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Services, including services of general interest

Eric Tjong Tjin Tai

1. INTRODUCTION

Within private law, the notion of services as the object of a contract is a relatively recent development. There is still no consensus on the desirability of a general concept of service contract. In the classic framework of Roman law there were only specific nominate contracts, which did not include services as such. However, recent research and legislation has recognised to a certain extent the category of service contracts. Within European law such contracts are recognised explicitly. Goods and services are two of the ‘four freedoms’ of the European Union.¹

In order to present the research on EU consumer and contract law regarding services, I will start by discussing the concept of services as such. This will be followed by a brief overview of current (national) private law doctrine regarding services. Next EU consumer and contract law regarding services is analysed. Finally I will discuss the category of Services of general interest (SGIs). Financial services and travel contracts will be discussed only tangentially, as these are the subject of other chapters. I will identify some questions for future research.

2. DEFINING SERVICES

Services as a concept exist outside of and separate from law. As we shall see, it is helpful to first examine non-legal perspectives.

Within economics it is nowadays almost a truism that markets are about the exchange of ‘goods and services’.² This suggests that services are everything that may be marketed besides goods, whereby goods refers primarily to material, tangible goods.³ Such a negative definition does not clarify matters.

Several economists have tried to provide further definitions, focusing on immateriality,⁴ and the fact that production and consumption coincide (that is, one cannot create a stock of services).⁵ That these definitions do not refer to activities can be explained by the fact that these authors try to distinguish between the productive sector (producing goods) and the service sector, and in both of these sectors activities are performed. In services management literature, services are generally characterised by intangibility (immateriality), inseparability (coincidence of production and consumption), heterogeneity (variability of service delivery where it depends on

¹ Article 26(2) TFEU.

² For example NG Mankiw and MP Taylor, *Economics* (Thomson, 2006), 63: ‘A market is a group of buyers and sellers of a particular good and service’, also D Salvatore, *Microeconomics: Theory and Applications*, 4th edn (Oxford University Press, 2003), 25.

³ Electronic or virtual goods would be covered by digital content services, see Section 5.2.

⁴ I.e. the service itself has no physical matter, cannot be touched.

⁵ TP Hill, ‘On goods and services’ (1977) 23 *Review of Income and Wealth* 315; P Hill, ‘Tangibles, intangibles and services: A new taxonomy for the classification of output’ (1999) 32 *Canadian Journal of Economics* 426; J Gadrey, ‘The characterization of goods and services: an alternative approach’ (2000) 46 *Review of Income and Wealth* 369.

individual service providers) and perishability (inability to store services).⁶ It is pointed out that there is a service-product continuum: the characteristics may not be shared equally by all kinds of services, while certain products may also share these characteristics to some extent. Indeed, goods may also contain service components (*servitisation of products*).⁷ For example the sale of a kitchen may encompass the installation of the product as well.⁸

What we see in this brief overview is that services are mainly viewed in contrast to goods, but the contrast is not absolute. A service appears to be any activity not involving production or delivery of a good. Incidentally, this depends partly on the perspective taken: the freelance designer of a chair provides a service to the manufacturer, but for the buyer the result of this service is just part of the chair. From a legal point of view the distinction between services and goods is captured mostly by the kind of *contract* involved. Where the contract involves the procurement of goods, it is a *sale*; where it aims at delivery of services, it is a *service contract*. Hence it is not the activity itself which is designated as much as the overall contract. A contract of sale can involve service activities, but that does not change the primary classification. This also means that preliminary activities are not usually considered separately, while economically speaking they should be seen as services. It should be pointed out, though, that nowadays there is a tendency to apply different rules to different elements of a contract, for example, the service obligations found in a contract of sale might be regulated by rules for services in general.⁹

Given that within law we focus on service *contracts*, that still does not make clear what distinguishes these contracts from their opposite: the contract of sale. After a thorough analysis of German and European law on services, Christiane Wendehorst concluded that the defining characteristic is that the contract is about activities or performance (*Leistung*).¹⁰ She further added a number of characteristics, to wit, intangibility, the lack of embodiment, obligation to do (instead of a result-oriented obligation), production factors being outside the sphere of the debtor, and independence. However, these characteristics do not all apply equally. The intangibility does indeed follow from the fact that services are activities. Embodiment, however, is possible, where the service aims at material work: the subcategory of building contract. Similarly, independence of the service provider is only necessary if we wish to distinguish service contracts from labour contracts, even though theoretically labour seems to be a kind of service. The production factors can well be in the sphere of the debtor, such as when a freelance programmer works at the premises of a bank. Finally, services actually may involve result-oriented obligations, such as the service of providing a haircut.

⁶ For example P Mudie and A Pirrie, *Services Marketing Management* (Butterworths, 2006), 3–5; AR Nankervis, Y Miyamoto, R Taylor and J Milton-Smith, *Managing Services* (Cambridge University Press, 2005), 6–8.

⁷ S Vandermerwe and J Rada, ‘Servitization of business: Adding value by adding services’ [1988] 6 *European Management Journal* 314. See also Services Directive [EC] 2006/123, OJ 2006 L376/36, recital (4).

⁸ Cf. Consumer Sales Directive [EC] 1999/44, OJ 1999 L171/12, Article 2(5).

⁹ E.g. Consumer Rights Act 2015, s.1 (UK); Dutch Civil code, Article 6:215.

¹⁰ C Wendehorst, ‘Das Vertragsrecht der Dienstleistungen im deutschen und künftigen europäischen Recht’ [2006] 206 *Archiv für die civilistische Praxis* 205.

If we wish to make clear in what way services differ from activities in general, we should rather look at the aim of services.¹¹ Service contracts specify the activities to be performed either by detailing the activities, or by making clear what the end result to be striven for is. The end result may be defined concretely (such as a haircut) or generally by referring to certain interests (such as legal services). The service provider will have to determine all further specific activities that promote the aim of the service.

Services appear therefore to be best described as being activities. Within law, services may be the core of a contract (in which case we speak of a service contract), but can also be incidental activities either with another contract, or outside of contract. These incidental activities are treated usually as supporting obligations or under tort law (such as providing misinformation). In the following I shall focus on service contracts, following the customary legal usage.

