GIDE

GIDE LOYRETTE NOUEL

MEMORANDUM

To	**Payen Gerard** **President** **AQUAFED**	**gerard.payen@aquafed.org**
From	Benoit Le Bret	lebret@gide.com
Re.:	Legal Analysis of the European Citizens' Initiative related to Water : Second request on internal market rules and liberalisation	
Date	31 January 2014	

EXECUTIVE SUMMARY

On 20th December 2013, the European Commission received the first Citizens' Initiative related to Water from the European Federation of Public Service Unions. The organisers request the Commission to exclude water services (supply, management,...) from the internal market rules and from liberalisation. Such requests strike by their ambiguity. It is submitted that they are inadmissible, as the action demanded from the Commission is not a legal act "required for the purpose of implementing the Treaties". It is in fact an act of exclusion from the ambit of Treaty provisions and such act cannot form the basis of a Citizens' Initiative.

The organisers seem to base their demands on article 14 of the Treaty relating to services of general economic interest. It is precisely because water services, such as water supply and management of water resources, waste-water treatment etc., are services of general economic interest that they are subject to the internal market and competition rules, and cannot be excluded from the ambit of such fundamental EU rules designed to protect transparency, equal treatment and non-discrimination amongst users and operators alike across Member States. Should the Commission accept to exclude such services from the internal market rules - which we believe it does not have the competence to do - it would lead to a situation where contracts relating to water supply and management would be awarded following opaque and discriminatory procedures, at odds with the EU's environmental policy. An exclusion of one type of economic services from the internal market rules would furthermore create a dangerous precedent which may lead to the disintegration of the internal market.

As regards the exclusion of water services from liberalisation, it is far from clear what the organisers really pursue with this request. The ambiguity stems from the absence of a legal definition of liberalisation at EU level. One narrow meaning could be taken to refer to the initial competitive bidding of public service contracts. One other more commonly used meaning can be taken to refer to the open access to non-historical economic operators. Behind this ambiguous request, some see the intention of the organisers to oblige Member States to organise water services on the basis of "in-house" contracts awarded to publically-owned companies. While member States can already opt for "in-house" contracts, it derives clearly from both articles 345 and Protocol 26 to the Treaty that the Commission cannot interfere in Member States' freedom to organise public services, including water services.

In light of the legal assessment as developed below, when responding to the Citizens' Initiative the Commission is called upon i) to clarify the limits and conditions in which ECI can be used as foreseen by article 11(4) of the Treaty, ii) to assess the current ECI having in mind the clear difference to be made between water as a resource and services that can be rendered for water supply and management as well as iii) taking into account the EU "acquis", both from an internal market and environmental policy point of view, and iv) to act in conformity with the provisions of the Treaty, notably regarding the wide discretion recognised to the national, regional and local authorities in organising services of general economic interest.

1. INTRODUCTORY REMARKS

1. On May 10th 2012, a European citizens' initiative ("ECI") relating to water was registered by the European Commission.[1] The organisers of this initiative urge the Commission 1) to ensure that all inhabitants enjoy a right to water and sanitation, 2) to exclude water supply and management of water resources from the internal market rules and from liberalisation, and 3) to increase the EU's efforts to achieve universal access to water and sanitation.

2. The ECI was submitted to the Commission on December 20th according to the procedure laid down in Regulation 211/2011.[2] The ball is now in the Commission's court. The latter has 3 months to carry out a thorough assessment of the ECI and issue a reasoned Communication deciding what follow-up action if any it intends to take.

3. The aim of the present note is to analyse the second request set out in the citizens' initiative, namely that relating to the "***exclusion of water supply and management of water resources from the internal market rules and from liberalisation***", in the light of the provisions of EU law, to highlight the risks that would ensue if ever the Commission were to give a favourable answer to such a request and the limits that any answer by the Commission would have to respect.

4. Before setting out the analysis of the specific request, two fundamental principles must be recalled. First, the citizens' initiative does not create an obligation to act for the Commission (1.1). Second, when considering whether to act, the Commission must have regard to the principle of conferral of powers and the principle of subsidiarity (1.2).

