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The European Governance of the Water Sector – Contentious Policy Agendas Triggering Transnational Reactions*

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Abstract: The provision of clean drinking water and sanitation are social policy fields that are under pressure from a combination of fiscal, environmental and social crises. The role of transnational politics in governing water through these crises is however often overlooked. The proposed paper addresses this gap by following the evolution of the European governance of the water sector. Relying on the analysis of legal principles and policy ideas (present in EU law, European Semester documents as well as policy publications), the paper seeks to uncover the changing balance between the decommodification of water services through the harmonization of environmental and quality standards on the one hand, and the commodification of water services through liberalizing reforms on the other. While water was eventually excluded from the “Services Directive”, the threat of liberalization played a significant role in the European right2water campaigns. Furthermore, the paper looks at alternative ways towards commodification, embedded in environmental and public procurement rules, and most importantly in the EU’s New Economic Governance framework. The paper also aims to identify the conditions under which countermovements were able to politicize these interventions and influence water policy-making at the EU level.

* This paper is work-in-progress. Comments and suggestions are welcome.

Introduction

The provision of clean drinking water and sanitation is under threat from a combination of fiscal, environmental and social crises. These crises are often man-made and result from the extension of the logic of capitalist accumulation to the field of public infrastructure, including water provision (Harvey, 2004). In many parts of the world - from Flint, Michigan in the US through Cape Town in South Africa to Chennai in India - these crises have recently erupted in a fast burning, full-blown manner (Butler, Scammell, & Benson, 2016; Dhillon, 2019; Watts, 2018). The European Union is by contrast facing a slow-burning problem set, that leaves space for competing political interpretations about the roots of these crises and for competing proposals on how to solve them (Seabrooke & Tsingou, 2019).

My objective in this paper is to assess the role of European Union policies and politics in governing water through these crises. In EU member states, water provision is predominantly the competence of local authorities that operate under a national regulatory framework, but European integration has made significant inroads in the area in recent decades. A significant part of the *Acquis Communautaire* now deals with water management from an environmental perspective, while the repeated attempts at the liberalization of the water sector at the European level have achieved less success.

I will analyse the content of policy and legal principles that underpin the European governance of water. I will do so by mapping the evolution of these policy ideas and legal principles and by identifying the links that connect them. I will follow up the development of these themes from early environmental protection legislation targeting water in the 1970s up until the Country Specific Recommendations and Country Reports formulated in the framework of the EU's New Economic Governance regime since 2011. I will focus on the EU level, but where necessary and relevant, I will address the impact of the EU legislation on country-level water services.

I will apply a political economy perspective, putting the concepts of commodification and its distributive socio-economic effects in the centre of my analysis. The main questions that guide my analysis are therefore the following: what is the role of commodification in the European governance of water, what are the main features of the liberalization¹ agenda in the sector at the European level, and how far has this agenda advanced? I will also consider the distributional consequences of these principles. How do these principles intend to distribute the costs of water

¹ In this paper, I will use the concepts commodification, marketization and liberalization interchangeably.

management across the main actors, e.g. governments of members states, local governments, private sector water companies, large-scale polluters (industry and agriculture) and households?

Where possible, I will also identify the counterreactions of social movements and other political actors to these policies. Water has been the subject of political mobilization at the EU, national and local level, including the first successful European Citizens' Initiative on the Right to Water, several local and national-level referenda and social movement campaigns defending water as a public service, and a wave of remunicipalizations sweeping through the entire continent (Bieler, 2017; Erne & Blaser, 2018; Kishimoto, Gendall, & Lobina, 2015; Parks, 2015). However, as we will see, not all aspects of EU legislation has generated the same intensity of political debate. The paper concludes by evaluating these legal and policy developments from the perspective of European integration studies, specifically in relation to the shift from a horizontal to a vertical mode of integration as proposed by Roland Erne (Erne, 2017, 2018).

