ISSN 2384-9169
Fascicolo n. 2 - 2020
rivista.eurojus.it

The Liberalization of Water Services under EU Law and the Human Right to Water

DI ROBERTA GRECO*

Summary: 1. Introduction. – 2. Services of General Economic Interest ("SGEIs"). – 3. Water Service as an SGEI. – 4. Harmonizing the Internal Market with the human right to water. – 4.1. Harmonization by means of conflict prevention. – 4.1.1. Exceptions to rules on competition. – 4.1.2. Exceptions to the internal market freedoms. – 4.1.3. Exceptions to public procurement rules. – 4.2. Harmonization by means of interpretation of relevant EU law provisions. – 4.2.1. The absence of coordination between the different sectors of EU law concerning the pricing of water services. – 4.2.2. The current interpretation of the principle of recovery of the costs of water services pursuant to Article 9 of the Water Framework Directive. – 4.2.3. The suggested interpretation of Article 9 WFD. – 4.3. Establishing systemic relationships of priority. – 5. The human right to water and the revision of the Drinking Water Directive. – 6. Conclusion.

1. At the European level, water scarcity is perceived as a less urgent concern than on other continents, still it is an increasingly widespread phenomenon[1]. An estimated 120 million people do not have access to safe drinking water or adequate sanitation[2], and, as of 2015, 14 million people did not use a basic drinking-water source[3]. In eastern Europe more than half of rural

* Adjunct Professor of International Law, LUMSA University of Rome, Associate at Studio legale internazionale Saccucci&Partners. The author would like to thank prof. Roberto Baratta for his suggestion and comments.

[1] Water scarcity "affects at least 11% of the European population and 17% of the EU territory". European Commission, *Water Scarcity & Droughts in the European Union*, https://ec.europa.eu/environment/water/quantity/scarcity_en.htm.

[2] European Environment Agency, *Europe's environment. An Assessment of Assessments. Water and related ecosystems*, 3 June 2016, http://www.eea.europa.eu/publications/europes-environment-aoa/chapter2.xhtml.

[3] WHO Regional Office for Europe, *Water and sanitation are still a luxury for millions of Europeans*, 14 April 2015, http://www.euro.who.int/en/health-topics/environment-and-health/water-and-sanitation/water-and-sanitation.

dwellers are still not connected to piped drinking-water on site[4]. Moreover, figures revealed in a study of the OECD show problems of affordability of water services for the poorest households[5].

The EU legal framework regarding the water sector does not directly address problems related to the availability and affordability of water. Rather, it focuses on quality standards for water intended for human consumption and on the environmental impact of water pollution[6]. While several directives refer to water[7], including the Water Framework Directive ("WFD")[8], no secondary EU law establishes a duty to provide an adequate, continuous and accessible supply of water in accordance with the main elements of the human right to water[9]. In brief, while the EU legislator has defined quality standards for drinking water, Member States are free to regulate regarding the affordability and availability of water for human consumption.

As for the affordability of water services, the setting of water prices is left to the discretion of Member States, which are only required to follow certain core principles, notably the cost recovery principle. By the same token, the decision on the ownership of water services is entirely in the purview of Member States. Article 345 of the TFEU[10] establishes that rules governing the system of property ownership in Member States should not be prejudiced by the

---

[4] *Ibid*.

[5] In the lowest decile of the OECD population, the cost for water and sanitation services may exceed three-five per cent of households' income, that is the percentage over which the cost of water is considered capable of affecting people's capacity to acquire other essential goods and services, including food, housing, health services and education. OECD Studies on water, *Pricing Water Resources and Water and Sanitation Services*, London, 2010, p. 75, www.oecd.org.

[6] V. DELOGE, *Road to 2015: The European Union and the Realisation of the Human Right to Water*, in *NZJEL*, 2013, p. 10 ff.

[7] Notably: the Urban Waste Water Directive, which aims to protect the environment from the adverse effects of urban waste water discharges as well as industrial discharges, Council Directive 91/271/EEC of 21 May 1991 concerning urban waste water treatment, OJ L135, 30.05.1991, p. 40-52; Commission Directive 98/15/EC of 27 February 1998 amending Council Directive 91/271/EEC with respect to certain requirements established in Annex I thereof, OJ L 67, 7.03.1998, pp. 29-30; the Drinking Water Directive addressing water quality standard for human consumption, Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption, OJ L 330, 5.12.1998, p. 32-54. On 1 February 2018, the European Commission adopted a proposal for a revised drinking water directive aimed at improving the quality of drinking water. European Commission, Proposal for a Directive of the European Parliament and of the Council on the quality of water intended for human consumption (recast), COM(2017) 753 final, 2017/0332(COD), 1.2.2018; the Groundwater Directive, establishing measures in order to prevent and control groundwater pollution, Directive 2006/118/EC of the European Parliament and of the Council of 12 December 2006 on the protection of groundwater against pollution and deterioration, OJ L 372, 27.12.2006, p. 19.

[8] 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, OJ L 327, 22.12.2000, p. 1, as amended by Decision 2455/201/EC of the European Parliament and of the Council of 20 November 2011, OJ L 331, 15.12.2011, p. 1 ("WFD"); Directive 2008/32/CE of the European Parliament and of the Council, 11 March 2008, OJ L 81, 20.03.2008, p. 60; Directive 2008/105/EC of the European Parliament and the Council of 16 December 2008, OJ L 384, 24.12.2008, p. 84; Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009, OJ L 140, 5.06.2009, p. 114; Directive 2013/39/EU of the European Parliament and of the Council of 12 August 2013, OJ L 226, 24.08.2013, p. 1. See G. REICHERT, *The European Community's Water Framework Directive: A Regional Approach to the Protection and Management of Transboundary Freshwater Resources?*, in *Water Resources and International Law*, 2005.

[9] H.F.M.W. VAN RIJSWICK, *Searching for the Right to Water in the Legislation and Case Law of the European Union*, in H. SMETS (ed.), *Le Droit à l'Eau Potable et à l'Assainissement en Europe. Implementing the Right to Drinking Water and Sanitation in 17 European Countries*, Paris, 2012, p. 112.

[10] Consolidated version of the TFEU, OJ C 326, 26.10.2012, p. 1.

Treaties, meaning that the EU is neutral as to this choice[11]. Accordingly, Member States are free to decide whether to privatize water services[12], to provide them directly or to do so through in-house entities.

When local authorities do not provide the services themselves, the services market can be liberalized. Several network industries providing public services – such as energy[13], gas[14], postal services[15], transport[16], electricity[17], public service broadcasting[18] and waste[19] – have been liberalized and the EU rules regulating the respective markets have been harmonized, thus granting the consumers a number of guarantees[20]. The public services mentioned above have been qualified as services of general economic interest ("SGEIs"), a notion which will be discussed in detail in the following section. Suffice here to say that SGEIs are meant to pursue public policy objectives and that the above list of major network industries considered SGEIs may be extended to «any other economic activity subject to public service obligations»[21], including the water industry.

However, secondary EU law has not yet provided for the liberalization and harmonization of rules on water services, which continue to be regulated by Member States. Accordingly, Member States are free to decide whether to qualify water service as an SGEI, with the further consequence that the water service users may not enjoy equivalent guarantees across different EU Member States.

---

[11] B. AKKERMANS, E. RAMAEKERS, *Article 345 TFUE (ex Article 295 EC), Its Meanings and Interpretations*, in *ELJ*, 2010, p. 305. According to the authors, the provision is related to the principle of neutrality in respect to the property regime of public or private enterprises.

[12] According to an OECD study, in Western Europe almost 45 per cent of people are supplied by a private operator and in France, Czech Republic, Spain, Italy and Greece private provisions of water services is rather widespread. E. PÉRARD, *Private Sector Participation and Regulatory Reform in Water Supply: The Southern Mediterranean Experience*, OECD Development Centre Working Papers, no. 265, 2008, p. 19. Only England and Wales have fully divested the water services sector. Water Act 1989, c. 15. On the water services regime regulated in Scotland see S. HENDRY, *The Human Right to Water in Scotland*, in H. SMETS (ed.), *Le droit a l'Eau Potable et à l'Assainissement en Europe. Implementing the Right to Water and Sanitation in 17 European Countries*, cit. In addition to the United Kingdom, the sole other State to have completely privatized water services is Chile.

[13] Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal energy market, OJ L 211, 14.08.2009, p. 55; Regulation 714/2009/CE of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation No. 1228/2003, OJ L 211 of 14.08.2009, p. 15.

[14] Directive 2009/73/EC of the European Parliament and the Council of 13 July 2009 concerning common rules for the internal market in natural gas repealing Directive 2003/55/EC, OJ L 211, 14.08.2009, p. 94; Regulation 714/2009/EC, OJ L 211, 14.08.2009, p. 36.

[15] Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ L 15, 21.01.1998, p. 14, as amended by Directives 2002/39/EC, OJ L 176, 5.07.2002, p. 21 and 2008/06/EC of 20 February 2008, OJ L 52, 27 27.02.2008, p. 3.

[16] Regulation 1370/2007/EC of the European Parliament and the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos. 1191/69 and 1107/70.

[17] Directive 2009/72/EC, OJ L 211, 14.08.2009, p. 55.

[18] General Court, judgment of 1 July 2010, joined cases T-568/08 and T-573/08, *M6 and TF1 v. Commission*, Reports II-3397.

[19] Directive 2008/98/CE on waste and repealing certain Directives, 19 November 2008, OJ L 312, 22.11.2008, p. 3.

[20] L. HANCHER, P. LAROUCHE, *The Coming of Age of EU Regulation of Network Industries and Services of General Economic Interest*, in P. CRAIG, G. DE BÚRCA (eds.), *The Evolution of EU Law*, Oxford, 2011, p. 743.

[21] European Commission, *Green Paper on Services of General Interest*, COM(2003) 270 final, 21.05.2003, para. 17.

In light of the above considerations, this article aims to assess whether current EU policy concerning the water industry sector is apt to promote the fulfilment of the right to water. It is submitted that, although the right to water is not enshrined in the Charter of Fundamental Rights of the European Union, a critical overlap exists between the core tenets of the right to water and the notion of SGEI. In this connection, the article will consider the opportunity of liberalizing the water service sector within the EU, provided that it is categorized as an SGEI[22].

In order to carry out an analysis of the EU rules connected with the implementation of the right to water, this article proceeds as follows. Section two and three provide, respectively, an overview of the notion of SGEI and of the possible consequences of qualifying water service as SGEI. Based on the premise that the pursuit of SGEI status in the water service sector could promote the fulfillment of the basic requirements of the right to water, section four assesses the current and prospective level of harmonization between the EU legal framework applicable to water services and the human right to water. Finally, section five draws the conclusion.

2. In brief, service of general interest ("SGI") are «services that public authorities of the Member States classify as being of general interest and, therefore, subject to specific public service obligations (PSO)»[23]. They may be divided into services of general *economic* interest ("SGEIs") [24] and *non-economic* services of general interest ("NSGIs") [25]. Drawing the distinction between the two is crucial as non-economic services «are not subject to specific EU legislation and are not covered by the internal market and competition rules of the Treaty»[26].

---

[22] This paper does not deal with the risk of foreign direct investments (in particular, from foreign investors controlled by the government of a third country) into the UE critical infrastructures, such as water, likely to affect security or public order. In this connection see Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ L 79I , 21.3.2019, p. 1–14. Likewise, this paper does not address the measures that have been adopted at the national level to protect the general interest in strategic industries, including water. Just to give an example, in Italy, public authorities have been guaranteed the power to intervene in market transactions concerning strategic companies – the so-called golden power – including companies operating in the water industry (see art. 15, decree-law 8 April 2020, No 23; art. 4 *bis*, para. 3, decree-law 21 September 2019, n. 105, converted, with amendments, by law 18 November 2019, No 133; decree-law 15 March 2012, n. 21, converted, with amendments, by law 11 May 2012, No 56). An in-depth analysis of these issues is left to further studies.

[23] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions – A Quality Framework for Services of General Interest in Europe, COM(2011) 900 final, 20.12.2011, p. 3. K. LENAERTS, *Defining the Concept of 'Services of General Interest' in Light of the 'Checks and Balances' Set out in the EU Treaties*, in *Jurisprudence*, 2012, p. 1247 ff.

[24] See U. NEERGAARD, *Services of General Economic Interest: The Nature of the Beast*, in M. KRAJEWSKI, U. NEERGAARD, J.W. VAN DE GRONDEN (eds.), *The Changing Legal Framework for Services of General Interest in Europe. Between Competition and Solidarity*, The Hague, 2009; S. WERNICKE, *Services of General Economic Interest in European Law: Solidarity Embedded in the Economic Constitution*, in J.W. VAN DE GRONDEN (ed.), *EU and WTO Law on Services. Limits to the Realization of General Interest Policies within the Services Markets?*, Alphen aan der Rijn, 2009; U. NEERGAARD, *Services of General Economic Interest under EU Law Constraints*, in D. SCHIEK, U. LIEBERT, H. SCHNEIDER (eds), *European Economic and Social Constitutionalism after the Treaty of Lisbon*, Cambridge, 2011.

[25] NSGI refers to "*services that public authorities of the Member States classify as being of general interest and, therefore, subject to specific public service obligations (PSO)*". See Communication COM(2011) 900 final, p. 3. See also U. NEERGAARD, *The Concept of SSGI and the Asymmetries Between Free Movement and Competition Law*, in U. NEERGAARD, E. SZYSZCZAK, J.W. VAN DE GRONDEN, M. KRAJEWSKI (eds.), *Social Services of General Interest in the EU*, The Hague, 2013, p. 207 ff.

[26] Communication from the Commission COM(2011) 900 final, p. 3. K. LENAERTS , *Defining the Concept of 'Services of General Interest' in Light of the 'Checks and Balances' Set out in the EU Treaties*, cit., p. 1250.