1.1 The citizens' initiative does not create an obligation to act

5. Article 11(4) of the Treaty on the European Union ("TEU") defines the citizens' initiative as follows:

> *Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties. (we underline)*

6. It derives clearly from the above that the citizens' initiative is a mere "invitation" to act and not an obligation.

7. While the Commission must examine the request when it satisfies all the procedural requirements set out in the above mentioned Regulation, it has absolute discretion on how to proceed with it.

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[1] http://ec.europa.eu/citizens-initiative/public/initiatives/finalised/details/2012/000003

[2] REGULATION (EU) No 211/2011 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 February 2011 on the citizens' initiative.

8. In particular, the Commission does not have to take any act.

9. The only obligation the Commission has is

> *to set out in a communication its legal and political conclusions on the citizens' initiative, the action it intends to take, if any, and* ***its reasons for taking or not taking that action*** [3] ***(we emphasise)***

10. In practice, the Commission will of course assess carefully whether the requests set out in the initiative are relevant and whether EU law provisions command to take some action in the particular field, or on the contrary whether the requests are not compatible with EU law or there is no need for legislation etc.

11. In any case the Commission can choose whether its initiative -if any- should take the form of a legislative proposal or of another "legal act", such as a recommendation or an opinion.

1.2 The citizens' initiative must relate to an action to be taken within the scope of the Treaty

12. As referred to in article 11(4) TEU cited above, the citizens' initiative must relate to a legal act required for the purpose of implementing the Treaties, which means that the action required by the citizens' initiative must remain within the scope of the Treaties. (underlined by us)

13. A citizens' initiative cannot propose to change the Treaties.

1.3 The European Commission is bound by the principles of conferral and subsidiarity

14. The European Commission is obliged to deal with a citizens' initiative within the framework of its powers set out in the Treaties.

15. When considering whether to act, it must respect the principles set out in Article 5 of the Treaty on the European Union.

16. First of all, the principle of conferral of powers, which sets the limits of Union competencies.

> *Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. (we underline)*
>
> *Competences not conferred upon the Union in the Treaties remain with the Member States. (we underline)*

17. Secondly, the principle of subsidiarity that governs the use by the Union of the competences conferred upon it.

> *Under the principle of subsidiarity, (...) the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.*

18. In light of the above, when considering whether to act upon a citizens' initiative, the Commission must carefully examine if it has competence to act in that field and in the

[3] Article 10 (1,m) (c) of Regulation No 211/2011.

affirmative, must assess whether the objective to be achieved can be better achieved at Union level than at Member State level[4].

19. In the present case, as water supply and management of water services are services of general interest[5] (as will be argued more at length *infra*), the Commission must have regard to the new Protocol n°26 to the Lisbon Treaty "on services of general interest", which alongside articles 14 and 106 (2) of the Treaty on the Functioning of the European Union ("TFEU") clarifies the division of competences between the Union and the Member States in this field.

20. In particular, Protocol n°26 underlines the essential role and wide discretion of national, regional and local authorities of Member States in providing, commissioning and organizing services of general interest as closely as possible to the needs of the users.

2. THE REQUEST TO EXCLUDE WATER SERVICES FROM THE INTERNAL MARKET RULES

21. The second request of the ECI is formulated in a very ambiguous manner which makes it very difficult to apprehend the real scope of the request. It is underlined that the current legal analysis is based on the elements submitted in the citizens' initiative as registered on the Commission's website[6]. It is these elements that must be taken into account by the Commission in its assessment, as it is on the basis thereof, that the signatures were collected.

22. First of all, it is unclear which part of the internal market rules is targeted by the request. As a matter of fact, the European internal market is a very vast concept that can be said to rest upon a combination of "negative integration" rules and "positive integration" rules. The "negative integration" rules comprise the rules designed to prohibit quantitative restrictions on trade and all measures having equivalent effect (article 34 TFEU), restrictions on the provision of services (article 56 TFEU) and on freedom of establishment (article 49 TFEU) as well restrictions on free movement of capital (article 63 TFEU).

23. An extensive but relevant interpretation may also include in the internal market the rules prohibiting state aids and anti-competitive agreements between undertakings which actually affect the internal market (articles 101-109 TFEU).

24. The positive integration rules comprise among other things the adoption of harmonising legislation on the basis of article 114 TFEU (which has as its object the establishment and functioning of the internal market), the adoption of European standards, the construction of a common market organisation in agricultural products etc.

25. Secondly, there is an extra ambiguity stemming from the two different formulations of the request in the registration form and in the explanatory note contained in the Annex to the ECI.