3. NATIONAL LAW ON SERVICE CONTRACTS¹²

National legal systems have taken some time to recognise service contracts as a separate category. Legal history is relevant as it explains some divisions that are still prevalent.

Under Roman law, paid service contracts fell under the hiring of labour (*locatio-conductio operarum*), to be distinguished from hiring of goods and building contracts (*locatio-conductio operis faciendi*).¹³ Unpaid services were considered to be mandate (*mandatum*).¹⁴ This distinction was influenced by the Roman prejudice that hiring of labour was akin to slave labour, while mandate was an activity of ‘free’ persons, such as legal advisors.¹⁵

In the *Code civil* the Roman system was taken over where Article 1779 Cc regulated ‘hiring’ of labour, mentioning three specific categories (labourers, transporters, entrepreneurs), and covered mandate elsewhere (Article 1984 Cc). In most legal systems, the categorisation of contracts developed further by distinguishing labour contracts (as this lent itself to specific protection of labourers), building or construction contracts, transport (which is influenced and regulated strongly by numerous international treaties), storage or custody (which traditionally under Roman law was a separate contract). The remaining category involves, roughly speaking, ‘pure’ service activities performed by independent contractors. This also came to encompass professional services that partly used to be categorised under mandate contracts.

Although service contracts as a general concept would involve all aforementioned specific contracts regarding activities, legally speaking we are accustomed to speak of

¹¹ TFE Tjong Tjin Tai, Mr. C. Asser’s Handleiding tot de beoefening van het Nederlands Burgerlijk Recht, Bijzondere overeenkomsten: Opdracht, inclusief de geneeskundige behandelingsovereenkomst en reisovereenkomst, vol. 7-IV* (Kluwer, 2014), nr. 18-20.

¹² RE Zimmermann (ed.), *Service Contracts* (Mohr Siebeck, 2010).

¹³ R Zimmermann, *The Law of Obligations* (Clarendon, 1996), 384.

¹⁴ Zimmerman, *The Law of Obligations* (n.13), 413.

¹⁵ Generally: F Ranieri, ‘Dienstleistungsverträge: Rechtsgeschichte und die italienische Erfahrung’, in Zimmermann, *Service Contracts* (n.12).

In: C.W. Twigg-Flesner (ed.), *Research Handbook on EU Consumer and Contract Law*, Cheltenham: Elgar 2016, p. 336-359.

service contracts only for the last-mentioned kind centrally involving services by independent contractors, not falling under a different kind of contract.¹⁶

In English law, service contracts have gained recognition as a species in the Supply of Goods and Services Act 1982. However, this Act hardly provides any special rules.¹⁷

The law regarding services consists mainly of case law that is categorised under general contract law or the law of professional liability.¹⁸ With regard to fiduciary duties involved in services, the case law on mandate or agency is relevant.¹⁹ The Consumer Rights Act 2015 has more extensive rules regarding services (ss.48–57), among which are provisions for the price (s.51), remedies (ss.54–56), and non-excludable liability (s.57).

French law has gradually come to accept a general remainder category of service contracts, called ‘*contrat d’entreprise*’.²⁰ Besides dedicated works²¹ the main treatment is found in general works on contract law.²² Mandate is regulated under Article 1984 CC and treated separately.

German law regulates service contracts mostly under the ‘*Dienstvertrag*’ (§ 611 BGB), which covers both labour contracts and independent services. Gratuitous service contracts fall under the ‘*Auftrag*’ (662 BGB). Furthermore, several rules of the *Auftrag* are analogously applicable to the *Dienstvertrag* that serves to promote material interests (see § 675 BGB).²³

Several other countries have specific rules for general service contracts. The Dutch Civil code (*Burgerlijk Wetboek*, BW) has a title on services (‘*Opdracht*’), with general rules and specific rules for mandate or agency contracts, brokerage, commercial agency and medical treatment.²⁴ The Swiss *Obligationenrecht* regulates the ‘*Auftrag*’.²⁵ The Italian Civil code regulates ‘*lavoro autonomo*’ in Articles 2222–2238 Cc, particularly recognising ‘intellectual professions (Article 2229–2238 Cc). See also Articles 1544–1587 Spanish Cc and Articles 1154–1156 Portuguese Cc. Belgian law recognises a general service contract (*contrat de service*, *dienstenovereenkomst*) of which storage and building contracts are species.²⁶

¹⁶ See for example the *International Encyclopedia of Comparative Law*, VIII, chs 9 (Commercial Services) and 10 (Professional and other independent services).

¹⁷ S Whittaker, ‘Contracts for services in English law and in the DCFR’, in Zimmermann, *Service Contracts* (n.12).

¹⁸ J Powell and others, *Jackson & Powell on Professional Liability*, 6th edn (Sweet & Maxwell, 2007).

¹⁹ See *West Building Society v Mothew* [1996] 4 All ER 698, and PG Watts, *Bowstead & Reynolds on Agency*, 19th edn (Sweet & Maxwell, 2010), para.6–032.

²⁰ J-S Borghetti, ‘Service contracts: The French experience’, in Zimmermann, *Service Contracts* (n.12).

²¹ F Labarthe and C Noblot, *Traité du contrat d’entreprise* (LGDJ, 2008).

²² For example P Malaurie, L Aynès and P-Y Gautier, *Les contrats spéciaux*, 6th edn (Defrénois, 2012), P-H Antonmattei and J Raynard, *Droit civil, contrats spéciaux*, 7th edn (Lexis Nexis, 2013).

²³ M Anders and B Gehle, *Das Recht der freien Dienste: Vertrag und Haftung* (De Gruyter, 2001), K Tillmanns, *Strukturfragen des Dienstvertrages* (Mohr Siebeck, 2007), P Mückl, *Der Vertragsbruch des Dienstleisters* (Sellier, 2010), T Kadner Graziano, ‘Dienstleistungsverträge im Recht der Schweiz, Österreichs und Deutschlands im Vergleich mit den Regelungen des Draft Common Frame of Reference’, in Zimmermann, *Service Contracts* (n.12).

²⁴ Article 7:400 ff. BW, see Tjong Tjin Tai (n.11) and TFE Tjong Tjin Tai, ‘Service contracts in the Dutch Civil code’, in Zimmermann, *Service contracts* (n.12).

