

Innovations for the Water Service in England and Wales after the Reform of 2014 and Profiles of Comparison with Other European Systems

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The privatisation of water services goes back to the Thatcher Government and the first legal reference was the Water Act 1989, replaced by the Water Industry Act 1991 amended several times until the Water Act 2014 was introduced, after a heated debate between the regulator Ofwat and the companies involved. The current system is based on entrusted service by licensing to private companies extractors for large retailers and smaller companies that supply water to the retail users; there are innovations as concerns competitive market, the control of Ofwat on licensing through new administrative procedures and on the quality of services and consumer protection (of large amounts of water, but not so for modest domestic consumers). This legal framework is compared with the experiences of other European countries that had privatised the management. In recent years, particularly in Germany and France, a new trend emerges: the return to public management by local authorities. In Spain and Italy, the mixed companies PPP including local authorities are still very diffused, while there are some private companies and public companies of local authorities.

Keywords: Privatisation; Water Service in England and Wales; Water Act 2014; Mixed Companies PPP.

I. Introduction

Within the UK the management of water services following the model of full privatisation is governed by an atypical and original legal scheme, not found at all in other European systems and geographically limited to England and Wales. In this case, the assignment of management from public authorities to private companies by the granting of *licences* (supply licences and administrative proceedings) and *agreements* (arrangements clarifying the conditions of service-delivery, terms, limits and obligations,

agreements of water companies to create infrastructure) was regulated by the government.¹

The direct consequence of this approach is the transition from a public monopoly to a private regional monopoly regulated to limit the power of the companies in their relationship with users; a notable change deriving from privatisation: government regulation is increased to protect consumers,² especially indirectly by rules imposed on companies for market access and the evaluation of performance and costs. As is widely known, the transfer from the public sector dates back to 1989 when the Thatcher Gov-

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1 See J Fenwick and K Harrop, 'La privatizzazione dei servizi pubblici locali nel Regno Unito. Privatizzazione e concorrenza' (2000) *Diritto dell'economia*, 53 ff. Before the privatization and the adoption of the Water Act 1973: B J Dangerfield, *The Structure and Management of the British Water Industry* (London: The

Institution of Water Engineers and Scientists 1979), 13; see for the legal framework until the Water Act 1989: Masons in Association with the Centre for Environmental Law, University of Southampton, *Water Law: a practical guide to the Water Act 1989* (Cambridge: Woodhead-Faulkner Limited 1990), 52. On the complex economic and political framework: C Graham, *Regulating Public Utilities: a Constitutional Approach* (Oxford: Hart Publishing 2000), 16 ff.

2 See P Cane, *Administrative Law* (Oxford: Oxford University Press 2011), 8-9, 25 ff.; H W R Wade and C F Forsyth (eds.), *Administrative Law* (Oxford: Oxford University Press 2014), 115-123.

ernment held that a new system based on private companies with greater commercial freedom would improve the efficiency of the service, achieve positive economic results and reduce the need for the government to cover the risk of deficits, with substantial benefits for users.

Until 1973 the structure of the water industry in England and Wales was fragmented, and mainly organised at the local level; the infrastructure of the water system, dating back to Victorian times, had to be updated with substantial investments which at that time could only have been sustained only by private companies. The 1973 *Water Act* reorganised the industry and established ten State-owned regional water and sewerage authorities responsible for water supply, sewerage and environmental services; and then twenty-nine privately owned water only companies which supplied water within these regional authorities.

During the 80s the quality of the service deteriorated and the whole industry suffered from a lack of investment because of budget limitations imposed by Conservative governments. Privatisation was expected to improve the overall efficiency, raise funds on the capital markets and stimulate quality investments to enhance the service.

II. The Management of Water Services in the UK and Their Privatisation During the Thatcher Governments

The Thatcher Governments of the 1980s drew up a reform for the water industry³ that favoured full pri-

vatation by abolishing the regional authorities, following the model of the other public services (such as the communications sector in 1984 and *British Gas*⁴ in 1986). Littlechild's White Paper⁵ of 1986 on the privatisation of the water industry suggested three possible forms of competition in the industry: comparative or yardstick competition, capital-market competition and product-market competition. The water and sewerage industry has the characteristics of a 'natural monopoly par excellence' and so, according to the White Paper, privatisation necessarily entailed the establishment of a permanent regulatory framework.

The privatisation covered water and sewerage services in England and Wales under the *Water Act 1989*, which transformed the ten regional authorities into private companies and the existing constraints on privately owned water companies for financing were removed and they were transformed into public limited liability companies; this resulted in the complete ending of public management, and the river authority was transferred to a new national entity (National Rivers Authority), later absorbed into the Environment Agency (*Environment Act 1995*). The regulation of 1989 was subject to changes and additions by the *Water Industry Act 1991*,⁶ as amended by the *Water Industry Act 1999*, the *Water Act 2003*⁷ and the *Water Act 2014*.

The solution adopted is not in line with the general trend of European countries that have largely retained the public management of water; Scotland saw the 1994 reform of the water service and the sector is managed by a public authority *Scottish Water* which still exercises its previous functions;⁸ the *Ir-*

3 On the reform of 1989 and amendments until the *Water Act 2003* see National Consumer Council, *In the Absence of Competition: Consumer View of Public Utilities Regulation* (London: Her Majesty's Stationery Office 1989), 142 ff.; M Armstrong, S Cowan and J Vickers, *Regulatory Reform, Economic Analysis and British Experience* (Cambridge: The MIT Press 1994), 335 ff.; Lord Mackay of Clashfern, 'Water and Waterways' (2009) *Halsbury's Laws of England, LexisNexis*, 106 ff.; D Woolley QC, J Pugh-Smith, R Langham and W Upton, *Environmental Law* (Oxford: Oxford University Press 2009), 404; M Collinson, *Procurement of Utilities: Law and Practise* (Oxford: Oxford University Press 2013), 29, 35.

4 See P Craig, *Administrative Law* (London: Sweet & Maxwell 2008), 346. For *British Gas*, private company since 1986 providing gas and electricity, see <<https://www.britishgas.co.uk>> Last accessed on 16 February 2016.

5 See the 1983 Littlechild Report which referred to telecommunications (<<http://www.publications.parliament.uk>> Last accessed on 16 February 2016) and the other Littlechild Report with its White Paper, published in February 1986: *Economic Regulation of*

Privatised Water Authorities; it deals with the introduction of 'price cap' regulation of the water industry; for more details see S Littlechild, 'Economic Regulation of Privatised Water Authorities and some Further Reflections' (1988) 4 *Oxford Review of Economic Policy* 2, 40 ff.; J Stern, *Regulation Initiative Working Paper No. 55, What the Littlechild Report actually said*, London Business School & Nera, August 2003. On reasons for privatisation, the White Paper (1986) and the *Water Act 1989* see J Vickers and G Yarrow, *Privatization: An Economic Analysis* (Cambridge: The MIT Press 1997), 387 ff.; D Parker, *The Official History of Privatization: The Formative Years 1970-1987 Vol I*, (London: Routledge 2009) and *Popular Capitalism, 1987-1997 Vol II* (London: Routledge 2012).

