

O artigo 36.º da Carta e o acesso a serviços públicos

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O ARTIGO 36.º DA CARTA E O ACESSO A SERVIÇOS PÚBLICOS

ARTICLE 36 OF THE CHARTER AND ACCESS TO PUBLIC SERVICES: SCOPE, EXTENT AND LIMITS OF A SUI GENERIS PROVISION

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Abstract: Article 36 of the Charter raises important legal questions of an institutional/constitutional and substantive nature.

I will first discuss the issues of substantive EU law raised by Article 36, which relate to the place of public services in Europe's economic and social constitution. I will then analyze the issues of EU institutional/constitutional law raised by the Article, an analysis which requires an investigation on the nature of the Charter's provisions on fundamental social rights.

My main argument is that Article 36 can be 'put into action' by individuals before judges as it may create direct effect.

Direct effect, indeed, has also an objective – rather than subjective – dimension as it can be described as the capacity of a provision of EU law to serve as a parameter of legality for national law, with exclusionary rather than substitution effects.

Keywords: Article 36 Charter – public services – social rights – justiciability

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I. Introduction.

The issues that are the subject of this contribution are not currently attracting the attention of scholars as much as other topical issues which concern the scope and extent of the Charter of Fundamental Rights of the European Union (EU). And yet, Article 36 of the Charter raises important legal questions of an institutional/constitutional and substantive nature. The provision states that the EU “recognizes and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union”.

I will first discuss the issues of substantive EU law raised by Article 36, which relate to the place of public services in Europe’s economic and social constitution and to the ‘added value’ of Article 36 itself within the legal discourse on public services (II). I will then analyze the issues of EU institutional/constitutional law raised by the Article, an analysis which requires an investigation on the nature of the Charter’s provisions on fundamental social rights. This will be carried out from two different, but strongly connected perspectives: the legal status, effectiveness and justiciability of Article 36 in the light of the social rights provisions contained in the Charter (III); and the inaction of the Court of Justice of the EU (CJEU) in the interpretation and application of Article 36 (IV). Finally, I will make a few concluding remarks (V).

II. Article 36 in context: public services under EU law.

Article 36 of the Charter refers to services of general economic interest (SGEIs) rather than to public services. ‘Public services’ is, in fact, a historically, geographically, socially, politically and culturally determined concept, whereas ‘SGEI’ is a specifically European term. This does not mean, however, that the EU dimension of SGEIs is, in itself, an autonomous, impermeable concept. In fact, it is influenced by national legal traditions, being the result of both the French and Anglo-Saxon models. Like in the Anglo-Saxon system, the conception of the State that has developed in EU law is more that of a regulator than an actor intervening directly in the economy. Like in the French system, the core principles of SGEIs are the main elements of *service public à la française*: access, quality, efficiency, adaptability, equality of treatment, and transparency.² In this article, I will use the terms ‘SGEIs’ and ‘public services’ interchangeably.

SGEIs are at the heart of several soft law acts adopted by the European Commission in the last twenty years that have raised issues relating to competition law, State aids, internal market and fundamental rights.³ Neither primary and secondary law

2. On this point see C. MARTINAND, *Le service public en France et en Europe. Un double effort de reconstruction indispensable*, in *Revue des Affaires Européennes*, 1994, 80 *et seq.*

3. See Communication from the Commission, of 26 September 1996, Services of General Interest, 96 /C 281 / 03; Communication from the Commission, of 19 January 2001, Services of general interest in Europe, 2001/C 17/04; Green Paper on services of general interest, of 21

nor the case law of the CJEU provide a definitive definition of what SGEIs are, as the content and scope of this notion have varied over the years.⁴ Inevitably, then, the criteria to be applied with regard to Article 106(2) TFEU⁵ cannot be identified *a priori* horizontally for all public services, but, rather, must be determined by EU institutions on a case-by-case basis. Indeed, no exhaustive list of the activities that can be considered SGEIs exists. This is not to say, however, that it would be impossible or undesirable to adopt a framework directive covering the different categories of public services. A framework directive could lay down the common rules applicable to each specific class of services and, therefore, provide answers to the questions raised by Member States' public authorities, citizens/users, service providers, civil society organisations and other stakeholders regarding the application of EU rules to public services.⁶

It must be noted, however, that a core of public service obligations attached to the operation of SGEIs does exist,⁷ since said obligations are identified in several regulations and directives, each targeting a specific sector of general

May 2003, COM(2003) 270 final; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, of 12 May 2004, White Paper on services of general interest, COM(2004) 374 final; Communication of the Commission, of 26 April 2006, Implementing the Community Lisbon programme: Social services of general interest in the European Union, COM(2006) 177 final; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, of 20 November 2007, Accompanying the Communication on "A single market for 21st century Europe" Services of general interest, including social services of general interest: a new European commitment, COM(2007) 725 final; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, of 20 December 2011, A Quality Framework for Services of General Interest in Europe, COM(2011) 900 final.

