

THE OBLIGATION TO CONTRACT IN BRITISH LAW

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Abstract

Nowadays the obligation to contract is rarely looked upon. Without reason though, because it is neither outdated nor inoperable. Based on three common law doctrines the obligation to contract goes back to the Middle Ages. It has not lost its relevance, as it can still be found in modern statutory law, such as in the electricity and mail sector. What is more, it is a fundamental institution with a great impact. The analysis showed that the five chosen forms of obligations to contract bear analogical requirements but very similar rationales and economic consequences. It sets impaired market power right and it overstrikes irrational behaviour of market participants. As overall achievement it aligns the range of property, freedom of contract and freedom of competition.

Key Words: Obligation to Contract, Common Calling, Business Affected With a Public Interest, Prime Necessity Doctrine, Supplying Electricity, Collecting And Delivering Mail

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A. Introduction – freedom of competition via freedom to contract

The freedom of competition is one of the main objectives of the European Union (EU). This objective has its basis in the preamble and in Art. 101 TFEU et seq. In a well-functioning, free market the movement of goods takes place smoothly, without the need to intervene by the sovereign. The commodity flow occurs in a way that gives everyone access to the goods or services needed at a fair price. The goal of a free and prosperous market as result of a free competition is in reality, however, disturbed, e.g. by natural, legal or virtual monopolies, and the market dominance exercised by individuals. Dominant market power may lead to a restriction of the availability of goods or services from interested parties for whatever reasons. In the end they cannot gain access on the same conditions. Therewith the commodity flow is impeded. This potential restriction is counteracted with the obligation to contract as a legal consequence. In this article it will be analysed to what extent a general principle of the obligation to contract exists in British law for the consumer.

I. The obligation to contract – a principle to understand the freedom of contract

The obligation to contract is the duty to conclude a contract with a person who is in need of the subject matter hereof – despite the contrary will of one of the parties. To decide whether and under which circumstances such a constraint against the supposed free will of the entities is compatible with the freedom of contract in British law 1. its requirements,

2. rationales, 3. legal consequences and 4. economic consequences will be analysed.

As such the obligation to contract is neither an entirely private or contract law phenomenon, nor only to be seen in public law. It is inter tangled in those areas of law. The obligation to contract itself as a matter to limit the freedom to contract belongs to public law, whereas the consequence, the contract, is private law. The legal consequences have, due to this interrelatedness, unusual facets: it enables one person to fully leave the freedom to contract by forcing another to conclude a contract that he never has wanted to conclude in the first place. This leads as well to a reduction of the owner's exclusivity. To ensure that such a legal construct does not entirely infuse the legal system, it must have certain boundaries.

The purpose of this article is to find out, whether there is in British private law a general principle that has as legal consequence the obligation to contract and analyse it with regard to the four set parameters. Private law is the chronological starting point as it is much older than competition law and has influenced any later branch of law. To reach this goal one has to research utility law which holds the duty to supply to the end-consumer.

II. Private & public laws' development over time

To examine the obligation to contract there are two main criteria one has to assess: the two branches of law, private and public law, and their development over time.

The obligation to contract in British private law seems to be part of both private and public law. Though the adjectival attributes hint that both branches are contradictory, the relationship of both branches is not easily explained. It depends on how they are defined. Under the premise of their existence howsoever they are defined, one has to admit that they must interact. Thus the question arises in any jurisdiction – common or civil law – whether the public law values and principles can be extended to private law and *vice versa* and of course, whether competition law holds the necessary analytical tools to deal with the conflicting interests of freedom to contract, competition and property.

Over time law changes. As economics, law and politics are the way of how life is organised in a society. Law must change mimicking both, economics and politics. Thus the keywords of privatisation, commercialisation and deregulation label the legal and economic changes over the last three decades in the British and European utility sector. But what happens to the law and the ideas leading to it after a change had taken place? Both are never entirely lost, they can simply be rediscovered for legal and political argumentations.

III. Viewing the obligation to contract in British law, through the lenses of Law & Economics

1. The fields of law

Due to the development over time the researched fields of law are private and public law. The article focuses on the interaction of private and public law, to guarantee that consumers have access to the goods and services needed. The obligation to contract can be found in common law or in statutes.¹ To outline the process and development of the obligation to contract the starting point has to be private law and the British principles that lead to an obligation to contract, as this legal consequence first occurred in the common law (C.I.). Merely it can be found in British utility law, too (C.II.). Hence British public law is of interest for the questions asked.

2. The legal and theoretical scope

The obligation to contract will not only be looked at through the legal lens but as well through an economic one by assessing the micro- and macro-economic consequences of it. Only by doing this it is possible to fully assess its function and value for the legal system.

1 Rudden, in: Harris/Tallon, Contract Law Today, Oxford 1989, p. 81, 82.

IV. Outline of the article

Before the actual analysis starts, the relevant terminology has to be exemplified (B.). Starting in a chronological way, the common law doctrines which lead to an obligation to contract have to be looked at in a first step (C.I.). They will be analysed with regard to four parameters: parameters (requirements, rationales, legal and economic consequences). Having done this it is possible to evaluate the British utility law, that might lead to an obligation to contract as well (C.II.). The two fields of law where an obligation to contract occurs can then be compared (D.), to analyse differences and similarities. The article will end in a conclusion (E.).

B. The terminology exemplified

The exemplified relevant terminology are the freedom of contract (I.), the obligation to contract (II.) and monopoly (III.).

I. Freedom of contract

In the 19th century following *Adam Smith's* doctrine of *laissez faire* economics the idea developed that contractual parties ought to be free to negotiate the terms and conditions they wish to be in the contract.² The common law followed this principle, though there is no constitutional basis for it.³ Nevertheless the freedom of contract has since then given and still gives rise to many problems, as the conditions of reality do not allow its ideal exercise. To name but a few there is the inequality of bargaining strength, the use of standard form contracts and acceptance of implied terms or consumer protection's statutes.⁴

Hence the freedom of contract rules not unexceptionally, but restraints are possible. There are three main techniques to limit it: first the *procedures* for making contracts, secondly rules to regulate the *content* of contracts and thirdly the possibility to *impose* an entire contract.⁵ Thus an inequality of bargaining strength has to be equalized to guarantee a

2 Atiyah, *The Rise and Fall of Freedom of Contract*, Oxford 1985, p. 221 & 299; Atiyah/Smith, *Atiyah's introduction to the law of contract*, 6th edition, Oxford 2005, pp. 9; Juss, in: *Freedom of Contract and Constitutional Law*, Jerusalem 1998, p. 245, 247; McKendrick, *Contract Law*, 9th edition, East Kilbride 2011, pp. 2-3; Mulcahy, *Contract law in perspective*, 5th edition, London 2008, pp. 26-27; Pound, 18 Y. L. J. 454, 456; Rudden, in: Harris/Tallon, *Contract Law Today*, Oxford 1989, p. 81, 84; Trebilcock, *The Limits of Freedom of Contract*, London 1993, pp. 21, 241. Further detailed history: Aronstam, *Consumer protection, freedom of contract and the law*, Cape Town 1979, pp. 1-25.

3 Atiyah/Smith, *Atiyah's introduction to the law of contract*, 6th edition, Oxford 2005, p. 10; Juss, in: *Freedom of Contract and Constitutional Law*, Jerusalem 1998, p. 245, 248, both with more references.

4 Atiyah, *The Rise and Fall of Freedom of Contract*, Oxford 1985, pp. 729; Atiyah/Smith, *Atiyah's introduction to the law of contract*, 6th edition, Oxford 2005, pp. 11-20; Mulcahy, *Contract law in perspective*, 5th edition, London 2008, p. 29; Murray, *Contract law, the fundamentals*, 2nd edition, London 2011, p. 9.

5 Atiyah/Smith, *Atiyah's introduction to the law of contract*, 6th edition, Oxford 2005, pp. 6-9.

certain freedom of contract for the inferior party. As such the obligation to contract is some kind of an anti-discrimination principle as well. In the end a stronger party might have to comply with contractual obligations – or even has to enter into a contract – that she would not have chosen for herself.