The notion of SGEI is not defined by the Treaties or by secondary legislation[27]. For the Commission, SGEIs are:

«economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of quality, safety, affordability, equal treatment or universal access) by the market without public intervention. The PSO is imposed on the provider by way of an entrustment and on the basis of a general interest criterion which ensures that the service is provided under conditions allowing it to fulfil its mission»[28].

SGEIs are different from other economic activities offering services in a given market[29] in as much as they are subject to public service obligations ("PSOs") considered necessary to satisfy general interest objectives. Public service obligations are specific requirements imposed by public authorities on the providers entrusted with an SGEI. In particular, they include "universal service obligation", namely a set of general requirements ensuring that certain services considered as essential are made available «to all consumers and users in a Member State, regardless of their geographical location, at a specified quality and, taking account of specific national circumstances, at an affordable price»[30].

Existing EU laws on SGEIs contain a number of PSOs aimed to promote social, territorial and economic cohesion within Europe[31], in line with the principle of solidarity[32]. The legal framework concerning SGEIs can be briefly described as follows[33].

Article 14 TFEU lists SGEIs among the shared values of the European Union. It establishes that competences related to SGEIs not expressly conferred to the EU belong to Member States. The European Parliament and the Council, acting by means of regulations, shall establish principles and set the conditions which enable SGEIs to fulfil their mission without prejudice to the competence of Member States to provide, commission and fund these services. Different views have been expressed as to whether Article 14 TFEU may be considered as the

---

[27] See A. ARENA, *Accesso ai Servizi d'Interesse Economico Generale*, in R. MASTROIANNI, O. POLLICINO, S. ALLEGREZZA, F. PAPPALARDO, O. RAZZOLINI (eds.), *Carta dei diritti fondamentali dell'Unione Europea*, Milan, 2017, p. 679 ff.; G. SKOVGAARD ØLYKKE, P. MØLLGAARD, *What is a service of general economic interest?*, in *European Journal of Law and Economics*, 2016, p. 205 ff; C. WEHLANDER, *Services of General Economic Interest as a Constitutional Concept of EU Law*, The Hague, 2016, pp. 171-206; M.T. KARAYIGIT, *The Notion of Services of General Economic Interest Revisited*, in *EPL*, 2009, p. 575 ff.

[28] Communication from the Commission COM(2011) 900 final, p. 3. See also *Green Paper on Services of General Interest*, para. 17; European Commission, *Guide on the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest*, SEC(2010) 1545 final, 7.12.2010, pp. 15-16.

[29] Court of Justice, judgment of 16 June 1987, case C-118/85, *Commission v. Italy*, ECLI:EU:C:1987:283, para.7; judgment of 18 June 1998, case C-35/96, *Commission v. Italy*, ECLI:EU:C:1998:303, para. 36; judgment of 12 September 2000, joined cases C-180/98 to C-184/98, *Pavlov and Others,* ECLI:EU:C:2000:428, para. 75.

[30] Communication COM(2011) 900 final, p. 4. See also *Green Paper on Services of General Interest,* para. 50 and Annex I, para. 2.

[31] W. SAUTER, *Services of general economic interest and universal service in EU law*, in *European Law Review,* 2008, p. 175 ff..

[32] M. ROSS, *The Value of Solidarity in European Public Services Law*, in M. KRAJEWSKI, U. NEERGAARD, J.W. VAN DE GRONDEN (eds.), *The Changing Legal Framework for Services of General Interest in Europe. Between Competition and Solidarity*, cit.; N. BOEGER, *Solidarity and EC Competition Law*, in *E.L.Rev.*, 2007, p. 319 ff.

[33] For an in-depth examination of the discipline of SGEIs see D. GALLO, *I Servizi di Interesse Economico Generale – Stato, Mercato e Welfare nel Diritto dell'Unione Europea*, Milan, 2010.

legal basis conferring on EU institutions the normative power to adopt legally binding acts on SGEIs[34].

Protocol No. 26 on SGEIs specifies that the shared values of the Union in respect of SGEIs include «the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest» and «a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights»[35].

Article 36 of the EU Charter establishes a negative obligation upon the Union to recognize Member States' freedom to define SGEIs in the context of a policy aimed at promoting social and territorial cohesion within the European Union[36].

These acts are complemented by a number of Communications of the European Commission[37].

The above mentioned set of rules on SGEIs have no direct effect[38]. There is no horizontal regulation[39] conferring an individual right to access SGEIs enforceable by domestic courts. Member States are free to define which services they consider to be SGEIs[40] and what PSOs must be guaranteed. They hold a due diligence obligation to promote access to such services,

---

[34] In favor, see ivi, p. 448; M. MONTI, *A New Strategy for the Single Market at the service of Europe's Economy and Society. Report to the President of the European Commission José Manuel Barros*, 9 May 2010, p. 74. *Contra*, A. ARENA, *Accesso ai Servizi d'Interesse Economico Generale*, cit., p. 686 ff.

[35] Consolidated version of the TEU, Protocol No. 26 on services of general interest, art. 1, OJ C 83, 30.03.2010, p. 308.

[36] EU Charter, OJ 326, 26.10.2012, p. 391 ff. J. ZEMÁNEK, *Access to Services of General Economic Interest Under Article 36 of the Charter of Fundamental Rights EU and the National Law*, in R. ARNOLD (ed.), *The Convergence of the Fundamental Rights Protection in Europe*, Dordrecht, 2016, p. 199 ff.; A. ARENA, *Accesso ai Servizi d'Interesse Economico Generale*, cit., p. 687. *Contra*, M. MARESCA, *L'Accesso ai Servizi di Interesse Generale, De-Regolazione e Ri-Regolazione del Mercato e Ruolo Degli Users' Rights*, in *DUE*, 2005, p. 447. The author refers to an individual right conferred by Art. 14 TFEU, read in conjunction with Art. 36 of the EU Charter; D. GALLO, *I servizi di Interesse Economico Generale – Stato, Mercato e Welfare nel Diritto dell'Unione Europea*, cit., p. 740. The scholar suggests that art. 36 of the EU Charter, if read in conjunction with Art. 14 TFEU, contributes to creating a positive obligation upon Member states to provide SIEGs; Commission of the European Communities, Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions, COM (2007) 725, 20.11.2007, p. 10.

[37] Commission, Services of General Interest in Europe, OJ C 281 p. 3-12, 26.09.1996; Communication from the Commission on Services of General Interest in Europe, OJ C 17, p. 4-23; Commission of the European Communities, Report to the Laeken European Council, Services of General Interest, COM(2001) 598 final, 17.10.2001; *Green Paper on Services of General Interest*; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 12 May 2004 entitled *White Paper on Services of General Interest*, COM(2004) 374 final; Communication from the Commission COM(2007) 725.

[38] With specific regard to art. 14 TFEU, Gallo concludes that the provision cannot produce direct effect as it leaves Member States wide discretion in determining SIEGs; thus, the content of the ensuing rights and duties is vague. D. GALLO, *I servizi di Interesse Economico Generale - Stato, Mercato e Welfare nel Diritto dell'Unione Europea*, cit., pp. 808-809. Some also believe that they have only a programmatic nature, H.F.M.W. VAN RIJSWICK, *Searching for the Human Right to Water in the Legislation and Case Law of The European Union*, cit., p. 119 *et seq*.

[39] See S. RODRIGUES, *Towards a General EC Framework Instrument Related to SGEI? Political Considerations and Legal Constraints*, in M. KRAJEWSKI, U. NEERGAARD, J.W. VAN DE GRONDEN (eds), *The Changing Legal Framework for Services of General Interest in Europe. Between Competition and Solidarity*, cit.

[40] Court of Justice, judgment of 20 April 2010, case C-265/08, *Federutility and Others*, ECLI:EU:C:2010:205, para. 29; 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, art. 1(3).

but in case of failure to do so, consumers have no appropriate redress or compensation mechanism at their disposal[41].

Member States' discretion in this field is only subject to the limits imposed by EU measures of harmonisation[42] and to the ultimate control of the Commission and the CJEU, which evaluate whether States have made a manifest error of assessment[43]. In brief, only when the European Union rules on a given service sector, qualify it as an SGEI, harmonize the relevant discipline among Member States and establish PSOs, are Member States bound to guarantee the provision of that SGEI in accordance with the relevant rules[44].

In the water sector, there is no specific secondary EU act establishing precise PSOs, thus Member States bear no immediate commitment to provide universal access to water services under EU law[45]. The following section seeks to evaluate the opportunity of an EU legislative intervention in the water service sector, one that would aim to liberalise the market and harmonize the respective rules, including universal service obligations.

3. As mentioned in the first section, the EU has already adopted sectoral legislation on SGEIs harmonising the rules on public service obligations of several major network industries, such as energy[46], gas[47], postal services[48], and transport[49].

On the contrary, the drinking water service sector has not been liberalized and, aside from specific environmental rules that apply to certain aspects of the supply of water services[50], it is not subject to a comprehensive regulatory regime[51]. As a consequence, the regulatory legal

---

[41] Communication from the Commission COM (2007) 725, p. 16; Court of Justice, judgment of 15 January 2014, case C-176/12, *Association de médiation sociale*, ECLI:EU:C:2014:2, para. 51. See, below, section 4.3.

[42] Court of Justice, judgment of 18 May 2000, case C-206/98, *Commission v. Belgium*, ECLI:EU:C:2000:256, para. 45.

[43] Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ C 8, 11.1.2012, pp. 4-14, paras 46, 48; General Court, judgment of 15 June 2005, case T-17/02, *Olsen v. Commission*, ECLI:EU:T:2005:218, para. 216; General Court, judgment of 12 February 2008, case T-289/03, *BUPA and Others v. Commission*, ECLI:EU:T:2008:29, paras. 165-169.

[44] K. LENAERTS, J.A. GUTIÉRREZ-FONS, *Le rôle du juge de l'Union dans l'interprétation des articles 14 et 106, paragraphe 2, TFUE*, in *Revue Concurrences,* 2011, p. 6; S.A. DE VRIES, *Harmonization of Services of General Economic Interest: Where There's a Will There's a Way!*, in J.W. VAN DE GRONDEN (ed.), *EU and WTO Law on Services. Limits to the Realization of General Interest Policies within the Services Markets?*, cit.

[45] *Contra*, M. MARESCA, *L'Accesso ai Servizi di Interesse Generale, De-Regolazione e Ri-Regolazione del Mercato e Ruolo Degli Users' Rights*, cit., pp. 447 and 450.

[46] For instance, the Energy Directive requires Member States to: "*ensure that all household customers (…), enjoy universal service, that is the right to be supplied with electricity of a specified quality within their territory at reasonable, easily and clearly comparable, transparent and nondiscriminatory prices*". Directive 2009/72/EC, OJ L 211, 14.08.2009, p. 55, art. 3(3). See also arts. 1, 3(2)(6)(7)(10).

[47] Directive 2009/73/EC, OJ L 211, 14.08.2009, p. 94, art. 3.

[48] The Postal Service Directive states that: "*Member States shall ensure that users enjoy the right to a universal service involving the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users*". Directive 97/67/EC, OJ L 15, 21.01.1998, p. 14.

[49] Regulation. 1370/2007/EC.

[50] For instance, the so-called cost-recovery principle. Directive 2000/60/EC, OJ L 327, 22.12.2000, pp. 1–73, Art. 9.

[51] In the *Green Paper on Services of General Interest,* para. 32, the Commission mentioned water supply among the services of general economic interest which "are not subject to a comprehensive regulatory regime at Community level […] the provision and organization of these services are subject to internal market, competition and State aid rules provided that these services can affect trade between Member State". See W. VANDENHOLE, T. WIELDERS, *Water as a Human Right – Water as an Essential Service: Does it Matter?*, in *NQHR*, 2008, p. 406.

framework of the water industry varies considerably across Member States that, absent universal service obligations determined at the European Union level, enjoy wide discretion in this area. Though the sector is generally considered as an SGEI[52], this qualification *per se* does not imply concrete obligations on Member States.

Defining specific USOs at the EU level in the water sector would have a number of consequences. In the first place, water services should be made available to all consumers within the EU, even if they were located in unprofitable areas and were unable to afford its price[53]. In addition, possible economic aid granted by Member States to water service providers who, otherwise, would incur excessive financial losses in order to meet universal service obligations, might be deemed compatible with the internal market and competition rules.

Read through the lens of human rights, the obligations falling under the category of USOs largely overlap with those stemming from the right to water, namely that of providing safe, available and accessible water to all[54]. In other terms, the universal service doctrine[55], which admits (under some conditions) market inefficiencies necessary to fulfil public interest objectives, may strike a balance between the Member States duty to comply with rules on market freedom and competition and the obligations ensuing from the right to water[56].

The lack of secondary EU law imposing USOs in the water service market leaves Member States free to decide whether to require providers entrusted with water services to meet PSOs. This may leave consumers without any title to receive a given amount of water at an affordable price and/or in remote areas of their countries[57].

Moreover, the diversified legal landscape concerning water services may give rise to uncertainty[58]. Absent a coherent legal framework at the EU level, the varied measures adopted by Member States in order to safeguard public water services might be considered protectionist

---

[52] See, *inter alia*, *Green Paper on services of General Interest*, p. 10; Directive 2000/60/EC, OJ L 327, 22.12.2000, p. 1, recital 15 of the Preamble: "[t]he supply of water is a service of general interest as defined in the Commission Communication on services of general interest in Europe"; Opinion of AG Ruiz-Jarabo Colomer delivered on 20 October 2009, case C-265/08, *Federutility and others v. Autorità per l'energia elettrica e il gas,* para. 53, recalling Court of Justice, judgment of 8 November 1983, joined cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82, *IAZ v. Commission*, ECLI:EU:C:1983:310.

[53] Communication, COM(2011) 900 final, p. 4. See also *Green Paper on Services of General Interest*, para. 50 and Annex I, para. 2.