Theoretical goals – Linking EU social policy analysis to social movement studies

In its contribution to academic debate, the paper aims to establish a middle ground between the study of EU water legislation and the study of water-related social movements². On the one hand, there is a rather specialized and descriptive literature from legal scholars focusing on the perspectives of market integration in the EU water sector (Boscheck et al., 2013; Finger, Glachant, Parcu, & Saussier, 2015; Porcher & Saussier, 2018, 2019). On the other hand, substantial scholarship has accumulated on water-related social movements either at the national (Bieler, 2017; Bieler & Jordan, 2017; Kishimoto et al., 2015) or at the EU-level (Moore, 2018; Parks, 2015).

The former stream of the literature is very technical and often has a pro-market bias (it operates with the assumption that markets provide the most efficient way of managing water resources). The latter school is critical of markets but does not engage with the evolution of EU water policy over the long run. Instead, it focuses on single, contentious episodes of market-making that triggered collective action at the EU or at the national level (such as the services in the internal market – Bolkestein – directive or water privatization as a result of bailout programs in the Southern periphery of the EU).

My approach is closest to the researchers at the PSIRU Research Unit in Greenwich, who are critical of the competition law tradition but at the same time take a more-long term perspective and pay more attention to the details of policy-making by comparison to social

² I am thankful for Roland Erne for pointing out this gap in the literature.

movement-focused studies (Hall & Lobina, 2007; Lobina, 2012). Madeleine Moore's recent study on the struggles over water in Europe also provides a detailed background discussion of global and EU-level policies affecting the area. (Moore, 2018). While similar to these studies in its ambition of linking the critique of EU-level water policies to social movement mobilization, this paper also moves beyond them by offering a more thorough engagement with the details of policies and by treating water as a social policy field on its own right.

The social policy perspective is often missing from the analysis of water governance at the EU level. Water is a fictitious commodity, in as much as the full subordination of water provision to the rules of market supply and demand can threaten human survival (Polanyi, 2001). Therefore, water markets have been subject to regulation not only in terms of quality but also in terms of pricing, and these interventions are also powerful social policy tools. To explore how developments at the European level affect water provision as a social policy area is an overarching goal of this paper.

To achieve these goals, I reviewed EU-level legal and policy documents dealing with the water sector as well as the political debates surrounding them³. Rather than exclusively focusing on a narrow textual analysis of EU law, I decided to take a broader approach and included in my study those policy ideas and legislative initiatives as well that are not directly present in the final text of these laws. I did this mainly because even those policy ideas that do not make it into law may have a lasting influence on actors' position and also on the subsequent interpretation of existing legislation. Legislative prescriptions - as they are the results of political compromises - leave ample room for interpretation. Interpretation does not only involve legal interpretation by the European Court of Justice but also a wide array of policy-focused interpretation by the Commission (working papers, communications and reports) and rival actors.

Attempts at the liberalization of water at the EU level

Some of the most influential studies on the Europeanization of public services treat water as an exception from liberalizing trends. Crespy notes that "water distribution is one sector where no liberalization directive has been adopted" and her statement is echoed by other authors (Bieling & Deckwirth, 2008, p. 242; Crespy, 2016, p. 43). While this is a factually correct starting point, in this paper I will qualify the statement on the lack of liberalization of water by pointing out that it was only due to political resistance that the persistent liberalization attempts coming from the Commission eventually failed. In the next sections I will also point out that

³ The Annex contains a list of the reviewed legislation, while I included policy papers in the references.

commodification could happen not only by direct liberalization but also in a more subtle way through environmental legislation.

After the adoption of the Single European Act in 1986, the European Commission embarked on an ambitious agenda of extending the internal market to services that were previously dominated by national and local monopolies, such as telecommunications, postal services, and to network industries such as the railways, electricity and gas (Crespy, 2016, pp. 41–43). The Commission followed a piecemeal approach in these areas until the early 2000s, meaning that it targeted each sector by specific legislation. Water was left out from the scope of this piecemeal agenda. However, with the appointment of Frits Bolkestein to Commissioner for Internal Market and Services in 1999, the Commission’s position had shifted towards a more radical and comprehensive agenda of service liberalization.