II. Obligation to contract

The obligation to contract – or obligation to conclude – is a legal duty that justifies the conclusion of a contract, i. e. another obligation. A contract is “a promise or set of promises which the law will enforce”⁶. Putting both together the obligation to contract seems to be contradicting the principle of private autonomy, especially property and freedom to contract. As these are important principles, based on the general idea of human freedom, it can only be allowed in exceptional cases. However, it secures the freedom of contract and property as well, *scilicet* the one of the consumer, as he is enabled to contract. In the scope of private law an already concluded preliminary agreement provides such an exceptional case.

III. Monopoly

The obligation to contract is intertwined with monopoly situations. The word derives from Greek μόνος (monós) meaning alone or single and πωλεῖν (poleín) meaning to sell⁷. Monopolies exist where a person or enterprise is the exclusive supplier of a particular commodity in a certain market, that can change the price by changing the sold quantity.⁸ A monopoly's effect is that the products output is smaller and that some consumer might switch to a substitute to satisfy their demands, substitutes, which cost society more to create than the monopolized product.⁹ Whereas in law¹⁰ mere significant market power to charge high prices might already constitute a monopoly, in economics¹¹ a single seller is needed. Natural monopolies have so great economies of scale that already two competitors cannot be viable, thus efficiency leads to a single firm – in legal monopolies the right to expel rivals is derived by law.¹²

C. The obligation to contract in British law

I. Three common law doctrines and their political and regulatory consequences

In common law there are three¹³ doctrines composing the common law anti-discrimination principle that leads to an obligation to contract: the common calling doctrine (1.), the principle of the business affected with a public interest (2.) and the prime necessity doctrine (3.). To understand the essence of each of the former three, their requirements (a)), legal consequences (b)), rationales (c)) and economic consequences (d)) will be assessed. This part concludes with an outlook of the three doctrine's political and regulatory consequences (4).

1. The common calling doctrine

The medieval common calling doctrine led to the idea that there existed a set of rules to be used for common callings, imposing a duty to serve.¹⁴

a) Requirements – What exactly constitutes a common calling?

The requirements are simple, there only has to be a rather simple *common/public calling*. But what constitutes such a calling? The noun *calling* means an invitation to come to the premises to do business.¹⁵ The adjectival attribute *common* as used in the medieval cases hints at the idea that the service at stake is available to or for the public.¹⁶

An availability *to* the public means that whoever renders his or her services to be available for the public, is *common*.¹⁷ As the doctrine of common calling is not restricted to persons practising a skilled profession, any profession is suitable, e.g. attorneys, carriers¹⁸ or innkeepers^{19, 20}.

An availability *for* the public is however something different. One needs the antonym of private callings to understand it.²¹ Whereas private callings aim at serving private purposes in a private

6 Pollock/Winfield, Pollock's Principles of Contract, 13th edition, London 1950, p. 1.

7 Hoad, The Concise Oxford Dictionary of English Etymology, Oxford 1996, headword monopoly.

8 Hoad, The Concise Oxford Dictionary of English Etymology, Oxford 1996, headword monopoly; Posner, Antitrust Law, 2nd edition, London 2001, p. 9.

9 Posner, Economic Analysis of the Law, 7th edition, New York 2007, pp. 282-284.

10 Law/Martin, A dictionary of law, 7th edition, Oxford 2009, headword monopoly.

11 Black/Hashimzade/Myles, A Dictionary of Economics, Oxford 2009, headword monopoly.

12 Whish, Competition Law, 7th edition, Oxford 2012, p. 10.

13 Taggart, in: The Province of Administrative Law, Oxford 1997, p. 1, 6.

14 Simpson, A history of the common law of contract, Oxford 1975, pp. 229: asserting that this idea is mistaken as there could not be a rule that can be used for *all* public callings.

15 Blackstone, Commentaries on the Laws of England, Volume II, Philadelphia 1860, p. 165.

16 Simpson, A history of the common law of contract, Oxford 1975, p. 230, citing the relevant case law.

17 Craig, 1991 P. L. R. 538, 540; Craig, Administrative Law, 6th edition, London 2008, p. 349-350.

18 Halsbury's Laws of England, 5th edition, London 2008, 7 [2, n3].

19 Halsbury's Laws of England, 5th edition, London 2008, 67 [186].

20 Adler, 28 Harv. L. R. 135, 149-151; Arterburn, 75 U. Pa. L. Rev. 411, 421; Reichman, in: Human Rights in Private Law, Oxford 2001, p. 245, 249-250; Simpson, A history of the common law of contract, Oxford 1975, pp. 231.

21 Wyman, 17 Harv. L. Rev. 156: going even further as to assuming that the private calling is the rule, public calling the exception.

business and interest, public callings aim at serving the public in a public business and interest.²² The “characterizing thing [...] in the private calling [...] is that [of] virtual competition, while in the public calling [...] is that of virtual monopoly”²³. Thus whatever service is for the public leads to a common attorney, common carrier or common innkeeper calling. By deciding to be a common attorney, carrier or innkeeper, the person decides as well to be held by the legal consequences following that profession. The basic contractual prerequisite of self determination is consequently followed.

b) Legal consequences – obligation to contract in contract theory

The effect is thus that a person having a common calling profession is “subject to control by the state [...], is] under peculiar public duties and this [...], is] explained on the basis of some exceptional relation to the public”²⁴. Those special duties are a matter of public policy; the basic idea is that the services were necessities that needed to be supplied.²⁵ Hence those persons have the duty to first *serve all* comers and to secondly *charge reasonable* prices.²⁶ In other words the common calling professionals were not able to exercise their profession and make up rules of their own in a way that was contrary to their purpose as a common calling professional.²⁷ A breach of any of those duties gives rise to common law causes of action.²⁸

However it is unclear, how these legal consequences are to be achieved. To escape the dilemma of either giving the obligator too much power to refuse or to entirely deny him this ability, the court came up with the premise that neither a previous²⁹ nor a special³⁰ contract is needed to form an obligation to contract. Nevertheless one can think of two solutions (See Table 1). The first one is that holding the common calling profession is the *invitation to treat*, to step inside and offer money is the *offer* amended in a way that no receipt of the acceptance is needed and the acceptance is replaced by the obligation to contract. The second solution is the following: the mere holding of a common calling profession is the *offer*, to step inside and offer money

is the *acceptance*, any refusal to do business already a breach of contract.³¹

The second solution seems indeed to be the favourable legal construction, as it gives the holder of the common calling profession less power to refuse the contract. But it is hard to understand then how the obligator is able to refuse the contract, which he is allegedly able to do, e.g. if his capacities are fully booked. Furthermore it does not fit with the ordinary contract theory where an offer has to be sufficiently specified, with regard to the contracting party. Of course it is possible to reduce the requirements in the case of a common calling situation for the offer. And again one can think of an exception considering the former example of the ability to refuse the contract, if the offer has the implied term that it expires after stock has run out. What is more, the first solution though being in line with common contract theory concerning the invitation to treat and the offer, it is rather exceptional with regard to the acceptance, which is entirely exchanged by a mere legal obligation. The otherwise hold up requirement of determination and free will as the driving force for a valid contract³² would have to be abandoned. Hence the second solution – adjusting the offer with the implied term that it expires after stock has run out – is favourable.

c) Rationales – public function, voluntary implication or both?

The provision of an obligation to contract in the situation of a common calling has different rationales. There are three classes of rationales: the public function, the voluntary approach and a combination of both.

Within the rationale of the public function, there are the purpose of the profession,³³ the necessity (necessities that needed to be supplied)³⁴ and the particular form of property³⁵. Each of the rationales applies one certain attribute (profession, necessities, property) as concept to have a public function of the common calling, therewith implementing in the profession or the good already a decrease of the relevant right. This is consistent with the historic development as the common calling doctrine counteracts the abuse of market power, especially in times of social hardship, e.g. the time following the Black Death.³⁶

22 Wyman, 17 Harv. L. Rev. 156, 167.

23 Wyman, 17 Harv. L. Rev. 156, 161.

24 Adler, 28 Harv. L. R. 135, 146.

25 Oliver, Common values and the public-private divide, London 1999, p. 201.

26 Arterburn, 75 U. Pa. L. Rev. 411; Craig, Administrative Law, 6th edition, London 2008, pp. 349-350; Oliver, Common values and the public-private divide, London 1999, pp. 201; Wyman, 17 Harv. L. Rev. 156, 161.