4. On the matter see, *ex multis*, U. NEERGAARD, *Services of General Economic Interest: The Nature of the Beast*, in M. KRAJEWSKI-U. NEERGAARD-J. VAN DE GRONDEN (eds.), *The Changing Legal Framework for Services of General Interest in Europe*, The Hague, 2009, 17 *et seq.*

5. On such provision see *infra*, in this §.

6. On this topic see, amongst others, M. ROSS, *The Europeanization of Public Services Supervision: Harnessing Competition and Citizenship?*, in *Yearbook of European Law*, 2004, 303 *et seq.*; G. NAPOLITANO, *Towards a European Legal Order for Services of General Economic Interest*, in *European Public Law*, 2005, 565 *et seq.*; M. KRAJEWSKI, *Providing Legal Clarity and Securing Policy Space for Public Services through a Legal Framework for Services of General Economic Interest: Squaring the Circle?*, in *European Public Law*, 2008, 377 *et seq.*; S. RODRIGUES, *Towards a General EC Framework Instrument Related to SGEI? Political considerations and Legal Constraints*, in M. KRAJEWSKI-U. NEERGAARD-J. VAN DE GRONDEN (eds.), *The Changing Legal Framework for Services of General Interest in Europe*, The Hague, 2009, 255 *et seq.*

7. See, *inter alia*, H. SCHWEITZER, *Daseinsvorsorge, "service public", Universaldienst. Art. 86 Abs. 2 EG-Vertrag und die Liberalisierung in den Sektoren Telekommunikation, Energie und Post*, Baden-Baden, 2001, 83-226 and 377-426; and W. SAUTER, *Public Services in EU Law*, Cambridge, 2014, 156-219.

interest.⁸ Moreover, the main characteristic that the different types of public services have in common is that they all play a crucial role in the organization of welfare policies in the 28 Member States of the EU, because they deliver ‘public goods’ to users/citizens and often involve social policy objectives. In brief, SGEIs comprise sectors such as electricity, gas, telecoms, water, postal services, transportation (i.e., public economic services) whose range now includes an increasing number of social and health services because the EU institutions, especially the Commission and the CJEU, consider them *economic* activities (of general interest). This means that, in spite of Protocol No. 26 on services of general interest (SGIs), where Article 2 specifies that the provisions of the Treaties “do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest”, many welfare activities are subject to EU law by virtue of their economic character,⁹ unless the derogation in Article 106(2) TFEU applies and the requirements therein set out are met. Indeed, this provision allows Member States to derogate from EU law for the benefit of users, since it establishes that “undertakings entrusted with the operation of services of general economic interest [...] shall be subject to the rules contained in the 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 assessment of whether an activity is economic or not is thus crucial in order to identify the scope and extent of EU law: only after it has been determined that the service is economic in nature can EU law come into play. However, to prevent Member States from granting *ex ante* exemption from EU law to general interest sectors, the CJEU has relied on a wide and flexible notion of economic activity, adopting a functional and objective – rather than institutional

8. See, for instance, Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States [1992] OJ L364/7; Directive 97/67/EC of the European Parliament and of the Council on common rules for the development of the internal market of Community postal services and the improvement of quality of service [1998] OJ L15/14; 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 L108/51; Regulation (EC) No 1370/2007 of the European Parliament and of the Council on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 [2007] OJ L315/1; Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community [2008] OJ L293/3; 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; Directive 2014/92/EU of the European Parliament and of the Council on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features [2014] OJ L257/214.

9. In the 2007 Communication, cited above, for instance, it is established that “an increasing number of activities performed daily by social services are now falling under the scope of EC law to the extent they are considered as economic in nature”, § 2.3, p. 8.

and subjective – interpretation of the concept under EU competition law.¹⁰ Thus, in determining whether a service is economic or not, the Court will in principle consider the following factors irrelevant: the legal status of the entity (public or private); its structure and organization; the way in which it is financed and the origin (public or private) of that financing; and the absence of a lucrative (for-profit) purpose.¹¹ The rationale behind the functional approach is that the task of defining the meaning and scope of the concept of economic activity must not be left to the Member States. Otherwise, said States would be free to restrict the scope of that concept, on a discretionary basis, so as to exclude as many activities as possible from the application of competition and market rules – and this would put into question the effectiveness of EU law and its uniform application within the Member States. The result is a significant widening of the scope of the Treaties, as can be inferred from the fact that, at present, only a limited number of sectors are deemed to be exempt *ex ante* from EU law.¹² However, the Member States enjoy a wide margin of discretion in defining and regulating public services: in the case of an economic activity, the control exercised by the EU institutions is limited to manifest errors of assessment on the part of Member States' authorities, as reiterated by the EU courts in several rulings, including the judgment in the *BUPA* case.¹³

Now, despite the presence of gaps in EU secondary law and in the case law of the CJEU, it seems possible to say that the concept of 'economic activity' normally has one constitutive element, namely the offer of goods or services, which implies the existence – whether actual or potential – of a market, as well as the fact that the activity is remunerated.¹⁴

With regard to the legal regime for SGEIs set up by the Treaty of Lisbon, it must be recalled that the Treaty marks the transition from the EU's initial approach, in which the objective of competition prevailed over the guaranteed supply of services, to the recognition of access to public services as a positive obligation to be imposed upon both the EU and its Member States.¹⁵ The distinctive feature of

10. See, among others, V. LOURI, 'Undertaking' as a Jurisdictional Element for the Application of EC Competition Rules", in *Legal Issues of Economic Integration*, 2002, 143; O. ODUDU, *The Boundaries of EC Competition Law. The Scope of Article 81*, Oxford, 2006, 23-56; W. SAUTER, H. SCHEPEL, *State and Market in European Union Law. The Public and Private Spheres of the Internal Market before the EU Courts*, Cambridge, 2009, 75-83; V. HATZOPOULOS, *Regulating Services in the European Union*, Oxford, 2012, 38-97.

11. See, *inter alia*, *Höfner*, C-41/90, EU:C:1991:161, paras 21-22.

12. The 2007 Communication, footnote 3 above, for instance, establishes that "an increasing number of activities performed daily by social services are now falling under the scope of EC law to the extent they are considered as economic in nature", 8, para 2.3.

