

Chapter 6

Liberalization of Water Services in Europe: The End of the French Water Exception?

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6.1 Liberalization of the Water Sector and the French Example

Since 1951, European states have progressively engaged in a reconciliation process with the goal of adopting shared European Union (EU) legislation to develop a common market. The legislation rests on three main categories of legal acts: the treaty, which is equivalent to a constitution; the directives; and the regulations.¹

The scope of the EU legislation has expanded considerably through the years. To regulate the common market, several categories of goods and services—either economic (energy, telecommunications, and railways) or non-economic (national education, basic social security programs, etc.)—have been defined with specific market regulations (Services of General Interest). Among them, Services of General Economic Interest (SGEI) designate services of an economic nature that are subject to public service obligations, including public networks such as water and sewerage

¹ A directive in the EU political system is a legal text that requires member states to achieve a particular result without imposing the means of achieving it. To be applied, a directive needs each member state to transpose it in its national legal system. A directive is distinguished from a regulation, which is self-executing, applies directly to member states, and needs no transposition.

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utilities.² The European policy has long remained vague about this concept. The organization of Services of General Interest was considered a national competency, not subject to any European law. However, the liberalization policy of SGEI initially developed by the EU in the mid-1980s introduced competition within industries of national importance that previously had enjoyed monopolies (energy, telecommunications, railways, etc.). This process of liberalization had two objectives: to create a single market for SGEI and encourage higher levels of management efficiency, thus offering new opportunities to private companies.

Economic competition regulations were designed to guarantee equal access to the market for all operators and social and territorial cohesion through the notions of “public service obligations” and “universal service.” Europe’s approach to the regulation of SGEI is evolving (Bauby 2011; Henry et al. 2003).

The issue addressed here is whether this evolution of the EU framework could influence the organization of the water sector in countries, like France, that have maintained their own organization until now. The organization of the water service in France is freely determined by each municipality (notably by its mayor, who is elected).³ It can be publicly organized or subject to public-private partnership. In the latter case, the franchise bidding procedure (delegation procedure) is not subject to EU public procurement legislation, which requires all criteria to be explicitly defined in advance. This context has favored the development of French water behemoths, whose scale has rarely been equaled by companies from other countries.⁴

The water sector generally is characterized by technical and economic factors that distinguish it from other SGEI (Table 6.1). In the name of these specificities and out of respect for subsidiarity, local public services such as water and sanitation utilities were long ignored by European competition legislation.

In terms of management models, though, other European legislation indirectly influences the water market and is far from neutral. The influence of successive directives, initially technical⁵ (demands concerning water quality and wastewater) and more recently economic⁶ (the principle of cost recovery), has been decisive in terms of the professionalization and development of enterprises in the sector.

Numerous national reforms were intended to enhance a more rational and industrial style of management within the sector. Attempts to introduce economies

² In reference to this institutional framework of Services of General Interest and also to the French legal concept of public service, we will use the phrase water and sewerage services rather than water and sewerage utilities.

³ The mayor enjoys relative independence from the other administrative levels in France. The municipality (commune) manages public infrastructure and organizes service delivery. Because France has more than 36,000 municipalities, and most of them have fewer than 10,000 residents, the municipalities form larger groups (inter-communality), often called “syndicats,” for joint water and wastewater management.

⁴ See Chap. 4 for more information on the French “majors.”

⁵ See [Appendix](#) at the end of this chapter for all directives on water quality and sanitation.

⁶ Water Framework Directive (2000/60/EC).

Table 6.1 Comparison of telecommunication, electricity, and water services

	Telecommunications	Electricity	Water
Basic features	Multi-pole networks, each consumer is a producer Increasing storage capacity	Production → transport → distribution → final consumption No storage	Resource → treatment → transport → consumption Water cycle Limited storage Watersheds Local
Terms of reference	Globalization	Globalization	Watersheds
Organizing authority	National or regional	National or regional	Local
Community standards	Internal market	Internal market	Environment and public health
Production	Low cost of production of message	Very high level	High cost: extraction, treatment, compliance with standards
Interconnection	Generalized global	High investment	High investments
Transport	Multiple means (wired, wireless, satellite, cable, electrical circuits, etc.) Technological progress and lower unit costs Maintenance costs	Generalized continental Natural monopoly of networks of transport and distribution Third party access Increasing costs with distance (losses)	Limited Natural monopoly of the supply chain and distribution High costs and relatively stable High maintenance costs
Payment of transport	Integrated in the contract	Integrated	Leakage
Distribution	Possible unbundling	Natural monopoly networks – third person access	Integrated
Marketing	By provider	By provider	By provider
Provider	In competition	In competition	Monopoly at the level of the organizing authority
Global payment of the service	By the issuer	By the consumer	By the consumer
Possible competition	Compulsory	Compulsory	Selection by organizing authority between “in house” and outsourcing
Technological progress	In service	In service	For the service in case of outsourcing
Trends in unit costs	Rapid	Fairly slow	Slow
Providers	Rapid decline Global groups Global groups + “small” European oligopoly	Stability and increases due to production Global groups + “small” European oligopoly	Stability and rising because of standards Local companies + large multi-service groups Multiplicity of local companies + several large groups

