. But, this example notwithstanding, there is a real risk that EC obligations will be interpreted more rigidly, to require the Member States to use hierarchical models to the exclusion of others in order to secure compliance with the emergent public service values discussed above. An example of such a rigid interpretation is provided by the EC procurement regime, the revision of which in the 1990s, caused both Germany and the UK to substantially abandon community-type regimes and replace them with more hierarchical models. This shift was not premised upon the relative effectiveness of the two regime-types, but rather on the fact that demonstrating compliance with EC rules was less easily contested where a hierarchical model was implemented.⁶⁵

Figure 2 shows that an analysis matching values to techniques produces examples for most of the co-ordinates. The table is descriptive of examples which can be demonstrated and provides guidance to policy makers by showing that the full range of regulatory forms (pure and hybrid) is available for each set of values, not just in theory but also in practice. This is not to say that every example is effective, but it does suggest that most sets of co-ordinates are available for decision as to what the most effective techniques are likely to be. The table does not provide prescription as to what techniques should be used in particular cases. Such prescription would require further analysis of which techniques would be likely to succeed having regard both to

⁶⁴ Malaret Garcia describes the role of the state in respect of services of general interest thus (*op cit* n14 p65): 'Even where the administration is not to provide the service itself, it retains all the powers necessary to guarantee that the delegated task properly fulfils the general interest (powers of direction, control and sanction).'

⁶⁵ Hood, Scott et al *op cit* n53 p169.

the pre-existing endowments of resources among the key actors in the policy domain and the existing regulatory culture.

Figure 2. Matching Values to Regime-Types: Selected Examples

Regime-Type Value Type	A Hierarchical	B Competition	C Community	D Hierarchy- Competition	E Competition- Community	F Community- Hierarchy	G Hierarchy- Community- Competition
Efficiency	Finance Ministry Expenditure Rules	Liberalization	Informal Expenditure Norms in Central Government	Privatization with Regulation	Insurers Monitoring of Insured's Claims Records	Mandated Efficiency Rules Internally Enforced	
Social- Procedural	Price Caps; Universal Service Standards	Liberalization (eg Telecoms)	Voluntary User Codes	Tax Incentives	Incorporate Terms of Codes into Consumer Contracts	Mandated Users' Charters	Mandated Users' Charters with Contractual Compensation
Continuity- Security	Health and Safety Regulation (eg Railways)	Published Safety Records (eg Airlines); Marketing of Interruptible power supplies	Product Safety Standards	Tendering For Public Subsidies	Trade Association Competition for Members/ Customers	Mandated Internal Safety Standards	

The basic principle for deciding on the appropriate match in any particular case is that policy makers should pay close attention to the distribution of the key resources capable of securing the achievement of the desired values.⁶⁶ In some cases the possession of information by firms to be regulated makes them very powerful. Techniques which combine community and hierarchy (notably the 'enforced self-regulation' model) can exploit that capacity, and harness it to the pursuit of public interests.⁶⁷ Where consumer groups are powerful, because they are well resourced or otherwise have effective organisation or good information, these capacities can be used (for example in spreading information about different service providers thus facilitating

⁶⁶ L. Hancher and M. Moran 'Organizing Regulatory Space' in Hancher and Moran *Capitalism, Culture and Regulation* Oxford, Oxford University Press, 1989.

⁶⁷ An example is provided by the practice of the UK telecoms regulator, OFTEL, of requiring telecommunications operators to publish comparative performance indicators each quarter - see <http://www.telco-cpi.org.uk/>.

competition-based mechanisms, or in monitoring and pursuing enforcement, strengthening the hierarchical dimension of a regime⁶⁸).

This organic principle must be combined with a sensitivity to considerations of the culture within any particular state. Strong traditions of self-regulation or agency regulation are likely to make new regimes using these forms more familiar, more legitimate and ultimately more successful. Overall any effective intervention in a policy domain to seek modifications to behaviour is likely to consist of modest shifts to existing positions and configurations. Public authorities may receive some modest increase to their powers; the extent to which firms control information may be reduced, for example through disclosure requirements; the capacity of consumer groups to monitor activities can be enhanced through provision of existing resources. Solutions to the problem of how to secure the achievement of any particular values in any particular domain are likely to differ from state to state and domain to domain. Where the EC legislation is developed the challenge is to provide statements of values which are sufficiently robust to be meaningful, but sufficiently flexible to allow member states to develop effective regulatory mechanisms to secure compliance.

6. Conclusion: Implications for Service Provision in the New Regulatory State

As the EC Member States move from a welfare state/provider model to a regulatory state model for governance of public services, it is clear that there is a wide range of institutional design choices and that there are rich examples of innovation. Exploiting these opportunities will require sensitivity both to cultural fit with the existing patterns within Member States, and proper

⁶⁸ As with the EC Directive 98/27/EC, OJ L 166, 11/06/98 p.51, which empowers consumer groups to take representative actions to vindicate consumer rights in certain EC directives. For a theoretical statement on the potential of public interest groups in regulatory enforcement see Ayres and Braithwaite *op cit* n43 Chapter 3.

attention to the incentives created by any particular model adopted. The question of fit can be seen as an issue of 'structural coupling' – how best to align the discourse of the regulatory regime with that of the regulated domain.⁶⁹ It would be surprising if Member States found it appropriate to converge upon any one model for any particular sector given the history of diversity. Judicial supervision of new arrangements is likely to be problematic. The English courts have struggled to understand the nature both of regulation and of contracts set within hybrid arrangements.⁷⁰ The use of such hybrids implies a form of regulatory instrumentality which is alien to the relatively pure categories of public and private law recognised by the courts. Adapting the concepts of the public and the private and the relationship between them is at the heart of the juridical challenge set by the ambition to develop and apply appropriate principles to services of general interest in EC law.

⁶⁹ G. Teubner 'Juridification: Concepts, Aspects, Limits, Solutions' in G. Teubner (ed) *Juridification of Social Spheres* Berlin, de Gruyter, 1987; G. Teubner 'After Privatization? The Many Autonomies of Private Law' [1998] *Current Legal Problems* 393, 402-408; T. Prosser 'Theorising Utility Regulation' (1999) 62 *Modern Law Review* 196.

⁷⁰ Freedland, M. 1994 'Government by Contract and Public Law', *Public Law* [1994] 86-104. Black, 1996 *op cit* n4; G. Teubner *op cit* n69, 419-424.