13. See T-289/03, EU:T:2008:29.

14. See D. GALLO, *Riflessioni sulla nozione di attività economica nella giurisprudenza della Corte di giustizia UE tra diritto antitrust e libertà di circolazione*, in A. TIZZANO ET AL. (edited by), *La tutela dei diritti. Scritti in onore di Giuseppe Tesaurò*, Napoli, 2014, 1807-1810.

15. See, amongst others, N. FIEDZIUK, *Services of General Economic Interest and the Treaty*

SGEIs is, therefore, that they do not merely operate on the basis of a derogation under Article 106(2) TFEU, which allows Member States to derogate from EU law for the benefit of users. Rather, access to SGEIs, as recognized in Article 36, is a positive obligation, in line with Article 14 TFEU and Protocol No. 26 on SGIs. Article 14 TFEU prescribes, *inter alia*, that “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”, while Article 1 of Protocol No. 26 defines and lists “the shared values of the Union in respect of SGEIs”. In this perspective, the European notion of ‘universal service’, as found in the aforesaid Protocol as well as in several EU secondary law acts and in the case law of the CJEU, is a clear indication of a positive integration between market interests and fundamental rights. In this sense, Erika Szyszczak is correct when she points out that the inclusion of Article 36 is a radical move to “extend the concept of fundamental rights beyond minimal ideas of social rights and towards ideas of universal access to social and welfare benefits, as well as to basic utilities”.¹⁶

Viewed in this way, and read in conjunction with Article 14 TFEU and the Protocol on SGIs,¹⁷ Article 36 – a binding provision, as we all know, due to the legal status of the Charter as a result of the entry into force of the Lisbon Treaty – is the privileged *sedes materiae* to discern and grasp this positive – rather than merely negative/derogatory – dimension of the EU discourse on public services. Indeed, it shows to what extent such services are a founding value of the EU, and one closely connected with the European model of society, the promotion of social cohesion, the notion of EU social citizenship and the exercise of fundamental social rights.¹⁸ Article 36 of the Charter represents a novelty in international law,

of Lisbon: Opening Doors to a Whole New Approach or Maintaining the Status Quo, in *European Law Review*, 2011, 226 *et seq.* and J. VAN DE GRONDEN-C. S. RUSU, *Services of General (Economic) Interest post-Lisbon*, in M. TRYBUS-L. RUBINI (eds.), *The Treaty of Lisbon and the Future of European Law and Policy*, Cheltenham, 2012, 413 *et seq.*

16. E. SZYSZCZAK, *Article 36: access to services of general economic interest*, in S. PEERS, T. HERVEY J. KENNER A. WARD (edited by) *The EU Charter of Fundamental Rights: a commentary*, Oxford, 2016, 36.04.

17. On the need to consider Art. 36 of the Charter and Art. 14 TFEU jointly, see A. LUCARELLI, *Commento all'art. 36. Accesso ai servizi di interesse economico generale*, in R. BIFULCO, M. CARTABIA, A. CELOTTO (edited by), *L'Europa dei diritti. Commento alla Carta dei diritti fondamentali dell'Unione Europea*, Bologna, 2001, 251; O. PORCHIA, *Alcune considerazioni sull'art. 36 della Carta dei diritti fondamentali dell'Unione europea: l'accesso ai servizi di interesse economico generale*, in *Il Diritto dell'Unione europea*, 2002, 633 *et seq.*

18. On such positive, rather than merely negative, dimension of SGEIs, see J. L. BUENDIA SIERRA, *Exclusive Rights and State Monopolies Under EC Law*, Oxford, 1999; C. SCOTT, *Services of General Interest in EC Law: Matching Values to Regulatory Technique in the Public and Privatised Sectors*, in *European Law Journal*, 2000, 310 *et seq.*; E. SZYSZCZAK, *Public Service Provision in Competitive Markets*, in *Yearbook of European Law*, 2001, 35 *et seq.*; F. MUNARI, *La disciplina dei cd. servizi essenziali tra diritto comunitario, prerogative degli Stati membri e interesse generale*, in *Il Diritto dell'Unione europea*, 2002, 39 *et seq.*; S. RODRIGUES,

since no similar provisions on access to public services are contained in either the European Convention on Human Rights (ECHR) or other international legal instruments concerning the protection of fundamental rights.¹⁹ As noted by Loïc Grard, “*la bataille pour l’inscription des ‘services d’intérêt économique général’ dans la Charte a été l’une des plus rudes et des plus incertaines*”²⁰. The provision, along with others included in the Charter, brings together the dimension of social rights and that of competition law and the free market, and thus aims at balancing neoliberal principles with the concept of social and territorial cohesion.²¹

This is confirmed by the inclusion of Article 36 in the Chapter on ‘Solidarity’ of the Charter, as well as by the nature of the principles that identify an essential core of public service obligations in harmonized and non-harmonized sectors of general interest – principles enshrined in Article 1 of Protocol No. 26, (binding/sectorial or soft/horizontal) secondary legislation, and the CJEU’s case law on SGEIs.