Source: Bauby (2010)

of scale often were associated with opening up to private management. While the example of England, which regionalized its water and sanitation services in 1976 before privatizing them in 1989, is at once extreme and well known, less reference is made to the examples of Italy and Portugal. These countries introduced regional management structures, accorded private law status to public enterprises, and made it possible to organize concessions with private partners (Marques 2006; Argento and van Helden 2010).

Nevertheless, the possible extension of liberalization legislation to the water sector was only recently made explicit in a number of opinions published by the European Commission (EC).⁷ The EC defended its position on liberalization not only in the internal EU debate but also in international negotiations, such as those on the General Agreement on Trade in Services (GATS) within the World Trade Organization (WTO). The EC suggested liberalizing a number of sectors, including environmental services.

While liberalization has, up until now, been encouraged by the EU, the policy has been criticized by those who consider liberalization to be little more than a dogma. A growing number of economists are highlighting the limits of liberalization as applied to public utilities (Lobina and Hall 2008). Nevertheless, whether or not the approach is appropriate, evolutions in European regulations have encouraged it. It is therefore legitimate to ask what the consequences would be of a yet broader approach to liberalization, for example if stricter competition rules were imposed in the field of environmental services.

Two questions arise in this context. First, if Europe decided to liberalize local water and sanitation utilities, would liberalization follow the same course as it has for national utilities? Furthermore, what would be the consequences of such a policy at the member-state level and on the international water market? In this regard, the French example is instructive. The liberalization encouraged by the EC presents an opportunity to increase international market share for private French companies, which already are active in the water sector. However, strict competition laws could call into question the dominant position of those same companies in France. Instead of requiring all criteria to be explicitly defined in advance, the French bidding procedure respects the principle of *intuitu personae*, in which the mayor of a municipality is able to negotiate directly with the bidders and can make his or her choice according to personal conviction.⁸

As the debate on liberalization and privatization deepens, especially around the liberalization of local public utilities, it is crucial to envision the consequences of a scenario in which local public water and sanitation services are liberalized.

⁷ The European Commission (EC) is one of the main institutions of the European Union. It is an executive body composed of one commissioner per member state. Unlike members of the European Parliament, commissioners are not elected.

⁸ *Intuitu personae* was introduced in France because the trust relationship was considered crucial to counterbalancing the incompleteness of the delegation contract.

6.2 Liberalization or Privatization: Two Notions Too Frequently Confused

In current usage, liberalization and privatization often are used to refer to the same concept. But while the relationship between them is understandable, purely and simply assimilating the two terms can lead to confusion.

Liberalization refers to a process involving the introduction of competition in sectors formerly characterized by exclusive rights or monopolies. With liberalization, state mechanisms of control, or even trusteeship, are replaced by market rules (in which case, the oft-used term is deregulation). Liberalization is applied to sectors in which, historically, one enterprise has enjoyed exclusive rights to develop and exploit infrastructure but natural monopoly conditions have disappeared. Examples include energy and communications. In these sectors, technological constraints placing limits on the possibility of duplicating networks were gradually overcome, and monopolies continued to exist due to political expediency before eventually being phased out.

Privatization refers to the status of the operator responsible for the activity. An activity is privatized when both the ownership of the infrastructure and the right to exploit it are accorded to organizations with a private legal status and access to private capital. The change in the legal status of France Télécom and the French government's sale of a percentage of its shares in the company is an example of gradual privatization.

There is no reason why liberalization and increased competition should exclude publicly funded organizations. Indeed, this was demonstrated in Scandinavia: the contracts of major public water operators have been renewed (for example, Malmö in Sweden) following a bidding process during which the historical public operator had to compete with private operators.