Water as a service in the internal market? – the Bolkestein directive and its discontents

Arguably, the single most often debated legislative instrument of the EU and the first major attempt at the liberalization of water at the EU level was the “Services in the Internal Market” directive (2006/123/EC). The directive was proposed by Commissioner Bolkestein, and in subsequent debates it was often simply referred to as the “Bolkestein directive”. The publication of the proposal was preceded by a long drafting period, when tensions about the possible consequences of the directive were already running high. During this time, Commissioner Bolkestein gave a speech at the Institute of Economic Affairs in 2002 in London, one of the main themes of which was water, and that served as a reference point for subsequent critics of the Commissioner’s agenda.

In his speech, Bolkestein advocated liberalization of the water sector as “a practical instrument for establishing the correct relationship between price, quality and the standard of the service provided”(Bolkestein, 2002). After establishing the link between price and quality, he went on to make the argument that drinking water was an increasingly scarce commodity (note his use of the term commodity) that could be subjected to competitive forces. As he said, “from an ecological point of view one may wonder whether the water sector does not need to be more subjected to market forces if supply and demand are to be better matched.” He also outlined several trends that in his opinion could lead to the liberalization of water: (1) diversification of suppliers, especially for large-scale users, (2) competition between regional networks that border each other, (3) technological innovations (e.g. membrane filtering) that would allow for small-scale, self-contained systems of water provision, (4) increased use of concession contracts based on the French model.

One month after Bolkestein's speech, the consultancy firm WRc and the global academic think-tank for environmental research, Ecologic Institute published a study on "the application of competition rules to the water sector in the European Community". The study was ordered by DG Competition and one of its stated goals was to identify the possibilities of increasing competition in the water sector within the European Union. However, in reality the study mixed theoretical argumentation in favour of the superior performance of the market as compared to public service arrangements with a detailed review of areas where competition could be increased, without putting forward any concrete proposals (Gordon-Walker & Marr, 2002).

The Commission's Communication on Internal Market Strategy Priorities 2003 – 2006 envisaged more concrete steps in the direction of the marketization of water. It stated that new legislation may be needed in water and that "all options" will be considered while respecting neutrality of ownership and public service obligations (European Commission, 2003, pp. 13–14). It also referred back to the Ecologic-WRc study as a main data source (Hall, 2003).

Despite the radically pro-market attitude of the Commissioner and the ambitious tone of the reviewed policy documents, the legal text of the directive proposed by the Commission eventually treated the water sector as an exception. The Commission's proposal was published in March 2004 and it allowed for derogations for non-economic services of general interest (including water) from the country of origin principle – the most controversial part of the directive. The final version of the directive adopted in 2006 is even more restrictive, excluding not only "water distribution" but also "water distribution and supply services and waste water services" from the scope of directive.

The reason why water was finally excluded from the directive may have to do with early politicization at the European level, that started already before the Commission made any concrete proposal. For example, Bernd Lange, a German SPD MEP from the Group of the Party of European Socialists, picked up on the water aspects of the speech that Bolkestein held at the Institute for Economic Affairs in November 2002 and submitted a written question to the Commission shortly afterwards. Lange demanded a clarification of the Commission's position on the liberalization of the water sector. In its joint response, the Commission maintained that "Bolkestein's speech was limited to sketching out recent developments in the water sector of various Member States, including the role of private operators." At that stage, the Commission was not willing to rule out liberalization of the water sector, as this was later also officially reaffirmed this position in its communication on the "Internal Market Strategy Priorities 2003 - 2006".

Trade unions and social movements were leading a large-scale mobilization against the directive which also spurred the European Parliament to have at least the most controversial

elements of the directive remove (Crespy, 2016). Bolkestein's failed attempt at the commodification of water has implications for later water struggles too. As one long-time campaigner at the European level has formulated it: it was with the Bolkestein directive that the "commission first showed its true colours"⁴. The experience of mobilization against Bolkestein played a significant role in EPSU's decision to launch its European on the Right to Water, which eventually turned out to be the first successful European Citizens' Initiative (Fischbach-Pyttel, 2017, p. 187).

Promoting competition for the market - Public procurement directives and the concessions directive

Irrespective of the final content of the directive, the debates surrounding the impact of the service directive for the water sector remained at a rather abstract level. Competition *within the water market* is limited by physical and geographical barriers. Water is a real natural monopoly, where each competing provider would need a parallel infrastructure, the set-up and maintenance costs of which would be prohibitive. In other words, entry barriers are set very high and the possibilities of consumer choice very limited. Legal scholars – prominently at the Florence School of Regulation – have been exploring ideas on how to address these issues, for example by allowing access to the water network by competing providers (Belenyesi, 2006).