²⁵ Article 394 Swiss *Obligationenrecht*, see Kadner Graziano (n.23), and H Honsell, *Schweizerisches Obligationenrecht, Besonderer Teil*, 8th edn (Stämpfli, 2006), § 23-27.

²⁶ B Tilleman and AL Verbeke, *Bijzondere overeenkomsten* (Die Keure, 2005), nr. 814–820.

The general impression is that there is a trend towards recognition of service contracts as a separate category. Legislation is still rather diverse, where different jurisdictions seem unable even to agree about the extent of service contracts. Specific rules are mainly formed in case law.

4. EUROPEAN PRINCIPLES

Besides national systems, there has been work on European principles. First is the Principles of European Law: Service Contracts (PELSC),²⁷ created by a study group of Tilburg University under the aegis of the Study Group on a European Civil Code.²⁸ Second is Book IV.C of the Draft Common Frame of Reference (DCFR), which consists of a slightly modified and arguably improved version of the PELSC. The PELSC and Book IV.C DCFR have had a lukewarm reception.²⁹ A positive aspect is that the PELSC have tried to formulate more general rules by focusing on a number of important kinds of activities that may be central to the service. This list looks somewhat haphazard. Also, certain activities or services³⁰ are explicitly left out for unsatisfactory reasons.³¹ Furthermore the level of detail of the rules does not always appear to be adequate. Finally, the relationship with the general rules of contract might be improved. However, one should bear in mind that the PELSC had to be created without much precedent.

The PELSC consist of a general part, followed by sections devoted to construction, processing, storage, design, information (and advice), and (medical) treatment. The DCFR follows this structure, but divides the general part into two sections: general provisions regarding the chapter and rules applying to service contracts in general. The general rules regulate issues such as information duties, the general standard of care and termination rules.

5. COMPARATIVE OBSERVATIONS ON SERVICE CONTRACTS

As is clear from the above overview, there are many national differences in definition and kinds of regulation of services. In the following I will try to focus on the main similarities and some noteworthy differences, drawing on existing legal rules and principles, combined with an analysis of the practice of service contracts. Generally speaking, the following issues are of interest regarding the legal rules on services contracts, in particular where consumers are concerned.³²

1. the scope of the rules on service contracts;

²⁷ JM Barendrecht C Jansen, M Loos, A Pinna, R Cascão and S van Gulijk (eds), *Principles on European Law: Service Contracts* (Sellier, 2007).

²⁸ See on the drafting process M Loos, 'Service Contracts', in A Hartkamp *et al.* (eds), *Towards a European Civil Code*, 4th edn (Kluwer Law International, 2011), 757–85; C Jansen, 'Principles of European law on service contracts: Background, genesis, and drafting method', in Zimmermann, *Service Contracts* (n.12), 43–57. To avoid misunderstanding: although I am positioned at Tilburg University, I have not been involved in the creation of the principles.

²⁹ Wendehorst (n.10), 293; H Unberath, 'Der Dienstleistungsvertrag im Entwurf des Gemeinsamen Referenzrahmens' (2008) *ZEuP* 745, H Eidenmüller, F Faust, HC Grigoleit, N Jansen, G Wagner and R Zimmermann, 'The Common Frame of Reference for European private law – policy choices and codification problems' (2008) *OJLS* 659, 691.

³⁰ Such as mandate or financial services.

³¹ This is partly due to choices within the SGECC generally.

³² The following analysis partly builds on Tjong Tjin Tai (n.11), nr. 15-70, also Loos (2011) (n.28).

2. content of the contract;
3. professional diligence;
4. payment;
5. termination of the contract;
6. remedies in case of default.

5.1 Scope of Service Contract

As we saw above (Section 3), there is a large variety of demarcations of service contracts. Mandate is often regulated under different rules, following the Roman law influence. Labour contracts and transport are usually also treated separately from service contracts. A common core is professional services, which are always recognised as falling under service contracts. Financial services are usually also recognised as service contracts, but have received specific European regulation.³³

Despite this variety, we can recognise some commonalities. Most jurisdictions appear to nowadays recognise a general category of service contracts, except possibly England. Even if there is doubt as to the possibility of general rules, it is seen as useful to develop general rules insofar as possible. From a systematic viewpoint it is better to start from the general definition of service contracts as encompassing all activities, and only subsequently recognising that there may be reasons to treat certain kinds of service contracts separately. To that extent the approach of the PELSC is appropriate, even if it may be criticised for not going sufficiently far by still leaving mandate out.³⁴ Even if we assume the systematic position of service contracts as an overarching category, for practical purposes it is preferable to work with a more specific concept of service contracts that is closer to services as perceived generally. Therefore I will not discuss custody (storage), labour, and building (construction) contracts.

A further question is whether service contracts are essentially paid services (Section 5.4). Again from a systematic point of view there is no reason to have a requirement of payment. However, in practice unpaid (gratuitous) service contracts are rare as one should hesitate to recognise a party taking on burdensome duties without payment.³⁵ I will therefore not discuss unpaid service contracts.³⁶

This means that I will concentrate on service contracts that involve activities by an independent contractor or service provider,³⁷ in return for payment. This indeed is the most generally recognised definition of service contracts.

Although such a definition in itself is not opposed, as it does seem to meet the facts, there is considerable resistance as to whether it is desirable to systematically recognise and discuss service contracts with general rules for all kinds of services.³⁸ At first sight there is little overlap or resemblance between medical treatment, a cab drive, legal representation, theatre performance, house cleaning, digital streaming of

³³ See Chapter 14 in this book.

³⁴ Which is due partly to choices from the PEL project as a whole.

³⁵ Under English law the doctrine of consideration might prove a barrier.

³⁶ Article IV.C.1:101(1)b DCFR declares the rules for paid service contracts applicable to unpaid service contracts insofar as that is appropriate.

³⁷ The notion of 'independence' follows from the fact that labour contracts are separately dealt with.

³⁸ Borghetti (n.20), Whittaker (n.17).

music, communication and child care. The general features that may be found would actually apply to all contracts in general: the only possible result might be an empty kind of abstraction or system-building for its own sake.