The interplay between public services and the EU values reveals, as a consequence, a shift from a purely national concept of social solidarity to a European one, through the elevation of national values to the level of EU principles and positive rules, sometimes with the result of pre-empting, in certain areas, the adoption of

Services publics et droit communautaire en 2001: de la régulation à l’évaluation, in *Europe*, 2002, 5 *et seq.*; V. ROJANSKI, *L’Union européenne et les services d’intérêt général*, in *Revue du Droit de l’Union européenne*, 2002, 735 *et seq.*; J. BAQUERO CRUZ, *Beyond Competition: Services of General Interest and European Community Law*, in G. DE BÚRCA (edited by), *op. cit.*, 169 *et seq.*; T. PROSSER, *Competition Law and Public Services: From Single Market to Citizenship Rights?*, in *European Public Law*, 2005, 543 *et seq.*; L. IDOT, *Concurrence et services d’intérêt général. Bref Bilan des évolutions postérieures au traité d’Amsterdam*, in J.-V. LOUIS, S. RODRIGUES (sous la direction de), *Les Services d’intérêt économique général et l’Union européenne*, Bruxelles, 2006, 39 *et seq.*; M. MARESCA, *Regole del mercato e servizi di interesse generale*, in F. BESTAGNO-L. G. RADICATI DI BROZOLO (a cura di), *Il mercato unico dei servizi*, Milano, 2007, 151 *et seq.*; E. SZYSZCZAK, *The Regulation of the State in Competitive Markets in the EU*, Oxford-Portland, 2007; W. SAUTER, H. SCHEPEL, *op. cit.*, 27-128 and 164-193; D. GALLO, *I servizi di interesse economico generale. Stato, Mercato e Welfare nel diritto dell’Unione europea*, Milano, 2010; M. CREMONA (edited by), *Market Integration and Public Services in the European Union*, Oxford, 2011; E. SZYSZCZAK-J. DAVIES-M. ANDENAS-T. BEKKEDAL (eds.), *Developments in Services of General Interest*, The Hague, 2011; A. ARENA, *I servizi di interesse generale tra disciplina sovranazionale e preclusione della potestà normativa degli Stati membri*, in *Rassegna di Diritto Pubblico Europeo*, 2012, 17 *et seq.*; W. SAUTER, *Public Services in EU Law*, Cambridge, 2014.

19. See the insightful analysis by A. ARENA, *Articolo 36. Accesso ai servizi d’interesse economico generale*, in R. MASTROIANNI, O. POLLICINO (a cura di), *Commentario alla Carta dei diritti fondamentali dell’Unione europea*, 2016, forthcoming.

20. L. GRARD, *Place et signification de la Charte des droits fondamentaux de l’Union européenne pour le concept de service d’intérêt général*, in *ERA-Forum*, 2002, 158.

21. On this topic see H. PAULIAT, *L’accès aux services d’intérêt économique général*, in Id. (sous la direction de), *La cohésion territoriale et les services publics en Europe*, Paris, 1999, 47.

national policies.²² This is what Gráinne De Búrca and Olivier Gerstenberg refer to as the *denationalisation* of social welfare in favour of a European dimension of the welfare state.²³

Turning to a more detailed analysis of Article 36, it must be noted, first of all, that the provision does not refer to a *right* of access, but simply to access to SGEIs. As will be further clarified in section III below, this may have several implications in terms of justiciability. Secondly, although the access at issue is that provided for “in national laws and practices”, it must be legally shaped “in accordance with the Treaties”. Now, some legal commentators have argued that ensuring access to SGEIs does not actually fall within the responsibilities of the EU, because in this sector there is simply an obligation “*de ne pas faire*’ *suivant laquelle l’Union agit sans remettre en cause ce qui a été décidé au niveau local ou national pour garantir l’accès au service public*”²⁴. According to their view, the EU has no further obligation in this regard other than ensuring that the application of antitrust law and the development of fundamental economic freedoms do not prevent the exercise of the right of access to public services as guaranteed under national law. However, giving greater weight to public services does not always and necessarily mean extending the powers of national authorities, and thus precluding a stronger role for the EU institutions in this sector. On a superficial reading, Article 36 seems to lend itself to such an interpretation, in particular where it states that the Union “recognises and respects access to services of general economic interest as provided for in national laws and practices”. On the other hand, a systematic interpretation of the provision, placing emphasis on the fact that said recognition and respect must be “in accordance with the Treaties”, requires that we take into account the larger role that the Union has played in the public services sector – not only at the level of secondary legislation, but also at the level of primary legislation – since the introduction of Article 14 TFEU.

‘Treaties’ means, above all, primary law provisions on competition and the internal market, including the above mentioned Article 14 TFEU and Protocol No. 26. Moreover, the expression “in accordance with the Treaties” refers to EU secondary law instruments deriving from primary law provisions, such as the various directives adopted on the basis of Article 106.3 TFEU.²⁵ The term

22. For a study on the interplay between SGEIs and the concepts of solidarity and citizenship see M. ROSS, *Promoting Solidarity: From Public Services to a European Model of Competition?*, in *Common Market Law Review*, 2007, 1057 *et seq.*; U. NEERGAARD, *Services of General Economic Interest under EU Constraints*, in D. SCHIEK-U. LIEBERT-H. SCHNEIDER (eds.), *European Economic and Social Constitutionalism after the Treaty of Lisbon*, Cambridge, 2011, 174 *et seq.*; W. SAUTER, *op. cit.*, 80-82.

23. See G. DE BURCA, O GERSTENBERG, *The denationalization of constitutional law*, in *Harvard International Law Journal*, 2006, 258-259. See also the reflections made by G. DE BURCA, *Towards European Welfare?*, in Id., *EU Law and the Welfare State*, Oxford, 2005, 1-9.

24. L. GRARD, *op. cit.*, 160.

25. “The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States”.

'Treaties' also means citizenship and non-discrimination provisions, since possible tension may be caused by national eligibility rules for social services that are framed to protect the nationals of a certain Member State, while denying access and eligibility to other EU nationals and to non-EU nationals. Indeed, the CJEU has extended the scope of citizenship provisions in relation to access to welfare benefits, even though some recent rulings have restrained this trend. This means that the national rules restricting access to public services – to retain control over the State's social welfare budget – may be in contrast with Article 18²⁶ and with the core (civil, political and social) rights deriving from Article 20 TFEU.²⁷ Indeed, the 2003 Green paper on SGIs defines public services as “a pillar of European citizenship, forming some of the rights enjoyed by European citizens and providing an opportunity for dialogue with public authorities within the context of good governance”.²⁸ Furthermore, in the 2007 Communication on SGIs, the Commission points out that Article 36 “includes ensuring equal treatment between women and men and combating all forms of discrimination in accessing services of general economic interest”²⁹. After all, a key factor in the fight against poverty and social exclusion is precisely to ensure that those services can be provided regardless of the geographical location and economic condition of users. The service in question must be offered at affordable prices or free of charge, if the social condition requires it.