However, the main aspect of marketization of the water sector is increasing the competition *for the market*, and this is where the debate shifted after the failure of the Bolkestein directive to commodify water. The main way of introducing competition into water services is therefore to facilitate the movement of capital through liberalizing concession and procurement rules, ensuring that public authorities increasingly tender out provision of services for competitive private providers, instead of keeping them in-house. According to advocates of liberalization, "new" private capital must be let into the operation of local water services through the reform of tendering, procurement and concession rules (d'Haussonville, 2014).

A discussion paper from DG Competition from 2004 – while acknowledging that competition would bring only limited benefits to water consumers – still puts forward three concrete ideas of enhancing competition in the sector (Gee, 2004). First, the non-essential parts of service provision can and should be outsourced – so the paper. Second, authorities that are responsible for water provision are advised to set the shortest possible duration to the exclusive rights granted in contracts to run services. In other words, authorities should sign the shortest possible contracts with providers, and after the expiry they should re-open these concessions through competitive tendering. In a third, consequential step of this agenda set put by the paper,

⁴ Interview with a leading member of the European water movement, Brussels, December 2018)

authorities have to ensure that there is effective competition when concession contracts are opened and services are re-tendered. They can do so by applying EU rules of transparency, non-discrimination to the process (Gee, 2004).

Directives on public procurement in the utilities sector have three generations: the area was first regulated at the EU level by Council Directive 90/531/EEC of 17 September 1990. The Parliament and the Council adopted the second version of the directive in 2004 and the third in 2014. As mentioned before, there is no separate liberalization directive in the water sector, but when it comes to public procurement rules, water is falling under the same rules as other network industries. The intended impact of the public procurement directives is to combine marketization and liberalization with regulation. On the one hand, it wants to increase market competition for public tenders, thereby contributing to lower prices and higher efficiency, on the other it wants to ensure transparency and non-discrimination on the same markets. On the other hand, the text of the directive acknowledges that there are limits to competition in the water sector due to the “need to procure water from sources near the area in which it will be used.” (Paragraph 26 of the Preamble, Directive 2014/25/EU).

The main purpose of the Concessions Directive (2014/23/EU) is “regulated liberalization” in a similar fashion to the public procurement directives, but taking into account the specificities that result from concessions as a distinct field of contractual relationships between the public and the private sector. The adoption of a concessions directive with a scope extending to water would have been particularly beneficial for the French water multinationals, as this is the legal framework that contributed to their successful long-term operation in France. The spread of the concession model to other parts of Europe would have vested these companies with a competitive advantage over other providers who were socialized into a different legal regime.

To dispel the concerns that the Directive would lead to privatization, the Commission issued a memo upon proposing the text in 2011, stating that “public authorities will remain entirely free to carry out public tasks assigned to them by using their own means or resources.” However, the memo also added that “if a public authority decides to outsource (e.g. to a private company) and concludes a contract with such an entity, the provisions of the new directive would have to be complied with.” (European Commission, 2011). In the wake of the success of the European Citizens’ Initiative on Right2Water, the final text of the directive unequivocally excludes water from its scope. Article 12 of the directive allows for specific exclusions in the field of water, giving a detailed list of the specific activities concerned (Article 12, [Concessions] Directive 2014/23/EU). The Concessions Directive has immediate relevance from the perspective of politicization, as the most tangible achievement of the European Citizens’

Initiative on Right2Water was the exclusion of the water sector from the final text of the directive.

The price of protection – The commodifying implications of EU environmental and quality regulation of water and their (re-) distributive socio-economic effects

The direct commodification attempts of the water sector at the European level have failed due to the vigilance of social movements and institutionalized political actors. However, the majority of EU legislation targeting water is not directly economic, but is rather aiming to set quality and environmental standards. Scholarly attention has also been focusing on this area⁵ (Hall, Lanz, Lobina, & de la Motte, 2004; Holzwarth, 2002; Hoornbeek, 2004; Kaika, 2003; Warleigh, 2000). In this section I will claim that EU environmental legislation has acquired a commodifying dimension over time, most importantly with the introduction of the cost recovery principle in the Water Framework Directive in 2000. This commodifying dimension is not exclusive but the cost recovery principle gives a strong tool in the hands of the Commission in case it wants to pursue a marketization agenda.