27 Reichman, in: Human Rights in Private Law, Oxford 2001, p. 245, 249.

28 Wyman, 17 Harv. L. Rev. 156, 158.

29 *Parker v Flint* (1699) 12 Mod Rep 254.

30 *Saunders v Plummer* (1662) O Bridg 223; *Thompson v Lacy* (1820) 3 B & Ald 283.

31 Bird, The Laws Respecting Travellers and Travelling, 2nd edition, London 1808, p. 51; Blackstone, Commentaries on the Laws of England, Volume II, Philadelphia 1860, p. 165; Singer, 90 Nw. U. L. Rev. 1283, 1309.

32 Instead of all: Atiyah/Smith, Atiyah's introduction to the law of contract, 6th edition, Oxford 2005, p. 37; Hogg, Promises in Contract Law, Cambridge 2011, pp. 3 & 86 et. seq.

33 Reichman, in: Human Rights in Private Law, Oxford 2001, p. 245, 248-250.

34 Wyman, 17 Harv. L. Rev. 156, 161; arguing that this is due to the monopoly: Beatson, 117 L. Q. Rev. 247, 258.

35 Singer, 90 Nw. U. L. Rev. 1283, 1310.

36 Craig, Administrative Law, 6th edition, London 2008, p. 350.

Table 1. Legal construction of the obligation to contract in common calling situations

	<i>invitation to treat</i>	<i>offer</i>	<i>acceptance</i>
possible modifications	implied that the offer expires after supplies run out	written/verbal/of conduct	not needed/written/verbal/of conduct
		conditional/termed/no receipt of acceptance needed	conditional/termed
Solution I	holding the common calling profession	stepping inside & offer money & no receipt of the acceptance is needed	replaced by the obligation to contract
Solution II	–	holding of a common calling profession	stepping inside & offer money

The voluntary implication is that people voluntarily want to serve all persons who come and want to be served.³⁷ Thus the duty to serve is not only on the notion that inns or common carriers constitute monopolies³⁸ or that they fulfil a “public function” fundamentally different from that performed by other private actors. Rather, *Blackstone* rests the duty to serve when they “hang out a sign” and “open [...their] house[s] for travellers,” they thereby impliedly “engage [...] to entertain all persons who travel that way”³⁹. This voluntary implication fits with the first solution and assumes rational and profit making behaviour of the acting people.

A combination of the public function and the voluntary approach can as well be found.⁴⁰ This combination does not lead to a paradox. It should be favoured as with it the justification can be adjusted for each specific case. What is more, is that all the four rationales hold a reasonable explanation for the obligation to contract. The voluntary implication even upholds the important aspect of the self determination as the constituting factor of a binding contract and thus the justification for a decrease in the relevant right.

d) Economic consequences – enforcing rationality

To begin with, the economic consequence of two parties freely agreeing to contract an exchange is that both think they would be better off with the exchange than without it; thus the social wealth at large is improved by contracting.⁴¹ Contract law helps to ensure this by securing the needed human cooperation.⁴² It has furthermore five more functions:

it prevents opportunism, interpolates efficiency both on wholesale and retail basis, punishes avoidable mistakes in the contracting process, allocates the risk to the superior risk bearer and reduces transaction costs.⁴³ However the obligation to contract leads in general to a situation which the economic analysis of the law assumes in its model to be true: the rationality of the competitors to reduce transaction costs.⁴⁴ Thus the legal consequence of the common calling doctrine forces the competitors to behave rationally, correcting their irrational behaviour by maximising their profit.

The economic consequences of the common calling doctrine can be categorised with regard to two criteria: the object (direct/indirect) and the subject (obligor/obligee/public).

In a nutshell the relevant resources will be allocated in a more efficient way, not only for the obligor but as well for the obligee. The resources though vary whether the effect is direct or indirect:

- the direct effect is linked to the resource the obligor publicly offers, which are the goods or services;
- the indirect effect is linked to the resources, manpower and time, the obligor and obligee would spend to either deny or to look for the directly involved resource.

The public welfare will be gained through the provision of more and faster fluctuation of resources, goods and services, and more efficient use of time. It leads furthermore to a certain amount of price stability, as the terms for the obliged contract must be fair.

37 Singer, 90 Nw. U. L. Rev. 1283, 1309 citing: Blackstone, Commentaries on the Laws of England, Volume II, Philadelphia 1860, p. 165.

38 Though for this rationale: Beatson, 117 L. Q. Rev. 247, 258.

39 Blackstone, Commentaries on the Laws of England, Volume II, Philadelphia 1860, p. 165.

40 Wyman, 17 Harv. L. Rev. 156, 161.

41 Atiyah/Smith, Atiyah's introduction to the law of contract, 6th edition, Oxford 2005, p. 3; Schäfer/Ott, Lehrbuch der ökonomischen Analyse des Zivilrechts, 4th edition, Berlin 2005, p. 393.

42 Atiyah/Smith, Atiyah's introduction to the law of contract, 6th edition, Oxford 2005, p. 4.

43 Kronman/Posner, The Economics of Contract Law, Toronto 1979, pp. 1-7; Posner, Economic Analysis of the Law, 7th edition, New York 2007, p. 99.

44 Posner, Economic Analysis of the Law, 7th edition, New York 2007, pp. 98-99; Schäfer/Ott, Lehrbuch der ökonomischen Analyse des Zivilrechts, 4th edition, Berlin 2005, pp. 393.

Table 2. Common callings' economic consequences

	obligor	obligee	public
direct effect	more efficient allocation of resources (goods, services)		more and faster fluctuation of resources (goods, services)
indirect effect	more efficient allocation of resources (manpower, time)		more and faster fluctuation of resources (goods, services), more efficient use of time

2. The principle of the business affected with a public interest

The principle of the business affected with a public interest was developed for the professions of “cranage, wharfage, housellage, pesage” in the 17th century by *Sir Matthew Hale*.⁴⁵ In his *Analysis of the Law Hale* splits the rights of things into *ius publicum* (things that “at least in their own use, are common to all the king's subjects”⁴⁶, such as common highways, bridges or ports) and *privatum* (things personal, such as express and implied contract, and things real⁴⁷). However the ordinary pursuit of trade or commerce is neither *ius privatum* nor *publicum*.

Giving the example of a small river in the public use for boats, they are *prima facie iura publica*.⁴⁸ But if a private person uses his ferry on this river for the use of all, that ferry gets as well “a thing of publick interest and use”⁴⁹ so that this ferry takes over the function of *ius publicum* and thus has to serve all who want to use it for a reasonable toll.⁵⁰ In other words the “*ius privatum* [...] must not prejudice the *ius publicum*”⁵¹. So far only *ius privatum* and *publicum* were concerned. In the situation of licensing the *ius regium* comes into play.

Blackstone does not comment on *Hale's* principle,⁵² nevertheless British judges, though less frequent than the Americans,⁵³ used it twice⁵⁴.

a) Requirements – a monopoly while providing services to the general public

Persons who had either a *de iure* or a *de facto* monopoly while providing services to the general public had a duty to serve. However a mere monopoly was not sufficient to render the obligation to contract. Those monopolies had to be “in the public interest”.⁵⁵ Yet it is not exactly defined what the public interest is composed of. This is why the principle of the business affected with public interest is best understood as it was applied by the British courts in two cases, each involving port facilities.⁵⁶

In the first one the defendant's justification, who had used a crane in a port without permission, was acknowledged. He claimed the crane to be necessary to land goods and wanted to use it on payment of reasonable compensation.⁵⁷

In the second case the defendant run the only London warehouse in which the plaintiff's wine could have been stored in a duty free manner. The plaintiff rejected to pay the fee and had to pay the bond duty. He thus sued for damages. As the defendant had a monopoly due to a licence of the crown, the property became an instrument of the general benefit⁵⁸ and must “perform the duty attached to it on reasonable terms”⁵⁹. The defendant had to rend the warehouse for a reasonable compensation only.⁶⁰

The requirements of the principle of the business affected with a public interest are that the public has a right for a particular purpose to use a (legally) monopolised facility. The public interest in it lies with the *virtuality* of the monopoly.

b) Legal consequences – the origin of the duty for reasonable and moderate rates

Where a person has the benefit of a monopoly, she has the responsibility to enter into a contract and to charge only a reasonable price for the offered

45 Hale, *A Collection of Tracts Relative to the Law of England: From Manuscripts, Volume 1, Dublin 1787*, pp. 77-78; Taggart, in: *The Province of Administrative Law, Oxford 1997*, p. 1, 6-7.