EU law does not require privatization of public organizations. The EC itself deplores the confusion between the terms "public service" and "public sector," as well as the confusion between "liberalization" and "privatization."⁹ If the approach taken by member states regarding the liberalization of the energy and telecom sectors has been characterized by a process of gradual privatization, nothing obliges other sectors to follow the same path as energy, telecommunications, railways, and other national public utilities.

⁹In its Green and White Papers on Services of General Interest and Public-Private Partnerships (PPPs) (European Commission 2004a, b; 2003). The purpose of the Green Papers published by the commission is to stimulate debate and launch consultations on particular subjects at the European level. Consultations can generate a White Paper aimed at translating discussions prompted by Green Papers into concrete proposals on European policy.

6.3 Water in France: A Hybrid Model

The French water situation is intricate. On one hand, due to the extensive involvement of private companies, the water sector already can be considered *de facto* privatized and liberalized. But at the same time, water and sewerage are never entirely privatized because they fall under a municipal area of jurisdiction that owns the infrastructure and manages the services (Table 6.2).

In addition, water and sanitation are true natural monopolies. Duplicating networks is costly, and it is difficult to introduce competition due to transport costs and the need to ensure health safety. If competition exists, it can only be by way of a bidding system, or by comparison, using a system of pseudo-competition, as applied in England after privatization (Littlechild 1988).

The delegation procedure in France is not competitive in the strict sense of the word, and *intuitu personae* continues to apply in the bidding process.¹⁰ Selection criteria are not made explicit *ex ante*; the mayor has discretionary power to adjust his or her selection criteria throughout the negotiation process.

The justification for *intuitu personae* derives from the fact that local authorities are unable to draw up complete contracts *ex ante* granting operators the right to run an essential service for a long period of time. Theoretically, the process of building trust and understanding with the operator limits long-term risks and transaction costs (Williamson 1985). Moreover, in the early days of urban water services, private companies were smaller, which meant less information asymmetry between the mayor and the operator.

The success of this model also can be explained by the compromise on financial and technical questions reached by operators and local authorities in the early 1990s. Entrenched over the course of time, the compromise was based on a win-win situation. Private operators partially financed the budgets of local authorities by means of entry fees, later phased out by law,¹¹ and provided substantial funds to political parties before legislation introduced in the 1990s made such practices illegal.¹² In return, local authorities provided operators with a safe and profitable market (Lorrain 1998), which formed the foundation for their international development. Synergies still exist today, in the technical rather than financial sphere, with companies providing solutions to new problems associated with sanitation and the environment.¹³

¹⁰ Despite the obligation, introduced by the Sapin Law in 1993, to advertise for and fairly analyze bids. The Sapin Law was designed to prevent corruption and improve transparency in economic activities, public procurement, and public funding of political activities.

¹¹ The practice of levying entry fees, enabling local authorities to demand a certain sum from the private operator winning the bid, which is then allocated to other public services, was banned by the Barnier Law, No. 95–101 of February 2, 1995 (Article 76).

¹² Notably via the law of January 15, 1990, on the Limitation of Electoral Expenditure and the Clarification of the Funding of Political Activity.

¹³ On the notion of technological rent, see Chap. 5.

Table 6.2 Management mode of water services in France

Procedure applicable to the award of the public contract	Direct public management ("régie")	Public procurement contract	Public service delegation ("délégation")
Type of contracts	N/A	Management contract	Lease contract ("affermage") Concession contract ("concession")
Approximate duration	N/A	3–5 years	10–12 years 25–30 years
Distribution of functions	Local authority	Private operator	Private operator
Maintenance and replacement of infrastructure	Local authority	Local authority	Private operator
Funding of upkeep of infrastructure	Local authority	Local authority	Local authority
Owner of the infrastructure	Local authority	Local authority	Local authority
Payment of the operator	By users	By the local authority, fixed part with incentive remuneration	By users By users

This table presents typical cases. In practice, there are a number of intermediate situations (for example, lease contracts—affermage—with a concession clause)

Table 6.3 Major findings of the Sapin Law Observatory (water and sewerage delegation)