26. While the summary of the objectives of the ECI purports to exclude "*Water supply and management of water resources*", its annexed explanatory note, albeit illustrative, requests the exclusion of "*water*" from the internal market. (we underline)

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[4] The principle of subsidiarity has been reinforced under the Lisbon Treaty. Protocol no2 on the application of the principles of subsidiarity and proportionality sets out the exact rules relating to the application of the principle of subsidiarity in the legislative process of the EU.

[5] Recital 15 of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (« the Water Framework Directive ») states : « *The supply of water is a service of general interest as defined in the Commission communication on services of general interest in Europe* ».

[6] It is stressed that the Citizens' Initiative refers to the object and 3 principal objectives as set out on the Commission's website. The explanatory note annexed to the sole English version of the Initiative can only be understood as an illustrative document, and cannot be considered as part of the Initiative.

27. It is thus not clear if the citizens' initiative wishes the "water" resource to be excluded from the internal market or the services related to water such as water supply of drinking water (including production, transport and distribution) and water treatment (including waste water treatment).

28. We believe that water resource must be distinguished from services related to water such as water supply and water treatment. While water is a precious resource for the population and deserves special protection by Member States and that could be even further protected by EU law (namely the Charter of fundamental rights), the services related to water are economic services that cannot be excluded from the internal market rules as shown below.

2.1 Water supply and other water services constitute services of general economic interest that are subject to the rules of the Treaty including the internal market rules

29. It is undisputable that water supply and water treatment services are services of general interest, which are subject to public service obligations in all Member States.[7]

2.1.1 Definition of Services of general economic interest ("SGEI")

30. The terms "services of general economic interest" ("SGEI") and "non-economic services of general interest" ("SGI") are used in a number of Treaty provisions - articles 14, 106(2) of the TFEU and Protocol n°26 to the Treaty - but are not defined by the Treaty or any secondary legislation.

31. The idea being that it is up to the Member States to define what they consider to be services of general economic interest and what not. The discretion conferred upon the Member States must however be exercised in accordance with EU law[8] and without committing a manifest error of assessment.[9]

32. The qualification by a Member State of a service as a service of general economic interest (provided it does not make an error of assessment) determines the EU provisions applicable to it.

33. While the services of general economic interest are subject to the EU competition law rules (including state aid control) and internal market rules[10], the non-economic services of general interest are not subject to these rules without prejudice to the fact that non-economic services can be linked to economic activities.

2.1.2 Criteria set out by the European Court of Justice to control the manifest error of assessment of Member States in qualifying a service as a SGEI

34. In the field of EU state aid law, the characterisation of a service of general economic interest is based upon three conditions: 1) that the nature of the activity is economic, 2) that it is carried out in the public interest and 3) that the public service mission is entrusted to the undertaking through an act of public authority.

35. The key factor to differentiate a SGEI from a SGI is the first one of those criteria: namely the economic nature of the activity carried out.

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[7] Recital 15 of the EU Water Framework Directive cited supra.
[8] One must have regard to any EU harmonised rules in the specific area looked at.
[9] Case T-17/02, *Fred Olsen v. Commission*, Judgment of 15th June 2005 §216. This principle has been highlighted by the Commission in its Communication on the services of general interest COM(2007)725 final and Commission Staff Working Document on the application of the EU rules on state aid, public procurement and internal market to SGEI, SWD(2013)53 final /2 .
[10] Article 106(2) TFEU.

2.1.2.1 The notion of economic activity

36. In the field of competition law, the Court of Justice has established that the notion of economic activity is to be understood as "***any activity consisting in offering goods and services in a given market***"[11]. Such a definition is without regard to the legal status of the entity performing the activity, whether public or private, whether for profit or not-for-profit.[12]

37. In the area of free movement of services, the essential characteristic distinguishing an economic service from a non-economic service, thereby prompting the application of article 56 TFEU, is " ***the existence of remuneration, that constitutes consideration for the service in question, and that is normally agreed between the provider and recipient of the service.***"[13] (we underline)

2.1.2.2 Negative definition of what does not constitute an economic activity

38. The Court of Justice held that the characteristic of remuneration is absent in the case of activities performed for no consideration by the State or on behalf of the State in the context of its duties in the social, cultural, educational and judicial fields such as courses provided under the national education system or the management of compulsory social security schemes which do not engage in economic activity. The payment of a fee by the recipients for example a tuition or enrolment fee paid by students in order to make a certain contribution to the operating expenses of a system does not in itself constitute "remuneration" because the service is still essentially financed by public funds.