[54] Van Rijswick points out that universal obligation can help to implement the right to water in EU law. H.F.M.W. VAN RIJSWICK, H.J.M. HAVEKES, *European and Dutch Water Law*, Groningen, 2012; Vandenhole and Wielders notice that, so far, due to the lack of any specific regulation on water services, "*the universal service obligations for the drinking water sector in the European Union (EU) have not (yet) been determined at the European level*", and that "*the responsibility for the organisation and the financing of the drinking water sectors remains with the member States*". W. VANDENHOLE, T. WIELDERS, *Water as a Human Right – Water as an Essential Service: Does it Matter?*, cit., p. 393, p. 405 ff.

[55] Distinction should be made between universal service and universal access to water. While under the more evolved notion of universal service every dwelling has to be connected to the chains, the aim of universal access to water is to provide to every person access to a source of potable water, even a communal tap. The right to water requires, *in primis*, universal access (more feasible in developing countries) and then the progressive realization of universal service.

[56] In this sense, see also M. DUBUY, *Le Droit à l'Eau Potable et à l'Assainissement et le Droit International,* in *R.G.D.I.P.*, 2012, p. 284.

[57] *Contra*, M. MARESCA, *L'Accesso ai Servizi di Interesse Generale, De-Regolazione e Ri-Regolazione del Mercato e Ruolo Degli Users' Rights*, cit., pp. 450-455.

[58] *Green Paper on Services of General Interest*, para. 83 and nt. 47 quoting WRc, Ecologic, *Study on the application of the Competition rules to the Water Sector in the European Community*, December 2002, http://ec.europa.eu/competition/publications/water_sector_report.pdf.

and in violation of the EU primary and secondary rules as it will be highlighted throughout this paper.

The following section assesses the possibility of harmonizing conflicting obligations that may arise from measures taken in order to guarantee access to safe, accessible and affordable water in line with the right to water, and primary and secondary EU law concerning internal market rules, state aid and the principle of cost recovery.

4. A heated debate has surrounded the campaign against the liberalization of water services within the European Union. It is sufficient to mention the first successful European citizens' legislative initiative «Water and sanitation are a human right! Water is a public good, not a commodity!» whose purpose was to exempt water supply and management of water resources from internal market rules and exclude water services from liberalization[59].

The initiative sets out the human right to water as in opposition to any form of liberalisation of water service. The same issue was raised in the debate in Italy on the occasion of the referenda against the privatization of water services that took place in June 2011[60]. However understandable these worries are, it is worth remembering that the human right to water does not prohibit the privatization and liberalization of water services as such, but only requires, whatever choice is made as per the ownership and management of water services, that states comply with the duty to respect, protect and fulfil the right.

This section illustrates that blanket opposition to the liberalization of water service within the EU does not necessarily foster the main features of the right to water, notably the availability, quality and affordability of water. On the contrary, if the liberalization of this sector is accompanied by rules establishing universal service obligations able to grant equal access to water services, at an affordable price, it may be a vehicle for enhancing the implementation of the right to water across Member States[61].

It would thus be worth reflecting on the introduction of a specific regulation that, as for other network industries concerning essential services, liberalizes the internal market for water services and, at the same time, fosters the harmonization of rules concerning public service

---

[59] Pursuant to art. 11.4 of the Consolidated version of the TEU, OJ C 326, 26.10.2012, pp. 13–390, European Citizens are allowed under certain conditions to submit a legislative proposal to the Commission. The European Citizens' initiative on water (No. ECI(2012)000003) was launched in April 2012. It collected 1,857,605 signatures, far more than the 1 million signatures required. Information about this initiative and its results are available online at: http://ec.europa.eu/citizens-initiative/public/initiatives/successful/details/2012/000003/en (last accessed, 12 July 2019).

[60] Two *referenda* sought to repeal some domestic provisions concerning, respectively, the privatization of water management (art. 23 *bis*, D.L. 25 June 2008, n. 112) and the criteria for determining the tariff of water services based on adequate remuneration of the invested capital (art. 154.1, D.Lgs. 3 April 2006, n. 152). Ultimately, both *referenda* reached the *quorum* and, accordingly, the challenged provisions were repealed. Concerning Italian water services, see: N. GIANNELLI, *La Riforma dei Servizi Idrici: Uno Sguardo alla Normativa Nazionale e Regionale*, in *IdF*, 2006, p. 277 ff.; V. PARISIO, *Demanio Idrico e Gestione del Servizio Idrico in una Prospettiva Comparata. Una Riflessione a Più Voci*, Brescia, 2011; *ibid*, *La gestione dei servizi pubblici a rete: il servizio idrico integrato tra monopoli e concorrenza*, in *Giustizia civile*, 2007, pp. 435-444; L. ARNAUDO, *Holes in the Water. The Reform of Water Services and Competition in Italy,* in *Competition and Regulation in Network Industries*, 2011, p. 173 ff.; E. BERGAMINI, *ITALY*, in M. KRAJEWSKI, U. NEERGAARD, J.W. VAN DE GRONDEN (eds), *The Changing Legal Framework for Services of General Interest in Europe. Between Competition and Solidarity*, cit.

[61] Van de Gronden considers the concept of SGEI as capable of reconciling the internal market and issues of public interest. J.W. VAN DE GRONDEN, *The EU and WTO law on Free Trade in Services and the Public Interest: Towards a Framework Directive on Services of General Economic Interest?*, in J.W. VAN DE GRONDEN (ed.), *EU and WTO Law on Services. Limits to the Realization of General Interest Policies within the Services Markets?*, cit., p. 250; Communication from the Commission COM(2007) 725.

obligations in the water sector, providing EU residents with a minimum equal standard of treatment[62]. A sound framework of guarantees in terms of accessibility and affordability of the service would make the opening of the water sector a chance to reduce the cost of the service, as competition usually turns out in favour of the final user. Put in these terms, the liberalization of the internal market for water services would no longer be felt as a menace, given that core rights would be guaranteed in any event, regardless of whether the service is provided by a public or a private operator, be it a national or a foreign legal person[63]. Scholars that support the adoption of a regulation on water services aimed at liberalising the sector while promoting and harmonising universal service obligations across EU Member States, have regarded Article 14 TFUE as its possible legal basis[64].

Against the above considerations, this section seeks to establish whether the concern for liberalizing the water services market is legitimately motivated by inherent risks under the current EU legal framework, or instead hide a bias that, on the contrary, is likely to affect the fulfilment of the right to water. Sub-sections 4.1 and 4.2 evaluate whether normative conflicts purportedly arising between the duties stemming from the right to water and those deriving from the possible liberalization of the water services within the EU may be, respectively, prevented or avoided by means of interpretative techniques. In the opposite case, sub-section 4.3 assesses whether the obligations ensuing from the right to water may warrant precedence.

4.1. This sub-section evaluates whether the liberalization of water services at the EU level would be compatible with obligations ensuing from the human right to water by looking at three main areas of EU rules that may raise concern, notably competition, internal market freedom, and public procurement.

Currently, the decision to establish specific duties upon the provider of water services to supply water at an affordable price to all, including the most disadvantaged and remote households, rests on Member States, who are free to confer water service the *status* of SGEI. While universal service obligations would greatly contribute to the fulfilment of the right to water within Member States, this service is not currently subject to common, harmonised rules at the EU level due to the concern that a secondary EU act compelling the liberalization of water services would affect the enjoyment of the right to water.

The following sub-sections will show that possible competitive advantages granted to the suppliers of water services entrusted with universal services obligations would be compatible with the EU rules on competition, State aid and market freedom. Motivated by the purpose of ensuring essential services to all, a number of exceptional rules for SGEIs have been adopted so to balance the competing interests of competition and internal market freedom, on the one hand, and access to essential services, on the other. It is submitted that these exceptional sets of rules have the potential to prevent normative conflicts.

---

[62] H.F.M.W. VAN RIJSWICK, *Searching for the right to water in the legislation and case law of the European Union*, cit., p. 129.

[63] As underlined by Hendry, in order to guarantee the right to water "*rigorous economic regulation [are] necessary, desiderable, and effective in the public sector just as it is to control the behaviour of firms*". S. HENDRY, *Ownership Models for Water Services: Implications for Regulation*, in A. MCHARG, B. BARTON, A. BRADBROOK, L. GODDEN (eds.), *Property and the Law in Energy and Natural Resources*, Oxford, 2010, p. 279.

[64] D. GALLO, *I Servizi di Interesse Economico Generale – Stato, Mercato e Welfare nel Diritto dell'Unione Europea*, cit., p. 448; M. MONTI, *A New Strategy for the Single Market at the service of Europe's Economy and Society. Report to the President of the European Commission José Manuel Barros*, cit., p. 74.

4.1.1. According to Article 106(2) TFUE, all undertakings, whether public or private, entrusted with the operation of SGEIs or having the character of a revenue-producing monopoly, are exempted from the scope of treaty rules on competition when the application of these rules affects the performance of the specific tasks assigned to them[65].

The Treaties do not preclude Member States from holding public undertakings or conferring special or exclusive rights on undertakings entrusted with the operation of SGEIs, to the extent that restrictions to competition or even the exclusion of competition is necessary to ensure the fulfilment of their mission.

Undertakings subject to public services obligations are required to guarantee adequate provision of services under conditions of market failure. The additional costs they are burdened with may be compensated by means of, *inter alia*, subsidies, fiscal advantages, loans, and non-refundable aid[66]. Compensation for the performance of PSOs strictly limited to the amount necessary to remunerate an efficient operator, who does not receive any real financial advantage, does not constitute State aid within the meaning of Article 107(1) TFEU[67]. In this connection, the CJEU laid down four cumulative requirements to be respected for compensation to fall outside the scope of the State aid rules (the so-called "*Altmark* conditions")[68].

In case the *Altmark* requirements are not met, compensation may still be considered compatible with Article 106(2) TFEU. The legal framework concerning the relation between SGEIs, compensation and state aid, was first laid down in 2005 when the Commission adopted the first SGEI package – known as "Monti-Kroes package" – setting forth the conditions under which State aid in the form of compensation for SGEIs were to be considered compatible with the Treaty under Article 106(2) TFEU. The "Monti-Kroes package" was updated in 2011 by the so-called "Almunia package", consisting of: *i*) a revised SGEI Decision, which specifies the conditions under which public service compensation directed to certain SGEI are compatible with Article 106(2) TFUE and exempted from the obligation of prior notification to the

[65] See Court of Justice, judgment of 19 May 1993, case C-320/91, *Corbeau*, ECLI:EU:C:1993:198, para.14; judgment of 27 April 994, C-393/92, *Gemeente Almelo and Others v Energiebedrijf IJsselmij,* ECLI:EU:C:1994:171; judgment of 23 October 1994, case C-157/94, *Commission v. Netherlands*, ECLI:EU:C:1997:499.

[66] Questions have arisen as to whether this compensation was to be considered as compatible with the Treaty rules concerning State aid. The European Court of Justice first considered this compensation as State aid allowed in consideration of the specific mission fulfilled by the undertaking (Court of Justice, judgment of 22 March 1977, case 78/76, *Steinike and Weinlig*, Reports p. 595) and, then, that lacking any financial profit they are not to be considered State aid (Court of Justice, judgment of 22 November 2001, case C-53/00, *Ferring*, ECLI:EU:C:2001:627; see also the Opinion of the AG Tizzano delivered on 8 May 2001, *Ferring*, ECLI:EU:C:2001:253). See F. CINTIOLI, *Concorrenza, Istituzioni e Servizio Pubblico*, Milan, 2010, p. 167 *et seq*.; D. GALLO, *I servizi di Interesse Economico Generale – Stato, Mercato e Welfare nel Diritto dell'Unione Europea*, cit., p. 630 ff.

[67] Court of Justice, judgment of 24 July 2003, case C-280/00, *Altmark Trans and Regierungspräsidium Magdeburg*, ECLI:EU:C:2003:415, para. 87.

[68] *Ibid*., paras 89-95. The conditions laid down by the Court of Justice were the following: *i*) the beneficiary undertaking is charged with clearly defined PSOs; *ii*) the parameters on the basis of which the compensation is calculated are established in advance in an objective and transparent manner; *iii*) compensation does not exceed what is necessary to cover all or part of the costs incurred in the discharge of the PSOs, plus a reasonable profit; *iv*) where the undertaking is not chosen through a public procurement procedure, the level of compensation is determined on the basis of an analysis of the costs which a typical undertaking, well-run and adequately provided with the relevant means, would have incurred in discharging PSOs, plus a reasonable profit.

Commission[69]; *ii*) a revised SGEI Framework setting out the criteria under which State aid granted to operators outside the social service field and not covered by the above mentioned Decision have to be notified to the Commission, which has to assess their compatibility and, eventually, declared them compatible with Article 106(2) TFEU[70]; *iii*) a *de minimis* Regulation[71], according to which compensation that does not exceed EUR 500,000.00 over any three-year period is *ipso facto* compatible with the Treaties as it does not interfere with the internal market and is thus exempted from the notification requirement under Article 108(3) TFEU; *iv*) an explanatory Communication that clarifies basic concepts «underlying the application of State aid rules to public service compensation»[72].

While both the Decision and the Framework illustrate the conditions under which public service compensation constituting State aid is compatible with TFEU state aid rules and is hence not prohibited, only when the choice to provide compensation for SGEIs complies with the Decision requirements is it exempted from the prior notification requirement laid down in Article 108(3) TFEU. On the contrary, when State aid for the operation of SGEIs is not covered by the Decision, it may still be compatible with Article 106(2) TFUE under the conditions established by the Framework Communication[73], but, in this case, the decision to grant compensation must be approved by the Commission upon notification pursuant to Article 108(3) TFEU[74]. This difference is due to the fact that the aid to be granted under the Framework, which applies when the value exceeds EUR 15 million, poses higher risks of distorting competition[75].