A final remark on the content of Article 36 concerns the natural correlation with other provisions of the Charter that cover areas falling within the scope of public services, including, among others: Article 14 on education,³⁰ Article 29 on placement services,³¹ Article 34 on social security and social assistance,³² Article

26. “Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited”.

27. “1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship. 2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: (a) the right to move and reside freely within the territory of the Member States...”.

28. See Green Paper, above n. 2, para. 2.2.

29. See 2007 Communication, above n. 2, para. 3.

30. “1. Everyone has the right to education and to have access to vocational and continuing training. 2. This right includes the possibility to receive free compulsory education. 3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right”.

31. “Everyone has the right of access to a free placement service”.

32. “1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices. 2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accor-

35 on health care,³³ and Article 38 on consumers protection.³⁴ In this regard, there is no doubt that access to SGEIs represents a precondition for the exercise of other fundamental social rights,³⁵ as well as of civil and political rights, such as those enshrined in Article 20 (“Equality before the law”)³⁶ and Article 21³⁷ on non-discrimination.³⁸ Moreover, denying access to SGEIs can constitute an impairment of human dignity as protected in Article 1 of the Charter.³⁹ This confirms that, when it comes to public services, fundamental rights are part of the shared values of the EU.⁴⁰ Indeed, there seems to be a strong interplay between fundamental rights and public services in secondary EU law instruments (both hard and soft law), as evidenced by the presence of several hard law provisions that regulate in detail the rights of users and consumers in specific sectors of general interest.⁴¹ Soft law instruments are even clearer in this respect; the 2004 White Paper on SGIs states that “universal service obligations establish the right of everyone to access certain services considered as essential and imposes

dance with Union law and national laws and practices. 3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.

33. “Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union’s policies and activities”.

34. “Union policies shall ensure a high level of consumer protection”.

35. See O. DE SCHUTTER, *L'accès aux services économiques d'intérêt général: un nouvel instrument de promotion des droits économiques et sociaux dans le cadre du marché intérieur – résumé de l'intervention d'Olivier De Schutter*, in *Les Services publics en Europe. Académie de droit européen – Trèves, 24-25 janvier 2002. Documentation de base*, 43; E. SZYSZCZAK, *op. cit.*, 36-02.

36. “Everyone is equal before the law”.

37. “1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited”.

38. See L. GRARD, *op. cit.*, 162.

39. See F. BENOÎT-ROHMER, *Access to services of general economic interest*, in EU NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS, *Commentary of the Charter of Fundamental Rights of the European Union*, 2006, 313; E. SZYSZCZAK, *op. cit.*, 36.03).

40. See V. CHAMPEIL-DESPLATS, *Services d'intérêt économique général, valeurs communes, cohésion sociale et territoriale*, in *L'Actualité juridique – Droit administratif*, 20 décembre 1999, 962-963.

41. See above note 4. Amongst scholars see J. ZEMANEK, *Access to Services of General Economic Interest Under Article 36 of the Charter of Fundamental Rights EU and the National Law*, in R. ARNOLD (edited by), *The Convergence of the Fundamental Rights Protection in Europe*, Heidelberg, 2016, 207.

obligations on service providers to offer defined services according to specified conditions including complete territorial coverage and at an affordable price”.⁴² Furthermore, the same document clarifies that “citizens and businesses rightly expect to have access to affordable high-quality services of general interest throughout the EU”.⁴³

III. The legal status and justiciability of Article 36.

The focus of our discussion will now shift from SGEIs and related substantive law aspects to the justiciability of Article 36.

On the whole, this is a very complex question to tackle, since, to my knowledge, as far as the EU case law is concerned, only in the *Anode* case⁴⁴ there is a reference to such provision. A reference through which the ECJ (European Court of Justice) merely clarifies that Article 36 expressly mentions territorial cohesion in connection with the right of access to services of general economic interest. Neither the ECJ nor the GC (General Court) have ever expressed their views on the justiciability of Article 36. Some Advocates General mentioned the norm in their opinions; yet, they did so in a rather unconvincing and vague manner⁴⁵. We are thus faced with the opposite of judicial activism, that is, deliberated passivity and inaction on the part of the EU judiciary. And this is censurable behavior, because Article 36 is one of those provisions whose content and scope must be fulfilled, in their scope, by the EU institutions, including the CJEU.

As noted by Tony Prosser, Article 36 “constitutionalizes the concept of services of general interest in ways linked to the basic concept of public service”.⁴⁶ In other words, it constitutionalizes a core of obligations identified elsewhere – in primary (Article 14 TFEU, Protocol No. 26) and secondary law – by the EU institutions.