39. The Court has only identified two categories of activities, which do not constitute economic activities. They are the following:

(a) Activities related to the exercise of state prerogatives

This category refers to activities linked to the exercise of state prerogatives by the State itself, or by authorities functioning within the limits of their public authority, in areas such as security[14], justice[15], foreign policy.

For example, the Court found that the control and supervision of the air space[16] or the monitoring of sea pollution[17] are non-economic activities.

(b) Certain activities of a purely social nature

Two such activities have been identified by the Court in this category. First, the management of compulsory insurance schemes pursuing an exclusively social objective, functioning according to the principle of solidarity, offering insurance benefits independently of

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[11] Cases C-180/98 to C-184/98, *Pavel Pavlov e.a Pavel Pavlov and Others and Stichting Pensioenfonds Medische Specialisten,* Judgment of 12th September 2000 § 75. Case C-82/01 P, *Aéroports de Paris v. Commission,* Judgment of 24th October 2002, §79.

[12] ECJ C-123/83, BNIC /Clair [1985] ECR 391.

[13] Case C-263/86, *Humbel,* Judgment of 27th September 1988, §17.

[14] Commission Decisions in case N 309/2002 of 19 March 2003, Aviation security – compensation for costs incurred following the attacks of 11 September 2001, OJ C 148, 25.6.2003, and in case N 438/2002 of 16 October 2002, Aid in support of public authority functions in the Belgian sector, OJ C 284, 21.11.2002, http://ec.europa.eu/community_law/state_aids/transports-2002/n438-02-fr.pdf.

[15] Commission Decision in case N140/2006 – Lithuania – Allotment of subsidies to the State Enterprises At the Correction Houses, OJ C 244, 11.10.2006, http://ec.europa.eu/comm/competition/state_aid/register/ii/doc/N-140-2006-WLWL-en-19.07.2006.pdf.

[16] Case C-364/42, *SAT v. Eurocontrol,* [1994] ECR I-43.

[17] Case C-343/95, *Diego Cali & Figli,* [1997] ECR I-1547.

contributions. Second, the provision of public education financed as a general rule by the public purse.[18]

40. On the contrary, other activities of a social nature such as optional insurance schemes or health services given in private hospitals are considered to be economic activities, as they are paid for by the beneficiary of those services.

41. This shows that the social aim or nature of the activity is not in itself sufficient to exclude the activity from being qualified as economic.

2.1.3 Applying the above-mentioned criteria, water services such as water supply and water treatment must be considered to be SGEIs

42. First of all, the activities related to water supply cannot be held to constitute "*activities related to the exercise of state prerogatives* " nor "*activities of a purely social nature*" within the meaning of the Court's jurisprudence referred to above.

43. Secondly, it must be noted that the activities of water production, transport, distribution and treatment are all services provided in exchange for remuneration by the final users, which is the real determining factor for them to qualify as economic activities.

44. As a matter of fact, as regards the supply of drinking water to citizens, in the majority of Member States except Ireland and the United Kingdom, customers pay a price for water corresponding to their "real" consumption (calculated by meter consumption) which includes the costs of water distribution and waste water treatment. [19] And in all Member States, if consumers don't pay the bill, they run the risk of being cut off.

45. Water pricing is in fact regulated by the EU Water Framework Directive whose article 9 established the principle of economic recovery of costs of water services.

46. Article 9 states that each Member State must ensure that "*the water pricing policies provide adequate incentives for users to use water resources efficiently*". (we underline)

47. Such requirement coincides with the principal criterion established by the Court's jurisprudence when reviewing if an activity is economic or not: that of the remuneration of the service.

48. Furthermore, the provision of a universal service has not been considered by the Court as excluding the existence of an economic activity. Indeed, the Court found that the distribution of electricity[20] and the distribution of post throughout the national territory[21] both constituted activities of general economic interest. The same logic must be transposed to water services.

49. In fact, the Court, in a case of competition law[22], concerning operators in the water distribution sector, did not find any manifest error of assessment in the qualification by national authorities of water supply undertakings as undertakings entrusted with a service of general economic interest.