Year	1998	1999	2000	2001	2002	2003	2004	2005	2006
Number of bidding processes observed	582	684	509	477	573	544	693	641	603
Number of bidding processes in the sample that can be used to calculate the price ^a	333	195	211	208	230	214	256	239	206
Percentage of incumbents renewed (renewal rate)	92 %	82 %	88 %	89 %	92 %	87 %	91 %	85 %	89 %
Average number of bids per procedure	N/A	2.4	2.1	2.2	2.3	2.3	2.2	2.4	2.6
Additional delegations won by independent operators (in number of contracts)	20	37	8	11	10	16	18	5	4
Evolution of average price ^b	-9 %	-10 %	-12 %	-8 %	-21 %	-10 %	N/A	N/A	N/A
Evolution of price in municipalities with fewer than 10,000 inhabitants	4 %	-4 %	-3 %	-3 %	-3 %	-12 %	-5 %	-1 %	-9.5 %
Evolution of price for municipalities with more than 10,000 inhabitants	-16.5 %	-14 %	-17 %	-12 %	-27 %	-9 %	-6 %	-1 %	-9 %

Source: AgroParisTech (2006)

^aThe renewal rate is based on a larger sample

^bAverage price of private operator: total income divided by total volume sales (the price is thus weighted by volume)

However, limits on competition for markets do not derive exclusively from *intuitu personae*. France is characterized by an oligopoly, and only one company submits a bid in a third of the delegation procedures.¹⁴ Nine out of 10 delegation contracts are awarded to incumbent private operators, and although local companies, operating independently of major groups, win a few contracts every year, foreign groups have yet to make an appearance on the French market (Table 6.3). The incumbent operator is ideally placed to win the bid for a new contract. In these conditions, only a highly determined mayor receiving excellent advice could really envisage choosing a new operator.

Thus, the water sector in France is neither privatized nor liberalized. It is a hybrid system in which responsibilities are shared by public and private entities and in which competition for markets, while not excluded, is not strictly applied.

¹⁴ As demonstrated by the Sapin Law Observatory (Brunet et al. 2003), which was set up by Agro-Paris-Tech-Engref with the support of the Ministry of Ecology.

6.4 Ongoing Evolutions in EU Policy on the Liberalization of the Water Sector

A range of technical and, above all, organizational approaches characterizes the management of water and sewerage services. Nevertheless, EU policy on quality standards in the water sector and, more generally, on the liberalization of network industries, has created a general framework that exerts an influence on the way water utilities are managed (EUROMARKET 2003).

The EU has published a number of directives on water quality and sewerage since the 1970s. The reason for this approach lies not in a desire to create an internal market, but rather in a concern to protect public health and the environment. The policy of harmonizing sanitation and environmental standards has led to substantial changes to the management of water and sanitation. European directives on water came in three waves of legislation that focused on water quality for human activities (1973–1988); pollution prevention (1988–1995); and the general principles governing the protection and management of water (1995 to the present)¹⁵ (see [Appendix](#) at the end of this chapter).

The high water quality standards imposed prompted private operators to enter into contracts to deliver drinking water services in France and Italy and led to the complete privatization of the service in England and Wales. Considering just how many new parameters were introduced in the directives of 1975 and 1980, operators were given a relatively short deadline to conform (Lupton and Bauby 2010).¹⁶

Starting in the 1980s, considerable efforts were made to apply the standards outlined in the European directives. In France, substantial investment in drinking water treatment infrastructure had to be made quickly. Furthermore, the kind of expertise and *savoir-faire* required prompted cities such as Toulon, Toulouse, Lyon, Paris, Bordeaux, and many others to delegate the service to private sector operators. The 1991 directive on sewerage, meanwhile, also resulted in a higher level of involvement on the part of the private sector, except in countries such as Germany and the Netherlands, which already had high drinking water standards.

In France, European legislation eventually encouraged the abandonment of the use of several catchment areas that did not provide sufficient quality and safety guarantees. The new standards also encouraged the interconnection of production sites so that drinking water could still be supplied if water resources were accidentally polluted. To achieve economies of scale in terms of production (volume treated) and operations (monitoring of quality), existing inter-communal structures will have to be expanded, which could lead to increased involvement on the part of the private sector.

¹⁵ The most important legislation between 1995 and the present was the Water Framework Directive (WFD) of 2000.

¹⁶ The stringency and scope of these EC drinking water standards can seem quite surprising. According to Jordan (1999), this can be explained by the short-term horizons of politicians and the relative ignorance of member states about the actual implications of these directives. Directives were viewed as a “commitment of policy intention,” not a “genuine legal obligation” (Macrory 1992, p. 350).