46 Hale, *The History of the Common Law of England, 6th edition, London 1820*, p. 41.

47 Hale, *The History of the Common Law of England, 6th edition, London 1820*, p. 76.

48 Hale, *A Collection of Tracts Relative to the Law of England: From Manuscripts, Volume 1, Dublin 1787*, pp. 8-9.

49 Hale, *A Collection of Tracts Relative to the Law of England: From Manuscripts, Volume 1, Dublin 1787*, pp. 6.

50 McAllister, 43 Harv. L. Rev. 759, 762.

51 Hale, *A Collection of Tracts Relative to the Law of England: From Manuscripts, Volume 1, Dublin 1787*, pp. 22.

52 Blackstone, *Commentaries on the Laws of England, Volume I, Philadelphia 1860*, §§ 370-371; McAllister, 43 Harv. L. Rev. 759, 766.

53 *Munn v Illinois* (1877) 94 US 77; McAllister, 43 Harv. L. Rev. 759, 767; Taggart, in: *The Province of Administrative Law, Oxford 1997*, p. 7.

54 *Bolt v Stennet* (1800) 8 Term Rep. 606; *Allnutt v Inglis*, 12 East 528.

55 Hale, *A Collection of Tracts Relative to the Law of England: From Manuscripts, Volume 1, Dublin 1787*, pp. 77-78; Taggart, in: *The Province of Administrative Law, Oxford 1997*, p. 1, 7; *Bolt v Stennet* (1800) 8 Term Rep. 606; *Allnutt v Inglis* (1810) 12 East 528.

56 *Bolt v Stennet* (1800) 8 Term Rep. 606; *Allnutt v Inglis* (1810) 12 East 528.

57 *Bolt v Stennet* (1800) 8 Term Rep. 606.

58 *Allnutt v Inglis* (1810) 12 East 528, 532.

59 *Allnutt v Inglis* (1810) 12 East 528, 538.

60 *Allnutt v Inglis* (1810) 12 East 528, 538–539.

service.⁶¹ Here the same questions are risen as within the legal consequences of the common calling. However they are a little more interesting, as the statutory law providing for the licensing did not require the obligatee to contract but to give a reasonable compensation.⁶²

One can develop from the legal consequence to ask only for a reasonable compensation an argument *a fortiori* (*a maiore ad minus*) for an obligation to contract. This can be illustrated by an example: because the bottleneck of the crane, etc. was licensed by the king and regulated with regard to moderate rates to be accessible, it had as well to be accessible for everyone via contract. Otherwise the king would have set the rate beforehand. Regarding the actual contracting there exist the same two solutions as with the common calling doctrine, where here again the second one is favourable.⁶³

c) *Rationales – ius publicum, ius privatum and ius regium*

The rationales of both decided cases lie in the function of the *ius publicum*. Though the statute that required the goods to be warehoused in the Dock Company did not explicitly state an obligation to contract, it was not passed for the sole benefit of the Company but also for the benefits of trade and the public in general.⁶⁴ However the rationales within *Hale's* principle derive from the situation of a monopoly, be it natural or virtual. In both decided cases⁶⁵ there was a monopoly, in the latter case it was one of parliamentary granted public privilege. Thus the *ius publicum* had to succeed over the *ius privatum* that might have been enhanced and guaranteed via the *ius regium*. It is this enhancement and guarantee with the licensing process, that gives the rationale of the obligation to contract: A contracted out public function has to be accessible to everyone. This is why the *ius publicum* is enhanced and reigned by the *ius regium*.

d) *Economic consequences – an enhancement of the common calling*

The economic consequences are overall the same as the one of the common calling⁶⁶. However due to the dissimilar rationale they are just in the slightest way different: whereas in the common calling situation the goods were *per se* open to all, due to the licensing process the state itself constituted the situation for the monopoly. There must have been a reason, why government did this (e.g. to have some sort of meta-

regulation in place, reducing the risk of abuse by setting meta-rules of how to pick the right person in a procurement procedure, or there must be a certain standard for the supply of the good as it is so dangerous to handle, etc. Thus the reasons can be object, subject or process related). To be sure due to the premise to reach an equal treatment and thus “distributional fairness”, and to ensure that the good and service is distributed to all at reasonable consideration, there must be an obligation to contract. As such the economic consequences vary according to the goods or services that are provided. On a macro-economic level price stability is enhanced.

3. *The prime necessity doctrine*

Emerging from both, the common calling and the principle of the business affected with a common interest is the third common law doctrine having as legal consequence an obligation to contract: the prime necessity doctrine.⁶⁷ As it is prevailing in Commonwealth law⁶⁸ but is not adopted by British courts, its requirements, legal and economic consequences and rationales will only be briefly reviewed.

According to this doctrine suppliers of “prime necessities” with a virtual monopoly have the implied duty to supply these to anyone who requires the prime necessity and is ready to pay a fair and reasonable price.⁶⁹ Its rationales are to provide the public with the prime necessities, even if there was no monopoly for the relevant necessity. This raises the definitional question, what exactly constitutes a prime necessity. The court does not do this with any word. It merely says, that water is one and that the rights and obligations of the appellant, which could neither be based upon the liability to water taxation or a monopoly of water supply, had to be “derived from the circumstances and from the relative positions of both parties”⁷⁰. The economic consequences are obvious: the obligation leads to a distribution of the prime necessity to everyone, as long as the obligator is willing to pay the reasonable price, hence here again rationality is restored with the same economic consequences as with the common calling doctrine⁷¹.

4. *Political and regulatory development due to the three common law doctrines*

A terminological problem arises for the question what a “prime necessity” constitutes, which is only stated but neither defined nor explained, as well as for the terms “public interest” or “common”. The legal consequences are that to hold the relevant profession

61 *Allnutt v Inglis* (1810) 12 East 528, 538–539.

62 Hale, A Collection of Tracts Relative to the Law of England: From Manuscripts, Volume 1, Dublin 1787, pp. 77–78.

63 See above: C.I.1.b), p. 53.

64 Craig, Administrative Law, 6th edition, London 2008, p. 439.

65 *Bolt v Stennet* (1800) 8 Term Rep. 606; *Allnutt v Inglis* (1810) 12 East 528.

66 See above: C.I.1.d), p. 54.

67 Oliver, 1997 P. L. 630, 633 & 634; Taggart, in: The Province of Administrative Law, Oxford 1997, p. 1, 7.

68 *Minister of Justice for the Dominion of Canada v City of Levis*, 1919 AC 505.

69 *Minister of Justice for the Dominion of Canada v City of Levis*, 1919 AC 505.

70 *Minister of Justice for the Dominion of Canada v City of Levis*, 1919 AC 505, 513.

71 See above: C.I.1.d), p. 54.

is already the offer, to step inside and ask for the good or service the acceptance. Economically all the three common law mechanisms restore rationality and thus annihilate market failure. The rationales can be seen in the overtaken public function, or, as in the common calling situation, in the voluntarily taken profession implying a public function. Only with regard to the prime necessity doctrine the rationale could be found in the distribution of the necessity.

Merely the common calling doctrine was extensively used by British courts and even extended to many professions, such as hotels or taverns.⁷² The American courts were far more restrictive in extending the common calling doctrine to different professions. But already in the 19th century the common calling status was broadened by American courts to the newly developing public utilities sector, e.g. gas, railroad, telephone, water, via two arguments: an analogy to the common carrier and in developing the principle of the business affected with a public interest and the prime necessity doctrine.⁷³ The British courts refused to do so, hence the legislature had to especially regulate the utility sector, which will be looked at in the following part.