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[18] See *Humbel* cited above.

[19] In the United Kingdom, it appears that the rate of households equipped with a meter is far from 100%. Households are charged a fixed fee for water linked to the rental value of their property (correlated to the surface of the property).

[20] Case C-393/92, *Almelo*, Judgment of the Court of 27 April 1994, paragraph 48.

[21] Case C-320/91, *Corbeau*, Judgment of the Court of 19th May 1993, paragraph 15.

[22] Joined cases 96-102, 104, 105, 108 and 110/82, *IAZ v. Commission*, Judgment of the Court of 8 November 1983, following Commission Decision of 17 December 1981, IV/29.995 – NAVEWA-ANSEAU.

50. Therefore in the light of the case law criteria set out above, water services must be considered to constitute services of general economic interest, subject to the EU internal market rules.

51. Such a finding is confirmed by a series of references in EU legislative acts and other European Commission documents which support the view that water supply and distribution is an economic activity.

2.1.4 Various acts of the European Commission have already acknowledged the economic nature of water services and expressly qualified them as SGEIs

(I) The Water Framework Directive

52. As already stated in paragraph 36 above, the Water Directive implicitly accepts that water services are of an economic nature, as it expressly requires Member States to operate their water market on the principle of recovery of the costs of such services. (article 9 of the Directive)

53. Qualifying water services as non-economic, *quod non*, would therefore run against the whole EU environmental policy.

(II) The Public Procurement (Utilities) Directive[23]

54. Directive 2004/17/EC, whose legal basis is article 114 TFEU (ex-article 95 TEC – internal market coordination) currently coordinates procurement procedures of entities operating in the water, energy, transport and postal services sectors.

55. The Directive applies to contracts for the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water, or the supply of drinking water to such networks.

56. Considering that the Directive's *raison d'être* is to regulate economic activities and ensure that procedures of the award of contracts to economic operators in this field respect the principles of equal treatment, mutual recognition, proportionality and transparency, it follows that the water sector is considered an economic activity which needs to respect the above mentioned EU law principles.

57. It is mentioned that the current proposal of the Commission, COM(2011)896, purporting to amend the Public Procurement Directive, confirms the aforementioned findings, as it is not does change the scope of application of Directive 2004/17/EC. It is here underlined that the "New" Public Procurement Utilities Directive has been adopted by the European Parliament on January 15th and is due to come into force after the "formal" adoption by the Council and 20 days following publication in the Official Journal (estimated somewhere in March 2014).

(III) The Services Directive[24]

58. The Services Directive – which applies to all SGEIs not expressly excluded from its ambit – characterises water distribution and supply services and waste water services as services of general economic interest.

59. Indeed, article 17 of the Directive states the following:

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[23] Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 134, 30.4.2004, p. 1–113.

[24] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, p. 36–68.

Article 16 shall not apply to:

*1. **Services of general economic interest** which are provided in another Member State **inter alia**:*

(...)

*d) **water distribution and supply services and waste water services ;***

60. In light of the above, there cannot be any remaining doubts as to the qualification of water services as SGEIs.

(IV) Commission Communications

61. The Commission in its 2007 Communication on "Services of general interest"[25] once again clearly includes water supply and water treatment in the SGEI category by stating:

> ***Other services of general economic interest, such as** those in the area of waste management, **water supply or waste water treatment**, are not subject to a self-standing regulatory regime at EU level.*[26]

62. ***Interim conclusion:*** Water services such as the ones described by the ECI are services of general economic interest and therefore subject to the Treaty rules on internal market (articles 49, 56, 63 TFEU), as well as the competition law rules (including state aid rules).

According to article 106(2) TFEU, these rules apply to undertakings entrusted with the operation of services of general economic interest in so far as their application does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

2.2 The risks of excluding water services from the internal market rules

63. The exclusion of water services from the internal market rules would pose serious legal issues to the Commission, both with regard to EU primary law as well as to EU secondary law, and gravely undermine the EU's action in ensuring a minimum level playing field in the European water sector for the benefit of European consumers and economic operators alike.

64. First and foremost, it is recalled that the EU institutions may not enact legislation which violates the fundamental principles of the EU Treaty (we will develop this *infra* paragraph **2.4**). In fact, a citizens' initiative may not request an act by the EU institutions that would violate the Treaty or seek to change it, as stated in section **1.2.** above.