6 See <<http://www.legislation.gov.uk>> Last accessed on 16 February 2016. See the *Water Resources Act 1991* in relation to *water industry and abstraction licences* (Article 34 ff.).

7 See (n6).

8 See S Mirate, 'The Management of the Water Service in the United Kingdom' in V Parisio (ed.), *The Water Supply Service in*

ish Water Authority continues to operate in Northern Ireland.⁹

The 1991 reform was mainly justified by the need for regulation of the economic activity, given the existence of a natural monopoly created by the companies supplying essential services to citizens. Therefore, different regulatory authorities were established to control the water industry.¹⁰ Powers and duties of companies and suppliers and specific requirements of drinking-water quality were established.¹¹

The distinction between the activities of economic regulation and water policy (environmental regulation) prevailed; the Water Services Regulation Authority (also called Office of Water Services - Ofwat¹²) was established as a non-ministerial government department,¹³ 'independent' of the government and the water companies, but directly responsible to the British Parliament and the Welsh Assembly. Its primary task is to ensure that water companies exercise their functions in accordance with the regulatory scheme and fund their activities with a reasonable return on capital; additional tasks relate to the promotion of appropriate competition and the protection of consumer interests.¹⁴ Ofwat, which determines rates and grants licences, indicating the specific conditions of the services provided by the com-

panies, works closely with the Environmental Agency and the Drinking Water Inspectorate with the support of the Consumer Council (Consumer Council for Water). Through the licensing system, regulation covers supply levels, the relationship of the water companies with their customers, the objects of the service and conditions of maintenance. Ofwat also has the task of protecting the interests of consumers through incentives that may result from effective competition between operators to ensure the promotion of efficiency. This aim is still highly controversial because competition had not been achieved, which justified the legislative intervention of the *Water Act 2014*.

In the water market there are three parties involved: the company responsible for the region as 'original' suppliers (regional water wholesaler companies or incumbent operators: they are extractors of water which were already operating when the privatisation was adopted in 1989 or have been licensed since 1989, national retailers and customers. Unlike the other utilities, the water companies are vertically integrated and manage all levels of the supply chain (production, delivery, retail and reception, transport and disposal of waste water). The tasks of a water operator may be modified or terminated in the event of (even partial) replacement of the hold-

Europe: Austrian, British, Dutch, Finnish, German, Italian and Romanian Experiences (Milano: Giuffrè 2013), 87, 98. Scotland had not adopted the model of absolute privatisation, but a different solution to the English-Welsh system, in line with the expressed desire of the community to preserve the public management of water services. The Scottish Parliament decided on the reorganisation of services under the Water Industry Act 2002 (<<http://www.legislation.gov.uk>> Last accessed on 16 February 2016) for greater efficiency and limiting the intervention of local governments through the replacement of the three regional authorities with a single public company: *Scottish Water* which manages and provides water services, in a system that is decidedly monopolistic, responsible to the Scottish Parliament. The *Water Industry Commissioner* is the economic regulator, responsible to the Scottish Government to control the performance of Scottish Water, while water quality control and health protection falls under the competence of the *Drinking Water Quality Regulator*, <<http://www.dwqr.org.uk>> Last accessed on 16 February 2016. In 2005 the liberalisation of the water market was introduced under the *Water Services Scotland Act 2005*, which also replaced the Water Industry Commissioner with the Water Industry Commission for Scotland (<<http://www.watercommission.co.uk>> Last accessed on 16 February 2016) and introduced the separation of operational and retail businesses to allow competition.

9 See the *Water Services Act 2013*, <<http://www.irishstatutebook.ie>> Last accessed on 16 February 2016; the water regulator is CER (*Commission for Energy Regulation*), <<http://www.cer.ie>> Last accessed on 16 February 2016.

10 See *Mirate* (n5), 88-89.

11 On water control authorities: *Department for Environment, Food and Rural Affairs (Defra) and Drinking Water Inspectorate* (<<http://www.defra.gov.uk>> <<http://www.dwi.defra.gov.uk>> Last accessed on 16 February 2016). On the complex system for many regulators see W A Maloney and J Richardson, *Managing Policy Change in Britain: the Politics of Water* (Edinburgh: Edinburgh University Press 1995), 101 ff. For standards required by the Directive 2000/60/EC on water policy: E Louka, *Water Law & Policy, Governance without Frontiers* (Oxford: Oxford University Press 2008), 49.

12 See <<http://www.ofwat.gov.uk>> Last accessed on 16 February 2016. For details see *Maloney/Richardson* (n11), 101, 107; T Prosser, *The Regulatory Enterprise* (Oxford: Oxford University Press 2010), 176; especially 188-189.

13 See T Prosser, 'Regulation and Legitimacy', in J Jowell, D Olivier and C O'Cinneide (eds), *The Changing Constitution* (Oxford: Oxford University Press 2015), 332; the Author explains the distance of this agency from ministerial responsibility through the adoption of the status of "non-ministerial government department, a notion which seems curious given the centrality of ministerial responsibility in the UK constitution, but does seek to prevent accusations of political interference which could discredit the achievement of privatization".

14 See the *Water Industry Act 1999* changing the *Water Industry Act 1991*, providing new rights for consumers especially domestic ones, for example the prohibition for companies to disconnect the water service for non-payment of bills and regulatory power of the Secretary of State on special charges for some categories.

er, because another operator may be appointed for a particular area (or part of it), but an exclusive geographic monopoly and the management ownership of the network infrastructure¹⁵ is still given.

The vital context of the water market is, therefore, determined by the regional monopoly: ten private companies ('wholesale' suppliers) operate on the basis of licences issued in 1989 by the Secretary of State and Ofwat and a number of private water-only companies selling water purchased from the incumbent operator setting their own prices. This is the framework of competition between companies, but subject to regulation based firstly on limits fixed by the Secretary of State with annual increases and, secondly, according to the parameters set by Ofwat, on the basis of the 'price-cap' method, and adjustments (1994-2005 with different percentages) in relation to inflation in favour of companies in England and Wales. Furthermore about thirty existing water supply companies that had avoided nationalisation in 1973 were added and they are currently subject to the regulatory regime in force.¹⁶ The Competition and Service (Utilities) Act 1992 introduced service standards and assigned additional tasks to the economic regulator for the resolution of conflicts between operators, allowing more competition and changing the controls on mergers of companies.

The Water Act 2003 required companies to make a significant contribution to water conservation. They must develop and publish plans for water management and plans for drought in addition to the general duty of developing and maintaining an efficient water supply in their areas of competence and they have to ensure the implementation of the agreements. There were changes in the organisation of Ofwat and the exercise of its power to impose sanctions. The aim of protecting the rights of consumers was introduced through the direct promotion of competition for private suppliers and the provision of new duties of protection. However, in 2005 an independent agency, the Consumer Council for Water, was established to represent industrial and domestic consumers in England and Wales¹⁷. Moreover, the Water Act 2003 attempted to liberalise the market with the ability to grant licences to third parties offering access to the network to provide the service to users with a domestic water consumption over a certain amount. However, barriers to entry are still significant and there is difficulty in identifying the means of access to the networks with prevailing re-

gional monopolies and a vertically integrated system.