Now, the fact that a core of obligations can be detected in EU law allows individuals to use secondary law in judicial proceedings. Article 36 may be indeed *evoked* by individuals/users/citizens claiming that national authorities

42. White Paper, footnote 3 above, para. 3.3.

43. White Paper, footnote 3 above, para. 2.1.

44. Judgment of 7 September 2016, C-121/15, EU:C:2016:637, paras 40 and 51.

45. Opinion by AG Alber of 1 February 2001, C-340/99, *TNT Traco SpA*, EU:C:2001:74, para. 94; Opinion by AG Jacobs of 30 April 2002, *Gemo*, C-126/01, EU:C:2002:273, para. 124; Opinion by AG Stix-Hachl of 7 November 2002, *Enirisorse*, C-34/01-C-38/01, EU:C:2002:643, footnote 101; Opinion by AG Maduro of 10 November 2005, C-205/03 P, *Feminin*, EU:C:2005:666, footnote 33; Opinion by AG Szpunar of 16 July 2015, C-293/14, *Hiebler*, EU:C:2015:472, footnote 31; Opinion by AG Mengozzi of 12 April 2016, C-121/15, *Anode*, EU:C:2016:248, paras 36 and 44.

46. T. PROSSER, *Competition Law and Public Services: From Single Market to Citizenship Rights?*, in *European Public Law*, 2005, 554.

have not given them access to services they are entitled to, or that the application of legislative provisions allowing for a reduction of basic social universal assistance endangers their fundamental right to receive an indispensable core of rights, which are listed in EU secondary law.⁴⁷ Therefore, Article 36 does have a potential in the context of national proceedings (which might lead to requests for preliminary rulings to the CJEU).

Article 36 may be employed/evoked also when EU law, rather than national law, is likely to reduce the level of protection accorded to users/citizens. It is worth to recall that, pursuant to this provision, the recognition and respect of access to SGEIs is aimed at promoting the social and territorial cohesion of the EU, meaning that such access is a constitutive element of the notion of European citizenship and a factor of social inclusiveness, in line with the Durkheimian dimension of “*interdependence sociale*”.⁴⁸ The case law on austerity measures of the national constitutional courts of some Member States is an excellent example in this respect,⁴⁹ as individuals may use Article 36 with the intention to call into question budget cuts that have an impact on access to essential services. More in general, legal issues may arise where a Member State is obliged to implement EU obligations than that run counter to national measures providing for a more advanced level of protection, in terms of access to SGEIs in a particular sector. Or, a Member State could reduce to a minimum the public service obligations relating to access in order to make a certain service attractive to a private provider. This last scenario raises the question of the extent to which a fundamental right can be protected by relying on Article 36, especially if there are no binding instruments of EU secondary law covering the sector in question, or if such instruments exist but do not contain any references to rights or to access to public services.

Now, saying that Article 36 can be evoked by individuals does not necessarily mean that this provision is a suitable basis for directly conferring rights on individuals *per se*. Being evoked, being generically relied on, is thus something different from being actually *invoked*, because not all rights are directly justiciable. Put differently, all rights have, in principle, a role and a standing in judicial proceedings, which is different from saying that all rights are directly enforceable, that is, recognized in provisions having direct effect. This, in turn, does not mean that they are taken seriously, for they are successfully put into action only if they are unconditional, self-standing (i.e., subjective) rights. They may act as standards of legality of national and EU law. They may have indirect effect. They may mirror general principles of EU law.

Having said this, the question is whether Article 36 could be invoked by individuals before courts and therefore produce direct effects. In this respect,

47. See, for example, Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption [1998] OJ L 330/32.

48. On this aspect see J.-M. BLANQUER, *Leon Duguit et le lien social* and R. LAFORE, *Services publics sociaux et cohésion sociale*, both in S. DECRETON (sous la direction de), *Services publics et lien social*, Paris, 1999, 77 *et seq.* and 369 *et seq.*, respectively.

49. For a general overview see <http://eurocrisislaw.eu.eu/>.

first of all closer attention must be devoted to the so-called rights/principles dichotomy as it emerges from a study of the Charter, from the standpoint of Article 36. As noted in the explanations to the Charter⁵⁰ and the Commentary of the Network of Independent Experts⁵¹, access to SGEIs is, in fact, a principle. Indeed, one might say that authors who, like Hans-W. Micklitz, maintain that Article 36 is an enforceable subjective right, merely rely on the *acquis communautaire* of universal service, without further elaborating on the matter.⁵²

Now, by assuming that assessing whether a Charter's provision is a fully enforceable right means assessing whether it has direct effect, as observed by AG Trstenjak in the *Dominguez* case,⁵³ what could we infer from a brief test on the fulfillment of the conditions of direct effect (i.e. clarity, precision, unconditional) in respect to Article 36? The answer is that the provision is neither precise nor unconditional and does not confer *per se* a right, with the result that it may not entail the disapplication of national provisions inconsistent with EU law. Direct effect, understood in its subjective dimension as the creation of individual rights, with substitution effects insofar as EU law governs the case, does not characterize Article 36. However, direct effect does not always and necessarily mean that subjective rights are directly conferred on individuals. Nor does it always entail substitution effects, whereby a norm of EU law replaces a provision of national law. Direct effect has also an objective – rather than subjective – dimension as it can be described as the capacity of a provision of EU law to serve as a parameter of legality for national law, with exclusionary rather than substitution effects. The topic revolves around the famous *invocabilité d'exclusion*, a concept originated in France and not very well known in other European countries. In a theoretical-reconstructive perspective, the crucial problem is whether or not this invocability is a form of direct effect.⁵⁴