The exceptional provisions established for SGEIs may apply to the water sector insofar as compensation is granted to an undertaking discharging public services obligations, for instance in order to guarantee access to water in distant unprofitable areas and/or to poor

[69] Commission Decision 2012/21/EU of 20 December 2011 on the application of art. 106(2) of the TFEU to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, C(2011) 9380 final, OJ L 7, 11.01.2012, p. 3–10. The Decision applies to certain specific fields other than the water sector (such as hospitals, social services, air or maritime links to islands with low average annual traffic, and airports and ports with low annual traffic) and, in general, to State aid granted to undertakings entrusted with the operation of an SGEI that do not exceed an annual amount of EUR 15 million over a period no longer than 10 years (unless significant investment is required). Compensation falling within the scope of the Decision must meet a number of conditions listed therein concerning, *inter alia*, the act of entrustment and the prohibition of over-compensation. See art. 4 regarding the act or acts of entrustment and art. 5 concerning the amount of compensation "which shall not exceed what is necessary to cover the net cost incurred in discharging the public service obligations, including a reasonable profit".

[70] Communication from the Commission on European on Union Framework for State aid in the form of public service compensation (2011), OJ C 8, 11.1.2012, pp. 15–22.

[71] Commission Regulation (EU) No. 360/2012 of 5 April 2012 on the application of Arts. 107 and 108 of the TFEU to *de minimis* aid granted to undertakings providing services of general economic interest, OJ L 114, 26.04.2012, pp. 8–13.

[72] Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ C 8, 11.1.2012, pp. 4–14.

[73] Among these conditions, there are the following: the need for an entrustment act to specify the public service obligations and the methods of calculating compensation (para. 2.3); compliance with the Union's public procurement rules (para. 2.6); prohibition of overcompensation (para. 2.8).

[74] Commission Staff Working Paper, *Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest*, SWD(2013) 53 final/2, 29.4.2013.

[75] Notably, the prior notification requirement for public service compensation exceeding EUR 15 million does not apply to hospitals and certain social services.

households that cannot afford the cost of the service. So far, few Member States have included water services among the entrusted SGEIs and granted compensation for them[76].

In accordance with Article 108(3) TFUE, Italy has notified the Commission twice of its intention to grant aid to a public water service provider, Abbanoa S.p.A ("Abbanoa"). The Commission took two decisions not to raise objections to the proposed aid measure[77]. The main facts and the Commission's line of reasoning can be summarised as follows.

Abbanoa is a company entrusted with an SGEI for the management of the Integrated Water Supply Service ("IWSS") for Sardinia. It is the sole (in-house) provider of water services in the Region[78]. The agreement granting Abbanoa a 26-year concession required the company to «provide universal and affordable supply of water services within the whole territory of Sardinia until 2028»[79].

The decision to create a new structure of water supply services in Sardinia, the IWSS, arose from the persistent unsustainable operating results of the previous providers. In 2002, the provision of drinking water services in Sardinia was found to generate an annual economic loss of about EUR 75 million. The unsustainable operating costs were due, according to the local authorities, to a combination of physical and commercial losses. On the one hand, poor infrastructure generated water leaks and, on the other hand, users often refused or delayed payment. The creation of the IWSS did not solve problems related to the persistent economic deficit of the company due to water losses as well as to difficulties in recovering credits from customers.

According to the Italian authorities' first notification, the company was *de facto* insolvent and unable to pay its creditors, and would have soon become incapable of providing the service. Although Sardinia had programmed Abbanoa's activities in order to render the water supply system profitable in the long run, at the relevant time it needed urgent rescue in the form of aid.

In its first decision, the Commission considered that the Italian measures aimed to rescue Albanoa were State aid under Article 107(1) TFEU; nonetheless, they were to be considered as compatible with the internal market pursuant to Article 107(3)(c) TFEU. In particular, the Commission underlined that the aid was motivated by serious social difficulties, given that, had the company ceased its activities, there would have been severe shortcomings in the supply of freshwater in Sardinia, where no alternative provider existed at the relevant time[80].

---

[76] Pursuant to art. 9 of the SGEI Decision and paragraph 62 of the SGEI Framework, every two years Member States are required to submit to the Commission a report on the implementation of the Decision and on the compliance with the Framework providing an overview of their respective application for the different categories of services referred therein. According to the reports on the application of SGEI Decision and SGEI Framework, during the years 2012-2013, 2014-2015 and 2016-2017, few Member States (notably, Germany, Hungary, Latvia and Slovenia for the all the three periods, Estonia for the second and third period) have provided public services compensation for water supply services and in no case have the compensation exceeded the annual amount of EUR 15 million (pursuant to art. 2(1)(a) of the SGEI Decision). Detailed information is available at http://ec.europa.eu/competition/state_aid/overview/public_services_en.html.

[77] Commission, decision State aid, case SA.33981 – *Italy, Rescue aid to Abbanoa S.p.A.*, 25.01.2012, D(2012) 151 final; decision State aid, case SA.35205 (2013/N) – *Italy, Restructuring Aid to Abbanoa S.p.A.*, 31.07.2013, C(2013) 4986 final.

[78] In 2005, Abbanoa was incorporated out of the merger of all the previous public drinking water suppliers in Sardinia. Its equity is owned about 85 per cent by the Sardinian municipalities and about 15 per cent by the Sardinian regional government.

[79] *Italy, Restructuring Aid to Abbanoa S.p.A.*, para. 2.2.(6)(a), p. 2.

[80] *Italy, Rescue Aid to Abbanoa S.p.A.*, para. 27, p. 5.

About one year after the Commission's decision on the aid, the Italian authorities notified the Commission of their intention to provide further restructuring aid to Abbanoa since the company was still in critical financial conditions and was virtually insolvent, which might have soon affected the company's ability to provide its essential services. The Italian authorities explained that they were prevented from releasing the authorised first rescue aid, consisting of a guarantee fund for a maximum amount of EUR 90 million, due to new public financial regulations. For this reason, they planned to integrate the guarantee fund into a restructuring aid fund. They sought permission to do so from the Commission.

The Commission, once again, considered the measures at issue as State aid within the meaning of Article 107(1) of the Treaty. Nonetheless, it deemed that such aid, if assessed in the light of the criteria laid down in the Restructuring Guidelines ("R&R Guidelines")[81], was compatible with the internal market pursuant to Article 107(3) of the Treaty. To reach this conclusion, the Commission referred to the circumstances that caused the company's difficulties, which were, on the one hand, common to other water services operators in Italy, notably «high distribution losses, old sewage equipment, need of substantial investment», and, on the other hand, specific to Sardinia, such as «poorer quality and higher costs of the sourced water, higher energy prices and lower population density»[82].

Against this background, the Commission deemed that «the need to ensure the provision of an essential SGEI on the entire territory of the Sardinia Region (for which Abbonoa is not entitled to any specific SGEI compensation, as its revenues stem only from regulated tariffs) »[83] constitute exceptional circumstances that justify the aid.

From the above-described legal framework and case-studies, the following considerations may be made as for the compatibility between the obligations stemming from the right to water and EU rules on State aid.

In the first place, the provider of water service entrusted with the SGEI may well receive compensation that, if complying with the *Altmark* conditions, does not fall under the general prohibition of State aid. Additionally, if the *Altmark* conditions are not complied with, compensation for discharging SGEI may still be deemed compatible with the internal market under Article 106(2) TFEU.

Second, the Abbanoa case shows that the Commission has taken into consideration the need to maintain USOs in the water sector and, accordingly, has decided not to raise objections to State aid necessary to discharge what it considers an essential SGEI.

4.1.2. Regulations aimed to guarantee standard of quality and affordability of water services may affect the opening of the water service market across EU Member States. This sub-section assesses whether they could be compatible with the rules on the internal market freedom.

[81] Communication from the Commission, *Community Guidelines on State aid for rescuing and restructuring firms in difficulty*, OJ C244, 1.10.2004, points 31 to 56.
[82] *Italy, Restructuring Aid to Abbanoa S.p.A*, para. 47.
[83] *Ibid*., para. 66.

Articles 49[84] and 56[85] TFEU prohibit restrictions on, respectively, the freedom of establishment and the freedom to provide services within the Member States of the European Union. Moreover, the so-called Services Directive[86] lays down provisions aimed at facilitating the exercise of both freedoms by removing barriers and enhancing legal and administrative coordination among Member States[87].

The aim of the Directive to give rise to an internal market for services is pursued by seeking to balance the purposes of opening services market and preserving public services[88]. It applies only to activities open to competition and does not oblige Member States either to privatise public entities providing services or to liberalise SIEG[89] – confirming the neutrality of the Treaties as for the ownership of undertakings – or to abolish existing monopolies in certain services[90]. The Directive does not even affect the freedom of Member States to define what they consider SIEGs, «how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to»[91]. Finally, the Directive purports not to «affect the exercise of fundamental rights as recognised in the Member States and by Community law »[92].

Member States are not obliged to liberalise essential public services, such as water services. However, once they do so, the issue is whether the provisions of Directive raise risks of excessive deregulation of public interest services.

[84] Art. 49 TFEU provides for freedom of establishment, which is meant to guarantee the right to take up and pursue activities as self-employed persons and to set up and manage undertakings within the European Union without discrimination and under the same conditions laid down by the Member State of establishment in favour of their own nationals. It involves the pursuit of an economic activity in another Member State through a fixed establishment on a stable and continuous basis for an indefinite period. See L. DANIELE, *Diritto del Mercato Unico Europeo, Cittadinanza - Libertà di circolazione - Concorrenza - Aiuti di Stato*, Milan, 2012, pp. 166-174.

[85] Art. 56 TFEU establishes the freedom to provide services on a temporary basis in another Member State. The free movement of services covers the activities of operators that are not established in the Member State where the service is provided.

[86] 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 pp. 36–68, 27.12.2006. See U. STELKENS, W. WEIß, M. MIRSCHBERGER (eds), *The Implementation of the EU Services Directive. Transposition, Problems and Strategies*, The Hague, 2012; J.W. VAN DE GRONDEN, *The Services Directive and Services of General (Economic) Interest*, in M. KRAJEWSKI, U. NEERGAARD, J.W. VAN DE GRONDEN (eds.), *The Changing Legal Framework for Services of General Interest in Europe. Between Competition and Solidarity*, cit.

[87] *Ibid.*, art. 1(1).

[88] *Ibid.*, recital 4.

[89] For the purpose of the Directive, SIEGs are only those services provided for in performance of a special task in the public interest entrusted to the provider by the Member State concerned. *Ibid.*, recital 70.

[90] *Ibid.*, recital 8 and art. 1(2).

[91] *Ibid.*, art. 1(3).

[92] *Ibid.*, art. 1(7), recital 15.

Pursuant to Article 17, certain SIEG, including the water distribution and supply services, are exempted from the scope of Article 16[93], concerning the freedom to provide services in another Member State[94].

On the contrary, to the extent that essential services, such as water services, have been privatized and liberalized, the Services Directive applies to the establishment of the respective undertakings.

In this connection, Article 9 of the Services Directive prohibits Member States from making access or exercise of a service activity subject to an authorisation scheme, notably a procedure under which providers are required to take steps in order to obtain a decision from a competent authority on access to a service activity[95]. Authorizations schemes may consist in, *inter alia*, licenses, approvals or concessions. Undoubtedly, these authorizations may become particularly burdensome and disincentivising for a service provider from another Member State that must wait for a decision on its application before starting up a business. However, they may be adopted with the aim of protecting general interest objectives.

In order to balance the opposing interests to limit constraints to the freedom of establishment, on the one hand, and to take into consideration genuine public concerns on the other, Article 9 allows for a derogation to the prohibition of authorisation schemes to the extent that these authorisations are non-discriminatory, justified by overriding reasons related to the public interest, and necessary to attain the objective pursued[96].

Service activities concerning water have been subject to authorisation schemes justified by overriding reasons relating to the public interest. For instance, the Netherlands and France have notified authorisation schemes applying to cross-border services, respectively, for water management and water abstraction, and for service providers checking the safety of water works[97]. To the author's knowledge, the CJEU has not yet undertaken any analysis of the compatibility of authorisation schemes in the water services sector with the criteria laid down in Article 9 of the Services Directive.

In addition, worthy of mention for the purpose of the present research is Article 15 of the Services Directive. It lists a number of requirements that are subject to the Member States' evaluation as per their compatibility with the conditions of non-discrimination, necessity and proportionality. Among the requirements subject to the Member States' assessment there are

---

[93] *Ibid.*, art. 16 requires Member States to respect the right of providers to supply services in a Member State other than that in which they are established. To this end, Member States shall refrain from imposing requirements for access or allow the exercise of service activities within their territories unless such requirements are non-discriminatory, necessary and proportionate to the objective pursued, as well as justified by reasons of public policy, public security, public health or the protection of the environment. According to Evans, this obligation can be read as a prohibition to restrict market access to the free movement of services. See S. EVANS, *The Service Directive: (Too) a Great Expectations? An initial overview of the rights and obligations under the Services Directive*, in J.W. VAN DE GRONDEN (ed.), *EU and WTO Law on Services. Limits to the Realization of General Interest Policies within the Services Markets?*, cit., p.14.

[94] *Ibid.*, art. 17. In general terms, SIEG are not excluded from the purview of the Directive. On the contrary, noneconomic services of general interest, which are not provided under compensation, do not fall under the scope of the Directive. See Commission, SEC(2010) 1545 final. According to some scholars, the very application of the Directive to SGEIs is likely to be excluded. See, D. GALLO, *I Servizi di Interesse Economico Generale – Stato, Mercato e Welfare nel Diritto dell'Unione Europea*, cit., p. 436.

[95] *Ibid.*, art. 4(6).

[96] *Ibid.*, art. 9(1); Court of Justice, judgment of 22 January 2002, case C-390/99, *Canal Satélite Digital*, ECLI:EU:C:2002:34.

[97] *Ibid.*, p. 83.