There are several reasons not to follow this critique. First, there exists an explicit idea of services as a general category, both outside and inside law. It is generally undesirable if law strays too far from the extra-legal viewpoint. Furthermore, lawyers cannot avoid recognising services as a general legal concept since the European Union, inspired by the economic viewpoint, regularly uses this concept in its legislation (Section 6). Finally, as a closer examination of service contracts shows, we can recognise certain more specific characteristics that distinguish service contracts generally from other contracts, even if these characteristics need not apply equally for all services. Examples are the reliance on trust and information duties, prevalence of long-term contracts, difficulties in proof of quality, principal-agent conflicts. By bringing together developments and insights from various kinds of service contracts, while remaining aware of the diversity which may necessitate caution in drawing too far-reaching general conclusions, we may gain further insight in this important group of contractual relations. Even in jurisdictions where the codification does not recognise service contracts as such, there have recently appeared doctrinal works covering this area as an integrated subject.³⁹

5.2 Content of the Contract

Service contracts tend to be less well specified than other contracts. One reason is that for many services it is not feasible or practical to provide a detailed specification beforehand.⁴⁰ The service provider is assumed to provide regular feedback to the service recipient and if necessary ask for instructions. In other words, service contracts assume regular communication, whereby the contract is specified by a cycle of information duties and instructions. This appears preferable to a detailed specification of all eventualities.

Given the diversity of services it is much harder to find a common paradigm of service provision, than in the case of contract of sale. Considered generally, a service contract involves activities with a certain goal in mind. Theoretically it is possible that the service provider only receives a set of detailed instructions to follow blindly without any sense of purpose. However, this is rare as even detailed instructions often leave out details which have to be supplemented with professional diligence (Section 5.3) that requires knowledge of the aim of the service: it is much easier to specify the goal in general. Furthermore, a service provider is usually hired only for a specific kind of service that normally implies default aims. A hairdresser will have to provide a haircut, a lawyer will provide legal assistance, a mobile phone service provider has to provide mobile connectivity.

Mostly the aim of the service is made clear beforehand: without any aim, the service provider would have no idea how to operate. It is possible that only the general service is set out, with further details to be provided at a later stage. In general the

³⁹ See Section 4.

⁴⁰ Article 6(1)a Directive 2011/83/EC does require information on the main characteristics; however, these may be rather general. See also Article 11 of Directive 2006/123/EU (services).

service provider will have to adapt his activities or services to these later requirements: this implies that he will have to follow later instructions as well, insofar as these are appropriate given the kind of service. This may be different for mass-produced services (see below), such as mobile phone services.

The aim of the service may be stated as the result that the service provider has to achieve, as that will under normal circumstances be realistic. An example is making a draft last will or serving notice of a procedure. In other cases the aim is only a goal to be striven for, as it is quite uncertain whether this will be reached even with the best effort of the service provider. An example is medical treatment. This amounts to the distinction between what the French call *obligation de résultat* (obligation of result) and *obligation de moyen* (obligation of skill and care).⁴¹ In the first case the service provider will be in default if the result has not been reached, except if he can prove force majeure. In the latter case, the service provider will only be in default if the principal proves that he did not act in the proper way. This distinction is partly contractual, as parties may choose to phrase the obligations of the service provider in either form. But the distinction also follows partly from the type of service involved. Obligations of result are much less common in service contracts than for example with sale or custody, where they are the norm.

Service contracts may therefore involve different ways in which the aim of the contract is guaranteed or specified; furthermore they usually assume that the customer has to some degree the right to instruct the service provider.⁴²

It may be useful at this point to distinguish a number of paradigmatic services. The first is the category of professional services. These are almost paradigmatic for services as such. However, they are different in several respects. Historically they evolved from professions with a central social importance and purpose: its providers have traditionally received a high degree of respect. They are not as strictly bound by instructions from the principal as other service providers; they have to follow strict deontological or professional rules which may at times require them to act contrary to specific instructions of the principal. They are regulated much more extensively, given the central importance of the services involved.⁴³

There are at least two reasons for the exceptional position of these services (also called regulated professions).⁴⁴ One is that these are usually experts in a certain area, which means that the principal will have to trust him as regards to the actions that are proposed. In a contract of sale we can say that the buyer has to beware; for professional services a relation of trust is necessary. Another is that these services are vital to the operation of society; laymen have to go to the practitioners of the profession and cannot decide to ask someone else (such as in the case of a dog-walking service). To be sure, these reasons apply to a certain extent also for other,

⁴¹ This distinction is recognised explicitly in Articles 1:107 and 108 PELSC and Articles IV.C-2:105 and 106 DCFR. Further: TFE Tjong Tjin Tai, 'Professional diligence and the UCP Directive' (2016) *European Review of Contract Law* 1.

⁴² Article 1:109 PELSC; Article 7:402 Dutch BW; Article 397 Swiss *Obligationenrecht*; § 665 BGB.

⁴³ This is recognised for example in Article 3(8) Directive 2005/29/EC which specifically allows a higher level of deontological or regulated professions, insofar as EU law allows this.

⁴⁴ Article 2(1) Directive 2005/29/EC, also Directive 2005/36/EC on recognition of professional qualifications.

non-regulated services such as computer services that laymen cannot provide themselves. With professional services these issues are highlighted. Another kind of services which is useful to distinguish are those that are mass-produced services. Examples are package travel, concerts or lectures: these are activities aimed at a large number of consumers. On the one hand consumers thereby only have to individually pay a small proportion of the total costs of the service, on the other hand they have no right of instruction or communication, and may have to accept unilateral changes in the details of the service. Such services are much closer to contracts of sale: it is even debated whether we should call these 'services'. In particular digital content services might need specific regulation.⁴⁵ However, under EU legislation these clearly are services. As these services are rather different from normal services, I will not discuss these extensively and will concentrate on individual services.

Given the large variety of services and the difficulty of providing specific rules in a civil code, service contracts in practice rely to a large extent on what is called private regulation.⁴⁶ This may be recognised explicitly in legislation.⁴⁷ Such rules may come under EU control if certain criteria are fulfilled.⁴⁸ Specific sectors of the service industry may evolve their own notions of what is proper and fitting to the specific service and provides a good balance between the rights of service provider and customer. Incidentally there may result an imbalance, which may have to be redressed by law. Legal regulation of services therefore is characterised by a large number of default rules that allow deviation for specific sectors, supplemented with a limited number of mandatory rules to set right undesirable imbalances.⁴⁹ It might be argued that for this area other forms of regulation are more appropriate than the classic division in default and mandatory rules.⁵⁰ EU regulation relies mostly on information duties.⁵¹

5.3 Professional Diligence and Information Duties

Because of the impossibility of giving complete definitive instructions beforehand, the contract has to contain an implied condition of professional diligence.⁵² Historically this is related, at least in civil law countries, to the Roman law concept of

⁴⁵ MBM Loos, N Helberger, L Guibault and C Mak, 'The regulation of digital content contracts in the optional instrument of contract law' (2011) *European Review of Private Law* 729.