50. Explanations relating to the Charter of Fundamental Rights, C 303/17.

51. See above, footnote 39.

52. H.-W. MICKLITZ, *Social justice and access in private law*, EUI Working Papers Law 2011/02, 25-26.

53. Opinion of 8 September 2011, C-282/10, EU:C:2011:559.

54. In the literature see F. DUMON, *La notion de "disposition directement applicable" en droit européen*, in *Cahiers de droit européen*, 1968, 369 *et seq.*; A. BLECKMANN, *L'applicabilité directe du droit communautaire*, in M. WAELBROECK, L. VELU (sous la direction de), *Les recours des individus devant les instances nationales en cas de violation du droit européen*, Bruxelles, 1978, 85-130; G. BEBR, *Les dispositions de droit communautaire directement applicables: développement d'une notion communautaire*, in *Cahiers de droit européen*, 1970, 3 *et seq.*; L. GALMOT, Y. BONICHOT, *La Cour de Justice des Communautés européennes et la transposition des directives en droit national*, in *Revue française de droit administratif*, 1988, 1 *et seq.*; P. MANIN, *L'invocabilité des directives: quelques interrogations*, in *Revue trimestrielle de droit européen*, 1990, 669 *et seq.*; T. EILMANSBERGER, *The Relationship between Rights and Remedies in EC Law: In Search of the Missing Link*, in *Common Market Law Review*, 2004, 1199 *et seq.*; M. RUFFERT, *Rights and Remedies in European Community Law: A Comparative view*, in *Common Market Law Review*, 1997, 307 *et seq.*; S. PRECHAL, *Does Direct Effect Still Matter?*, in *Common Market Law Review*, 2000, 1047 *et seq.*; W. VAN GERVEN, *Of Rights, Rem-*

The CJEU seems to answer in the affirmative. In *Becker*, for instance, the Court stated that, where the provisions of a directive appear to be unconditional, they may be relied upon “as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State”.⁵⁵

In the literature Bleckmann notes that the notion of direct effect is “*plus large que celle qui se réfère à la création de droits ou d’obligations pour les individus*” as it comprises “*toutes les formes d’application d’une norme par le juge*”.⁵⁶ Similarly, Pescatore considers direct effect always as a “matter of justiciability”.⁵⁷ As explained by Edward, the doctrine of direct effect, “using that expression in a broad way”, provides the criteria “for selecting or rejecting the norms to be applied and for clarifying the scope of judicial competence”.⁵⁸ Prechal rightly points out that “direct effect is the obligation of a court or another authority to apply the relevant provision of Community law, either as a norm which governs the case or as a standard for legal review”.⁵⁹

If Article 36 is applied in combination with other EU law provisions on SGEIs – amongst others, above all, sectoral secondary legal acts – able to specify the content of the Charter’s provision, direct effect, in the objective form explained above, can be affirmed.

In any case, even if one would reject the idea that exclusionary/objective effect is a form of direct effect, one cannot argue that Article 36 is just a programmatic provision simply because it contains a principle, rather than a right. As a matter of fact, Article 52(5) of the Charter establishes that the provisions of the Charter which contain principles “shall be judicially cognizable” in the interpretation of the acts adopted by Member States and in the ruling on their legality. In this way, it seems to depart from the legal traditions of certain States (such as Ireland), in which a role for social rights in judicial proceedings is always excluded, and

edies and Procedures, in *Common Market Law Review*, 2000, 501 *et seq.*; S. PRECHAL, *Direct Effect Reconsidered, Redefined and Rejected*, in J. M. PRINSSSEN, A. SCHRAUWEN A. (eds.), *Direct Effect: Rethinking a Classic of EC Legal Doctrine*, Groningen, 2002, 15-41; B. DE WITTE, *Direct Effect, Primacy and the Nature of the Legal Order*, in P. CRAIG, G. DE BÜRCA (eds.), *The Evolution of EU Law*², Oxford, 2011, 323-362; R. SCHÜTZE, *European Union Law*, Cambridge², 2018, 76-81.

55. Judgment of 19 January 1982, 8/81, ECLI:EU:C:1982:7 (*emphasis added*), para. 25.

56. A. BLECKMANN, *op. cit.*, 89.

57. P. PESCATORE, *International Law and Community Law – A Comparative Analysis*, in *Common Market Law Review*, 1970, 167 *et seq.*, 174 and 177.

58. D. EDWARD, *Direct Effect: Myth, Mess or Mystery?*, in J. M. PRINSSSEN, A. SCHRAUWEN A. (eds.), *op. cit.*, 1-13, 13.

59. S. PRECHAL, *Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union*, in C. BARNARD (ed. by), *The Fundamentals of EU Law Revisited. Assessing the Impact of the Constitutional Debate*, Oxford, 2007, 35-69, 37-38.

move closer to those of other Member States,⁶⁰ in which social rights are given a justiciable dimension.⁶¹ Article 36 may thus be applied before the courts in order to interpret and challenge national as well as EU acts. Indeed, notwithstanding a recent ambiguous approach of the CJEU,⁶² lack of direct effect cannot, in itself, affect the capacity of a provision of primary law to act both as means of interpretation and as a parameter of legality. As stated by S. Peers and S. Prechal, principles may be relied upon even to set aside conflicting legislation or to stop the adoption of regressive measures.⁶³ Following this doctrine, EU or national principles on the provision of public services may be employed to set aside EU or national measures that would impair a core of rights implied in the concept of universal service, or to prevent their adoption.

Finally, the main condition in order to rely on Article 36, as directly effective provision apt to determine the disapplication of national laws, or as a means for reviewing acts of the EU and Member States, is that those laws and acts must fall within the scope of application of EU law, in accordance with Article 51 of the Charter.⁶⁴ In this respect, it seems that such condition may be very often fulfilled, as can be easily inferred from what has been said so far on the existence of a core of positive obligations imposed upon the EU and Member States and drawn from a combined reading of primary and secondary law as well as from the case law of the CJEU. The intensity of the review would be limited considering the wide discretion left to the EU and Member States in this area;⁶⁵ however, a joint application of Articles 36 and 52(5) of the Charter could have a strong operational dimension. The CJEU may have an important role, with regard to

60. See N. LAZZERINI, *La Corte di giustizia ed i "principi" della Carta dei diritti fondamentali nella sentenza Glatzel*, available online at <http://www.sidiblog.org/2014/06/04/la-corte-di-justizia-ue-ed-i-principi-della-carta-dei-diritti-fondamentali-nella-sentenza-glatzel/> and C. LADENBURGER, *FIDE Report 2012*, available online at http://www.fide2012.eu/index.php?doc_id=88.