«*fixed minimum and/or maximum tariffs with which the provider must comply*»[98]. Member States have to notify the Commission of any new law, regulations or administrative provision which sets such requirements and the Commission can request the State concerned to refrain from adopting them or to abolish them[99]. However, the Directive takes the specificity of the SIEG into consideration by stipulating that the Member States' assessment of the list of requirements enshrined in Article 15 applies to legislation in the field of SGEIs only insofar as it does not obstruct the performance of the particular task assigned to them[100]. According to the Commission, as far as water services are concerned, some Member States have adopted fixed tariffs (*i.e.* tariffs setting a fixed amount and not just minimum or maximum limits)[101], notably Hungary, Lithuania and Slovakia, while the United Kingdom, Belgium and Portugal have set maximum tariffs[102]. The reasons most commonly mentioned by Member States to justify fixed or maximum tariffs are the protection of consumers and the quality of the service[103]. In these cases, no request from the Commission to withdraw the fixed or maximum tariffs has been reported[104].

In light of the above, it seems that as far as water services are concerned, derogations to the freedom of establishment and exemptions to the freedom to provide services allow States to take into consideration consumer rights and quality standards, in compliance with the right to water.

4.1.3 This section analyses EU rules on public procurement to establish whether the exemptions granted to water services from the above-described regime, which apparently seeks to avoid the negative effects of liberalization on the right to water, instead risks limiting the fulfilment of this right.

The water service industry has monopolistic features (*natural* monopoly) due to the high costs associated with building and maintaining the related infrastructure, which renders a single utility and, accordingly, a single provider the most economically viable solution. The EU leaves Member States free to supply water service (as well as other public services) either directly or by availing themselves of separate bodies within the public administration (so-called in-house), or else to resort to an economic operator. In the latter case, the supply of water service must be tendered and all EU operators must be offered the same access to the market in order to operate

[98] *Ibid.*, art. 15(2)(*g*).
[99] *Ibid.*, art. 15(7).
[100] *Ibid.*, art. 15(4).
[101] Commission Staff Working Paper of 27 January 2011 on the process of mutual evaluation of the Service Directive, Accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, SEC(2011) 102 final, p. 35.
[102] 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 pp. 36–68, 27.12.2006, pp. 35-36.
[103] *Ibid.*, p. 35.
[104] It is worth nothing that, in a recent preliminary ruling, the Court of Justice held that: "The condition of proportionality laid down in Article 15(3)(c) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market must be interpreted as not precluding measures such as those at issue in the main proceedings, which set a maximum price for bottled liquefied petroleum gas and which require certain operators to carry out home delivery of that gas, provided that those measures are maintained only for a limited duration and do not go beyond what is necessary in order to achieve the objective of general economic interest pursued". Court of Justice, judgment of 11 April 2019, joined cases C-473/17 and C-546/17, *Repsol Butano*, ECLI:EU:C:2019:308, para. 66.

the monopoly on the basis of exclusive rights (competition *for* the market)[105]. The EU public procurement rules will thus apply, requiring States to carry out the awarding procedure according to the principles of transparency, non-discrimination and equal treatment, so as to avoid market distortions[106].

More specifically, public contracting entities may enter into either service contracts or service concessions with these economic operators. The main difference between the two «lies in the consideration for the provision of services»[107]. While a service contract involves consideration for the provision of services, which is paid directly by the contracting authority to the service provider, for a service concession, the consideration consists «in the right to exploit the service, either alone, or together with payment»[108]. The CJEU has singled out further criteria to distinguish service contracts from service concessions[109]. In particular, there is a service contract when the contracting party providing the service does not bear a significant share of the risk run by the contracting authority[110], risk to be understood as «exposure to the vagaries of the market» such as, *inter alia*, competition from other operators, divergence between the cost of the service and the revenues received, inability of the users to pay for the service provided[111].

It may be difficult to distinguish between a service contract and a service concession when the provider is granted public service compensation, which is likely to shift the market risk from the operator to the public authorities. In a case concerning the procurement procedure of a public service for drinking water supply and disposal of sewage, in which the rules of public law governing the operation of the service limited the risk of the provider (through compulsory connection and usage, and prices calculated on a break-even basis), the Court ruled that:

«in relation to a contract for the supply of services, the fact that the supplier does not receive consideration directly from the contracting authority, but is entitled to collect payment under private law from third parties, is sufficient for that contract to be categorised as a 'service concession' […] where the supplier assumes all, or at least a significant share, of the operating risk faced by the contracting authority, even if that risk is, from the outset, very limited on account of the detailed rules of public law governing that service»[112].

---

[105] It differs from competition in the market consisting in removing barriers to the national market (licensing restrictions, fees etc.) in order to allow private providers of different nationalities to compete on equal footing.
[106] In addition, art. 12 of the Service Directive permits no exceptions to the transparent selection procedure for SGEIs, while the forth Altmark condition requires States to select the undertaking entrusted with an SGEI by means of an open competition.
[107] See art. 1(2)(a) and (d) and art. 1(3)(b) of 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. Court of Justice, judgment of 10 November 2011, case C-348/10, *Norma-A and Dekom*, ECLI:EU:C:2011:721, para. 41; judgment of 10 September 2009, case C-206/08, *Eurawasser*, ECLI:EU:C:2009:540, para. 51.
[108] See art. 1(2)(a) and (d) and art. 1(3)(b) of Directive 2004/17/EC. Court of Justice, judgment of 10 November 2011, case C-348/10, *Norma-A and Dekom*, ECLI:EU:C:2011:721, para. 41; judgment of 10 September 2009, case C-206/08, ECLI:EU:C:2009:540, *Eurawasser*, para. 51.
[109] Court of Justice, judgment of 13 October 2005, case C-458/03, *Parking Brixen,* ECLI:EU:C:2005:605, para. 40; judgment of 18 July 2007, case C-382/05, *Commission v. Italy*, ECLI:EU:C:2007:445, para. 34; judgment of 13 November 2008, case C-437/07, *Commission v. Italy*, ECLI:EU:C:2008:624, para. 29.
[110] *Norma-A SIA, Dekom SIA v. Latgales plānošanas reģions*, para. 59.
[111] *Ibid*., para. 48; *WAZV Gotha v. Eurawasser*, paras. 66-67.
[112] *Ibid*., para. 59.

Distinguishing between contract and concession services is not without consequence as the EU secondary rules on procurement in the water sector[113] apply only to the former. In particular, Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors[114] applies to competitive procedures for the awarding of service contracts[115] whose value is above a certain threshold[116]. It requires the selection of the economic operator by means of public procedures based on the principles of equal treatment, non-discrimination, proportionality and transparency[117].

As far as water services are concerned, the Directive applies to: the provision or operation of fixed networks in connection with the production, transport or distribution of drinking water to the public; the supply of drinking water to such networks; and contracts connected with hydraulic engineering, irrigation, and land drainage projects, and the disposal or treatment of sewage[118].

However, contracting entities have often resorted to service concessions in the water sector. It is noteworthy that concessions agreements, unlike other contracts with public authorities, have remained outside the scope of secondary legislation on public procurement and are solely governed by general rules concerning freedom of establishment, free movement of services, and the principles of non-discrimination, transparency and equal treatment. Before the general revision of the discipline of public procurement in 2014[119], the same was true for all service concessions awarded by contracting entities carrying out activities in the water, energy, transport and postal services sectors[120].

The European Commission acknowledged this legal loophole in the field of service concession, and highlighted the risk of distortions within the internal market. It contended that the interpretation and implementation of the principles of transparency and equal treatment lacks legal certainty, a circumstance that might increase the risk of illegally awarded contracts, malpractice and corruption, causing an unlevel playing fields. This would discourage

---

[113] The need for specific rules on procurement in sectors considered as SGEIs is due to the fact that Member States still grant special and exclusive rights to undertakings entrusted with the supply and operation of the networks industries. See P. DELIMATSIS, *The Regulation of Water Services in the EU Internal Market*, TILEC Discussion Paper No. 2015-020, 2015, p. 18; C.H. BOVIS, *Financing Services of General Interest in the EU: How do Public Procurement and State Aids Interact to Demarcate between Market Forces and Protection?*, in *ELJ*, 2005.

[114] Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ L 94, 28.3.2014, p. 243.

[115] *Ibid.*, art. 1

[116] *Ibid.*, art. 15.

[117] *Ibid.*, art. 36.

[118] *Ibid.*, art. 10.

[119] Three Directives have been adopted in 2014 concerning rules on public procurements, notably: Directive 2014/25/EU; Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance OJ L 94, 28.3.2014, p. 65–242; Directive 2014/23/EU of the European Parliament and the Council of 26 February 2014 on the award of concession contracts, OJ L 94/1, 28.03.2014, p. 1–64.

[120] See art. 18 of the repealed Directive 2004/17/EC; *WAZV Gotha v. Eurawasser*, para. 44 recalling: Court of Justice, judgment of 7 December 2000, case C-324/98, *Telaustria and Telefonadress*, ECLI:EU:C:2000:669, paras. 60-62; judgment of 21 July 2005, case C-231/03, *Coname*, ECLI:EU:C:2005:487, paras. 16-19; judgment of 13 October 2005, *Parking Brixen*, ECLI:EU:C:2005:605, paras. 46-49; judgment of 13 November 2008, case C-324/07, *Coditel Brabant*, ECLI:EU:C:2008:621, para. 25. See H.M. STERGIOU, *The Increasing Influence of Primary EU Law and EU Public Procurement Law: Must a Concession to Provide Services of General Economic Interest be Tendered?*, in J.W. VAN DE GRONDEN (ed.), *EU and WTO Law on Services. Limits to the Realization of General Interest Policies within the Services Markets?*, cit.

investment in infrastructure and services, ultimately resulting in inefficiency. According to the Commission, even if all Member States passed legislation on the procedure to award concessions in order to translate Treaty principles into domestic law, uncertainty would remain as to the interpretation of those principles. Different rules across Member States would inevitably result in divergent requirements and conflicting procedural regimes, increasing regulatory complexity and disparities, as well as giving rise to barriers to cross border activities. In brief, in the Commission's view, only the intervention of the EU would end this lack of legal certainty and closure of the market[121]. Accordingly, in December 2011, the Commission proposed a Directives on the awarding of concession contracts[122] to fill this gap.

The proposed Directive on the award of concession contracts dictated rules on transparency, including an obligation of notification of the intention to award a service as well as the results of the award procedure[123]. It also provided for the possibility to terminate a concession in case the CJEU found that a Member State has not correctly adjudged a concession and infringed the obligations established under the Treaty and the Directive[124]. In addition, it precluded renegotiation in the case of strategic underbidding, as is the case when companies purposely quote bids less than the real amount with the intention of renegotiating the contract for a higher price after having won the bid[125].

Almost all these provisions have been enshrined in the subsequently adopted Directive on the award of concession contracts[126], thus confirming the objective of ensuring legal certainty, transparency, fairness and equal treatment in the awards of service concession contracts for all operators across the Union, thereby encouraging investments and better quality of services[127].

It is notable that notwithstanding the fact that Commission's proposal acknowledged the need to introduce provisions for the award of service concessions in the water sector[128], it was decided that water services were to be excluded from the scope of the Directive[129]. The broad support received by the EU citizens' initiative on water supported this decision. The EU Commissioner Barnier explained that the withdrawal of water services from the scope of the

---

[121] European Commission, Proposal for a Directive on the award of concession contracts, COM/2011/0897 final - 2011/0437 (COD), 20 December 2011, pp. 2-4.
[122] *Ibid*., art. 5, para. 1. The proposal comes together with other two Directive proposals: the first on procurement by entities operating in the water, energy, transport and postal sector and, second, on public procurement. See respectively: European Commission, Proposal for a Directive of the European Parliament and of the Council on procurement by entities in the water, energy, transport and postal services sectors, COM(2011) 895 final, 20.12.2011, aimed at modifying Directives 2004/18/CE and 2004/17/CE; European Commission, Proposal for a Directive of the European Parliament and of the Council on public procurement, COM(2011) 896 final, 20.12.2011. See currently Directive 2014/25/EU.
[123] *Ibid.*, art. 26
[124] *Ibid.*, art. 43.
[125] *Ibid.*, art. 42.
[126] Directive 2014/23/EU.
[127] For instance by, *inter alia: i*) clarifying key concepts such as concession, operational risk, exclusive and special rights; *ii*) solving doubts related to concessions between entities within the public sector (Art. 17); *iii*) establishing in detail the requirements related to the different stages of the awarding procedure; *iv*) combating corruption and preventing conflicts of interest; *v*) extending the scope of application of the "Remedies Directives" (Directives 89/665/EEC and 92/13/ECC, as amended by Directive 2007/66/EC) to all concession contracts above the threshold in order to challenge the award decision in court.
[128] European Commission, Proposal COM/2011/0897 final - 2011/0437 (COD), recital 5.
[129] Directive 2014/23/EU, recital 40, art. 12.

directive on services concessions was intended to please European citizens and silence criticism on the purported intention of the European Commission to encourage the privatization of water services[130]. In line with the citizens' initiative, the Directive justifies the exemption of the water sector from its scope by recalling the special features and the specific and complex arrangements to which the concessions in the water sector are often subject due to the «importance of water as a public good of fundamental value to all Union citizens»[131].

As a consequence, public procurement rules do not apply when water services are provided by local authorities in-house, through a joint venture or an affiliated undertaking, as well as in the case of a service concession.

To my understanding, the decision to withdrawal water services from the scope of the concession directive, while (allegedly) taken in order to please EU citizens and to ensure their right to water within the Union, is likely to affect the sound provision of water services[132]. The Concession Directive does not require either the liberalization of the water service market or the privatization of public utilities[133]. It does not require Member States to contract out services through concessions and applies only once the decision to tender the service is taken, requiring contracting authorities or entities to allow all potential bidders to take part in an open competition[134]. Equally, the Directive does not prejudice the freedom of public authorities to define SGEIs, their scope and characteristics[135].

These facts provide assurances as to the freedom left to Member States to define public policy objectives for public services and to decide about their possible divestiture. In brief, Member States' leeway to regulate in the public interest seems to be unaffected by the relevant provisions of the Concession Directive. On the contrary, the Directive may have positive effects in terms of fair competition among private providers and genuine opening up of the transnational market. Due to its exclusion from the scope of the Directive, the procedure for selecting private providers in case of water service concession remains regulated solely by the Treaty principles of transparency, equality of treatment, proportionality and mutual recognition. As a result, there is no coordination or harmonization among those few Member States that have adopted *ad hoc* legislation aimed at regulating the different phases of the awarding procedure[136].