Therefore, the consequence of privatisation was the affirmation of regional monopolies according to the scheme of 'regulation by comparison without direct competition', introduced by the economic regulator that sets the price of water imposed on companies for a period of five years with the aim of providing business and a return on invested capital and at the same time reducing costs, thus affecting the operators through pricing actions.¹⁸ As a result of full privatisation in 1989, the public monopolies were transferred to private companies, but still within a monopoly system managed at regional level, thus related to a public reference that is an implicit limit to free competition between companies.¹⁹ The private sector is still responsible for the ownership of the infrastructure and the operation of the supply network, aspects that were previously the responsibility of the public sector. The legal framework has inevitably encouraged the presence of only a few operators and licence holders dating back to 1989 with many new restrictions on the entry of private companies. Competition in practice is very limited.

Ofwat, adopting tariff regulation (or defined incentive regulation), must not only prevent market abuse, but also stimulate competition. The companies are not in direct competition with each other but they must be compared by the regulator. The system allows comparison to imitate competitive pressures on prices and higher quality, as if every company is subject to the same efficiency incentives, operating in a real market. This mechanism was implemented by the imposition of a 'price-cap' (maximum limit, determined according to operational costs and investments) in relation to the local situation, informa-

15 For details see *Collinson* (n4), 29 ff.

16 See J Wackerbauer, 'Regulation and Privatisation of the Public Water Supply in England, France and Germany' (2007) 8 *Competition and Regulation in Network Industries* 2, 105.

17 See <<http://www.ccwater.org.uk>> Last accessed on 16 February 2016.

18 See *Mirate* (n5), 90; G Crowhurst, S Davidson and R Lee, 'Sewage as Waste: Implications for the UK Water Industry of the ECJ's Ruling on the Application of the Waste Framework Directive to Sewage' (2007) *European Environmental Law Review*, 272.

19 On the firm opposition of water companies, despite of the criticism from political parties for excessive profits see *Graham* (n1), 155.

tion gathered by the regulator and provided by the companies relating to the aim of efficiency every five years.²⁰ From this, a benchmark (or 'yard-stick') is created to determine the level of efficiency of the companies, in order to guarantee to customers those benefits that normally follow from price competition. Companies are therefore encouraged to improve their efficiency in order to obtain a reasonable profit in such conditions. Another strategic goal is the control of performance enhanced by the publication of rankings for each company based on efficiency, service levels, product quality and so on. These lists are a form of pressure between 'equal' companies and this leads to constant improvements in the performance of services.²¹

The system highlights the complex context of relations between public powers (government, Secretary of State, Ofwat), private water companies, regulators and consumers (several categories: industry for large quantities of water and private consumers, individually or in groups, for consumption levels). The Floods and Water Management Act 2010 conferred new responsibilities on the Environment Agency in terms of studying flood risks and remediation, as well as measures to help and reduce liabilities in the water sector and to obtain 'social' prices from companies. The primary duty is to protect the interests of consumers, wherever possible by promoting effective competition.

Essentially, for the water service the control system is specialised because it is based on different and distinct authorities ('independent' in the relations between themselves and less so from the government) to control the quality of drinking water, costs and disbursement conditions, but with an evi-

dent lack of coordinating instruments and cooperation.

Finally, a private body, Water UK,²² assumes the role of 'intermediary' between the government and water suppliers with the aim of protecting their interests, representing all the major organisations in England, Wales, Scotland and Northern Ireland; the aims relate to the promotion of high standards of quality of drinking water, eco-sustainability and a stable regulatory regime to attract investment.

III. The Licensing Regime before the Water Act 2014

Until the adoption of the *Water Act 2014*, private companies in England and Wales had been operating in the water market on the basis of licences issued by Ofwat after a specific application procedure, as the owners of the networks and exclusively for the task of delivering the supply and the collection of tariffs, with the duty to provide service for the licence over a period of twenty-five years; conditions were established by the act of entrustment and performance levels were set by the regulator. Legal rules provided that a private company holding a licence might access the network of a company already licensed to supply water and provide it to their customers.

The current system of licences is characterised by some essential distinctions between the types of actions needed to be carried out in the business of resource extraction and delivery depending on the source. In terms of legal acts, we can state their nature is definitely not contractual but public, since they derive from the intervention of public authorities issuing the licence and the duties of water operators according to the *Water Industry Act 1991*.²³

Operator licences, necessary for the extraction of water, were granted to a few companies, owners since 1989 of the privatised networks, and were awarded without any bidding process and ensured a monopoly control of the service. Initially, for the effectiveness of a licence a period of twenty-five years had been planned in the absence of a regulation of the legal situation at the time of expiry with respect to notice. The *Competition and Service (Utilities) Act 1992* provided notice of ten years for withdrawal and, in 2002, Ofwat changed the conditions of the licences and extended the notice period to twenty-five years, making licences perpetual, but again without any

20 See S Merret, *The Price of Water: Studies in Water Resource Economics and Management* (London: IWA Publishing 2007), 43 ff. In particular on 'price-cap' see M Waterson, 'Developing Utility Regulation in the UK' in D Helm (ed.), *British Utility Regulation. Principles, Experience and Reform*, (Oxford: Oxford Economic Research Associates Ltd. 1995), 131 ff.

21 For this opinion see M. Grenfell, 'Can Competition Law Supplant Utilities Regulation?' in C McCrudden (ed.), *Regulation and Deregulation, Policy and Practice in the Utilities and Financial Services Industries* (Oxford: Oxford University Press 1999), 226-227.

22 For details see <<http://www.water.org.uk>> Last accessed on 16 February 2016. The agency works with leading regulatory bodies: *Ofwat, Environment Agency, Drinking Water Inspectorate* and similar bodies operate in Scotland, Wales and Northern Ireland.

23 See D Foulkes, *Administrative Law* (London: Butterworth 1995), 461.

tendering procedure. A second category of licence, defined as new appointment and variations licences, is a common solution. The company owner can provide the service in a particular area for the change of an original licence (undertaker licences) with the same obligations. Ofwat grants this licence when the area is not served by an operator or a user consumes large amounts of water and intends to change operator or if there is the consent of the original operator.

Moreover water supply licences, which are relatively rare, allow a new operator to supply water using networks owned by an original undertaker (extractor of large quantities), and in this way the company provides water services to users of an area that falls within the competence of another licensed company. This category of licence is instead enhanced with the Water Act 2014 (Part 1, Water Industry, Chapter 1, Expansion of water supply licensing, Water Supply and Sewerage Licences, Types of Water Supply).

A third category retail licence allows the holder to use the water supply of a company to supply water to retail users through a retail authorisation (also provided in the Water Act 2014, Part 1, Chapter 1, substituting section 17A of the Water Industry Act 1991) or for the same utility to be allowed to buy water directly from a company; finally there is a 'combined' licence in the sense that the holder, in addition to the licence for the retail, has a prior authorisation that allows the introduction of water into the water supply of a particular company.