61. Reference must be made here to the French concept of *justiciabilité normative*. See D. ROMAN (sous la direction de), *La justiciabilité des droits sociaux: vecteurs et résistances. Actes du colloque tenu au Collège de France*, Paris, 25 et 26 mai 2011, Paris, 2012.

62. See *Wolfgang Glatzel* of 22 May 2014, C-356/12, EU:C:2014:350, paras 74-86.

63. See S. PEERS and S. PRECHAL, *Article 52*, in S. PEERS, T. HERVEY, J. KENNER and A. WARD (edited by), *op. cit.*, 52.182-52.183.

64. "1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties. 2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties".

65. On such issue see generally T. VON DANWITZ and K. PARASHAS, *A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights*, in *Fordham International Law Journal*, 2012, 414.

Articles 260⁶⁶ and 267 TFEU⁶⁷, in guiding national authorities and jurisdictions and, with respect to Articles 263(4)⁶⁸ and 267 TFEU, in the review of legality of EU acts.

One last point to be noted about the operational dimension of Article 36 is whether access to public services, as foreseen in the provision, might mirror a general principle of EU law, and whether an answer in the affirmative would entail consequences in terms of judicial protection. First of all, the fact that access to SGEIs might be a principle of substantive law, differently from the majority of general principles elaborated by the CJEU, is not in itself a valid reason to exclude its qualification as a general principle of EU law. One need only think, for instance, of principles such as free competition or the even more limited precautionary principle, in line with Takis Tridimas' study on the legal status and effectiveness of general principles of EU substantive law,⁶⁹ to realize this. Secondly, the dual legal nature of access to SGEIs, seen as a *positive* (obligation) and not only *negative* (derogation) provision, precludes a criticism based on the idea that the qualification as a general principle cannot be envisaged because Article 36 is connected with a derogatory provision, such as Article 106.2 TFEU. Thirdly, access to SGEIs is part of most Member States' legal traditions as well as of EU primary and secondary law. Some may object that not all legal traditions envisage such principle; and yet, this is not a decisive argument since, as demonstrated by Tridimas, a general principle "can be recognized as part of EU law though it is not recognized in the laws of all Member States".⁷⁰

In conclusion, the fact that access to SGEIs can be qualified as a general principle of EU law may support its justiciability.

66. "1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court. 2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it...".

67. "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning [...] (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union".

68. "Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures".

69. T. TRIDIMAS, *The General Principles of EU Law*³, Oxford, 2013, 1-8.

70. *Ibidem*, 2.

IV. A criticism of the CJEU's inaction in the interpretation and application of Article 36.

In its jurisprudence, the CJEU has never dealt with the potential of Article 36 directly. The European judges have thus been passive in the interpretation and application of this provision. However, they should change their approach, be bolder and finally take action. Indeed, the CJEU has been extremely active in pushing towards greater liberalization and privatization of SGEIs. Two examples are clear in this respect: the functional, expansive and dynamic notion of economic activity, and the erosion of the Member States' discretionary powers as far as golden shares in crucial public services sectors are concerned.⁷¹

The Court, as a way to pursue a better balance between market interests and social concerns, should be proactive also by giving greater relevance to access to public services rather than to the objectives of free market and competition. As noted above, the Court, only in one case, and Advocates have briefly stated their views on Article 36 of the Charter. However, neither the Court nor the Advocates General focused on its judicial potential, but, rather, on its relevance in counterbalancing the free market goals of EU law on SGEIs. This is already an important move towards a more balanced approach, but it is not enough. Hopefully, in the future the Court will exploit the potential of Article 36, read in conjunction with Article 14 TFEU, Protocol No. 26 and secondary law - i.e., all sources of law containing positive obligations on public services as well as references to access to SGEIs. Exploiting said potential from the perspective of individuals and that of justiciability means shaping access to public services as a parameter of legality and a general "principle of substantive EU law".

When rights are at stake and those rights are the result of socio-economic changes, courts, without being overly 'creative' agents of change, should intercept and legally frame the socio-cultural transformations that occur in modern societies: the emergence of access to essential services as a principle within the meaning of Article 52(5) of the Charter is precisely a novelty that the Court should valorize as much as possible. The problem with an approach grounded in a sort of Scalian originalism and a literal interpretation of the law is that it tends to disregard the fact that concepts such as equality and solidarity constantly change and thus require the application of new and more adequate legal tools.

V. Concluding Remarks.

Albeit being generally considered as a principle – rather than a right –, Article 36 has an operational character because it may be relied on by individuals and

71. In this regard it is sufficient to think of the reductive interpretation of the principle of neutrality vis-à-vis the ownership of companies enshrined in Art. 345 TFEU and the rebuttal of general interest exceptions in all but one ruling on golden shares (*Commission v. Belgium* of 4 June 2002, C-503/99, EU:C:2002:328).

function as a parameter of legality to challenge EU law provisions as well as national laws. Indeed, there exists a core of principles and rules on the regulation of public services, at both EU and national levels. Hopefully, the CJEU will change direction and give Article 36 the weight it deserves, with the ultimate result of counterbalancing the neo-liberal approach adopted over the years in several areas of its jurisprudence on SGEIs.