---

[130] The Commissioner stated: "[d]espite all the changes to the legal text, and the contributions from all political parties in the European Parliament and the Council, it is my judgment that the text we now have relating to water is not satisfactory for anyone: it does not provide the reassurances that citizens expect and it creates fragmentation in the single market. That is why the best solution now appears to be to remove water from the scope of the concessions directive. It is our duty to take into account the concerns expressed by so many citizens". See the Statement by Commissioner Michel Barnier on the exclusion of water from the Concessions Directive, 21 June 2013, available at: https://ec.europa.eu/archives/commission_2010-2014/barnier/headlines/speeches/2013/06/20130621_en.html.

[131] Directive 2014/25/EU, recital 40.

[132] Aquafed claims that behind the decision to withdraw water services from the concession directive there are powerful lobbies interested at defending their current positions. See press release available at http://www.aquafed.org/actu-42.html.

[133] Directive 2014/23/EU, recital 7, Art. 2.2.

[134] J.C. CLIFTON, D. DÍAZ-FUENTES, *The European Union's Concessions Directive: A Critical reading*, in *Intereconomics, Review of European Economic Policy*, 2013, p. 144.

[135] Directive 2014/23/EU, recital 6, art. 4.

[136] Commission of the European Communities, *Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concession*, COM(2004) 327 final, 30.04.2004, paras 31-32.

In light of the above considerations, I posit that the choice to regulate the award procedure for private providers only in case of public procurement in respect of service contracts was not meant to enhance the quality and affordability of water services, which are often managed through concession contracts, but to please the EU electorate, in principle contrary to any form of liberalization of the sector. The possible exposure to uneven competition, on the contrary, risks discouraging investments necessary to raise the standard of water services.

4.2. The EU legal framework related to the water sector is highly fragmented and is largely focused on environmental issues related to the protection of European waters. As mentioned in section 1, different directives and regulations have been adopted dealing with specific subject matters, such as the quality of drinking water or the treatment of wastewater. None of these refer the affordability of water services, core feature of the human right to water. On the contrary, this tenet seems to have received little consideration compared to environmental objectives aimed to protect the quality of EU waters. This section describes possible normative conflicts between obligations stemming from the EU law governing water policy, on the one hand, and SGEIs, on the other hand (sub-section 4.2.1). It then illustrates the current case law concerning the principle of recovery of the costs of water services pursuant to Article 9 of the WFD (sub-section 4.2.2). Finally, it suggests a possible interpretation of Article 9 WFD that takes into account the provisions of other sectors of EU law, as well as the human right to water (sub-section 4.2.3).

4.2.1 The WFD[137] addresses the provision of water services only marginally[138] and does not explicitly seek to achieve complete harmonization of the rules of Member States concerning water[139]. However, Article 9 WFD establishes the principle of full recovery of the costs of water services[140].

The cost recovery principle aims to make the end user of the service accountable for his consumption in order to promote sustainable use of water resources in accordance with the polluter pays principle[141]. It is believed that low tariffs of water services lead to excessive use, while higher costs disincentive unnecessary consumption.

This rule, valuable from an environmental perspective, appears to disregard social objectives. Excessive subsidization is undoubtedly likely to result in inefficient use, over-exploitation and degradation of surface and groundwater resources, while sound water pricing

[137] Directive 2000/60/EC, OJ L 327, 22.12.2000, pp. 1–73.

[138] Art. 2(38) WFD: «"Water services" means all services which provide, for households, public institutions or any economic activity: (a) abstraction, impoundment, storage, treatment and distribution of surface water or groundwater, (b) waste-water collection and treatment facilities which subsequently discharge into surface water ».

[139] Court of Justice, judgment of 30 November 2006, case C-32/05, *Commission v. Luxembourg*, ECLI:EU:C:2006:749, para. 41. The directive, adopted under art. 192 TFUE, is meant to contribute to the pursuit of objectives set forth under the Union policy on the environment.

[140] Art. 9 WFD.

[141] H. UNNERSTALL, *The Principle of Full Cost Recovery in the EU-Water Framework Directive - Genesis and Content*, in *JEL*, 2007, p. 29 ff; W. HOWARTH, *Cost Recovery For Water Services and the Polluter Pays Principle*, in *ERA Forum*, 2009, p. 565 ff.; J. MARTIN-ORTEGA, G. GIANNOCCARO, J. BERBEL, *Environmental and Resource Costs Under Water Scarcity Conditions: An Estimation in the Context of the European Water Framework Directive*, in *Water Resources Management*, 2011, p. 1615 ff.; E. GAWEL, *Environmental and Resource Costs Under Article 9 of the Water Framework Directive: Challenges for the Implementation of the Principle of Cost Recovery for Water Services*, Berlin, 2015.

policies may affect the demand of different water users, reducing pressure on water resources[142]. However, if strictly applied, the cost-recovery rule may have an impact «on the affordability of water services especially for low-income groups and some rural and farming communities that pay little of the total water service costs»[143].

To some degree, this concern has been taken into account in the Directive. The third sentence of Article 9(1) WFD allows Member States – which are required to ensure (by 2010) an adequate contribution of water users to the recovery of costs – to conduct a proportionality assessment having regard, *inter alia*, to the social effects of the cost recovery rule. In addition, Article 9(4) allows Member States to depart, for determined *water-use activity*, from the rigorous application of the cost recovery principle[144].

Article 9 WFD lends itself to different interpretations and its interrelation with other sectors of EU law is not obvious[145]. As far as the affordability of water services is concerned, inconsistency between the cost recovery principle and social tariffs or compensation for undertakings entrusted with public services obligations cannot be excluded[146]. While some have posited that funding measures in the interest of the poorest is permitted under the Directive[147], it is my contention that the conditions under which Article 9 WFD tolerates support in favour of low-income households are unclear and such uncertainty may interfere with Member States' freedom to implement social policy in the water sector.

Looking at the *travaux préparatoires* of the WFD, the Commission's original proposal included an exemption from full cost recovery prices «in order to allow a basic level of water use for domestic purposes at an affordable price»[148]. This proposal did not survive the negotiations on the directive and the final text contains no provision on affordability of water services. The Commission has recognised that strict recovery of costs will impact the affordability of services, especially for low-income households. However, it has argued that, while social concerns must be taken into consideration when designing new pricing policies, they should not be the primary objective of water pricing policies in a situation of unsustainable water use[149]. In addition, the cost recovery principle is applied equally to a variety of water uses,

---

[142] G. SIMMONDS, *Consumer Representation in Europe Policy and Practice for Utilities and Network Industries, Universal and Public Service Obligations in Europe*, Centre for the Study of Regulated Industries Research Report No. 15, 2003, p. 57 ff.

[143] Commission of the European Communities, Communication from the Commission to the Council, the European Parliament and the Economic and social Committee, *Pricing policy for enhancing the sustainability of water resource*s, COM(2000) 477 final, 26.07.2000, p. 12. See also *OECD Studies on water*, *Pricing Water Resources and Water and Sanitation Services*, London, 2010, www.oecd.org; UNECE, WHO Regional Office for Europe, *No one left behind: Good practices to ensure equitable access to water and sanitation in the pan-European region*, New York-Geneva, 2012, p. xiii; A. REYNAUD, *Assessing the impact of full cost recovery of water services on European households*, in *Water Resources and Economics*, 2016, pp. 65-78.

[144] Art. 9 (4) WFD.

[145] P. TURRINI, *Just Dipping a Toe in the Water? On the Reconciliation of the European Institutions with Article 9 of the Water Framework Directive*, in *Geo.Int'l Envtl.L.Rev.*, 2018, p. 112 ff.

[146] By the same token, Turrini, commenting on the relationship between SGEIs and the principle of full recovery of costs, held that: "whether Article 9 is breached (…) the subsidy's contribution to a more responsible water use is cancelled out". *Ibid*., p. 127.

[147] European Commission, *Stakeholder Dialogue on Benchmarking Water Quality and Water Services*, *Summary 2014 and 2015 Meetings*, 16 December 2015, p. 20.

[148] European Commission proposal for a Council Directive establishing a framework for Community action in the field of water policy of 17 June 1997, COM/97/0049 final - SYN 97/0067, OJ C184/20, p. 20, Art. 12.3.*a*.

[149] Communication from the Commission COM(2000) 477 final, 26.07.2000, pp. 16-17. The Commission suggests the introduction of specific pricing schemes, such as rising block pricing that combine affordability and

without distinguishing among agricultural, industrial or domestic uses. On a whole, Article 9 WFD was conceived with the foremost aim of promoting sustainable water use, even at the expense of the needs of the most vulnerable consumers, who bring the risk of disregarding the affordability tenet of the right to water[150].

The following sub-section illustrates the recent case-law concerning Article 9 WFD in order to draw further conclusions from the reading of the CJEU.

4.2.2. At the outset, it must be admitted that the CJEU's interpretation of Article 9 WFD raises further concern[151]. The first and most prominent case concerning the matter touched upon the applicability of the cost recovery principle to activities relating to the supply of water, such as the abstraction of water for irrigation or industrial purposes and the impoundment of water for hydroelectric power generation. The European Commission brought an infringement procedure against Germany for failure to correctly transpose Article 9 WFD claiming that, due to the restrictive interpretation of water services by German authorities, abstraction of water for, *inter alia*, agricultural and industrial purposes remained outside the scope of the obligations introduced by this provision. The European Commission maintained that the concept of water services covers all activities relating to the supply of water, which cannot be exempted as such from pricing policies and the cost recovery principle. On the contrary, Germany, supported by some Member States, notably Austria, Sweden, Finland, Hungary, the UK and Denmark[152], posited that the concept of water services under Articles 2(38) and 9 FWD refers only to the supply of drinking water and the collection, treatment and disposal of wastewater, thereby exempting other activities from the purview of Article 9 WFD.

The CJEU dismissed the Commission's action as unfounded[153]. The salience of the judgment can be summarised as follows.

In answering the question of whether Articles 9 WFD applies only to the supply of water or also to any service relating to «abstraction, impoundment, storage, treatment and distribution of surface water or groundwater», as per the definition enshrined in Article 2(38) WFD, the Court ruled out that the Directive imposes «a generalised pricing obligation in respect of all activities relating to water use»[154]. According to the Court, the literal interpretation of those provisions does clarify whether all services relating to the activities listed above are subject to the principle of recovery of costs, or only those associated with the supply of water. However,

---

environmental efficiency objectives. It argues that ex-ante and ex-post assessment of both the social welfare effects and the impacts on household water demand of such pricing policies is necessary to ensure that both social and environmental objectives can be met.

[150] Opinion of the Economic and Social Committee on the "Communication from the commission to the council, the European Parliament and the Economic and Social Committee – Pricing policies for enhancing the sustainability of water resources", OJ C123/65, 25 April 2001.

[151] To the author knowledge, so far Art. 9 WFD has been addressed by the CJEU in three cases, namely: Court of Justice, judgment of 11 September 2014, case C-525/12, *Commission v. Germany*, ECLI:EU:C:2014:2202; judgment of 30 June 2016, case C-648/13, *Commission v. Poland,* ECLI:EU:C:2016:490; this is an infringement procedure against Poland concerning its failure to transpose art. 9(2) WFD within the time limit laid down by the Commission in its reasoned opinion; judgment of 7 December 2016, case C-686/15, *Vodoopskrba i odvodnja,* ECLI:EU:C:2016:927: this is a preliminary ruling regarding the interpretation of the WFD in respect to the freedom left by the Directive to national legislations to determine the pricing method for water services.

[152] These States have intervened in favour of Germany in the above mentioned case C-525/12, *Commission v. Germany*.

[153] Ivi.

[154] *Ibid.*, para. 48.

a teleological interpretation allows us, in the Court's view, to reach the conclusion that measures for recovery the costs for water services are only one among many instruments available to Member States to achieve rational water use and, thus, to pursue the aim of the Directive to maintain and improve the aquatic environment in the EU[155]. While the abstraction or impoundment of water may affect the quality of waters, it cannot be inferred that in any event «the absence of pricing for such activities will necessarily jeopardise the attainment of those objectives»[156]. Moreover, this conclusion is deemed to be in line with Article 9(4) WFD, which allows Member States to exempt a given water-use activity to the recovery of costs, provided that the exemption «does not compromise the purposes and the achievement of the objectives of that directive»[157]. Therefore, in case of water activities other than water supply, for an infringement of the WFD to be found, the CJEU needs further evidence from the European Commission establishing that the lack of pricing policies in accordance with the cost recovery principle has actually affected the achievement of the objective of the Directive.

This ruling has been sharply criticized for failing to clarify the scope of the notion of water services covered by Article 9 WFD and, above all, for having watered down the obligations stemming from the cost recovery principle, granting excessive freedom to Member States to pursue domestic policies irrespective of the compliance with this principle[158]. From the point of view of the present study, other concerns must be raised.

In brief, the principle of cost recovery certainly applies to the supply of water for human consumption, unless a State proves that by departing from this principle it has not affected the fulfilment of the Directive's objectives. On the contrary, for other activities relating to the supply of water, it is for the Commission to establish that the departure from this principle has compromised the purpose of the Directive, in the absence of which Member States are free to exempt such uses from being fully charged. Not only has no special regard been given to drinking water use for human consumption for funding measures aiming to foster universal access to water, but drinking water and wastewater treatment are the sole uses to be *de plano* subjected to the rule of the recovery of costs.

The above scenario shows a discrepancy between the rules belonging to two different sectors of EU law, notably that of SGEIs and competition, on the one hand, and water policy on the other, which by virtue of the cost recovery principle risks neglecting the affordability of water services, thus compromising the enjoyment of the human right to water. Against this background, the following sub-section suggests a human rights-oriented reading of Article 9 WFD[159].