The environmental governance of the water sector has had an economic dimension from its inception. The first instances of Community legislation on water were aiming at the harmonization of sectoral standards at the European level, in a bid to preclude unfair competition. We interpret these measures as tools for decommodification as they prevent regime competition. While they did not regulate the institutional setup of the market, they had a strong influence on actors' position indirectly, through the regulation of the quality of the product and the service they offered to users.

Early legislation with de-commodifying effect

Community legislation targeting the water sector started to appear in the 1970s, with specific directives on quality standards (Directive 75/440/EEC, Directive 79/869/EEC). Taking a more comprehensive approach, in 1980 the Council adopted Directive 80/778/EEC on the quality of water intended for human consumption, commonly known as the “Drinking Water Directive”. As their basis, these directives invoked the objective of harmonious development and balanced expansion of economic activities across the Community – spelled out in Article 2 of the Treaty of Rome. They stated that the approximation of laws in member states is needed because

⁵ David Hall and his co-authors divide their detailed and comprehensive review of EU water legislation in two parts: “EU environmental legislation” on the one hand, and “Competition, single market and trade rules” on the other. The balance between these two parts is definitely shifting towards the environmental side. The authors devote 16 pages to the former aspect, while they deal with the latter on two pages (Hall, Lanz, Lobina, & de la Motte, 2004).

differences in national legislation may create differences in the “conditions of competition and, as a result directly affect the operation of the common market” (Preamble of Directive 80/778/EEC). By tackling the disparities in quality standards across member states - that could have been exploited as unfair advantage – the Community took water quality out of regulatory competition.

The Drinking Water Directive was updated in 1998, catching up with some of the new developments in the sector since 1980. For example, the inclusion of bottled water in the 1998 directive signals that the EU kept up with changes on the market and was ready to regulate an important new market phenomenon at the transnational level. Otherwise, the main principles of the directive remained unchanged. Researchers at the PSIRU in Greenwich claim that some of the more ambitious quality goals - such as odour, taste or colour - were dropped from the final text of the directive upon the objection of water suppliers. They also point out that the deadline for keeping lead limits was extended until 2013. For these reasons, the cost implications of the water framework directive were relatively modest and were spread out over a long timeframe (Hall et al., 2004, pp. 11–12).

Neither the 1980 nor the 1998 version of the directive deals however with social issues pertaining to drinking water, such as availability, access or affordability. Those aspects have firmly stayed at the member state level at this stage of the integration.⁶ The most important economic implication of standard-setting EU legislation is that it can necessitate large-scale infrastructural investments. Investment is needed in research, physical infrastructure and monitoring capacity in a bid to reach the respective thresholds set out by these laws. In the case of the drinking water directive, the costs of these investments were relatively modest and they did not alter fundamentally the balance of power between different types of providers (water multinationals vs. local providers). By contrast, the Urban Waste Water Treatment Directive (91/271/EEC) had much higher cost implications, transforming the financing models of water investment, and thereby also having a distributive impact between different actors.

David Hall and Emanuele Lobina claim that the infrastructural developments that were needed to comply with the waste water directive added up to “arguably the largest common infrastructure project undertaken by the EU in its history” (Hall & Lobina, 2007, p. 65). This has strained the budgets of municipalities and also of member state governments that were already under pressure to fulfil the Maastricht deficit and debt targets in the run-up to the introduction of the Euro and in the wake of capital market integration. Implementing the directive was

⁶ EU legislative process started in 2017 with a view to revise the Drinking Water Directive once again. In response first successful European Citizens’ Initiative on the Right to Water, the Commission included provisions (Article 13) on water accessibility in the draft proposal of the recast directive. The precise content and the final status of article 9 is however uncertain as of 2019.

particularly challenging financially in then-accession East European countries, and subsequently a large part of European regional and cohesion funds were used to meet this challenge. Overall, the financing needs of waste water investment combined with EU-wide austerity have contributed to an increased role of large water multinationals (Hall et al., 2004, p. 13; Hall & Lobina, 2007, p. 66) These companies had the scale of operations, the know-how, as well as the links to funding sources and governments to undertake these projects, often in public-private partnership arrangements.