⁴⁶ A Ogus, 'The regulation of services and the public-private divide' in F Caffagi and H Muir-Watt (eds), *The Regulatory Function of European Private Law* (Edward Elgar, 2009); T Heremans, *Professional Services in the EU Internal Market: Quality Regulation and Self-Regulation* (Hart Publishing, 2012), Hatzopoulos (2012) (n.75).

⁴⁷ Article 396 Swiss *Obligationenrecht* refers to the nature of the service. Cf. Article 2(f) Directive 2005/29/EC referring to code of conduct.

⁴⁸ Hatzopoulos (2013) (n.79), 468, referring to Case C-309/99, *Wouters v Nederlandse Orde van Advocaten* [2002] ECR I-1577, paras 61–62 and Joined Cases C-94 and 202/04, *Cipolla v Fazari and Capopart v Meloni* [2006] ECR I-11421, paras 50–51.

⁴⁹ The PELSC contain mostly default rules (Barendrecht *et al.* (n.27), 129), which unfortunately is not clear from the provisions themselves.

⁵⁰ Cf. Hatzopoulos (2012) (n.75).

⁵¹ In particular Article 22 Directive 2006/123/EC and Articles 5 and 6 Directive 2011/83/EU.

⁵² Cf. Article 2(h) Directive 2005/29/EC. See more extensively TFE Tjong Tjin Tai (2016) (n.41).

diligentia paterfamilias.⁵³ As explained above, services usually are only specified abstractly and have to be filled in by the good judgement of a service provider who has to decide in the circumstances on the appropriate course of action. For example, the customer can direct a chauffeur regarding the destination and to some extent the route to follow, but he should not try to say whether the chauffeur has to turn or stop at a given moment, as that may depend on other traffic, police instructions and the like. In a contract of sale this is evident as the customer there has no right to instructions; he must be satisfied with the end result. With a service contract, the customer may have some claim to provide instructions (also because he has to pay for the activities), but cannot continually instruct. Furthermore, the customer may lack the knowledge to provide detailed instructions and has to rely on the information and advice provided by the service provider. Indeed, the customer may often not even know about the specific status of the service and whether he might wish to provide further instructions.

It is therefore incumbent upon the service provider himself to regularly inform or warn the customer,⁵⁴ insofar as that is appropriate for the service, and to advise on a possible course of action. Hence a medical doctor has to ask the patient his choice on following a specific treatment, and he has to inform and advise the patient about the risks of each option (informed consent). This is understandable as these choices may directly influence the possibility of reaching the desired result or aim of the service. Since the customer usually has no guarantee of obtaining the result and will have to pay for the activities even if the result is not reached, he has a greater interest in directing these activities and being informed.

These considerations explain the existence of numerous information duties,⁵⁵ as well as the general duty of professional diligence or duty of skill and care.⁵⁶ Article 1:107 PELSC contains very detailed provisions on the standard of care, which may be too detailed for practical purposes. A general rule of diligence might be sufficient, to be elaborated further in case law. Similarly Article 1:105 PELSC which provides that the service provider should take all circumstances into account seems to be superfluous as this follows from the appropriate care.

For services that specifically aim at furthering the customer's interest the service provider owes a fiduciary duty, an obligation of loyalty, which means that he should avoid conflict of interest, or at least inform the customer about the conflict. Current legislation assumes this in particular for mandate, but it may also occur for other services.⁵⁷

5.4 Payment

⁵³ See Article 1137 Cc, applied analogously.

⁵⁴ See Article 1:110 PELSC. Further JA Luzak, *The implied duty of a service provider to warn* (diss. University of Amsterdam 2011), available 11 April 2016 at <http://dare.uva.nl/document/344262>.

⁵⁵ A. Pinna, *The Obligations to Inform and to Advise* (Boom, 2003), for example Articles 7:402 and 403 Dutch BW.

⁵⁶ Article 398 Swiss *Obligationenrecht*; Article 1176 Italian Codice civile; Article 7:401 Dutch BW; Supply of Goods and Services Act 1982, s.13, Consumer Rights Act 2015, s.49(1) (UK).

⁵⁷ For mandate see Articles IV.D.5:101 and 102 DCFR. For other services see for example Article 6:107 PELSC; § 654 BGB; Article 1596 Cc (analogously applied); *Bristol and West Building Society v Mothew* [1996] 4 All ER 698; Article 7:416-418 Dutch BW; Article 415 Swiss *Obligationenrecht*.

With regard to the need for payment for the service, legislative approaches differ. In some countries the possibility of gratuitous service contracts is recognised,⁵⁸ in others payment is an essential element of a service contract.⁵⁹ A large number of methods for price calculations exist, such as payment by time/period, by activity, for completion of the full task or part of the task, payment on condition of success (no cure, no pay). Often these are determined by customary practices in a given business area:⁶⁰ general rules tend to refer to usage.⁶¹ In general it is up to the principal to determine whether he accepts the agreed-on manner for price calculation, provided he has been sufficiently informed beforehand.⁶²

One reason for providing default or mandatory legal rules is to avoid abuses with contractual payment rules, whereby customers would have to pay regardless of the quality of the service, or where the payment would be severely disproportionate to the efforts of the service provider. As services often do not provide a fixed price beforehand and instead rely on regular intermediate payments, it is necessary that the costs do not too quickly run out of control.

A related question is whether the customer also has to provide compensation for sundry expenses incurred by the service provider in the course of his activities.⁶³ This appears to depend largely on the business customs for the specific service, and may be laid down in contractual rules. Generally speaking the customer will pay one way or the other: either because he pays them directly, or because the costs are integrated in the general costs of service, as part of the price per activity (such as a telephone call or postage stamp) or spread out over all the service contracts (as in the case of courses to update the knowledge of the service provider).