A doctrine of liberalization of SGEI gradually has emerged from the corpus of directives,¹⁷ which, until recently, was only applicable to national network industries. These principles are:

- The phasing out of exclusive or special rights; in other words, the suppression of traditional monopolies.
- The dissociation of some segments—notably distribution/sales and production, for which competition becomes possible—from the transfer segment, which requires infrastructure like pipes and remains a natural monopoly.
- The introduction of non-discriminatory, fair competition rules in competing segments with, on occasion, an independent regulator.
- A recognition of the specific character of a universal service, the objective of which is to guarantee general and continuous access at a reasonable price and high quality. This implies universal service obligations to the service provider.

The French exception constituted by the role of *intuitu personae* in the attribution of delegation contracts has been, until now, in conformity with EU concession law. European law distinguishes public procurement contracts, governed by strict competition rules, from concessions, which are merely covered by general principles of transparency, equality of treatment, proportionality,¹⁸ and mutual recognition. The criterion defining the concession is based on the notion of the economic risk taken by the operator, which relies on income generated from users (European Commission 2000).

For a long time, concessions were not taken into account in EU law. But in the absence of explicit rules, a form of derivative law emerged. Case law generated by the EU Court of Justice has eroded the notion of concessions by introducing a particularly broad conception of the field of public procurement contracts without, however, going so far as to confuse the two.¹⁹

Thus, the existence of legal risks associated with the absence of regulation has gradually convinced certain states that European legislation designed to better define the rules governing concessions is to be welcomed. The European Council²⁰ meeting held in Lisbon in March 2000 already had called for accelerating the process of liberalization in all markets in the EU. The question of extending competition requirements to local networks has been posed but not yet resolved, in that there is no majority on either side in the European Council or Parliament. The Treaty of Lisbon, which went into effect on December 1, 2009, reinforces the rights and powers

¹⁷ See [Appendix](#) at the end of this chapter for the various liberalization directives relative to the telecommunication, railways, electricity, and postal services.

¹⁸ The principle of proportionality requires that any new measures must be both necessary and appropriate in regard to the objective sought.

¹⁹ *Telaustria Judgment*, ECJ, December 7, 2000, Case C-324/98.

²⁰ The European Council is an institution of the EU. It is charged with defining the general political directions and priorities of the EU. It has no formal legislative power and it comprises the heads of state or government of the member states, along with the president of the European Commission and the president of the European Council.

of all member states and local authorities and curbs the desire of some parties to liberalize local public services. In 2011 the French Senate expressed reservations about changes to rules governing concessions, and the EC proposed a draft legislative provision that same year on concessions, which would confirm the criterion of risk and reinforce publicity obligations. The award criteria would be defined *ex ante* and could not be changed during negotiations.

A final version of the directive on concessions was then adopted. However, this set off a debate among citizens and organizations in different countries and provoked a petition—the European Citizens’ Initiative—demanding that water be removed from the scope of the Concessions Directive. Finally, in a statement in June 2013, the EU’s European commissioner for internal market and services announced the exclusion of water from the directive. Attitudes in Europe about the way in which the water and sanitation sector should be managed are gradually changing, and it is possible that the practice of *intuitu personae* will be abandoned in the medium term.

6.5 What New Perspectives Would Emerge with the End of *Intuitu Personae*?

The new procedure of competitive dialogue suggested by the EC in 2004²¹ for public-private partnerships includes a negotiation phase, but the main reform envisaged would be the introduction of competition based on weighted criteria defined in advance. This new procedure would be applicable to water concessions. This is the precise point where the principle of *intuitu personae* is really challenged, in that the mayor would have some restriction in his or her freedom of choice.

What would be the consequences if the practice of *intuitu personae* were abandoned in France? The definition of *a priori* selection criteria opens the door to new entrants because it reduces incumbent advantage. On the other hand, French companies are consolidating their positions, as witnessed by the renewal of the water delegation contract for the Paris suburbs: in the name of competition, water giant Suez Environnement attempted to convince the elected officials of the Syndicat des Eaux d’Ile de France (SEDIF)²² to subdivide their delegation, or, in other words, to set up a number of independent subcontracts. This would have increased Suez’s chances of beating out the contract holder, Veolia Environnement, and winning part of the contract. The option was rejected by the elected officials.

²¹ The Green Paper on PPPs of April 30, 2004, followed by a summary of the consultation published in May 2005, and the communication of November 17, 2005.

²² SEDIF is an inter-communality serving water for 142 municipalities around Paris for more than four million users. Paris is not a member of this inter-communality and has its own service, recently returned to public management (*régie*) after 150 years of private delegation. SEDIF, whose water contract was renewed in 2010, remains delegated to the private sector.