65. Second, it is recalled that any attempt to regulate water services cannot disregard the current secondary law EU acquis (as described in section **2.1.4** above).

66. The exclusion of water services from the internal market rules, as requested by the ECI, would most certainly mean that the Services Directive, based on ex-articles 47 and 55 TEC, as well as the New Public Procurement Directive, based on article 114 TFEU, would have to be amended in order to remove water services from their respective application.

67. This would involve taking a step backwards on the progress achieved in terms of protection of economic operators and consumers alike.

68. Moreover, excluding water services from the ambit of article 114 TFEU, would mean that there would be no legal basis to establish any guaranteed harmonised universal service across Member States based on uniform criteria (such as equality, universality, continuity,

[25] COM (2007)725 final.
[26] Part 2.1 of the Communication.

affordability, scrutiny by bodies independent of those operating the service), such as it has been the case with the EU postal service or EU telecommunications.

69. Nor would the same level of consumer protection be ensured across Member States.

70. The repeal of the New Public Procurement Directive adopted this year - in so far as it relates to water services - would entail the end of a, EU wide, uniform application of the implementation of the principles of transparency and non-discrimination, in the area of public tenders for provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of drinking water.

71. Third, if the ECI's intention is to extend the exclusion to current EU rules of competition and state aid law - which can also be considered to be rules of the internal market in the large sense[27], as they seek to protect distortion of competition in the internal market - that would lead to anti-competitive practices in the Member States that would considerably prejudice consumers.

72. It is recalled that the Treaty - article 106(2) TFEU - entrusts the Commission with the task of controlling state compensation for public service obligations performed by undertakings entrusted with a SGEI, and the Commission cannot simply derogate from a power conferred on it by the Treaty (nor can such a request be considered admissible with regard to article 11(4) of the Treaty).

73. Fourth, the singling out of water from other utilities such as electricity or gas is not justified and **would create a dangerous precedent which could lead to disintegration of the internal market.**

74. Alongside all the risks highlighted above that would ensue from a potential exclusion of water services from the internal market rules, it is reminded, here below, that the European Court has ruled that public contracts relating to water simply cannot derogate from the fundamental rules of the Treaty.

2.3 Public contracts relating to water supply and management may not derogate from the Treaty rules (whenever they present a cross-border interest)

75. It is recalled that according to settled case law, and by virtue of the principle of equal treatment and transparency, Member States' local authorities have to follow a system of competitive tendering whenever they intend to entrust the management of a service of general economic interest to a separate legal entity providing adequate publicity and ensuring the impartiality of the procurement procedure followed. [28] The only exemption foreseen from the obligation to put public service contracts out to competitive tendering is where the service provider is an entity controlled by the local authority which carries out the essential part of its activities with the controlling local authority.[29] The control criteria refer to strict conditions such as a control "similar" to that which the granting public authority exercises over its own departments. It must have a decisive influence over both strategic objectives and significant decisions of the service provider.

76. This very same case-law confirmed that the contracting entities from Member States have to comply with the rules and principles of the EU Treaty whenever they conclude public contracts falling in the scope of the Treaty even if they fall outside of the scope of the Public Procurement Directives.[30] These principles include the Internal Market rules: free movement

[27] Reference is made to paragraph 15 supra.
[28] Case C-324/98, *Telaustria*, Judgment of 7 December 2000.
[29] Case C-107/98, *Teckal*, Judgment of 18th November 1999.
[30] Case C-59/00, *Bent Mousten Vestergaard*, Judgment of 3rd December 2001.

of goods, the right of establishment, the freedom to provide services, non-discrimination and equal treatment, transparency, proportionality and mutual recognition.[31]

77. This means that even in the case of contracts relating to the supply of drinking water which would be below the thresholds foreseen by the Public Procurement Directive or in the case of concessions relating to water supply (or if the water services would suddenly be excluded from the Public Procurement Directive as requested by the ECI), the local authority must still abide by the internal market rules as well as the principles of non-discrimination, equal-treatment, transparency, proportionality and mutual recognition.

78. This principle applies whenever the contract to be awarded might ***potentially*** be of interest to an economic operator located in another Member State.