---

[155] *Ibid.*, paras. 49-55.
[156] *Ibid.*, para. 56.
[157] *Ibid.*, para. 57.
[158] E. GAWEL, *ECJ on Cost Recovery for Water Services Under Article 9 of the Water Framework Directive: Camera Locuta Causa Non Finita*, in *JEEPL*, 2015, pp. 71-79; P.E. LINDHOUT, H.F.M.W. VAN RIJSWICK, *Effectiveness of the Principle of Recovery of the Costs of Water Services Jeopardized by The European Court of Justice. Annotations on the Judgment in C-525/12*, in *JEEPL*, 2015, p. 80 ff.; P. TURRINI, *Just Dipping a Toe in the Water? On the Reconciliation of the European Institutions with Article 9 of the Water Framework Directive*, cit., pp. 134-139.
[159] The rules on interpretation of the Vienna Convention on the Law of Treaties, Vienna, 1969, apply to the EU Treaties (see art. 5 VCLT according to which the Convention applies "to any treaty which is the constituent instrument of an international organization"). M. HERDEGEN, *Interpretation in International Law*, in *Max Planck Encyclopedia of Public International Law*, 2013, para. 50. The applicability of such rules to the secondary EU law is uncertain. Kuijper notices that, when private parties have made references to the rules of interpretation of the

4.2.3. It is the contention of this section that the rules on interpretation applicable to the EU law have the potential to reconcile apparently conflicting obligations stemming from different sectors of the EU law, notably the obligation to recover the costs of water services for environmental purposes and the duty to ensure the affordability of water services to all consumers, in particular those who cannot afford them, so as to foster the fulfilment of universal access to water and the human right to water.

In the first place, attention must also be paid to the Preamble of the Directive, which takes into account the human right dimension of water establishing that «[w]ater is not a commercial good like any other but, rather, a heritage which must be protected, defended and treated as such»[160].

Following the same line of argument put forward by the CJEU for water uses other than the supply of water, it can be argued that the cost recovery rule is not strictly mandatory, but admits exemptions not only for certain activities related to the supply of water, but also to the supply of drinking water as such. Article 9(4) WFD explicitly exempts Member States from applying the cost recovery principle to a given water-use activity if, in accordance with established practices, «this does not compromise the purposes and the achievement of the objectives of this Directive», that is the prevention and reduction of water pollution, the promotion of sustainable water use and environmental protection[161]. Provided that these final objectives are fulfilled or at least not compromised, the principle of the recovery of costs can be set aside also when the supply of water to households is concerned. This understanding is corroborated by the third sentence of Article 9(1) WFD, according to which the cost recovery principle may be subject to a proportionality assessment, meaning that considerations for the economic viability of the pricing policy should not automatically take precedence over considerations on the social effects of the recovery.

A problem may arise if departing from the cost recovery principle in order to compensate suppliers entrusted with public service obligations could affect the status of the European aquatic ecosystem, jeopardizing the purposes of the Directive. In this connection, if we limit the content of public service obligations in the water service sector to the core obligations established under the human right to water, it is rather unlikely that the purposes of the WFD would be compromised. Indeed, taking the General Comment No. 15 as yardstick, the right to water entails States' duty to provide water for free only in a minimum amount and only to the most vulnerable people unable to otherwise afford the cost of the service. Moreover, on average, only 15 per cent of total water abstraction in Europe is used for public water supply, whereas 44 per cent is used for agriculture, 40 per cent for industry and energy production[162]. These considerations and facts lead to the conclusion that the segment of consumers that would be exempted from paying the full cost of the service would hardly reach a level capable of

---

Vienna Convention with respect to secondary European Union law, they have been ignored by the EC. See P.J. KUIJPER, *The European Courts and the Law of Treaties: The Continuing Story*, in E. CANNIZZARO (ed.), *The Law of Treaties. Beyond the Vienna Convention*, Oxford, 2011, p. 269; K. LENAERTS, J.A. GUTIÉRREZ-FONS, *To Say What The Law of the EU Is: Methods of Interpretation and the European Court of Justice*, Working Paper, EUI AEL, 2013/09.

[160] *Ibid*., p. 1, recital 1, WFD.

[161] Court of Justice, judgment of 11 September 2014, case C-525/12, *Commission v. Germany*, ECLI:EU:C:2014:2202, para. 86.

[162] Data available at http://www.eea.europa.eu/themes/water/water-resources/water-use-by-sectors.

jeopardizing the quality of European waters. Therefore, providing water free of charges in Europe to the most vulnerable would not compromise the final purposes of the Directive.

In addition, Article 9(1) WFD allows Member States to have regard to «the geographic and climatic conditions of the region or regions affected». Geographic differences in service areas has an impact on their affordability. The cost connected to supply drinking water is higher in remote and sparsely populated areas than in well-connected and densely populated regions. As a consequence, the water service provider may decide both to avoid servicing such areas or to raise tariffs, unless consideration is granted by public authorities to avoid transferring the greater costs to the end users. In line with the balancing test laid down in the third sentence of Article 9(1) WFD, tariffs aiming to compensate these costs shall be considered compatible with the requirement to ensure adequate water pricing.

Additionally, the CJEU reiterates that a provision of EU law «must be placed in its context and interpreted in the light of the provisions of EU law as a whole».[163] EU secondary law must thus be read against primary EU law. In this connection, Article 14 TFEU rules that, given the role played by SGEIs «in promoting social and territorial cohesion», both the Union and Member States «shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions». Article 36 of the EU Charter requires the Union to respect SGEI as provided for in national laws «in order to promote the social and territorial cohesion of the Union». Water service, as an SGEI, may contribute to promoting the social and territorial cohesion in so far as their costs remain affordable also for residents of remote and sparsely populated areas. In this connection, the rules on SGEIs, notably Article 14 TFEU and Article 36 of the EU Charter, should be a matter in point in interpreting domestic laws establishing funding measures in favor of water service operators or the consumers of water utilities. In the hypothetical case of an infringement procedure for an alleged lack of implementation of the cost recovery rule, the CJEU should take into consideration the fact that Member States' measures concerning the price of water services are aimed at fulfilling *territorial cohesion*[164].

Furthermore, in line with the requirements of Article 175 TFEU[165] and the objectives defined in Article 174 TFEU[166], this funding policy would also contribute to strengthening the economic, social and territorial cohesion among different areas and regions of the EU, taking into special regard the least favoured regions, rural areas and regions where people may face higher costs due to geographic and demographic disadvantages.

---

[163] Court of Justice, judgment of 6 October 1982, case C-283/81, *CILFIT v. Ministero della Sanità*, ECLI:EU:C:1982:335, para. 20; judgment of 11 September 2014, case C-525/12, *Commission v. Germany*, ECLI:EU:C:2014:2202, para. 43.

[164] A case in point is Court of Justice, judgment of 7 September 2016, case C-121/15, *ANODE*, ECLI:EU:C:2016:637, paras. 40-52. In this preliminary ruling, the Court of Justice established that French law on regulated tariffs for the sale of natural gas was compatible with the provisions of a Directive concerning common rules for the internal market in natural gas (in particular, art. 3.2 of Directive 2009/73/EC). According to the Court, although art. 3.2 of Directive on gas allows Member States to impose public service obligations on undertakings operating in the gas sector only if the security of gas supply is at stake, France's pricing policy, read in the light of arts. 14 TFEU and 106 TFEU and Protocol No. 26 on services of general interest, annexed to the EU Treaty, has to be deemed compatible with the Directive to the extent that it aims to ensure territorial cohesion, and provided that the other conditions set out in the article are satisfied.

[165] Art. 175(1) TFEU.

[166] Art. 174 TFUE.

Finally, EU law should be interpreted in harmony with the legal order that provides its context[167]. As noted by Kuijper, the CJEU has ruled on cases by informing the interpretation of secondary EU rules by reference to specific international agreements[168]. In line with the Court's case-law[169], the WFD may also be read in conformity with international agreements encompassing human right to water, especially the ICESCR, to which all Member States are parties. In this respect, as far as the issues of water affordability is concerned, the content of the right to water may overlap with universal services obligations deriving from an SGEI in the water services sector. In both cases, there may be an obligation to ensure a minimum amount of water to all irrespective of the profitability of the service. Likewise, the interpretation of the rule on full recovery of costs should be informed by the duty to provide universal access to water.

Framed in these terms, the principle of recovery of the costs of water services would allow special sectorial and geographical considerations to be taken into account, together with consideration for the needs of the most vulnerable water consumers.

4.3. All Member States, as parties to the ICESCR, are bound to comply with the obligations stemming from the right to water as incorporated in the right to an adequate standard of living under Article 11 ICESCR. I submit that they are equally bound to respect the right to water at an EU level.

It has been posited that the right to water has entered the European *acquis* because of Article 6 of the TEU[170]. Thanks to the case-law of the European Court of Human Rights recognizing the right to water, it is said that the latter should be regarded as a general principle of the EU law[171]. Actually, the European Convention of Human Rights ("ECHR") does not enshrine a right to water and, although some features of this right have been recognized by the European Court, the latter never mentioned the right to water when called to interpret the relevant provisions of ECHR. Therefore, it may be premature to consider the right to water as a general principle of the EU law by means of its acknowledgment by the case-law of the European Court of Human Rights.

Nevertheless, the right to water may be considered a general principle of the Union's law as this right is enshrined in international human rights treaties, such as, *inter alia*, the ICESCR. Article 6(3) TEU mentions the general principles concerning fundamental rights as sources of

---

[167] K. LENAERTS, J. A. GUTIÉRREZ-FONS, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, cit.

[168] See P. J. KUIJPER, *The European Courts and the Law of Treaties*, in E. Cannizzaro (ed.), *The Law of Treaties. Beyond the Vienna Convention*, cit., pp. 264-265.

[169] Court of Justice, judgment of 10 January 2006, case C-344/04, *IATA and ELFAA*, ECLI:EU:C:2006:10, in which the Court interpreted Regulation No. 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flight, in line with the Montreal Convention to which the EU and its Member States were parties. Court of Justice, judgment of 17 June 2010, case C-31/09, *Bolbol*, ECLI:EU:C:2010:351, in which the Court interpreted the then Directive on minimum standards for the granting of refugee status referring to the 1951 Geneva Convention on the Status of Refugees.

[170] Art. 6(3) of the Consolidated version of the TEU, OJ C 326, 26.10.2012, p. 13–390 establishes that "[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".

[171] P. TURRINI, *Just Dipping a Toe in the Water? On the Reconciliation of the European Institutions with Article 9 of the Water Framework Directive*, cit., pp. 112-113, nt. 114.

the EU law having primary status[172]. It states that: «[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law». Despite the fact that international human rights treaties are not mentioned in this provision among the sources of inspiration of general principles of law, the list is not exhaustive and they have been considered by the CJEU as establishing the existence of general principles[173]. Indeed, the CJEU has relied on international human rights treaties, in particular the ICCPR and the ICESCR, to recognize a number of human rights, including civil and political rights as well as economic, social and cultural rights[174].

In light of the above, human rights contained in international treaties to which Member States are parties are principles common to EU States, which they are obliged to respect and the interpreter to take into consideration[175].

The human right to water, as a general principle of the Union' law, might be assimilated to the EU primary law in the hierarchy of EU sources[176]. This has two consequences. First, with respect to the primary law of the European Union, such as the internal market rules, the right to water should be taken into consideration for the purpose of interpretation[177].

Second, the right to water would be a parameter against which EU secondary law can be evaluated, such as the rule on the recovery of the costs of water services enshrined in Article 9 WFD, especially in case of normative conflicts with the affordability tenet of the right to water[178]. After all, the EU is bound to respect international law, including the right to water, in the exercise of its powers[179], notably when adopting secondary rules.

---

[172] Court of Justice, judgment of 15 October 2009, case C-101/08, *Audiolux and Others*, ECLI:EU:C:2009:626, para. 63; judgment of 29 October 2009, case C-174/08, *NCC Construction Danmark*, ECLI:EU:C:2009:669, para. 42.

[173] C. AMALFITANO, *General Principles of EU Law and the Protection of Fundamental Rights*, Cheltenham-Northampton, 2018, p. 30 ff.; D. CHALMERS, G. DAVIES, G. MONTI, *European Union Law*, Cambridge, 2016, p. 253.

[174] See, among others, Court of Justice, judgment of 14 May 1974, case C-4/73, *Nolde KG v. Commission*, ECLI:EU:C:1974:51; judgment of 13 December 1979, case C-44/79, *Hauer v. Land Rheinland-Pfalz*, ECLI:EU:C:1979:290; judgment of 18 October 1989, case C-374/87, *Orkem v. Commission*, ECLI:EU:C:1989:387; judgment of 27 June 2006, case C-540/03, *Parliament v. Council*, ECLI:EU:C:2006:429; judgment of 13 April 2010, case C-73/08, *Bressol and Others*, ECLI:EU:C:2010:181.

[175] R. BARATTA, *Lezioni di Diritto dell'Unione europea*, Roma: LUISS University Press, 2018, p. 81. About general principles of EU Law see: C. AMALFITANO, *General Principles of EU Law and the Protection of Fundamental Rights*, cit., pp. 30-35; D. CHALMERS, G. DAVIES, G. MONTI, *European Union Law*, cit.; L. DANIELE, *La protezione dei diritti fondamentali nell'Unione europea dopo il trattato di Lisbona: un quadro di insieme*, in *Il Diritto dell'Unione europea*, 2009, pp. 650-652; G. STROZZI, *Il sistema integrato di tutela dei diritti fondamentali dopo Lisbona: attualità e prospettive*, in *Il Diritto dell'Unione europea*, 2011, pp. 841-843; T. TRIDIMAS, *Fundamental Rights, General Principles of EU Law, and the Charter*, in *Cambridge Yearbook of European Legal Studies*, 2014, p. 361 ff.; R. BARATTA, *Droits fondamentaux et 'valeurs' dans le processus d'intégration européenne*, in *Studi sull'integrazione europea*, 2019, pp. 289-307.