With the introduction of more competition, public operators also could bid for public service delegations. In the long term, that could lead to the emergence of public operators that would be increasingly independent from local authorities in terms of status and hierarchy. This scenario is all the more credible with the accelerated development of inter-communality²³ since 1999. Taking advantage of a larger inter-communal perimeter, or territory, many *régies*—direct public managers—have increased in size. Such direct public management operators are thus able to develop skills and expertise. In the southwest of France, one inter-communality implemented at the local scale²⁴ now offers a range of services to all the county's municipalities, much to the irritation of private operators.

On the other hand, the principle of short-term *régie*-style management could be called into question. Currently, the management approach to be applied—*régie* or delegation—is chosen by the local authority (see Table 6.2). Unlike delegation contracts, there is no predefined term with the *régies*. With liberalization, *régies* could be regularly compelled to face competition, unless they agreed not to offer services outside the territory for which they were originally responsible. This would be the application of the in-house principle, which is increasingly recognized by the EU Court of Justice.²⁵

Finally, the reinforcement of public management in France would weaken the French private water companies. Their success in France has enhanced their international development since the mid-twentieth century, and they have grown large enough to export their technical skill. The domestic market provided them with cash flow to finance their international development.

At the European scale, in theory, more liberalization in the water sector should be considered favorable to the development of private companies by increasing their ability to conquer international markets beyond Europe. Internationally, new private operators could increase their market shares and challenge French companies like Suez and Veolia. In France, the consequences on the market would be differentiated by the type of areas. In urban zones and rural areas in which an inter-communal system is used to create economies of scale, the status of large *régies* and private enterprises could converge. Public and private operators would be distinguished only by the nature of their capital structure and, initially at least, their organizational scale (regional or international, respectively). *Ex ante* competition would be fierce in these areas. However, the question arises about how to monitor the operator *ex post* in what will inevitably be a monopoly lasting for the duration of the contract.

²³ See note 3 for more about French local organization and inter-communality.

²⁴ The Syndicat Départemental des Landes.

²⁵ The in-house principle was recognized in France by law No. 2010-559 of May 28, 2010. Municipalities are allowed to create local societies publicly owned but under private law. These so-called *Sociétés Publiques Locales* can operate water or sewerage utilities on the territory of the shareholder municipalities and no competition is required (Sapin Law does not apply to them). In 2011, only a few municipalities had chosen this management mode. That is why it is not detailed in Table 6.2.

In other rural areas without inter-communal organization and with low population densities and dispersed population centers, the competition would probably be limited because such contracts would be less profitable. Low population density increases per capita infrastructure costs and few industrial users, buying large quantities of water, limits per capita revenue. Private operators could abandon this segment of the market in what economists call the risk of creaming off the market. Services in such areas would be supplied by micro-régies with limited technical and human resources, incapable of guaranteeing a safe, high-quality service.

Currently, private operators already have displayed less interest in providing services to such areas. Table 6.3, above, illustrates the end of mutualization of cost between large and small contracts within delegation operators. Private operators abandoned their historical strategy of extending their market from large cities to small ones by pricing small cities only on marginal cost, rather than on full cost. As a consequence, from a strict cost recovery point of view, prices were underestimated in small cities and over-estimated in others.

As a consequence, there is a risk of operators creaming off the best contracts and ignoring the worst: only the most profitable segments are of interest to competing operators. The legal obligation to provide a universal service should, in theory, limit these perverse effects. Nevertheless, in practice, in the case of local services in which costs are supposed to be covered without external aid (cost recovery principle), it is difficult to see how a two-speed public service can be avoided. These considerations demonstrate the wisdom of not only focusing on the implementation of competition rules, but also taking into account issues associated with social solidarity and the regulation of monopolies.

6.6 French Systems of Regulation Yet to Be Fully Developed

The liberalization of national network services is accompanied by a system of regulation based above all on encouraging fair competition between operators within the market and protecting universal service obligations (notably, via financial compensation mechanisms). In liberalized sectors, so-called independent national regulation authorities have been set up precisely with this objective in mind. In France, examples are provided by the Energy Regulation Committee and the Electronic Communications and Postal Authority.

The specificities of the water sector, notably the fact that competition within the market is virtually impossible, has led to the development of other kinds of regulation instruments focused on monitoring contracts and comparative evaluation. In spite of numerous initiatives taken in France since the 1990s (Guérin-Schneider and Nakhla 2003), benchmarking is still rarely practiced. Several attempts for comparative strong regulation have been rejected with the election of

right-wing governments.²⁶ However, a consensus formed around the need to define a shared core of performance indicators that could be applied to public services to control the result (continuity, quality, sustainability, etc.) rather than input (personnel, costs, etc.) (Cour des comptes 2003; Cousquer et al. 2005; Guérin-Schneider and Nakhla 2000; Institut de la Gestion Déléguée 2004; Martinand 2001).