The criteria being very wide, in practice, most contracts relating to public services will thus have to abide by the standards derived from primary EU law.

79. In such cases, the internal market rules cannot be circumvented, according to the Court.

80. Therefore, in so far as the citizens' initiative purports to exclude the application of the Treaty to all types of public contracts related to water, it must be declared inadmissible.

2.4 The Commission may not disregard the fundamental rules of the Treaty

81. It derives clearly from Article 263 of the TFEU, that EU institutions must respect the fundamental provisions set out in the Treaty whenever they adopt binding legislation.

82. Case 81/77 (Société Les Commissionnaires Réunis)[32] provides an interesting illustration of this principle in the area of agriculture. In that particular case, the European Council adopted a Regulation authorising the imposition of charges having equivalent effect to customs duties on wine imports. Two wine merchants attacked the measure of the Council on the basis it was contrary to the rules on free movement of goods in so far as it derogated from the said principles.

83. The Court recalled that the abolition between Member States of customs duties and charges having equivalent effect constituted a "*fundamental principle of the common market applicable to all products and goods with the result that any possible exception must be clearly laid down in the Treaty.*"

84. The Court did not find any exception laid down in the Treaties. It therefore considered that the act of the Council was invalid.

85. A further interesting lesson to be learnt from that case is that the Court considered that '*any prejudice to the acquis communautaire in relation to the unity of the market risked opening the way to mechanisms which would lead to disintegration contrary to the objectives set out in article 2 of the Treaty (now article 3(2) TFEU).*'

86. This is very much transposable to the issue at stake in the present case.

87. More recently, the case law of the Court reaffirmed the duty of institutions to respect the fundamental principles of free movement of goods just like Member States.[33]

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[31] Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives.

[32] Joined cases 80/77 and 81/77, *Société Les Commissionnaires Réunis SARL and Receveur des Douanes in case 80/77 and SARL Les Fils de Henri Ramel and Receveur des Douanes in case 81/77*, Judgment of 20th April 1978.

[33] Joined cases C-154/04 and 155/04, *Alliance for Natural Health*, Judgment of 12 July 2005, paragraph 47.

88. In the light of the above, the Commission's marge de manoeuvre is very limited as it cannot act upon the citizens' initiative in any way that would expose it to an action for annulment for breach of the fundamental EU Treaty provisions.

3. WATER LIBERALISATION

89. The other request contained in the citizens' initiative purports to "*exclude water services from liberalisation*".

3.1 No precise and uniform legal definition of "liberalisation" in EU law

90. Though the term "liberalisation" is used frequently in EU legislation and Commission communications, it is never defined.

91. It must be conceded that even from an "economic" perspective, liberalisation is a "wide" concept. It can be taken to refer to the gradual opening of a certain market to competition, the free access to an economic activity by different economic agents, private or public, and the end of monopolies.

92. We asked ourselves the question whether the term "liberalisation" in the citizens' initiative must be construed as referring to the competitive bidding of utilities contracts or rather to the "open access" by all economic operators on parts of the "network", which is correlated with the end of monopolies.

93. We carried out a search of the term in existing EU legislation relating to services of general economic interest which have been "liberalised" (energy, telecommunications, rail services etc.) to try to infer its potential meaning in the EU law context.

94. While some EU legislation relating to public contracts contains the word "liberalisation" in its recitals albeit indirectly [34], it appears from information gathered on the Commission websites, that the most commonly used meaning of "liberalisation" refers to the Directives adopted by the Commission to end monopolies, offer open access to non-historical economic operators, offer choice of operators to consumers etc.

95. DG COMP for example[35] characterises the **"Liberalisation of the electricity and gas markets"** by stating the following :

> *During the 1990s when most of the national electricity and natural gas markets were still monopolised the European Union and the Member States decided to open these markets to competition gradually. In particular, the European Union decided to*
>
> - *Distinguish clearly between competitive parts of the industry (e.g. supply to customers) and non-competitive parts (e.g. operation of the networks);*
> - *Oblige the operators of the non-competitive parts of the industry (e.g. the networks and other infrastructure) to allow third parties to have access to the infrastructure;*
> - *Free up the supply side of the market (e.g. remove barriers preventing alternative suppliers from importing or producing energy);*

[34] Public Procurement Directive 2004/17/EC, recital 14 (in relation with the WTO Government Agreement on Public Procurement); Regulation EC n° 1370/2007 on public passenger transport services by rail and by road, recital 7 (This approach has been endorsed by the European Council under the Lisbon Process of 28 March 2000 which called on the Commission, the Council and the Member States, each in accordance with their respective powers, to 'speed up liberalisation in areas such as transport).