[176] L. DANIELE, *Diritto dell'Unione Europea. Sistema istituzionale – Ordinamento – Tutela giurisdizionale – Competenze*, cit., p. 158; J.P. JACQUÉ, *À propos de la hiérarchie des normes*, in Liber Amicorum *per Antonio Tizzano. De la Cour CECA à la Cour de l'Union:le long parcours de la justice Européenne*, Turin, 2018, p. 431.

[177] In any event, assuming a conflict between the right to water and the internal market rules, the CJEU would not have jurisdiction to establish the validity of the Treaties rules.

[178] B. NASCIMBENE, C. SANNA, *Articolo 6*, in A. TIZZANO (ed.), *Trattati dell'Unione europea*, Milan, 2014, pp. 54-71, p. 31.

[179] Court of Justice, judgment of 16 June 1998, case C-162/96, *Racke v. Hauptzollamt Mainz*, ECLI:EU:C:1998:293, para. 45; judgment of 3 September 2008, case C-402/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, ECLI:EU:C:2008:461, para. 291.

On a different note, as for the relationships between different sectors of EU law, one may contend that Member States that define water service as SGEIs, given the primary ranking of the rules on SGEIs in the Treaties and the EU Charter, should be free to adopt funding measures to ensure universal access to the service irrespective of the actual recover of the costs associated to said service, as requested by Article 9 WFD.

However, given the lack of a regulation dealing with SGEIs as a whole[180], and the persistent sectoral approach which has so far excluded water service from the discipline of SGEIs, if a Member State does not impose universal service obligations in the water sector, and, to speak in human rights terms, does not endeavour to guarantee access to safe, accessible and affordable water to all, including in remote and low populated regions, the infringement of the human right to water would remain unenforceable at the EU level[181]. Article 14 TFEU provides that the European Parliament and the Council, acting by means of a regulation, *shall* establish principles and criteria to allow SIEGs to fulfil their mission. So far, this rule has been considered the legal basis for the Union to legislate in the field, and not a mandatory obligation compelling the Union to legislate[182]. Article 36 of the EU Charter does not confer an enforceable individual right to be granted access to SGEIs, but only establishes a negative obligation upon the Union to avoid constraining Member States' freedom to legislate in this connection[183].

In order to establish clear obligations of Member States regarding the fulfilment of the core features of the right to water, the following section illustrates a legislative proposal currently under review.

5. In the first successful EU citizens' legislative initiative *Water and sanitation are a human right! Water is a public good, not a commodity!*, the signatories invited the European Commission to propose legislation aimed not only to exempt water from the internal market rules and water services from liberalization, but also to oblige «[t]he EU institutions and Member States […] to ensure that all inhabitants enjoy the right to water and sanitation» and to encourage the EU to increase «its efforts to achieve universal access to water and sanitation»[184].

---

[180] M. MONTI, *A New Strategy for the Single Market at the service of Europe's Economy and Society. Report to the President of the European Commission José Manuel Barros*, cit., p. 74, Monti refers that: "[i]t has been proposed to address services of general economic interest in a horizontal framework regulation. However, the consultation has made clear that a proposal for a framework regulation would have limited added value, if any, and that its chances of being adopted would be very small. At this stage, it does therefore not seem appropriate for the Commission to present such a proposal". On the opportuneness of considering such a regulation see: D. GALLO, *I servizi di Interesse Economico Generale – Stato, Mercato e Welfare nel Diritto dell'Unione Europea*, cit., p. 228, p. 447 ff.; Opinion of the European Economic and Social Committee on 'Services of general economic interest: how should responsibilities be divided up between the EU and the Member States?', OJ C 128, 18.5.2010, p. 65–68, para. 4.12.

[181] Gallo also contends that art. 14 TFEU and art. 36 EU Charter do impose positive obligations upon both the Union and Member States (p. 227), and agrees that these provisions do not confer individual rights enforceable by means of an action for damages for extra-contractual liability of the EU or Member States (p. 827). D. GALLO, *I servizi di Interesse Economico Generale – Stato, Mercato e Welfare nel Diritto dell'Unione Europea*, cit.

[182] *Contra* ivi, pp. 451-452. The author contends that individual users and undertakings might bring an action for failure to act pursuant to art. 265 TFEU against the Commission should it fail to bring a proposal in this connection.

[183] Explanations relating to the EU Charter, OJ V 303, 14.12.2007, p. 17-35, art. 36. A. ARENA, *Accesso ai Servizi d'Interesse Economico Generale*, cit., pp. 686-688. *Contra*, D. GALLO, *I Servizi di Interesse Economico Generale – Stato, Mercato e Welfare nel Diritto dell'Unione Europea*, cit., p. 740; M. MARESCA, *L'Accesso ai Servizi di Interesse Generale, De-Regolazione e Ri-regolazione del mercato e ruolo degli Users' Rights*, in *DUE*, 2005, p. 447.

[184] European Citizens' initiative on water (No. ECI(2012)000003) available online at: http://ec.europa.eu/citizens-initiative/public/initiatives/successful/details/2012/000003/en.

Following this initiative the European Commission committed itself to recognising water as a human right[185]. However, while acknowledging the problem of water affordability and accessibility, the Commission's Communication on the EU citizens' legislative was limited to inviting Member States to ensure access to a minimum water supply for all citizens, in accordance with the recommendations of the WHO[186]. As for the issue of the privatization and liberalization of water services, the Commission expressed its intent to continue ensuring neutrality in relation to national decisions governing the ownership of water undertakings.

The European Parliament, which has clearly expressed its aversion to any form of liberalisation of the water service sector[187], criticised the Commission's response[188], calling on the institution to «permanently exclude water and sanitation and wastewater disposal from internal market rules and from any trade agreement, and to provide them at affordable price»[189]. By the same token, the European Economic and Social Committee criticised the Commission Communication for lack of ambition, urging the latter to propose a EU legislation recognising the human right to water[190].

Following these criticisms, the European Commission has finally submitted a proposal for amending the Directive on the quality of water intended for human consumption (Drinking Water Directive)[191], so to take into account the call for affordable access to drinking water for all EU inhabitants, in line with the acknowledgment of the human right to water made over the last decade by UN General Assembly and by the Parliamentary Assembly of the Council of Europe as well as the final outcome document of the 2012 Conference on Sustainable Development (Rio+20) and in the framework of the UN 2030 Agenda, under Sustainable Development Goal 6[192].

The Commission's proposal adds a new provision, Article 13, on access to water for human consumption, which seeks to contribute to achieving «*universal and equitable access to safe and affordable drinking water for all*»[193], by setting a twofold obligation for Member States. First, States must «improve access to and promote use of drinking water via a number of measures», including identifying people without access to drinking water, informing them about connection possibilities, as well as ensuring that equipment to freely access tap water is available in most cities. Second, they are under a duty «to take all measures necessary to ensure

---

[185] Communication from the Commission on the European Citizens' Initiative "*Water and sanitation are a human right! Water is a public good, not a commodity!*", COM(2014) 177 final, 19.03.2014.
[186], *Ibid*., p. 8.
[187] Resolution of the European Parliament on the Green Paper of the Commission on Services of General Economic Interest, of 14 January 2004.
[188] European Parliament, Resolution on the follow-up to the European Citizens' Initiative Right2Water, adopted by the Parliament Plenary on 8 September 2015, para. 21, where the Parliament stated that "*the Commission's alleged neutrality regarding water ownership and management is in contradiction with the privatisation programmes imposed on some Member States by the Troika*".
[189] *Ibid.*, para. 22.
[190] Opinion of the European Economic and Social Committee of 15 October 2014, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2015.012.01.0033.01.ENG. As for water pricing policies, the Committee underlines the importance of reconciling the need to guarantee universal access to water and the WFD principle of the recovery of the costs of water services (paras 4.4-4.6) proposing that water services be reclassified as services of non-economic general interest (para. 4.8.2).
[191] Council Directive 98/83/EC, OJ L 330, 5.12.1998, p. 32-54.
[192] European Commission Proposal COM(2017) 753 final, 2017/0332(COD), pp.12-13.
[193] Ivi, p. 23.

access to drinking water for vulnerable and marginalised groups»[194]. As for the possible rift between funding measures for ensuring universal access to water and the principle of full recovery of the costs of water services under Article 9 WFD, the Commission took a clear stance in favour of the former by stating that «[t]he principle of recovery of costs therefore does not prevent Member States from adopting social tariffs or having measures safeguarding populations at a socio-economic disadvantage, in addition to the measures provided for in new Article 13 of this Directive »[195].

The European Parliament adopted amendments to the Commission's proposal[196] and concluded its first reading on 28 March 2019[197]. At the time of writing the proposal it is awaiting the Council first reading position. For the sake of this study, it is significant that an explicit recognition of the right of access to drinking water was made by the Parliament[198]. In short, the amendments to the EC proposal are meant to strengthen access to drinking water for all in the Union[199]. The objective of the Directive is twofold: not only ensuring the safety of drinking water, but also providing universal access to drinking water intended for human consumption[200]. Notably, the amended draft Directive also calls for coherence with the WFD, in particular for the pricing policy of water service, which should take due consideration to the exception clause provided for in Article 9(4) WFD[201].

The draft revised Drinking Water Directive, as it currently appears, apparently gives the issue of the affordability of water a central role, filling an important gap in the EU primary and secondary legislation, and is thus likely to contribute to the fulfilment of the right to water in the Union.

6. Secondary EU regulations have liberalized some network industries qualified as SGEIs. This process has been accompanied by the requirement of public service obligations in favour of end users, ensuing the harmonization of the level of protection across the EU. On the contrary, no EU act has so far dealt with the liberalization and harmonization of the water service market and no horizontal regulation exists concerning SGEIs. Accordingly, Member States remain free to qualify water services as such and to establish universal services obligations in the water sector. Therefore, unequal access to the service might be provided across the Union.

Based on the consideration that the obligations stemming from the right to water and the universal service obligations associated with SGEIs overlap in many respects, the article enquired whether the liberalisation of water service within the EU would balance economic and human rights considerations, provided that public service obligations are set forth in order to

---

[194] European Commission Proposal COM(2017) 753 final, 2017/0332(COD), p. 23.
[195] *Ibid*.
[196] European Parliament amendments of 23 October 2018 on the European Commission Proposal COM(2017) 753 final, 2017/0332(COD) (COM(2017)0753 – C8-0019/2018 – 2017/0332(COD). See also Council of the European Union Proposal for a Directive of the European Parliament and of the Council on the quality of water intended for human consumption (recast) – General approach of 27 February 2019, 2017/0332(COD).
[197] European Parliament legislative resolution of 28 March 2019 on the European Commission Proposal COM(2017) 753 final, (COM(2017)0753 – C8-0019/2018 – 2017/0332(COD)).
[198] *Ibid.*, amendment 7, recital 4.
[199] *Ibid.*, amendments 161, 187 and 213, recital 2; amendment 3, recital 2 b; amendment 7, recital 4; amendment 8, recital 4 a; amendment 28, recital 17; amendments 113, 165, 191, 208, 166, 192, 169, 195, 170, 196, 197, 220, art. 13.1.
[200] *Ibid.*, amendments 163,189, 207 and 215, art. 1.2.
[201] *Ibid.*, amendment 4, recital 2 c; amendment 28, recital 17; amendment 29, recital 18; amendment 32, recital 21.

guarantee equal access to safe water[202]. Liberalisation of the water sector has a threefold potential: first, attracting investment in a high-cost sector; secondly, fuelling competition among providers in order to boost the quality of the service and to lower tariffs; and thirdly, fostering more even conditions of access to water service in favour of the less well-off. The core issue addressed by this article concerns the alleged incompatibility of the liberalization of water services with the requirements of the right to water.

In order to find path of harmonization between the two, this article has first evaluated the possibility of preventing normative conflicts between obligations stemming from an act of entrustment to carry out an SGEI and the provisions of competition, State aid and public procurement. It has been concluded that a number of exceptions to competition and State aid rules do allow interpreters to resolve inconsistencies in these different domains. As for the relevant rules on public procurement, it has been contended that, paradoxically, the exemption of water services from the Concession Directive, purportedly made to guarantee the right to water, risks undermining the fulfilment of this right. The lack of common and clear rules concerning the award of concessions in the water service sector may fuel uncertainty, even corruption and fraud, taking into consideration the fact that even when the service is provided by a PPP, the choice of the private provider would better be made by means of a fair public tender open to competition.

Secondly, the article continues by assessing whether a potential source of conflicting obligations between the right to water and the EU law could be avoided by means of interpretation. The case in point concerns the cost recovery principle set forth by Article 9 WFD and the lack of coordination of the latter with public service obligations, which strive for the affordability of essential services. It is concluded that it is far from clear to what extent the full recovery of water service costs would be compatible with the requirement of payment for the supply of water to poor or remote households. In an effort to seek harmonization between the EU different regimes under consideration, a human-rights oriented interpretation of Article 9 WFD, which takes into account the affordability tenet of the human right to water, was proposed.

Finally, in the case of potential unavoidable normative conflicts between market rules and the right to water, even considering this right as a general principle of the EU law, it is possible that no priority would be given to the latter. On a different note, the right to water would ultimately prevail over secondary legislation establishing the rule of the full recovery of costs of water service.

All in all, I submit that, at the EU level, the liberalization of water service may be considered compatible with the requirement of the right to water to the extent that private undertakings are entrusted with public service obligations aimed at ensuring access to safe, accessible and affordable water. In principle, liberalization of water service may enhance the right to water by imposing on Member States the duty to provide universal access to safe drinking water at an affordable price.

Nonetheless, as the liberalisation of the water service sector does not seem to be imminent, as it is fiercely opposed by EU citizens, the proposal of the Commission to revise the Drinking

[202] From a political point of view, the feasibility of imposing an EU regulation aimed to liberalize the water service market during the current crisis faced by the EU deserves further reflections, which are beyond the scope of this paper.

Water Directive so as to ensure universal access to safe, affordable, drinking water in the overt intent to enhance the right to water deserves a warm welcome. Its outcome warrants close monitoring in the years to come.