Performance indicators were finally legitimized by law: the use of such benchmarks was imposed in an annual operator report,²⁷ and a clearly defined list of performance indicators is required in the annual report written by the mayor, describing water and sewerage services in terms of quality and price.²⁸ The Water Law of 2006 created the French National Agency for Water and Aquatic Environments (ONEMA) and mandated this new administrative body to collect at the national level the information included in these annual mayoral reports. It remains to be seen if this national performance indicator monitoring system will quickly attain its objectives or whether a stricter approach to regulation will prove necessary. First results are not entirely satisfying. In February 2011, utilities for which at least one performance indicator had been published in the monitoring system represented only 24 % and 19 % of the population served by drinking water and wastewater utilities, respectively (Canneva and Guérin-Schneider 2011).

6.7 Anticipating the Negative Impact of Liberalization

EU law has not yet challenged the specificity of concessions based on the principle of *intuitu personae* rather than competition. Nevertheless, the liberalization of public services is now deeply anchored in the culture of the EC. Thus, anticipating the impact of the eventual repeal of the principle of trust is important.

If the principle of strict competition were to be legislatively imposed on the water sector in Europe, the market share would probably be modified, challenging major companies. But if regulation remains limited to fair competition, the impact could also be social, as illustrated above by the French case study.

In France, the most likely outcome of the end of *intuitu personae* would be the emergence of new operators alongside French companies: probably foreign and new public enterprises (*régies*). The latter would reshape the status of *régies*,²⁹ notably by enabling them to operate outside of their original territories. This situation could undermine the dominant position of French companies in the country, in Europe, and around the world. The oligopoly in France could be attenuated.

²⁶ In 2002, a law established a regulatory body for water services with relatively strong prerogatives for monitoring and control and a remit to provide local authorities with information on pricing and performance.

²⁷ Decree No. 2004-136.

²⁸ So-called *Rapport Prix Qualité du Service* (Decree No. 2007-675 and its implementing decree).

²⁹ Or the development of the Public Local Societies recently introduced in French Law (No. 2010-559).

However, the introduction of competition and the end of mutualization of cost between large and small contracts within delegation operators, as mentioned above, may create a two-speed public service. Profitable areas would gain in competition, whereas the less profitable would be abandoned.

This demonstrates the importance of retaining mechanisms independent from the market. It is necessary to regulate service quality and maintain instruments of social solidarity, such as the universal service obligation and mutualization mechanisms, that have made the development of water services in France and Europe possible.

Finally, regulation will only be effective if it does not remain at a national or European level. Most of the countries in Europe and elsewhere are organized at a local level. The regulation tools, notably performance monitoring systems that have developed in many countries, shall be appropriated and used by local authorities to monitor and negotiate contracts with private operators or to steer public operators.

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Appendix: Directives in the Water Sector and Other SGEI

Main Water and Sanitation Directives

- Surface water directive (75/440/EEC³⁰) and its daughter directive (79/869/EEC)
- Bathing water quality directive (76/160/EEC)
- Dangerous substances directive (76/464/EEC)
- Fish water directive (78/659/EEC)
- Shellfish water directive (79/923/EEC)
- Groundwater directive (80/68/EEC)
- Drinking water quality directive (80/778/EEC) and its revision (98/83/EC)
- Urban wastewater treatment directive (91/271/EEC)
- Nitrates directive (91/676/EEC)
- Water Framework Directive (2000/60/EC)

European Directives on the Liberalization of SGEI

Telecommunication

- Commission Directive 90/388/EC of June 28, 1990, on competition in the markets for telecommunications services, and its revision (Directive 99/64/EC)

³⁰ EEC: European Economic Community

- Directive 96/19/EC on full competition in telecommunication markets (amending Directive 90/388/EC)
- Commission Directive 2002/77/EC on competition in the markets for electronic communications networks and services (amending Directive 90/388/EC)

Railways

- Council Directive 91/440/EEC on the development of the European Community's railways
- Directive 2001/12/EC of the European Parliament and Council on the development of the European Union railways (amending Council Directive 91/440/EEC)