[35] http://ec.europa.eu/competition/sectors/energy/overview_en.html

- *Remove gradually any restrictions on customers from changing their supplier;*
- *Introduce independent regulators to monitor the sector.*

96. We believe that the citizens' initiative had in view this second meaning of the term "liberalisation", as public service contracts are already open to competition in the water sector.

3.2 The specificities of the water services "market"

97. As you explained to us, water utilities all over Europe are either private or public monopolies. Therefore, in comparison with the energy sector detailed above, they cannot be considered to have been "liberalised".

98. Although water supply might need to be modernised in order to improve quality and compliance with environmental standards in certain Member States, water services present certain special characteristics in comparison with the energy or telecom sector which imply that there is no pressing need to adopt similar rules to the ones adopted in those sectors.

99. First of all, water is not transported over long distances.

100. Secondly, although competition could be introduced on the supply side (treatment, production) if separated from transport, transporting water from several different suppliers would mean mixing water of potentially different quality. This raises issues of liability if substandard water enters the system, potentially "polluting" all the water. It also makes it difficult to compete on quality. In this way water cannot be compared to a uniform product like electricity where different suppliers can more easily use the same grid.

101. Furthermore, there is to date no political consensus at Member State level nor at EU level to move towards liberalisation in this sector (Parliament resolutions of 14th January 2004 and 31st March 2006 consider that liberalisation of water supply should not be carried out in view of the distinctive regional characteristics of the sector and local responsibility for provision of drinking water[36]).

102. It must be underlined that there are regular opportunities for companies to bid for water contracts, on the basis of the already existent EU Public Procurement Directive and the fundamental EU principles of non-discrimination, transparency and mutual recognition.

103. In the light of the above, while the Commission may reassure citizens that liberalisation is not foreseen in the near future, if it deems it appropriate, it cannot take a "legal act" that would exclude water services from liberalisation.

104. Indeed, the phrasing of article 11(4) of the Treaty states clearly that citizens can only invite the Commission to submit a proposal on matters where citizens consider that a **legal act of the Union is required for the purpose of implementing the Treaties**.

105. In the present case, what is requested is not a legal act for the purpose of implementing the Treaties, but rather a negative act of exclusion.[37]

106. Excluding water services from liberalisation cannot be construed as an act required for the purpose of implementing the Treaties and therefore cannot form the basis of a legal act.

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[36] P5_TA(2004)0018, European Parliament resolution on the Green Paper on services of general interest paragraphs 47-48.

[37] The same argument can effect be used as an additional argument against exclusion of water from the internal market rules.

107. If the Commission were to adopt such a legal commitment nevertheless, it would create a dangerous precedent. It would mean that any utility could be excluded from regulation.

3.3 The Commission cannot impose a certain type of organisation to the Member States

108. The Explanatory note annexed to the Citizens' Initiative can only be understood as an illustrative document, alongside the Initiative.

109. This note suggests to the Commission:

> *To promote Public-Public Partnerships*
>
> *and*
>
> *To enshrine into law that control over water and water resources must remain in public hands*

110. Although we understand that water resources are already under public control everywhere in the EU (we have not been informed of the contrary), such requests are presented by some as imposing an obligation on Member States to organise water services on the basis of "in-house" contracts awarded to publically-owned companies.

111. Such a request is incompatible with the EU Treaty provisions for the following reasons.

112. Protocol 26 expressly recognises the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest.

113. Article 345 TFEU implies the existence of a principle of neutrality as regards the system of property ownership in Member States.

> *The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership*

114. Moreover, EU law is based on the principle of non-discrimination.

115. On the basis of the above-mentioned EU provisions and principles, the Commission is therefore prohibited from interfering in Member States' internal organisation of water services.

116. In fact, Commissioner Barnier issued a statement on the occasion of the exclusion of water from the Concessions Directive[38] where he made it very clear that "*the decision on how to run a public service is in Member States' hands, and their local authorities. And it will remain that way*".

Benoit Le Bret

[38] Statement of June 21st 2013.