IV. A Comparative European Perspective: Recent Trends to Return to Public Solutions

There were some significant negative effects of privatisation and, in fact, the government has sought to remedy a situation of water stress (when a State guarantees less than 1,700 cubic meters of water per person per year), but it is not yet a scarcity of the resource (less than 1,000 cubic meters per person per year) because of the increase of consumption and inefficient management.²⁴ Furthermore, the debate has brought forward the reform proposal and encouraged legislative solutions in terms of management and the consideration of water as an economic resource and, at the same time, a human right.

The most critical aspects of the system relate to investments in infrastructure and networks and the pricing policy, the quality of services to consumers and the protection of the environment. There are also the profiles of the legal classification of water as a need and a fundamental right and whether it should be considered a 'common good'. Basic goals of the water sector, such as affordability, transparency, accountability, environmental protection and human health, have not been achieved by the full privatisation and regulation adopted in England and Wales, especially as compared to the current inefficiency of the private companies, because the State has intervened on several occasions of difficulty to meet the costs of emergency assistance or for reasons of health protection.

Ofwat also outlines the framework of the criteria of 'price-cap' within which private companies can operate for prices that have a five-year efficacy and performance, but during this period of five years, individual companies will have a margin to increase profits eventually to save on efficiency at the expense of customer satisfaction.²⁵ However, when the public authorities control water quality, imposing new constraints involving new costs for private companies, they may ask the regulator to change the 'price-cap' by referring to the main activities of the companies regardless of the policies pursued by subsidiaries.²⁶ Therefore, for these critical profiles, control and adjustment would be required with significant difficulties. Ofwat has attempted to implement this control through consultations with operators²⁷ who were often not favourable mainly because of their economic interests and the legal nature of water which is actually not clear from the point of view of being not only an economic resource, but a right and a common good.

24 See the analysis of the Water White Paper, *Water for Life*, p. 13 (<<http://www.defra.gov.uk>> Last accessed on 16 February 2016). For some proposals to reform the water market see <<http://www.gov.uk/government/publications/water-for-life-market-reform-proposal>> Last accessed on 16 February 2016.

25 See M Abou-Seada, C Cooper, F Ghaffari, R Jones, O Kyriacou and M Simpson, *The Economic Consequences of Accounting in the English and Welsh Water Industry: A non-shareholder perspective*, 9. Available at <<http://www.st-andrews.ac.uk>> Last accessed on 16 February 2016.

26 For a case of merger of companies see *Abou-Seada/Cooper/Ghaffari/Jones/Kyriacou/Simpson*, (n25), 20.

27 On these consultations and the recent evolution of regulation see R Baldwin, 'Regulatory Stability and the Challenges of Re-regulation' (2014) *Public Law*, 208 ff., especially 219.

So the regulatory framework before the reform of 2014 did not favour real competition among water companies, but only a very limited competitive market, unlike telecommunications where competition was growing and the gas and electricity sectors.²⁸

In addition, the particularity of the English-Welsh system and the adjustment is even more evident in comparison with other management models (municipal management, public company, private and mixed companies) adopted in some European countries, as in the cases of Germany, France and Spain, also in consideration of the recent trends of 're-municipalisation' of the water service. However, the reasons for privatisation often appear identical to the opposite solution: to support higher savings, efficiency and methods adopted by municipalities to consider the requests of citizens about transparency and control of costs. Therefore in recent years we have witnessed a return to the previous balance after a period of enthusiasm for privatisation, which demonstrated some of the problems of exclusively private management.

In short, there are three forms of redistricting: in the material sense as the public participation in the share capital of a water company or through the buying of properties by the municipality; in a functional sense when a public body performs an activity which was previously managed by a private company and, finally, in the formal sense when a company, governed by private law and wholly owned by the municipality, is regulated by public law as a public institution.

In Germany, water networks are public property and management is mainly municipal (e.g., in the case of Munich; in Düsseldorf the service is run by a former municipal company transformed into a joint stock company in which the public holds 45%) and in part carried out by private companies and mixed public and private companies;²⁹ from 1999, the financial problems of the Federal State of Berlin justified the privatisation of public services, but since 2007 a trend to 'return to the municipalities' has clearly begun.³⁰ In the French system there are different organisational models: the private solution (private or mixed companies) is prevalent, but in recent years in various municipalities (Paris, Lyon, Toulouse, Bordeaux and Lille) a new public trend has emerged as in Germany; municipalities have the choice between public management and private companies by a delegation of tasks, administrative concession and a contract awarded after a tender; infrastructure remains the property of the public body.³¹

In Spain, the management is entrusted to public companies, private companies and to mixed companies (*sociedades de economía mixta* for local services); water is not connected to a right, but is under public ownership under Article 132 of the Constitution: *dominio público* of the State. Article 149.1.22 provides the State with the authority to regulate public ownership of water and the *Ley de aguas* 1985 (reformed as TR 46/1999), determines the categories of basins, the uses of public interest and the definition of public good.³²

28 On the *Utilities Act 2000* (electricity and gas) and *Competition and Service (Utilities) 1992* on telecommunications, electricity, gas and water see Wade/Forsyth (n2), 122-123. On regulators see Prosser (n13), 315.

29 For further details see Wackerbauer (n15), 107 ff.; I Risini, 'Water Supply Services in Germany', in V. Parisio (eds), *The Water Supply Service in Europe*, 135 ff.; H Wollmann, G Marcou (eds), *The Provision of Public Services in Europe. Between State, Local Government and Market* (Cheltenham: Elgar 2010); J Brehme, *Privatisierung und Regulierung der öffentlichen Wasserversorgung* (Tübingen: Mohr Siebeck 2010).

30 See X Volmerange, 'The remunicipalisation des services publics en Allemagne', report for the Conference 'OLA Symposium in partnership with the CEMR, Simplification of Local Administration in Europe Levels and Dimensions', Bologna, 30-31 October 2014, <<http://www.ola-europe.com>> Last accessed on 16 February 2016.

31 For details see F Fraysse, 'La gestion du service de l'eau: perspective comparatiste' in V. Parisio (ed.) *Demanio idrico e gestione del servizio idrico in una prospettiva comparata: una riflessione a più voci* (Milan: Giuffrè 2011), 32 ff.; for the model of 'managed

liberalisation' see B Morgan, *Water on Tap: Rights and Regulation in the Transnational Governance of Urban Water Services* (Cambridge: Cambridge University Press 2011), 49 ff.; S Brammeret, *Les relations des collectivités territoriales avec les sociétés d'économie mixte locales* (Paris Cedex: Lextenso éditions 2012).

32 For details see A Embid Irujo, *Ciudadanos y Usuarios en la Gestión del Agua* (Navarra: Civitas 2008); F Sosa Wagner, *La gestión de los servicios públicos locales* (Navarra: Civitas 2008); M J Montoro Chiner, 'Water Service in Spain', in V. Parisio (ed.), *Demanio idrico e gestione del servizio idrico in una prospettiva comparata: una riflessione a più voci*, 65 ff.; D Santiago Iglesias, *Las sociedades de economía mixta como forma de gestión de los servicios públicos locales* (Madrid: Iustel 2010); A Simonati, 'Il regime pubblicistico delle acque: profili comparatistici' in G Santucci, A Simonati and F Cortese (eds), *L'acqua e il diritto* (Trento: Collana Università degli Studi di Trento 2011), 94 ff.; I J Compaired, *Los Cánones de Regulación y las Tarifas de Utilización del Agua* (Navarra: T. R. Aranzadi 2012); I Gallego, N Garrido and F. Delgado, 'The Implementation of the Water Framework Directive and Territorial Disputes in Spanish Law' (2013) 19 *European Public Law* 4, 675 ff.