A further question is whether the customer would be liable if the service provider incurs damage in the course of the performance of the service.⁶⁴ Generally speaking it again appears fair that the service provider should bear his own liability for damage, as this is a professional risk for which he should be insured and he will be in the best position to take preventive measures. However, in certain cases this does not seem to apply, as in the case of a freelance computer programmer who works on the premises of a bank and is hurt when a fire breaks out. Again we may assume that in general no specific legal rules are necessary as business practice and the contract may provide sufficient certainty and fairness. For consumers, unbearably high liability risks can be attacked through the general rules on unfair contract terms.⁶⁵

5.5 Termination of the Contract

A particular characteristic of services is that they cannot be stored: they are in principle used or consumed at the moment of their production (Section 2). This

⁵⁸ The Netherlands (Article 7:405 BW); Switzerland (Article 394 *Obligationenrecht*).

⁵⁹ E.g. France.

⁶⁰ Such as no cure, no pay with brokers, cf. Article 413 Swiss *Obligationenrecht*; Article 7:426 Dutch BW; § 652 BGB; IV.D.2:102(4) DCFR.

⁶¹ Article 2233 Italian Cc.

⁶² As is required for consumers (Article 6(1)d Directive 2005/29/EC and Article 5(1)c Consumer Rights Directive 2011/83/EU).

⁶³ Article 7:405(1) Dutch BW; Article 402(1) Swiss *Obligationenrecht*.

⁶⁴ Article 7:405(1) Dutch BW; Article 402(2) Swiss *Obligationenrecht*.

⁶⁵ E.g. article 1(e) Annex to Directive 93/13/EEC.

follows from the fact that most services are individualised, tailored to a specific person (such as advice) or in their production connected to an individual (such as an individual oral lesson). Because of this fact, service contracts often have to be contracts for a somewhat extended duration which cannot always be specified in advance. This is even more so where it is not certain in advance when the aim of the service will be realised. The duration may be relatively short (as in the case of opening a lock) or extensive (as in the case of legal representation in a court procedure or commercial agency). Furthermore, certain services by their nature are never fully completed, an example being the tending to a garden.

Because of this uncertainty, the customer may have reason to wish to terminate the contract before the aim has been realised, even if the service normally would end only at completion of the contract. Furthermore, given the necessity of trusting the service provider in many service relationships, it generally is undesirable that the customer should continue the service where he no longer trusts the service provider.

On the other hand, the service provider may desire a degree of certainty with regard to the future demand for his services, and may have made investments or refused other customers in reliance on continuance of the service. Similarly, the customer may be dependent on the continuity of the service. An advocate normally cannot simply stop representing his client during a court hearing.

As these considerations show, there are conflicting indications as regards the possibility of termination.⁶⁶ If this area is left fully unregulated, chances are that contractual arrangements would evolve that would not sufficiently respond to these considerations. There is therefore good reason for a certain measure of legal regulation.⁶⁷ It may be true that, to a certain extent, these rules might be common for all long-term relationships. However, it might also be the case that long-term relationships mostly involve services, in which case the special characteristics of such relationships are due to their service character.

Existing rules regarding termination of service contracts vary from full freedom to terminate,⁶⁸ to freedom for the customer only.⁶⁹ The interest of the service provider may be safeguarded by an obligation for the customer to pay damages upon termination.⁷⁰ It is reasonable to require the customer to offer payment for services over a certain period after termination (or conversely, to require a reasonable period of notice of termination, which amounts to the same). The question then is as to the duration of notice, or the amount of money to be paid.

5.6 Remedies in Case of Defective Services

A final issue regarding services is the question of remedies for breach of contract. In case of defective services the customer may regularly meet significant barriers in his quest to obtain relief.

First of all, the customer is generally required to prove the breach of contract. Given the transient nature of services, such proof may be difficult to provide for

⁶⁶ Incidentally, this also applies to mass-produced services.

⁶⁷ Also Wendehorst (n.10).

⁶⁸ Article 404(1) Swiss *Obligationenrecht*.

⁶⁹ Article 7:408 Dutch BW; Article 2237 Italian Cc; Article IV.C.2:111 DCFR; Article 1:115 PELSC.

⁷⁰ E.g. Article 404(2) Swiss *Obligationenrecht*; Article IV.C.2:111 DCFR.

certain services. The patient can hardly be expected to prove what occurred during an operation while he was sedated. Similarly, in certain cases it is more natural to require the service provider to keep account of his activities. Therefore several jurisdictions have established specific rules for certain kinds of services which devolve part of the burden of proof to the service provider, or oblige him to keep and provide accounts.⁷¹ Furthermore, even if the defective service is proven, an appropriate remedy may be hard to come by. Following the nature of services, repair may not always be a feasible remedy. A wedding planner can hardly make up for his lack of service by providing for a new wedding. Even full return of payment seems insufficient compensation for the customer. Furthermore, services may often involve consequential damage that is regularly if not mostly expressly stipulated as not to be compensated in case of breach of contract. Such a limitation of damages is usually accepted.

The state of remedies for defective services is the more unsatisfactory as the customer is dependent on the service provider: it is costly (and cannot fairly be required) to keep a back-up service provider on call. Hence the customer has little recourse for gross negligence on the part of the service provider. Economically speaking, one may wonder whether the remedies are really efficient.

5.7 Conclusion

As regards several issues there are reasons that are common to many services that point in the direction of some amount of regulation. Individual jurisdictions provide scattered legislation; the area could benefit from a more thorough analysis of desirable rules. In this overview only a limited analysis was feasible. Specific areas such as the client's duty to cooperate,⁷² personal performance versus sub-contracting,⁷³ duty to provide account,⁷⁴ or rules on the precontractual phase and formation of contract have been ignored.

6. EU LAW ON SERVICES⁷⁵

European law does not so much regulate service *contracts* as services as such, in line with the economic definition. Services are mentioned regularly in directives but often without specific definition. Indeed, 'service' may not have a general meaning but rather appears to be defined anew in the context of each legal act.⁷⁶ The Services Directive 2006/123/EC defines services in Article 4(1) as 'any self-employed economic activity, normally provided for remuneration, as referred to in Article 50 of the Treaty'. This refers to what is now Article 57 TFEU, which states that:

⁷¹ See for medical liability Article 7:105 PELSC; Article L 1111-2 para.7 *Code de la Santé Publique* (France); BGH NJW 1992, 2351 (Germany). Regarding accounts see § 665 BGB; Article 400 Swiss *Obligationenrecht*; Article 1993 Cc; Articles 4:109, 6:106, 7:109 PELSC; Article 3:402(2) PELMC.