II. Statutory law

An obligation to contract is expected to exist in the area of utility law in sectors like electricity, gas, mail, telecommunications, transportations or water. Only two of them will be analysed here. The decision fell on electricity (1.) as it is a very important resource that is in Great Britain supplied via a network, a subsidy for other heat producing sources and privatised since 1989. The second sector chosen is one that is a descendant of the common calling profession of a common carrier, the royal mail system (2.). Furthermore it was recently privatised in 2013 and is as such of further interest.

1. Supplying electricity

The main aim of the 1989 privatized electricity sector is according to section 13 para II lit a Utilities Act 2000 to “secure that all reasonable demands for electricity are met”. Any person who wants to generate, transmit, distribute or supply electricity needs a license, each having a special set of conditions and duties, section 4 Electricity Act 1989. Public service obligations were introduced to progress “services of general economic interest”⁷⁴ due to the European

Directive⁷⁵, so that common minimum standards, regarding consumer protection and the security of supply are met all over the EU.⁷⁶

a) Requirements – providing for an obligation

Only the distribution and actual supply of electricity to the end customer is within the scope of this article's topic. The distribution systems are the actual networks that bring electricity to the end users. Supplying electricity means to purchase it from the generators and selling it on to customers, which includes customer services, such as billing; suppliers have to contract with distributors to move the purchased electricity through the networks to the customers' premises.⁷⁷

The licence conditions of relevance are: condition 3 to regulate the prices charged to costumers, condition 8 to set out statements that hold the information about the charges which will be made and condition 8A, which imposes a duty not to discriminate as between any person or class of person while providing those services.⁷⁸

There are three levels of explicit duties the licensees have to fulfil. First there is a “duty to connect on request” for the electricity distributors, section 44 Utilities Act 2000 amending section 16 Electricity Act 1989. Thus the electricity distributor has a duty to connect the premises of the owner, following a certain procedure. Having connected the premises to the net, secondly the electricity distributors have to maintain the connection, section 44 Utilities Act 2000 para IV. Under normal circumstances after having provided for the connection and necessary tools such as a meter, there follows the contracting to supply electricity with the supplier. But what happens, if there is no contract, which leads to the third set of rules? The supplier is thirdly deemed to have contracted and can charge accordingly, even if there was no contract, Schedule 6 Utilities Act 2000.

Though the former *National Consumer Council* pleaded for an absolute “obligation to supply”⁷⁹ according to the wording of section 44 Utilities Act 2000 amending section 16 Electricity Act 1989 there is no explicit obligation to contract and thus to supply the end-users with electricity.⁸⁰ However one can reach such an obligation with an interpretation of the first and last duty, together with condition 8A and the general principle as the overall *telos* of the Utilities Act 2000.

75 DIRECTIVE 2003/54/EC of 26 June 2003, OJ L 176/37.

76 Brothwood, 3 I. E. L. T. R. 48.

77 For this: Hassan, 9 I. E. L. T. R. 231, 232; Simmonds, Regulation of the UK Electricity Industry, Bath 2002, p. 19.

78 Cross, Electric Utility Regulation in the European Union, Chichester 1996, p. 264 & 268.

79 NCC, In the absence of competition, London 1989, p. 169.

80 With no further argument for such an obligation with regard to section 16 Electricity Act 1989: Bailey/Tudway, Electricity, Law and Practice, London 1992, Part B 7.02; Beatson, 109 L. Q. Rev. 401, 415.

72 Taggart, in: The Province of Administrative Law, Oxford 1997, p. 1, 7.

73 Taggart, in: The Province of Administrative Law, Oxford 1997, p. 1, 7.

74 Art. 14 & 106 para II TFEU; EC of 21 May 2003, Green Paper on services of general economic interest, COM (2003) 270; EC of 12 May 2004, White Paper on services of general economic interest, COM (2004) 374.

The duty to connect on request would not lead to a reasonable result if it did not imply a duty to supply. The first duty simply does not make sense, as the establishing of the connection in itself is only costly, without the supply there is no benefit to either party to it. Thence both sides, the supplier and the end-consumer are rather interested in contracting. Though the Utilities Act 2000 does not provide for a special obligation to supply, it nevertheless regulated the situation if there was no contract providing for the charges as if contracted and thus for a fiction. Concluding *a fortiori* (*a maiore ad minus*) from this the obligation to supply is the basis for this fictional legal consequence.

As condition 8A provides for a non-discriminating fulfilment of the licensee's duties this leads the argument as well to an obligation. In the light of the authority's duty of consumer protection concerning prices and the terms of supply the duty to connect has to lead to an obligation to supply.

This rule even though the duty to connect is addressed to a different person – the distributor – than the one holding the licence – the supplier. The reason for this is that the obligation to contract is not only hooked on the back of the duty to connect, but flanked by condition 8A and the protection of the financial interests of the supplier in Schedule 6 Utilities Act 2000, who can charge accordingly.

The requirements to trigger an obligation to supply are a connection to the network and the willingness and ability to pay reasonable prices.

b) Legal consequences – A contract needed?

At first glance it seems that there is not exactly a contract needed, as Schedule 6 Utilities Act 2000 provides the electricity supplier with the terms needed. Nevertheless one can see the formation of a contract.⁸¹ Starting off from this situation, the offer can be seen in keeping the electric flow up and thus potentially supplying, the acceptance in actually using the supply. Thence both, offer and acceptance are non-verbal and of conduct. Therefore Schedule 6 Utilities Act 2000 makes only clear that the provider can charge accordingly. If the electric supplier caps the electricity distribution, but the owner wants to have access to electricity he has to pursue both, keeping up the electric flow and contracting.

The obligation to supply can be thought of as being statutory as well, regarding section 49 Utilities Act 2000's wording (special agreement) and Schedule 6 Utilities Act 2000.⁸² However, case law dating back to the midst of the last century have the same *ratio*

decidendi.⁸³ Thus the application to be supplied with electricity can only trigger the supplier's statutory obligation to supply; this is in accordance with the fact that contractual remedies are not available for the customer according to the still valid section 27 Electricity Act 1989.⁸⁴ In fact such an obligation by statute has the same consequences as if one affirms to use a contract that is reduced by certain remedies via statutory law. The distributor is obliged to supply electricity after the owner or proprietor applied for it. The function of such a statutory duty is the same as an obligation to contract, where the acceptance or offer is forced upon the distributor.

c) Rationales – controlling power while distributing electricity to everyone

The Utilities Act 2000 holds the rationales for this obligation. They are indeed similar to the one in the prime necessity doctrine and *Lord Hale's* principle: licensing the distribution of such an important resource is, because it is distributed through a physical network, advisable, but will lead to a conglomeration of market power. To control this virtually produced power and ensure an overall distribution of the resource needed, several mechanisms are used, such as the duty to connect or the anti-discrimination condition. Hence the main *telos*, to secure that all reasonable demands of electricity can be met according to section 13 Utilities Act 2000 para II lit a, is the rationale underlying this obligation. It leads to the last piece needed in the view of the end-consumer to achieve the overall *telos* and thus regulating this privatized and licensed sector.

d) Economic consequences – basic services for everyone

The economic consequences of this obligation are similar to those of the common law doctrines.⁸⁵ However this is reached in two steps, the duty to connect and the obligation to supply. The duty to connect forces upon the distributor maybe an uneconomic decision to connect the owner's premises. But according to section 19 Electricity Act 1989 the person requiring the connection has to pay for “any expenses reasonably incurred” the burden of uneconomic use is shifted to the owner. After being connected to the network, the obligation to contract of the suppliers again leads to the reduction of irrational and uneconomic behaviour, as the provision of electricity to one more user in itself after being connected to the network, only leads to a better usage of the network.

81 Atiyah/Smith, Atiyah's introduction to the law of contract, 6th edition, Oxford 2005, p. 88.

82 Bailey/Tudway, Electricity, Law and Practice, London 1992, Part B 7.03; Tillotson, Contract Law in Perspective, London 1995, pp. 138-139.