The shift towards commodification

EU-level environmental legislation in the area of water has obtained an explicit Treaty base with the Treaty of Maastricht in 1992. Article 130s of Title XVI (ENVIRONMENT) of the TEU established the competence of the EU in the area of water by licensing EU legislators to adopt measures concerning “the management of water resources”⁷. Other sections of the Environment chapter outlined the main objectives and principles of EU policies on the environment, including the precautionary principle and the polluter pays principle, which will be directly relevant in the water sector.

These are broad principles on distributing the costs of protecting and regenerating environmental resources that can be used against large-scale polluters of water sources, but they also leave room for an interpretation that promotes commodification of water services, by subjecting individual households to increasing market pressures. As I will demonstrate, this contradiction has played out in subsequent EU water legislation.

As the main piece of EU law in the environmental management of water, the Water Framework Directive embodies the contradictions of the Europeanization of the water sector. The directive is a comprehensive piece of legislation that has the ambition to cover all relevant aspects of the protection of waters in Europe, the protection of drinking water being only one – even though a main – objective.

The preamble of the directive declares that water “is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such” (Recital 1,

⁷ There is no other instance of water directly appearing in the Treaties, but the Charter of Fundamental Rights of the European Union, which is now a legally binding part of the Treaties, in its Article 36 declares that “The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union.” (Article 36 Charter of Fundamental Rights of the European Union) Furthermore, the twentieth principle of the recently adopted European Pillar of Social Rights states that “Everyone has the right to access essential services of good quality, including water, sanitation, energy, transport, financial services and digital communications. Support for access to such services shall be available for those in need.” (Section 20 of Interinstitutional Proclamation [European Pillar of Social Rights] 2017/C 428/09)

[Water Framework Directive] 2000/60/EC). In contradiction to the above principle stands the directive's apparent embrace of the idea that market principles, in particular pricing, can be effectively used to achieve the goal of sustainable water management.

A pronounced element of the directive is the cost recovery principle, which demands adequate financial contribution from water users and polluters to cover the costs of the environmental protection of water resources. Article 9 of the directive (titled Recovery of costs for water services) prescribes that "Member States shall ensure by 2010 that water-pricing policies provide adequate incentives for users to use water resources efficiently, and thereby contribute to the environmental objectives of this Directive" (Article 9, [Water Framework Directive] 2000/60/EC).

To repeat, the cost recovery principle involves the possibility of further commodification of water, especially in countries where household water use is subsidized or entirely financed from general taxation, such as in Ireland. However, there are additional measures of the directive that tone down this potential commodifying effect. First, Paragraph 9.4 exempts member states from the application of the principle "in accordance with established practices" "where this does not compromise the purposes and the achievement of the objectives of this Directive." (Directive 2000/60/EC)

The last sentence of paragraph 9.1 also clarifies that while observing the goal of cost recovery, Member States may still "have regard to the social, environmental and economic effects of the recovery as well as the geographic and climatic conditions of the region or regions affected". The directive also distinguishes between different user categories, stipulating an at least three-way disaggregation into the groups of industry, households and agriculture, and demanding an adequate contribution from each. However, the different power position of these three groups and their differing responsibilities in creating pollution is not directly acknowledged in the directive.

Since the adoption of the directive, EU-level actors have been making intense efforts to interpret and specify the meaning of the directive's provisions. Commissioner Bolkestein in his speech in November 2002 that I previously quoted also made reference to the Water Framework Directive and alleged that the directive "provides for cross-border trade in water", even though there is no such provision in the directive (Hall, 2003, p. 3). In a position of more expertise on the matter, other parts of the Commission (DG Environment in particular) have played a more important role in promoting a comprehensive, far-reaching and strict application of the cost recovery principle. According to Page and Kaika, DG Environment sees "'pricing' as something of a panacea", and the EU-level environmental lobby is also sympathetic to this approach (Page and Kaika 2003, 339–40).