V. The Reform Expressed in the Cave Review and Water White Paper: Innovations Contained in the Water Act 2014

In this context of critical issues the recent reform was introduced and the discussion of the background to the 2014 Act includes the Cave Review,³³ which was fundamental, as well as the Water White Paper; the Review was published in 2009 and deals with challenges and opportunities, retail market, industry structure and innovative capacity, and indicates recommendations to consider for the bill; in fact the aim of this report is “to recommend changes to the framework of the industry to deliver benefits to customers and the environment. The Review did not consider competition or innovation as being ends in themselves but a means of improving services for customers, particularly the most vulnerable, and improving environmental outcomes.”³⁴ Recommendations include, for example, unbundling the combined supply licence and creating a new upstream licence for companies wishing to introduce raw or treated water into an incumbent network or remove and treat wastewater or treat and dispose of sludge from it and “mandating the publication of water and wastewater supply costs at a water resource zone level and transport costs across their region based on a common methodology.”³⁵ The Report also suggested, for supplies to incumbents, replacing the costs principle with an *ex ante* access pricing system based on full economic costs; access prices would be determined by Ofwat at a water resource zone level using a common methodology with reference to guidance from Defra and Welsh ministers, and this framework should ensure that an efficient operator is able to cover their costs, tariffs are non-discriminatory and cost-reflective and an efficient entry is supported. For suppliers, retailers or large customers, the Review considered replacing the costs principle with an *ex ante* access pricing framework based on long-run avoidable costs; access prices for this sector would be also determined by Ofwat on the same grounds.

Other recommendations were on “the introduction of retail competition, removing retail only mergers from the special water merger regime altogether” and the role of Ofwat which is given “a statutory duty to develop and publish guidance on its approach to assessing the loss of comparator after consultation with stakeholders. This should set out the criteria, weight-

ings and methodology used in any future assessment.”³⁶

The Water White Paper³⁷ (Water for Life) of the Government submitted to the Parliament in December 2011 followed an inquiry in 2008 on the status of the water services and a debate to innovate, to make the market competitive with benefits for the environment and users for greater efficiency; there was a consultation phase (September 2009) involving the economic operators and public opinion in collaboration with the Welsh Assembly. The outlines of the reform expressed in the Water White Paper concern the management of infrastructure, improved techniques of extraction of the resource, protection of water, but the main goal was the introduction of effective competition in the market, that would promote the efficiency of the service, access, sustainability and economic advantages for the user (including a ‘social tariff’). Particularly innovative is the aim of the clear separation of infrastructure management from the provision of services (the so-called retail market), and the reform should allow users to buy retail services after being presented with a choice between several operators. There were different versions from the first Draft Water Bill (June 2012) almost up to the end of April 2014. The final text³⁸ was approved in May as the Water Act 2014: this paper will examine its essential content and how it differs to the Water Industry Act 1991. The legal framework covers only England and Wales. Scotland started collaborating as concerns a common policy and water market for retail services.

The Bill of 2013 contains some important changes to the text of 2012 and, in particular, with regard to the powers and duties of Ofwat and the more limited level of competition ‘upstream’ between suppliers of large quantities. The incumbent companies (holders of original licences) and investors should be satisfied with this reduction of competition and greater

33 The Cave Review - ‘Independent Review of Competition and Innovation in Water Markets: Final Report, Prof. Martin Cave’ April 2009, London. This document can be found in full on the website at <www.defra.gov.uk/environment/water/industry/cavereview> Last accessed on 16 February 2016.

34 See *The Report* (n33), 5.

35 See *The Report* (n33), 117.

36 See *The Report* (n33), 119.

37 *The Water White Paper* (n23).

38 *The Royal Assent* 14 May 2014; for the text of the *Water Act 2014* see <<http://www.parliament.uk>> Last accessed on 16 February 2016.

attention to long-term planning; in fact, the debate and the industry complaints about the reform process were very heated in 2012 and the chief executive of Ofwat resigned.³⁹

Two new categories of water supply licences have been introduced (and two types of licences for the sewage system) in England and Wales, relating to retail and wholesale; the important aspect is that in comparison with the previous rules, the wholesale licence does not include retail. The new system for the retail market depends on the amendment of the provisions. In October 2012, the regulator activated the procedure for consulting companies in order to obtain their consent to reform the regulation of licences as required by the Competition and Service (Utilities) Act 1992; the companies were anxious to retain the confidence of investors. However, they rejected the proposal, referring to the question of updating the 2014 prices⁴⁰ for the period 2015/2020.

Significantly the reform confers upon the economic regulator Ofwat's great powers relating to prices and licences; there are also rules to strengthen the powers of sanction, control and consumer protection, given the past position of weakness that prevented adequate consumer protection. The Authority grants a licence in accordance with the system of water supply licences to which an authorisation is added that gives the holder thereof the right to exercise one or more activities: a retail authorisation, a wholesale authorisation (only the production of 'wholesale' services), a restricted retail authorisation and a supplementary authorisation (Part 1, Chapter 1, Expansion of water supply licensing).

The Water Act 2014 amends and supplements the provisions of the Water Industry Act of 1991 as regards the duties of the regulator (Chapter 3, Article

22) such as, for example, the primary duty to ensure the resilience of long-term water-supply systems of suppliers with regard to environmental impact, population growth and changes in consumer behaviour and to ensure that suppliers take appropriate measures to address the long-term demand for water, the promotion of proper planning and long-term investments by the operators, and the adoption of measures to manage water resources in a sustainable way to improve efficiency and reduce demand in order to reduce the impact on resources.

Ofwat is the public body responsible for issuing licences to supply (Chapter 1, Article 17) and will adjust the tendering process, establishing the rules for applications, information and necessary documents, the fee to be paid depending on the conditions and specifying whether the application concerns the issue of the licence with a special authorisation for a certain activity, or with a combination of authorisations, or a variation of licences with these authorisations. In addition, the Authority may amend the terms of appointment and licence to a company supplying water when it believes it is necessary, but it must first consult the company appointed or the person who holds the licence, the Secretary of State, Ministers of Wales and other authorities (e.g., Drinking Water Inspectorate) which it considers useful to consult; changes cannot come into effect until after two years from the entry into force of the provision (Chapter 5, Article 55).

The Authority is involved in the application of standards of performance (Chapter 3, Article 29) in the delivery of water from the holders of licences in compliance with the permits to retail and to those with limitations; the Minister may impose requirements in relation to certain water supplies and setting conditions which must be fulfilled by the Minister or by Ofwat with the consent of or pursuant to a general authorisation of the Secretary of State. The legislation sets specific standards of performance with regard to the regular supply of water that, in the opinion of the Minister, must be achieved in a particular case.