83 *Norweb plc v Dixon* 1995; Bailey/Tudway, Electricity, Law and Practice, London 1992, Part B 7.03 citing further case law.

84 Bailey/Tudway, Electricity, Law and Practice, London 1992, Part B 7.03.

85 See above: C.I., pp. 52-57.

2. Collecting and delivering mail

Royal Mail, established 1516 by Henry VIII, was only available for royal letters. Private letters were explicitly excluded. With the 1583 Orders in Council Royal Mail claimed exclusive responsibility over private letters.⁸⁶ In 1837 a first concept of universal service was established with the “Uniform Penny Postage”.⁸⁷ After having developed into a government department Royal Mail became in 1969 a statutory corporation turning in November 2001 into a public limited company. Royal Mail was for 350 years the monopolist on the British postal market. With the Postal Service Act 2000 the postal service was licensed, thus the Postal Service Commission (Postcomm) was able to offer licenses to private companies. Transforming European Directives⁸⁸ since April 2004 the postal market opened to competition.⁸⁹ With the new authority, OFCOM, there is no longer a need for licenses but since October 2011 a general authorisation procedure according to the new section 28 Postal Service Act 2011.

a) Requirements for the universal postal services

The starting point is the idea of the common carrier and the *common calling* doctrine. Though there was an obligation to contract for common carriers, this ceased at least for Royal Mail since the Post Office Act 1969, as according to section 7 para IV, the Post Office was explicitly stated to not be a common carrier. This was upheld in section 99 Postal Service Act 2000. Even more, although in section 9 para I Post Office Act 1969 the duty of the Post Office was described to “meet the social, industrial and commercial needs”, according to para IV any form of duty or enforceable liability should not be construed due to this section. All the three provisions are still valid law.

This is why the obligation to contract cannot derive from the common calling doctrine for Royal Mail. Nevertheless since Royal Mail is no longer a monopoly and newly privatised, the provision of the acceptance and delivery of mail had to be secured. Hence there is a bundle of rules to guarantee a universal postal service via the Postal Service Act 2011 and OFCOM's The Postal Services Order 2012. Not the Royal Mail, but first of all OFCOM has the duty to secure the provision of universal postal service as it has to carry out its duties to secure “sufficient access points to meet the reasonable needs of users of the universal postal service”, section 29 para VI Postal Service Act 2011. Section 31 Postal Service Act 2011 sets out seven

minimum requirements that have to be included in a universal postal service, such as that there should be at least one delivery and collection of letters every Monday to Saturday. These seven requirements are further specified in OFCOM's The Postal Services Order 2012. Instead of being under a contractual obligation to deliver mail, as the only universal postal service provider, Royal Mail has to fulfil universal postal service obligations, section 35 Postal Service Act 2011. Thus there are obligations imposed by written law.

b) Legal consequences – Royal Mail's five schemes

Royal Mail has to fulfil the universal postal service obligations. Being universal they are available to every resident. Hence it is under statutory obligation and – according to Royal Mail – not under a contractual obligation to deliver the mail. Royal Mail names the universal postal service obligations “non-contract services”, such as the delivery of inland and overseas letters and parcels.⁹⁰ Those “non-contract services” are governed by five schemes Royal Mail is empowered to pass, section 89 para I Postal Service Act 2000. They are read as if they were general terms and conditions of a contract.

Yet, does posting a letter or parcel in legal terms lead to a non-contractual relationship as announced by Royal Mail? One can think here again either way, of a contract and of an obligation by law. Within a contractual approach⁹¹ putting up mailboxes and post offices are the invitations to treat, posting the mail the offer and emptying the mailbox or accepting the mail in the post office the acceptance. If a mailbox is used the offeror waives the requirement to receive the acceptance. As can be seen in section 33 Postal Service Act 2011 and sections 7 & 8 and Schedule 1 of The Postal Services Order 2012, it is only under limited conditions possible for the universal postal service provider to refuse the services. If it does, OFCOM may impose a designated universal service provider condition to make sure the universal postal service is secured, section 36 para III Postal Service Act 2011.

However if one favours an obligation by law, the obligation comes to existence by posting the letter.

The mere possibility to understand mailing along the lines of contract theory in itself is no argument for or against such an approach. However that Royal Mail is now privatized might lead to an argument to the contrary. But there are four and more qualified arguments for an obligation by the law. First the common calling doctrine is permanently excluded via statutory law. Thus the legislator had the aim not to enter the sector of contract law. Secondly the

86 Campbell-Smith, *Masters of the Post*, London 2011, pp. 15-17.

87 Campbell-Smith, *Masters of the Post*, London 2011, pp. 123-133; Dnes, 4 E. J. L. & E. 93 & 94.

88 Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997, OJ L 15/14; DIRECTIVE 2002/39/EC of 10 June 2002, OJ L 176/21.

89 Marchini/Grant, 38 Euro. Law. 14.

90 The Schemes are available at: <http://www.royalmail.com/non-contract-terms-and-conditions>.

91 Atiyah/Smith, *Introduction to the law of contract*, 6th edition, Oxford 2005, p. 88.

legislator used the term “universal postal service”, which in itself means that the service must be available to every individual,⁹² providing for a baseline of service. Thirdly Royal Mail is as universal postal service provider empowered to set up schemes. Though those schemes regulate the relationship to the same extent as general terms and conditions of a contract would do, they are statutorily legitimated to do so. Furthermore, the schemes need to be detailed to a similar extent as general terms and conditions, as they are intended to provide for the concrete regulation of the mass services of delivering mail. This is why the empowerment to rule out the schemes for the universal postal services is so far and covers as well “other terms and conditions which are to be applicable to the services concerned”, section 89 para II lit b Postal Service Act 2000. What is more, Postcomm and now OFCOM has the power to specify the products needed, sections 3 & 13 Postal Service Act 2000, though Royal Mail denied that⁹³. Fourthly and most important both solutions lead to the same consequences, which is that Royal Mail is obliged to fulfil the services as set out in the scheme, with a reduced liability according to section 90 Postal Service Act 2000. Only under very limited conditions it is possible to refuse services, e.g. if the mail holds dangerous items.

c) Rationales – universal postal services as a guarantee for consumer protection

The postal services are considered a “service of general economic interest” by the *European Commission (EC)*. As part of the Lisbon Agenda the European's postal policy is to enhance a Single Market and ensure high quality universal postal services.⁹⁴ Transforming the European Directives on postal services, the rationale for the universal postal services is to ensure that while the market is opened via licenses for other postal services providers, a minimum standard of postal services is available for every individual. Instead of using contractual obligations and an obligation to contract, the legislator ensured the availability of postal services with the force of public law. Not only has the legislation lifted the burden from the consumer to enforce the conclusion of the contract in court, it has also imposed OFCOM as an authority and regulator to secure universal postal services. Hence the rules of the universal postal services go even further than a mere obligation to contract, as they force upon the universal postal service provider obligations by law. Though they are able to set out schemes for the

universal postal services, the boundaries as to what the actual content of the obligation by law is, are narrowly set by the legislator and OFCOM beforehand. Furthermore the prices are being monitored.

d) Economic consequences – basic postal services for everyone

So far only the beforehand authority, Postcomm, provided for a brief impact assessment and consumer consultation of the restructuring of postal services with the provision of universal postal services. OFCOM itself was not required to carry out any assessment of the universal postal service order before it was put into place, but has to undertake a review now in 18 months, section 30 para IV Postal Service Act 2011. However what Postcomm elaborated, is only a confirmation and specification of the universal postal services after having consulted the consumers in 2005.⁹⁵ The universal postal services' specification is needed to “reduce uncertainty in the transition to a new regime”⁹⁶. The authorisation system and the specific universal postal services secure both, the opening of the market for new competitors while ensuring at the same time that everyone can use the universal postal service. Potential competitors can calculate in a better way, which costs and cross-subsidizing strategy they need, before they enter the market. A Single Market is thus created while opening up trading and securing the needed services for everyone.