By putting prices in the centre of its agenda, and by opening the possibility of commodification, the Commission also got involved in social policy questions related to water provision, most importantly the question of affordability. The Commission published its Communication on “Pricing policies for enhancing the sustainability of water resources” in 2000. This document demonstrates that the Commission was aware of the social policy implications of water pricing already before the adoption of the WFD. The document declares that in the case of “unsustainable water use, social concerns should not be the main objective of water pricing policies, although they need to be taken into account while designing new pricing policies”(European Commission, 2000, p. 17). In the document, the Commission also expressed its conviction that instead of addressing social issues through direct intervention into pricing, social concerns could be “better dealt with through accompanying social measures” (European Commission, 2000, p. 17) . On the other hand the document calls for phased-in implementation of reforms aiming to achieve full cost recovery, in order to ensure political acceptability (European Commission, 2000, pp. 16–17).

I reviewed further key documents published or sponsored by the Commission or related agencies on the cost recovery principle and all of them mentioned social aspects, in particular affordability (European Commission, 2012; European Environment Agency, 2013; Kirhensteine, Clarke, Oosterhuis, & Sorensen, 2010). These documents also reiterate the position of the Commission already formulated in the 2010 Communication: that the main rule should be cost recovery and social considerations can only be used by member states to justify exceptions to this rule. In addition, this view holds that affordability should be addressed by separate social measures rather than by intervention in water pricing.

It is also worth mentioning that the European Environment Agency uses a very strong pro-market language. In 2013, this Commission-related agency published a technical report on the “Assessment of cost recovery through water pricing”. This paper places a very high level of confidence in the market pricing mechanisms as the best way to reveal information to consumers⁸ about scarcity and to allocate resources efficiently (European Environment Agency, 2013, p. 8). Furthermore, it treats social considerations as “uncomfortable political hurdles to the establishment of the cost-recovery principle”(European Environment Agency, 2013, p. 11).

The report also outlines a few key characteristics of an “optimal” water charging system. These include prices that are “high enough to enable water service suppliers to invest in improvements, innovation and expansion”. The report also rejects the direct use of social equity

⁸ Already the use of the term consumer instead of citizen or the more neutral service user can provide clues about the policy preferences of certain actors (Mazzucato, 2018, p. 251).

considerations in pricing, claiming that “when not responsibly managed”, these measures “can have large-scale negative impacts on the environment, and actually prevent efficient resource use and allocation” (European Environment Agency, 2013, pp. 13–14).

Commission and commission-related agencies however do not have a monopoly over the interpretation of any aspect of the directive. When it comes to a legal debate between the Commission and a member state, it is the European Court of Justice has the final word. In a recent case, the Commission referred Germany to the Court for not applying the cost recovery principle to its hydro-electric power stations. On 11 September 2014, the Court ruled in favour of the member state by interpreting the cost recovery principle in a much narrower way than the Commission would have done. (ECJ Case C-525/12). However, we must add that this ruling had nothing to do with domestic water charges and the ECJ tends to contradict itself from one ruling to the other as cases in the area of EU labour market regulation suggest.

To sum up, from the reviewed EU-legislation, I consider the drinking water and the wastewater treatment directives as legislative instruments that promote the de-commodification of water. By setting Europe-wide standards that every water operator has to meet, they take quality out of competition and therefore they have a de-commodifying impact. The investment needs of the wastewater treatment directive (in the context of fiscal austerity) arguably strengthened the role of large private multinational operators in the sector at the expense of small public municipal operators. These two directives set relatively clear, measurable objectives and distribute responsibility relatively clearly between different actors. As opposed to them, the Water Framework Directive operates at a more abstract level, setting general guidelines and principles for a variety of connected stakeholders. The most relevant aspect of the Water Framework Directive from our point of view is the cost recovery principle that guides the European water sector towards a more commodifying direction and can have a socially negative impact on households through increased prices. However, the principle leaves ample room for interpretation and struggles between political actors.

The New Economic Governance of Water – Connecting the dots?