New powers and duties were foreseen for Ofwat: the adoption of common codes of practice, the general duty to ensure that incumbents do not create undue discrimination in favour of their businesses in the retail sector and the necessary comparison between the companies. The role is, therefore, expanded, if we can consider that Ofwat, the economic reg-

39 After an 'industry revolt' that began in December 2012, Ms Regina Finn (chief executive) left the water regulator in November 2013 after six years at the helm and faced criticism from the industry after spearheading controversial proposals to change the way water utilities are regulated. Ofwat threatened to take companies that opposed the plans of the Competition Commission but backed down under the weight of opposition from the industry; companies warned the plans would increase risk for investors, leading to higher consumer bills. Ms Finn said: "We have laid the foundations for a new model of regulation in which water companies have to listen to their customers and deliver a step-change in their performance. These changes will lead to long lasting improvements in the sector." 15 May 2013 (<www.telegraph.co.uk> Last accessed on 16 February 2016).

40 On updating rates for the period 2015/2020 see <<http://www.ofwat.gov.uk>> Last accessed on 16 February 2016 1 in particular, the *Price review 2014* (<<http://www.water.org.uk>> Last accessed on 16 February 2016).

ulator of the sector, was initially set up in part to legitimise the current system. In fact, it has confirmed the monopoly of water, regulating the aims and standards of performance required. These objectives, standards and policies were outlined for the individual companies within the scope in which they can operate prices and generally manage their performance according to pre-defined criteria; probably the main instrument of legitimacy of the Ofwat system was the introduction of maximum rates of increase in the prices that companies can establish for a period of five years.

VI. Specific Acts and Administrative Proceedings

The Water Act 2014 contains a reform of the licences for the provision of water services and rules of how to easily change the selection of operator, but only non-domestic users can opt for a new supplier regardless of their level of consumption. Furthermore, in order to facilitate the entry of new operators into the market, it was determined that new operators are no longer obliged to provide a full customer service, changing the current regulations (Water Industry Act 1991): new subjects entering the market can only operate under the system of licences (water supply licensing) imposing retail services (retail services, provided directly to the user and connected to the bill, call centre services) and upstream services (not provided directly to the user: collection, transport and treatment of water).

In the previous system, the company entered the market and decided to enter the water network for which the incumbent held an original supplier licence and sold water retail. The Water Act 2003 introduced a new concept of licensee's water supply in the Water Industry Act 1991: the granting of the licence is a general condition for the extraction and use of water by legitimate companies that provide the service, with the exception of modest quantities to be used in emergency situations; licensees buy water (drawing rights) and/or acquire the ability to provide water to the system of economic wholesale networks and retail consumers. An incumbent undertaker also cannot take a licence for the retail supply of water in order to maintain the competitiveness that the separation from the licensee was intended to introduce; the licence must permit the licensee to buy water from the network

for retail and can also include additional authorisation to introduce water purchased independently in the fuel system of the 'historic' operator.

The new rules of 2014 are intended to modify this scheme to promote competition through a clearer separation between network and service management and to introduce new types of licences; thus the reform would facilitate the entry of new operators interested in entering the water market in the network of the incumbents (with the original licences), and providing only services that relate to the production process without any obligations regarding the provision of retail services. However, we must point out that competition on the retail side does not pertain to domestic customers. To achieve this particular (and limited) retail market, the Water Act 2014 provides for a system of authorisation for entry, which presupposes, however, the granting of a licence: the new regulation is expected in Part 1, Water Industry, Chapter 1. Water supply licences and sewerage licences (Licences for the supply of water and sewerage management), and, in particular, section 17A of the Water Industry Act 1991 is replaced in the content of the new rules. The regulatory Authority may issue a water supply licence to an individual subject to the use of the supply system of a water undertaker and the obtained licence may give the holder one or more authorisations or combination thereof: (a) retail authorisation services will be provided by different operators on the basis of a retail authorisation with the order to use the water system of a supplier to deliver water to the premises of the licence holder and the people associated with the holder and the consumer, excluding, however, dwellings; (b) a wholesale authorisation which allows entry to water networks and providing only those services related to the production process and not the retail and, therefore, to introduce water into the water supply of a supplier and there is a special system of supply in accordance with the authorisation of retail. There are combined solutions which are more restrictive than those that were provided in the previous version of the Water Bill:⁴¹ (c) a restricted retail authorisation for the supply of water to the

41 The first *Draft* (2012) contained two other kinds of authorisation but at the end they were not included: the *network infrastructure authorisation* (operators can use their own infrastructure connected to the network of the *incumbent*, overcoming a part of the production process) and the *retail infrastructure authorisation* in reinforcement of the infrastructure necessary for the provision of service to commercial and industrial users.

premises of the customers of the licensee; and (d) a restricted retail authorisation and a supplementary authorisation for non-domestic and for a particular supply system in accordance with a limited authorisation of the licensee to retail. Moreover 'Schedule 1' states that a retail authorisation and a wholesale authorisation relates to the water system whose area is wholly or mainly in England, while a restricted retail authorisation and a supplementary authorisation concern prevalently or totally an area of Wales.

The Authority may exercise a discretionary power granting a licence for water supply only in accordance with a general authorisation given by the Secretary of State who, in turn, must have consulted the Ministers of Wales; there is however no reference to tender proceedings to grant these acts. In addition, the person who owns the licence of water supply is the one who is currently holder and there are several limitations to the powers for the release of a wholesale authorisation; other public authorities must be consulted, such as the Secretary of State, the Chief Inspector of Drinking Water, and the Environment Agency. Before the release of a supplementary authorisation, in addition to the previous authorities, the Ministers of Wales and the Chief Inspector of Drinking Water for Wales must also be consulted. Finally, the water supply licence can be issued only to water undertakers and other legal entities if they are limited companies; these limits not apply if the licence provides a retail authorisation or a restricted retail authorisation or a combination of these two.

The new rules provide for licences and authorisations contained in the first acts as specification of the individual activities that holders can exercise; there are also agreements (contracts, agreements under private law) between undertakers for the construction of infrastructure and organisational arrangements between the most important undertakers for the supply of large amounts of water and the buying of water from other subjects (Chapter 2, Articles 8, 10, 12). In relation to these interventions there are various economic burdens on undertakers for connections or to provide a water network. They also provide for arrangements between public authorities in England, Wales and Scotland and the Water Services Regulation Authority of Scotland (Chapter 1, Article 7 amending the regulation of 2005) about the commitment of Scottish Ministers to adopt regulations by order for management applications for water supply licences, the circumstances and the conditions of

their release, and for a licensing system coordinated with the Water Industry Commission for Scotland (Chapter 1, Article 6 amending the Water Industry Act 1991) in order to create a larger market. Moreover, the Authority (Water Industry Commission) of Scotland may adopt one or more codes of procedural rules on the terms and conditions of the agreements concerning the organisational bulk in terms of water supply. Within a particular time-frame, the Authority must also adopt measures to determine whether a person (a company) respects these codes (Chapter 2, Article 8, Sec. 40B).