Looking at the economic consequences, they are at the first glance the same as those where an obligation to contract exists in private law: in the economic analysis of the law assumed rationality is forced upon the universal service providers. However they do not have the choice to not collect or deliver mail in remote and not so frequently toured areas. The universal service obligations force the universal service provider to provide for services that would otherwise not be available out of efficiency reasons at all. The economic consequence is the upkeep of uneconomic services for the sake of individuals.

D. The implications of the obligation to contract

I. Requirements – indistinct normative terminology

With regard to the requirements all the five areas of research use normative terminology⁹⁷: a *common calling*, the business affected with a *public interest*, the *prime necessity*, the *public service obligation* or

92 In this sense: Postcomm, The building blocks for a sustainable postal service, London 2011, p. 9.

93 Postcomm, The building blocks for a sustainable postal service, London 2011, p. 8.

94 Article 1 DIRECTIVE 97/67/EC of 15 December 1997, OJ 1998 L 15/14; Preamble para II of the DIRECTIVE 2002/39/EC of 10 June 2002, OJ 2002 L 176/21; Preamble paras I & V of the DIRECTIVE 2008/6/EC of 20 February 2008, OJ 2008 L 52/3.

95 Postcomm, The building blocks for a sustainable postal service, London 2011, pp.7-12.

96 Postcomm, The building blocks for a sustainable postal service, London 2011, p. 8.

97 See below: Table 3, p. 62.

the *universal* postal service. Either they start right from the distributional obligation that they need to serve everyone (*common*, business affected with a *public* interest, *universal* and *public* service obligation) or they hold in the first step the importance of the service or good (*prime necessity*) which leads in a second conclusion to the consequence that they should be obliged to serve everyone. As all terms are to be filled normatively, it is hard to find a definition that can be used to subsume. This could be especially seen if the latter course of action was taken. But why is it that the first way seems to be clearer? This is due to the fact that the important service was either already firmly set – to serve electricity, to deliver mail in the largest sense or another service provided for in with a legal monopoly – or linked to the chosen profession. But what exactly constitutes a *prime necessity*, thus distinguishes one service or good from all the others leading to a possible reduction of the exclusivity of property and the right to choose a contractual partner, is not stated at all.

The core problem lies in the definition of the service or good, that should lead to an obligation to contract. In the first solution this question is not raised at all, but already affirmed. *Prime necessity* is a term that is and must be open to every service and good, which is why the definitional problem arises.

Merely instead of being clearer, the first solution blurs the underlying rationale and core problem of the obligation to contract. The regulator himself had already decided what universal services the public needed, undergoing a tedious process. He held it up against what already existed as services and what the needs of the consumers might be, thus deciding in advance for the essentiality and necessity of the good for the people. Whereas the regulator has the necessary resources – manpower and time – to decide upon the question, which service or good shall fall within the obligation to contract, courts lack those. Though courts are able in common law jurisdiction to decide with their *ratio decidendi* on a general applicable rule, they have first and foremost to decide the case. Hence they look at what the service or good means for the specific applying potential obligee.

What do the goods or services have in common that provide for an obligation to contract in the five areas of law? They are all goods or services that were served in a more or less dominant position, that are not or at least not easily exchangeable. Both criteria give the potential obligor the power to exclude the potential obligee. It is this power that gives rise to the similarity of the situations. Furthermore the potential obligee is in need of the good or service. This need can be further specified as core human survival needs (physical and security), social human needs or process related needs.⁹⁸ Though the EC looked in

more detail into the “services of general economic interest” it did not define as well what exactly constitutes such a service. *Plato's* and *Maslow's* proposed classification of human needs might be taken as another basis to approach and explain what the needed requirements for the goods and services of relevance are.

II. Legal consequences – obligation to contract or statutory obligation

The legal consequences of the five analysed legal relationships are either a contract to be concluded at reasonable and fair terms by the parties or a statutory obligation.⁹⁹ In the first case the parties can still decide on how the contract will look like and the courts can only decide on its reasonability and fairness. In the latter the regulator had in advance decided upon the legal relationship's broader design, though given the provider the possibility to arrange for “general terms and conditions” schemes, to provide for the more specific obligation. Both are ways of compensation for the loss of being able to choose the contractual partner on a first level. On a second level in each of the five areas of law it is still possible under certain conditions to refuse to contract.

Whereas a statutory obligation leads to the same advanced set rules, which grants for more equal treatment, if the legal consequence is a contract to be negotiated the obliged party has more leeway in the specific case while contracting. Nevertheless equal treatment is held up due to the requirement that the contract must be fair and reasonable.

The underlying principles with regard to the requirements of a dominant position and the need for the good or service is that the more dominant the position and the more needed the good or service is, the more justified is an obligation to contract. This construction is preferable to grant the obligator a certain amount of negotiability in every case, thus compensating for the restraint of the previously granted exclusivity. Though having already given some kind of leeway for setting up “general terms and conditions” to specify the legal relations, another method could be allowing the obligator to set up schemes beforehand, especially if the good in want is needed by everyone in a mass scenario.

III. Rationales – the public interest, the interest of the obligee and of the obligor

The rationales for all five areas of law¹⁰⁰ aim to balance the interests of proprietor/service provider, obligee and the public. The exclusivity of property which leads to private property, excludes others – hence the public – for the sake of the individual. It is

⁹⁸ This idea goes back to ancient Greek philosophy (Plato, *Politeia*, *Platon's Werke*, Zehn Bücher vom Staate, Stuttgart 1855, Book II at 369-371) and was picked up by psychology and economics in the 20th

century (Maslow, 50 *Psychological Review* 370; Welzel, in: *Oxford Handbook of Political Behaviour*, Oxford 2007, pp. 192-193).

⁹⁹ See below: Table 3, p. 62.

¹⁰⁰ See below: Table 3, p. 62.

institutionalized and protected by the state. But it has as well to serve the public. For such a purpose the granted exclusivity can be restrained. This strain of thought can be seen in each an every situation of the five areas of law. The more important or necessary the good or service is for the obligor, the easier it is to restrain the right. This is most obvious in the situation where the state created a virtual monopoly by licensing, which is the case in the business affected with a public interest, the supply of electricity, the delivery of mail.

Though only the first doctrine of the common calling provided in one approach for a voluntary implication while choosing the profession, all the five have as underlying rationale the public interest that is to be served by providing for an obligation to

contract. It is indeed the public interest that justifies the restraint of the exclusivity.

IV. Economic consequences – more efficient resource allocation

The economic consequences of the obligation to contract are in all five fields a restored rationality of the participants and thus more efficient resource allocation. Part of the effects of the dominant position and its market failure can be annihilated with the obligation to contract. Hence the power of the dominant undertaking leading to the potential market failure is corrected. The obligation to contract has a negative potential as well in non-regulated areas: it might lead to a reduction of innovation. It can furthermore be circumvented by an inefficient reduction of the stock.

Table 3. Summary of the five areas of research and the four criteria

	Common calling doctrine	Business affected with a public interest	Prime necessity doctrine	Duty to supply – Utilities Act 2000	Universal postal service obligations – Postal Services Act 2011
Requirements	common calling	monopoly	prime necessity	public service obligator, network connection	universal postal provider, stamping
Legal consequences	obligation to contract			statutory obligation to contract	
Rationales	public interest / voluntary implication	<i>ius publicum</i> pushes back <i>ius privatum</i> with an enhancement by the <i>ius regium</i>	distribution to everyone	secure that all reasonable demands of electricity are met	minimum standard of postal services is available for every individual
Economic consequences	more efficient allocation of resources, restoring rationality			more efficient allocation of resources, restoring rationality, shifting connection costs to the owner, upkeep of uneconomic services for the sake of the individuals	

E. Conclusion

The problem of access to certain goods and services is not a new, but a very old one dating back to medieval cases to a time where competition law was unknown.

The obligation to contract has only in areas where the good or service that should lead to an obligation to contract subsumable requirements. If the question whether or not to provide for such an obligation was answered beforehand, it can provide for a good principle to reduce market failure. However the legal consequence does not have to be a contract concluded by the parties, but can be as well a

statutory obligation as could be seen in the sector of electricity and posting mails. The overall rationales are to distribute the public with the good or service and thus to grant access in a broader sense. Interestingly in the first doctrinethe common calling, the underlying idea is that a special/peculiar responsibility comes with the dominant position.¹⁰¹ The economic consequence leads overall to more rational behaviour of the market participants.