Electricity

- Directive 96/92/EC of the European Parliament and Council concerning common rules for the internal market in electricity
- Directive 2003/54/EC of the European Parliament and Council concerning common rules for the internal market in electricity (amending directive 96/92/EC)

Postal Services

- Directive 97/67/EC of the European Parliament and Council on common rules for the development of the internal market of Community postal services and the improvement of quality of service
- Commission directive 2002/77/EC on competition in the markets for electronic communications networks and services (amending directive 97/67/EC)
- Directive 2008/6/EC of the European Parliament and Council with regard to the full accomplishment of the internal market of Community postal services (amending Directive 97/67/EC)

References

- AgroParisTech (2006) Observatoire de la Loi Sapin. Déroulement des procédures de délégation de services publics d'eau potable et d'assainissement de 1998 à 2006. Available in http://www.agroparistech.fr/IMG/pdf/LS_synt_06-GC_VersionFA.pdf, <http://www.agroparistech.fr/Sous-Rubrique-Laboratoire-GEA-.html>
- Argento D, Van Helden GJ (2010) Water sector reform in Italy and in the Netherlands: ambitious change with an uncertain outcome versus consensus-seeking moderate change. *Int Rev Adm Sci* 76(4):790–809
- Bauby P (2010) Mapping of the Public Services in the European Union and 27 Member States, CEEP

- Bauby P (2011) L'europanisation des services publics. Presses de SciencePo, Paris
- Brunet E, Guérin-Schneider L, Bonnet F (2003) Impact of a new legislation on the water market and competition in France. *Water Sci Technol Water Supply* 3(1–2):389–394
- Canneva G and Guérin-Schneider L (2011). National monitoring of water utility performance in France. *Water Sci Technol Water Supply* 11(6):745–753
- Cour des comptes (2003) La gestion des services publics d'eau et d'assainissement. Rapport public particulier, Les éditions du JO, Cours des Comptes
- Cousquer Y, Dumont J, François H et al (2005) Les indicateurs de performance appliqués aux services publics de l'eau et de l'assainissement. Constats et propositions
- EC (European Commission) (2000) Commission interpretative communication on concessions under Community law (2000/C 121/02)
- EC (European Commission) (2004a) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - White Paper on services of general interest COM/2004/0374 final Brussels
- EC (European Commission) (2004b) Report on the public consultation on the Green Paper on services of general interest, Commission Staff
- EUROMARKET (2003) Analysis of the European Union explicit and implicit policies and approaches in the larger water sector. Deliverable 1. Available in <http://mir.epfl.ch/euromarket>
- Guérin-Schneider L, Nakhla M (2000) Le service public d'eau délégué: du contrôle local des moyens au suivi de la performance. *Revue Politiques et Management Public* 18(1):105–123
- Guérin-Schneider L, Nakhla M (2003) Les indicateurs de performance: une évolution clef dans la gestion et la régulation des services d'eau et d'assainissement. *Flux* 52/53:55–68
- Henry C, Matheu M, Jeunemaître A (2003) Réguler les services publics en réseaux : l'expérience européenne. La Documentation Française, Paris
- Institut de la Gestion Déléguée (2004) Indicateurs de performance Eau potable et assainissement: 'pour une liste commune'. Edition IGD
- Jordan A (1999) European Community water policy standards: locked in or watered down. *J Common Mark Stud* 37(1):13–37
- Littlechild S (1988) Economic regulation of privatised water authorities and some further reflections. *Oxf Rev Econ Policy* 4(2):40–68
- Lobina E, Hall D (2008) The illusions of competition in the water sector – a response to the OFWAT/Cave consultations on introducing competition in the water sector in England and Wales, PSIRU reports
- Lorrain D (1998) Le régulateur, le service public, le marché et la firme. *Flux* 31–32:13–23
- Lupton S, Bauby P (2010) Quelles évolutions pour le service public français face aux directives européennes? In: Schneier-Madanes G (ed) L'eau mondialisée: la gouvernance en question, collection "Recherches". La Découverte, Paris, pp 109–128
- Macrory R (1992) The enforcement of community environmental law: some critical issues. *Common Mark Law Rev* 29:347–369
- Marques RC (2006) A yardstick competition model for Portuguese water and sewerage services regulation. *Util Policy* 14(3):175–184
- Martinand C (2001) La maîtrise des services publics urbains organisés en réseaux. Conseil Economique et Social, Les éditions des journaux officiels
- Williamson OE (1985) The economic institutions of capitalism: firms, markets, relational contracting. Free Press, New York