⁷² See Article 1:104 PELSC.

⁷³ See Article 1:106 PELSC; Article 398(4) Swiss *Obligationenrecht*; Article 7:404 Dutch BW; § 613 and 664 BGB; Article 2232 Italian Cc.

⁷⁴ Article. 401 Swiss *Obligationenrecht*; Article 7:403 Dutch BW.

⁷⁵ See generally V Hatzopoulos, *Regulating Services in the European Union* (Oxford University Press 2012).

⁷⁶ S Kümmerle, 'Güter und Dienstleistungen – Vertragstypenbildung durch den EuGH', in FJA Santos, Ch Baldus, H Dedek (eds), *Vertragstypen in Europa – Historische Entwicklungen und europäische Perspektiven* (Sellier, 2011).

“Services shall be considered to be ‘services’ within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. ‘Services’ shall in particular include: (a) activities of an industrial character; (b) activities of a commercial character; (c) activities of craftsmen; (d) activities of the professions ...”

Services in the TFEU serve as a catch-all category to ensure that all economic activity is covered under the four freedoms.⁷⁷ The Court of Justice of the European Union (CJEU) nowadays refrains from using an abstract manner in determining whether the service does or does not fall within this concept.⁷⁸ If we examine the CJEU case law on services,⁷⁹ this involves mostly the right to freedom of services, besides public procurement law which we will not discuss here.

EU regulation, as far as private law is concerned, is haphazard. An early proposal for a directive on services⁸⁰ was withdrawn after it met strong criticism.⁸¹ In 2006 the Services Directive (2006/123/EC)⁸² was adopted. Several important services are not regulated by the Directive, in particular transport, financial and medical services, notaries public and process servers (Article 2(2)). Besides laying down rules to promote freedom of services in the common market, it also contains rules designed to protect clients, in particular information duties (Articles 22 and 27).⁸³ The Directive refrained from imposing a mandatory business insurance (recital (99)), instead leaving the choice to Member States (Article 23). It has only a limited effect on contract law,⁸⁴ and does not address many of the issues identified above (for example, content of contract, termination, remedies). Rather it aims at harmonisation through codes of conduct (see Article 37).⁸⁵

Other directives also contain service-oriented rules.⁸⁶ Article 2(6) Consumer Rights Directive 2011/83/EU⁸⁷ (CRD) defines ‘service contract’ as meaning ‘any contract other than a sales contract under which the trader supplies or undertakes to supply a service to the consumer and the consumer pays or undertakes to pay the price thereof’. While the directive generally regulates goods and services together, it cannot avoid specific arrangements. In particular Articles 5(2) and 8(7) CRD make an exception for the requirement of written confirmation in the case of a service provided

⁷⁷ Case C-452/04, *Fidium Finanz v Bundesanstalt für Finanzdienstleistungsaufsicht* [2006] ECR I-9521, para.32.

⁷⁸ Case C-215/01, *Schnitzer* [2003] ECR I-14847, paras 30–31.

⁷⁹ V Hatzopoulos and TU Do, ‘The case law of the ECJ concerning the free provision of services: 2000–2005’ (2006) *Common Market Law Review* 923; V Hatzopoulos, ‘The court’s approach to services (2006–2012): from case law to case load’ (2013) *Common Market Law Review* 459.

⁸⁰ OJ 1991 C12/8.

⁸¹ Communication of 23 June 1994, COM (94) 260.

⁸² C. Barnard, ‘Unravelling the services Directive’ (2008) 45 *Common Market Law Review* 323–94, JW van den Gronden (ed.), *The EU and WTO Law on Services* (Kluwer Law International, 2009).

⁸³ Th Ackermann, ‘Das Informationsmodell im Recht der Dienstleistungen’ (2009) *ZEuP* 230 concludes that these obligations have little effect on the functioning of the internal market.

⁸⁴ M. Schauer, ‘Contract law of the Services Directive’ (2008) *European Review of Contract Law* 1.

⁸⁵ P Delimatsis, ‘The EU Services Directive and the mandate for the creation of professional codes of conduct’, in I Lianos and O Odudu (eds), *Regulating Trade in Services in the EU and the WTO* (Cambridge University Press, 2012).

⁸⁶ I will leave out of consideration rules on Private International Law.

⁸⁷ Superseding the Directive on distance contracts (97/7/EC).

In: C.W. Twigg-Flesner (ed.), *Research Handbook on EU Consumer and Contract Law*, Cheltenham: Elgar 2016, p. 336-359.

through and invoiced by a means of distance communication, Article 6(1) CRD states that the term for the right of withdrawal begins at the moment of conclusion of the contract instead of receipt of the good, and Article 6(3)/16(a) CRD provides an exception to the right of withdrawal after the service has begun (if so agreed upon). These consequences follow from the fact that services cannot be stored (and therefore cannot be returned).

The E-commerce Directive 2000/31/EC works with a concept of ‘information society service’ which just refers to the common language word ‘service’ with several additional requirements related to the purpose of the directive.⁸⁸ The directive provides certain information requirements (Articles 5 and 6). Furthermore the directive recognises the special position of regulated professions (Article 8). The directive also provides special exemption for liability for certain internet service providers who transmit or store information without being actively involved with it (Articles 12–15).⁸⁹

Chapter 15 (Articles 147–158) of the proposal for a Common European Sales Law (COM(2011)635) contains rules for related services with a sales contract.⁹⁰ These rules are tailored specifically to the context of services related to a sales contract, and are not a fitting model for services in general.⁹¹

7. SERVICES OF GENERAL INTEREST⁹²

A special category of services is services of general interest (SGIs).⁹³ These are services that have a particular public or general importance because of which they are either regulated more strongly than general contract law would require, are in some ways outside the usual system of free markets, and/or are to a certain extent exempt from the common rules of the European common market. Examples are public

⁸⁸ Article 2(a) E-commerce Directive refers to Article 1(2) Directive 98/34/EC as amended by Directive 98/48/EC, which reads that ‘service’ means ‘any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services’.