Above all, there are legal acts regulated by public law issued by public authorities (Secretary of State and Ofwat) whose content, as defined in law and by acts of the economic regulator, is to grant a right to extract water and to manage the service (before 1989 only a public authority had this responsibility) after obtaining the licence. The authorisation allows in addition the exercise of certain activities with terms and obligations; however, this confirms the prevalence of the rules of public law for water and its management although there are no references to a normative concept of public asset or public property. The Water Act 2014 regulates licences and authorisations. The Act aims to allow certain activities previously provided by public entities regarding the extraction and management of water, and this distinction is most evident in the functional and not formal aspect in terms of users at the time.

There are other innovations for the goals of establishing a flexible and competitive market: a) to increase the transfer of large amounts of water between the various companies which are licence holders; b) to remove the requirement, still in force, for new operators wishing to enter the market to negotiate the conditions of their entry with all the incumbent water companies (suppliers licensed from 1989); c) to reform the system of quantification of the rates set by the cost principle.

For the obligations of water suppliers, Schedule 2 (sect. 66A ff. to replace standards in the Water Act 1991) refers to the use of the water supply system of wholesale suppliers from the holders of retail authorisations or restricted retail authorisations to provide water in different ways that must be specified in the requests and that the undertaker must comply with, depending on the area of intervention and if it is wholly or mainly in England or Wales. Ofwat exerts tight control on the conditions laid down by law con-

sulting, as in other cases already analysed, the Secretary of State or the Welsh Ministers (section 66CA) and it is therefore implied that the exercise of discretion is often conditioned by the involvement of authorities of the executive power; these aspects do not support the nature of an effectively independent authority. In addition, the control also extends to the execution of the agreements between the licence holder and the water undertaker (sect. 66D).

Other provisions of the Water Act 2014 concern the regulation of aquatic environments (Chapter 5, Part 3, Article 61 ff.), for example the use of resources, soil drainage and flood risk management, a discipline that involves various public authorities (Environment Agency, Natural Resources Body for Wales) and insurances in case of floods (Chapter 5, Part 4).

VII. Conclusions: The (False) Myth of English-Welsh Privatisation and the Adequacy of the Model of The 'Public-Private-Partnership' Company

A study of the Water Act 2014 shows a vertical system of powers and consulting structures: Ofwat may issue a water supply licence only in accordance with a general authorisation given by the Secretary of State, who must first have consulted the Ministers of Wales. Before the granting of a water supply licence which gives a wholesale authorisation (only production services and not retail), Ofwat must consult the Secretary of State and the Director of the Inspectorate of Drinking Water. In addition, to issue a licence to supply water with a supplementary authorisation, the Authority should have consulted the Secretary of State, the Director of the Inspector of Drinking Water, the Welsh Ministers and the Director of the Drinking Water Inspectorate for Wales (Part 1, Chapter 1, 1).

Another key objective is the creation of a common market for water involving England, Scotland and Wales for retail services, since up to now companies could not provide the service legitimately in a different geographical area because of the consolidated regional monopoly; that limitation has been a source of litigation in the field of competition between water industries.⁴² These limitations on the market, which are certainly not the expression of a modern legal system of the EU, are clearly contrary to the

principle of freedom of establishment and to provide services under the TFEU (Article 26, internal market; 49-55, the right of establishment; 56-62, services) and do not consider the introduction of the new European network Warg as a unitary reference for the coordination of regulators at EU level.⁴³

For the goal of creating 'a single retail market' between England, Scotland and Wales, the Secretary of State has acquired the power to adopt rules to ensure that a licence application submitted to the Water Industry Commission for Scotland is regarded as an application submitted to Ofwat (with the same rules); the scheme in Scotland does not include 'wholesale' services which are provided by Scottish Water. The 'cross-border' rules (for a EU Member State!) will therefore apply only to 'retail' services and changes are to be introduced in the equivalent Scottish legislation.

There are substantial differences between the two models of England-Wales and Scotland, but there are also common elements such as the objective of an open internal market. The creation of the common market of retail services between England, Wales and

42 The case *Albion Water Ltd* as regards the introduction of effective competition between the companies in England and Wales against *Dwr Cymru Cyfyngedig*, the Welsh monopolist company and owner of the network, see the judgment of 28 March 2013 (*Competition Appeal Tribunal* [2013] All ER (D) 128 May; 31 July 2013, Case No: 1166/5/7/10, <<http://www.lexisnexis.com>> Last accessed on 16 February 2016). *Albion Water* finally managed to gain compensation after several disputes since 2004, under an act of commitment granted according to the *Water Act 1991* to replace *Dwr Cymru* as a supplier of water to *Shotton Paper*, a printer of newspapers in North Wales. *Albion* was not in a position to achieve a profitable margin between wholesale costs and retail prices due to the high costs charged by *Dwr Cymru* to supply through its network. Following the entry into force of the *Competition Act 1998* in 2000, *Albion* challenged *Ofwat* that the activity of *Dwr Cymru* was an abuse of a dominant position, contrary to the prohibition enshrined in Chapter II of the rules on competition. See also the earlier judgment of 14 and 15 January 2008 as well as of 22 May 2008 [2008] EWCA Civ 536; for a review of the case see M Collinson, *Procurement of Utilities: Law and Practise*, (Oxford: Oxford University Press 2013), 34 ff. For a case in which *Ofwat* allowed the market entry of another company to improve competition in a particular zone with regard to the supply of water to commercial activities, see the judgment of 10 December 2009 [2009] EWHC 3493 (Admin), CO/4719/2009. The dispute developed between *Ofwat*, which granted the license to *SSE Water*, and *Welsh Water Ltd* (wholesale supplier of water for much of Wales and a small part of England) that already had opposed to the entry of *SSE* by submitting observations to the regulator. The judgments are available in <<http://www.lexisnexis.com>> Last accessed on 16 February 2016.

43 *Warg* is the network of European regulators of eleven EU countries (Italy, Ireland, Malta, Bulgaria, Portugal, Scotland, Hungary, Latvia, Lithuania, Denmark, Spain); the primary task is the promotion and coordination at the European level and the establishing project was presented at the meeting in Milan at the *AEEGSI (Autorità per l'energia elettrica, il gas e il sistema idrico)* of 23 April 2014.

Scotland, is based on mutual recognition of licences; Ofwat and the Water Industry Commission Scotland coordinate the two systems consisting of licensing arrangements between England and Wales and Scotland. There are no agreements regarding means between England, Wales and Scotland, under Article 6 'Arrangements with the Water Industry Commission for Scotland' and Article 7 'Arrangements with the Water Services Regulation Authority' Water Act of 2014 to amend the Water Service Act 2005 in Scotland.

Ofwat may issue a licence for both systems in the light of the relevant legislation through a new procedure in favour of private companies that can operate in both orders with a redefinition of the tasks of economic regulators. However the aim of the so-called Anglo-Scottish retail market will be difficult to implement; a part of Scottish public opinion wants to maintain the necessary distinction between the two systems for the provision of water services, because a reform could affect the Scottish system which is considered more efficient than the English one.