Though *Hale's* doctrine is no longer used, it actually is the first to show the implications of private, public and the regulatory law in the context

¹⁰¹ See above: C.I.1.d), p. 56.

of the obligation to contract. It already stated a universal service idea following privatisation, namely that a contracted out public function has to be accessible to everyone. As competition law and the regulatory authorities have the legal and economic tools to weigh the involved private and public interests, it is the right branch of law to deal with this problem.

The brief glimpse into the underlying rationales of need showed that a psychological, political and economical research on the obligation to contract will shed further light into the specification of the goods and services concerned.

References

All webpages were accessed at 28/9/2014 at 8 p.m.

1. Adler, E. A. *Business Jurisprudence*, 28 *Harvard Law Review* (1934), pp. 135-173.
2. Aronstam, P. *Consumer protection, freedom of contract and the law*, based on a thesis submitted for the degree of Doctor of Philosophy in the Faculty of Law, Cape Town 1979.
3. Arterburn, N. F. *The Origin and First Test of Public Callings*, 75 *University Pennsylvania Law Review* (1926-1927), pp. 411-428.
4. Atiyah, P. S. *The Rise and Fall of Freedom of Contract*, Oxford 1985.
5. Atiyah, P. S. / Smith, S. A. *Atiyah's introduction to the law of contract*, 6th edition, Oxford 2005.
6. Bailey, S. K./ Tudway, R. H. *Electricity, Law and Practice*, London 1992.
7. Beatson, J. *Restitution of taxes, levies and other imposts: defining the extent of the Woolwich principle*, 109 *Law Quarterly Review* (1993), pp. 401-441.
8. Beatson, J. *The role of statute in the development of common law doctrine*, 117 *Law Quarterly Review* (2001), pp. 247-272.
9. Bird, J. B. *The Laws Respecting Travellers and Travelling*, comprising all the cases and statutes relative to that subject and also, the law relating to the innkeeper, 2nd edition, London 1808.
10. Black, J./ Hashimzade, N. /Myles, G. *A Dictionary of Economics*, Oxford 2009.
11. Blackstone, William Sir *Commentaries on the Laws of England in four Books, Volume I, Books I & II*, Philadelphia 1860.
12. Blackstone, William Sir *Commentaries on the Laws of England in four Books, Volume II, Books III & IV*, Philadelphia 1860.
13. Brothwood, M. *Public service obligations in the electricity and gas sectors: Great Britain*, 3 *International Energy Law & Taxation Review* (2004), pp. 48-56.
14. Campbell-Smith, Duncan *Masters of the Post, The Authorized History of Royal Mail*, London 2011.
15. Craig, P. *Administrative Law*, 6th edition, London 2008.
16. Craig, P. P. *Constitutions, property and regulation*, 1991 *Public Law Review*, pp. 538-554.
17. Cross, E. D. *Electric Utility Regulation in the European Union, A Country by Country Guide*, Chichester 1996.
18. Dnes, A. W. *The future of the British post office*, 4 *European Journal of Law & Economics* (1997), pp. 93-102.
19. Hale, Sir Matthew *The History of the Common Law of England, and an Analysis of the Civil Part of the Law*, 6th edition, London 1820.
20. Hale, Sir Matthew *A Collection of Tracts Relative to the Law of England: From Manuscripts, Volume 1*, Dublin 1787.
21. Hassan, M. B. *The Utilities Act 2000: impact on the electricity industry*, 9 *International Energy Law & Taxation Review* (2000), pp. 231-234.
22. Hoad, Terry F. *The Concise Oxford Dictionary of English Etymology*, edited by T. F. Hoad, Oxford 1996.
23. Hogg, M. *Promises in Contract Law, Comparative Perspectives*, Cambridge 2011.
24. Juss, Satvinder S. *Human Rights and the ethic of Bourgeois individualism in the United Kingdom*, in: *Freedom of Contract and Constitutional Law*, Jerusalem 1998, pp. 245-260.
25. Klingelmann, Hans-Dieter *Oxford Handbook of Political Behaviour*, edited by Hans-Dieter Klingelmann, Oxford 2007.
26. Kronman, Anthony T./ Posner, Richard A. *The Economics of Contract Law*, Toronto 1979.
27. Law, Jonathan/ Martin, Elizabeth A. *A dictionary of law*, edited by Jonathan Law and Elizabeth A. Martin, 7th edition, Oxford 2009.
28. LexisNexis Halsbury's *Laws of England*, 5th edition, London 2008, volume 67, *Licensing and Gambling* LexisNexisHalsbury's *Laws of England*, 5th edition, London 2008, volume 7, *Carriage and Carriers*.
29. Marchini, Renzo/ Grant, Jane *Royal Mail stripped of monopoly*, 38 *European Lawyer* (2004), pp. 14-15.
30. Maslow, Abraham Harold *A Theory of Human Motivation*, 50 *Psychological Review* (1946), pp. 370-396.
31. McAllister, Breck P. *Lord Hale and business affected with a public interest*, 43 *Harvard Law Review* (1929-1930), pp. 759-791.
32. McKendrick, Ewan *Contract Law*, 9th edition, East Kilbride 2011.
33. Mulcahy, Linda *Contract law in perspective*, 5th edition, London 2008.
34. Murray, Ryan *Contract law, the fundamentals*, 2nd edition, London 2011.
35. National Consumer Council *In the absence of competition*, London 1989.
36. Oliver, Dawn *Common values in public and private law and the public/private divide*, 7 *Public Law* (1997), pp. 630-646.
37. Oliver, Dawn *Common values and the public-private divide*, London 1999.
38. Plato *Politeia, Platon's Werke, Zehn Bücher vom Staate*, translated by Wilhelm Siegmund Teuffelund and Wilhelm Wiegandin, Stuttgart 1855, available at: <http://www.opera-platonis.de/Politeia.html>.
39. Pollock, Frederick/ Winfield, Percy Henry *Principles of Contract*, 13th edition, London 1950.
40. Posner, Richard A. *Economic Analysis of the Law*, 7th edition, New York 2007.
41. Posner, Richard A. *Antitrust Law*, 2nd edition, London 2001 *Postcomm, The building blocks for a sustainable*

- postal service, London 2011, available at: <http://stakeholders.ofcom.org.uk/binaries/post/2005.pdf>.
42. Pound, Roscoe Liberty of Contract, 18 *The Yale Law Journal* (1909), pp. 454-487.
 43. Reichman, Amnon Property Rights, Public Policy and the Limits of the Legal power to Discriminate, in: *Human Rights in Private Law*, ed. by Daniel Friedmann and Daphne Barak-Erez, Oxford 2001, pp. 245-280.
 44. Rudden, Bernard The Domain of Contract, in: *Contract Law Today, Anglo-French Comparison*, edited by Donald Harris and Denis Tallon, Oxford 1989.
 45. Schäfer, Hans-Bernd/ Ott, Claus *Lehrbuch der ökonomischen Analyse des Zivilrechts*, 4th edition, Berlin 2005.
 46. Simmonds, Gillian Regulation of the UK Electricity Industry, Bath 2002, available at: http://www.bath.ac.uk/management/cri/pubpdf/Industry_Briefs/Electricity_Gillian_Simmonds.pdf.
 47. Simpson, A. W. B. *A history of the common law of contract, The rise and fall of the action of assumpsit*, Oxford 1975.
 48. Singer, Joseph William No right to exclude, Public accommodations and private property, 90 *Northwestern University Law Review* pp. 1283-1495.
 49. Taggart, Michael The Province of Administrative Law Determined, in: *The Province of Administrative Law*, Oxford 1997, pp. 1-20.
 50. Tillotson, John *Contract Law in Perspective*, London 1995.
 51. Trebilcock, Michael J. *The Limits of Freedom of Contract*, London 1993.
 52. Whish, Richard *Competition Law*, 7th edition, Oxford 2012.
 53. Wyman, Bruce The Law of the Public Callings as a Solution of the Trust Problems, 17 *Harvard Law Review* (1903-1904), pp. 156-173.