⁸⁹ A deeper analysis of these rules is outside the bounds of this chapter; see for the case law in particular Case C-324/09, *L’Oréal v eBay* [2011] ECR 2011 I-6011 and Case C070/10 *Scarlet v SABAM* [2011] ECR I-11959 and case law referred to therein.

⁹⁰ Servitisation of products, see Section 2 above, see also Article 2(15) Consumer Rights Directive 2011/83/EU and Article 6(1)e Directive 2005/29/EC, and Annex I, sub 8 and 23.

⁹¹ See the critical analysis by M Ilmer, ‘Related Services in the Commission Proposal for a Common European Sales Law’ (2013) *European Review of Private Law* 131.

⁹² K Lenaerts, ‘Defining the concept of ‘services of general interest’ in light of the ‘checks and balances’ set out in the EU treaties’ (2012) *Jurisprudence* 1247; P Rott ‘A new social contract law for public services? – Consequences from regulation of services of general economic interest in the EC’ (2005) *European Review of Contract Law* 323; M Krajewski, U Neergaard and JW van de Gronden (eds), *The Changing Legal Framework for Services of General Interest in Europe* (TMC Asser Press, 2009); U Neergaard, E Szyszczak, JW van de Gronden and M Krajewski (eds), *Social Services of General Interest in the EU* (TMC Asser Press 2012); Hatzopoulos (2012) (n.75), P Rott and C Willett, ‘Consumers and services of general interest’ in G Howells, I Ramsay and T Wilhelmsson (eds), *Handbook of Research on International Consumer Law* (Edward Elgar, 2010).

⁹³ EU Commission, ‘A Quality Framework for Services of General Interest in Europe’, Communication 20 December 2011, COM(2011) 900 final; see also <http://www.euractiv.com/section/sustainable-dev/linksdossier/services-of-general-interest-in-the-eu/> (accessed 1 April 2016). The concept has been discussed earlier in two Communications (COM(96)443 final and COM(2007)725 final), and a Greenpaper (COM(2003)270 final).

transport, energy and water supply, telecommunication services, medical services and social security services.⁹⁴ These services are subjected to additional supervision and may be under government control. Within the EU regulatory scheme, SGIs are recognised in Article 14 TFEU⁹⁵ and Protocol no 26 on Services of General Interest, which stipulates in Article 1:

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

Article 36 of the Charter of Fundamental Rights adds: ‘The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union.’

This makes clear that SGIs are primarily the responsibility of and at the discretion of the national authorities. SGIs are divided into economic and non-economic services. The former involve an economic relationship, the latter (which may involve security, justice, health, compulsory education) do not. The relevance of this distinction is that economic SGIs are subject to the general EU rules, but non-economic SGIs are not. As Article 2 of Protocol 26 says: ‘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.’

An important part of SGI regulation is the obligation to provide universal service, meaning that everyone should have access to the service.⁹⁶ This obligation leads to rules that restrict the rights of service providers to refuse to contract with a consumer, to terminate for minor breaches of contract by the consumer, and to limit the right of the consumer to terminate the contract.

At present EU law shies away from general rules for SGIs and provides detailed rules mostly in sector-specific directives.⁹⁷ For transport services there are rules for remedies in case of delays.⁹⁸

There is a continuous move by the EU towards greater liberalisation of the markets of both economic and non-economic SGIs, although to a varying degree.⁹⁹

⁹⁴ Hatzopoulos (2013) (n.79), 486 lists case law referring to tax assistance, distribution of energy and water, ambulance services and pension schemes.

⁹⁵ See M Ross, ‘Article 16 E.C. and services of general interest: from derogation to obligation?’ (2000) *European Law Review* 22. (Article 16 EC is now Article 14 TFEU.)

⁹⁶ Rott (n.92).

⁹⁷ Such as the Universal Service Directive 2002/22/EC (telecommunication); Postal Market Directive 97/67/EC as amended by Directive 2002/39 and Directive 2008/6/EC; Energy Market Directives 2003/54/EC and 2003/55/EC; and Directive 2011/24/EU on cross-border healthcare.

⁹⁸ Regulation 261/2004 and Regulation 1371/2007.

⁹⁹ See generally N Ruccia, ‘The legal framework of services of general economic interest in the European Union’, Fourth Annual Conference on Competition and Regulation in Network Industries, 25 November 2011, available 11 April 2016 at <http://www.crninet.com/2011/c9a.pdf>. With regard to

In: C.W. Twigg-Flesner (ed.), *Research Handbook on EU Consumer and Contract Law*, Cheltenham: Elgar 2016, p. 336-359.

This is reflected in the rules and case law on public procurement and concessions.¹⁰⁰ The developments regarding SGIs are intended to liberalise these services as far as possible; safeguarding the interests of consumers is only an additional requirement. The EU therefore tries to find alternative forms of governance to reach a similar level of assurance as was provided in the classic form of government ownership and control. It is not evident that these experiments will always actually benefit consumers. One might wonder whether it would have been better for the EU to refrain from interfering in this field. On the positive side, the EU rules regarding SGIs may on occasion provide further rights to consumers than existed in earlier national regulations.

8. Conclusion

Because of the diversity of services it is not easy to provide general rules (default or mandatory) for regulating services appropriately. Currently we see a variety of mechanisms, combining classic regulation specific to sectors with private regulation and harmonised information obligations.¹⁰¹ Such a mixture of approaches generally appears preferable. Although a detailed set of uniform rules seems inappropriate as this would not adequately fit all services, further doctrinal and empirical research might help to provide more clarity and improved regulation in this area. Interdisciplinary research as to the nature of services may lead to a deepened understanding. Extended comparative and doctrinal research regarding the content of service contracts, additional obligations, price, termination, and effective, fair and just remedies could improve the law of services, and could benefit from a better understanding of the nature of services. This would need to be accompanied with a reconsideration of the optimal mix of regulation instruments like default and mandatory law, information duties and public supervision.

tendering SGIs see N Fiedziuk, 'Putting services of general economic interest up for tender: reflections on applicable rules' (2013) *Common Market Law Review* 87.

¹⁰⁰ Hatzopoulos (2013) (n.79), 488; Fiedziuk (n.99).

¹⁰¹ Cf. Hatzopoulos (2012) (n.75).