The Water Act 2014 is aimed at the introduction of effective competition by facilitating the entry of new industries into the market⁴⁴ and changes of suppliers for commercial and industrial users, so competition is only being extended to the non-domestic sector. While home users are not directly considered in the Water White Paper, they would receive benefits indirectly from the market reform, with lowered costs and improved efficiency.

Privatisation has, therefore, led to a greater regulation of the sector, since the water industry operates an asset of natural monopoly. For the essential nature of the products and services these companies could not be subject to the sanctions provided in general for cases of market failure. Moreover, the Government needed to attract buyers for new business-

es and for the purpose of 'economic regulation'. So the introduction of regulation is the only solution to prevent the worst excesses of regional monopoly, but it does not create competition.

The final text contained in the Water Act 2014 confirmed that the initial objective is the reform of the water industry to make it more innovative and responsive to users' needs and to improve its ability to cope with natural hazards such as drought and flooding and to ensure a smooth transition to free trade in the long term. Additional purposes relate to increased choice in the retail market, while also providing a cross-border market with Scotland and facilities to market for new water managers and an improvement in the national water supply. The new system should also make it easier for companies to buy and sell water to each other and for the special scheme of mergers between water industries and new procedures for permits with three additional licensing schemes.

There are various critical issues: on the one hand, the evident difficulty of the State in reorganising and modernising the water sector since its privatisation in 1989, and on the other hand, the equally evident unsustainability of the current model according to the initial setting. The reform may still hide a misconception that competition by itself makes the retail market really efficient. There will be more operators for the same network, however fragmented, offering different services to the same customer, but with difficulty in controlling and identifying responsibilities. In addition there are no reliable data to justify that private management will be better and more efficient than public or mixed solutions. The British model also reflects its particular legal system, so it is not a solution that could be 'exportable' to other European contexts.

In the Water Act 2014 there are no references to selection procedures by public tenders for the granting of licences, although for other sectors (health services, see the Health and Social Care Act 2012) this technique is adopted for contracts for the supply of services.⁴⁵ While considering Utilities Contracts Regulations 2006 No. 6, it also includes among utilities "A company holding an appointment as a water undertaker or a sewerage undertaker under the Water Industry Act 1991" which provides or operates a fixed network, a service to the public in connection with the production, transport or distribution of drinking water.⁴⁶ Provisions on the adjudication of contracts for the related services are within the scope of the

44 On the legal limits as regards the entry for a new operator replacing an existing company, see the case: *Thames Water Utilities Limited and Ofwat under the Water Act 1991* that allows competition between water service providers by (restrictive) rules for the replacement of a supplier to another: *Royal Courts of Justice*, 25 January 2012 (Case No: C1/2010/2982). For a similar case see *Welsh Water Ltd* [2009] EWHC, Admin 3493, [7] (n36); *Thames Water Utilities Ltd v. London Hampstead Homes Ltd* [2003] Vol. 1, WLR 198, [36].

45 See T Prosser, *The Economic Constitution* (Oxford: Oxford University Press 2014), 213-214.

46 For water services in accordance with Article 2 of the Directive 2000/60/EC, see Case C-525/12 *Commission v Germany* [2014] ECLI-2202.

amended legislation for the implementation of Directive 2014/25/EU relating to the water sector.

So with the Water Act 2014, the allocation of licences does not follow the technique of public tender, but the single application is subject to discretionary criteria and a specific evaluation of the economic regulator, often after hearing the opinion of the Secretary of State and other public authorities. Private traders receive a water supply licence, which would be a concession (originally public) for activities, for a specified period and may buy water from other companies and licensees for wholesale supply. The public sector has transferred the responsibilities, risks and benefits for the supply of water to the private sector while maintaining control of the market through a very particular regulation on the basis of a functional privatisation. The regulator has fostered competition in the sector, even if the result did not prove satisfactory and the water market is still a monopoly. However, strong competition is a major driver of productivity and competitiveness, but the economic regulator – although necessary for markets where there is no effective competition – may also impose significant costs for companies and consumers.

In conclusion, the analysis of the English-Welsh experience expresses an atypical pattern (a real private industry in a context of regional monopoly) that is special, partly obsolete, hardly ‘exportable’ nor applicable in other organisational schemes, very much dependent on the order in which it was formulated. Moreover, it is not recognisable in other European experiences. There are also aspects of incompatibility with EU law in terms of the absence of rules about public tenders for granting licences.

In Europe the most frequent model is the corporate model based on a public-private partnership:⁴⁷ it appears to be the best legal structure for the reconciliation of the interests linked to services, given the demands of necessary implementation of the rules of EU law and the simultaneous presence of public (especially local governments) as a means for user requests; in some systems the participation of citizens has indicated a different choice for political management by measures of ‘direct democracy’ for instance in the extreme cases of the re-municipalisation of public utilities in some German cities as a result of organised committees that supported the referendum on the issues under debate. There is an obvious advantage in public management and public-private

partnerships: companies are responsible for their activities to local authorities and the local community, which, through the municipality, may demand to know the reasons for any failure.

The scheme of the corporate public-private partnership has a significant reach in Italy and the characteristics of the most important companies of local public services⁴⁸ seem to describe an ‘Italian model’ that is expressed in competition in a market following strict regulations and tendering procedures under domestic law and EU law; the close connection with the territory derives both from local business being involved in various services offered and the presence of public shareholders (especially local authorities) in the capital of companies of significant economic importance, given the investments and activities involved.

The latest industrial policy is aimed not only at national consolidation, but also the possibility of extension into nearby economic and territorial areas (or even distant ones) to the original sites through additional mergers solicited by the legislation⁴⁹ or the incorporation of medium-sized enterprises in ‘regional companies’. This evolution is being implemented since there are still situations with fragmented services companies of limited size (e.g., in the North-East of Italy). So the strategic decisions regarding the growth during the last decade have brought local utility companies into the model of ‘regional companies’ (widespread in Germany) and in some cases for other regions with various projections abroad, particularly in relation to electricity, water, gas and the use of energy derived from waste, according to legal schemes which are quite different from those required by the regulation of the differentiated water service in the UK.

47 See Ch H Bovis, ‘Future Directions in Public Service Partnerships in the EU’ (2013) *European Business Law Review* 1, 1 ff.

48 See *A2A spa* (<<http://www.a2a.eu>> Last accessed on 16 February 2016), *Acea spa* (<<http://www.acea.it>> Last accessed on 16 February 2016), *Hera spa* (<<http://www.gruppohera.it>> Last accessed on 16 February 2016), *Iren spa* (<<http://www.grupporena.it>> Last accessed on 16 February 2016).

49 Law by Decree no. 133 of September 12, 2014, converted into Law no. 164 of November 11, 2014, predicted a revival of privatisation for investor companies by local authorities, particularly in the sectors of local transport, environmental services (waste) and water; Law no. 124 of 7 August 2015 on the reorganisation of public administrations and public services; drafts of legislative decree on local public services (Act of the Government n. 308, July 2016) and on companies with a public participation (Act of the Government n. 297, April 2016), <<http://www.astrid-online.it>> Last accessed on 10 July 2016.

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