In the previous sections of this paper I have demonstrated that a direct, EU-wide liberalization of the water sector was prevented, but the environmental governance of water at the EU level contains several elements that potentially open the way for increasing marketization and increasing private sector involvement.

At the same time, the marketization impact of these principles is contingent upon a specific interpretation that could emerge in subsequent political processes. One such process is

the EU's new economic governance framework (NEG). The NEG was brought to life in the wake of the financial and sovereign debt crises of the EU. According to the Commission's own definition, it is a comprehensive set of instruments targeting member states' economic and social policies in a bid to avoid fiscal and macroeconomic imbalances and to promote structural reforms and investment⁹.

The European Semester process is at the heart of the New Economic Governance. The European Semester is a yearly procedure of coordination, scrutiny and possible correction of member states' economic and social policies so that they comply with the goals set out in the NEG framework. The European Commission is the key actor in the process, in terms of setting the agenda and coordinating a mechanism that is ultimately about the surveillance and potential sanctioning of member states' policies (Erne, 2015).

The main documents of the EU's new economic governance are the *country-specific recommendations* (CSR) that are issued every year to each member state and that cover the measures that the member state should implement in order to achieve the goals of the NEG. For those member states that had received bailout packages, the CSRs prescribed to follow the instructions of the *Memorandum of Understanding* (MoU) – the main documents of bailout programs. Finally, the *Country Reports* (CR) are comprehensive documents that give an overview of member states' economic and social policies and lay the groundwork for the CSRs. They also assess the member state's progress in implementing previous year's CSRs.

To assess how water appears in the NEG framework, I reviewed country-specific recommendations and Country Reports for four countries (Germany, Ireland, Italy and Romania). These four countries represent the diversity of the EU in terms of size, geographical location and economic development. Also, Ireland and Romania were subject to bailout programs, so in their case, I also reviewed memoranda of understanding. Analysing the semester documents help us assess the extent to which the principles identified in previous sections have had an impact on water management at the member state level.

Overall, water is mentioned rarely in these documents. In the memoranda of understanding and country-specific recommendations, water only appears directly for Ireland, for the rest of the countries it is either Country Reports that I rely on or I had to take a broader approach, looking at recommendations issued for network industries and local public services as those recommendations arguably cover water services as well.

⁹ https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester/framework/european-semester-why-and-how_en

Keeping these caveats in mind, commodification is the strongest and most persistent theme in NEG documents. Investment also appears but apart from promoting access to water for vulnerable populations in Romania, the investment agenda in water lacks the “social” element. The NEG documents also continue the pro-market interpretation of environmental principles. In the following, I will discuss the presence of each of these concepts in NEG documents in turn.

Commodification and decommodification in NEG documents

Commodification is the most direct and most prominent theme relating to water in Irish NEG documents. The introduction of water charges has been explicitly on the agenda of the bailout program and then continued to be mentioned in other NEG documents. In Ireland water provision is financed from general taxation since 1996 and private households do not pay domestic water charges (Murphy, 2019), by contrast to commercial users of water services. The introduction of water charges would have meant commodification, as it would have represented a shift towards the conception of water as a product that has to be paid for by individual consumers rather than a human right or a public service that can also be financed from general taxation.

The commitment to introduce water charges was part of the Memorandum of Understanding between the Irish government on the one hand and the Troika of the European Commission, the IMF and the European Central Bank on the other in 2010. It consequently featured in the Economic Adjustment Programme for Ireland published in February 2011. Water was part of the “structural reforms” section of these documents. From among structural reforms, water was however not on top of the agenda. The most urgent task to complete in the structural reform section of the bailout program was labour market reform, and overall, the first priority of the bailout program was fiscal retrenchment, notably by wage cuts in the public sector. The launch of the reform of the water sector was scheduled only for the fourth review (end of the year 2011). Nevertheless, this can also suggest that the signatories of the Memorandum were aware of the political risks associated with the introduction of water charges, and therefore they did not want to rush it through.

The initial version of the MoU and its updates until 2012 repeated two general goals, the transfer of responsibilities from local authorities to a water utility (later to be named Irish Water), and the introduction of water charges, but they did not prescribe the exact steps through which to achieve these goals. The updates from 2012 onwards provided more details. The last four updates of the Memorandum of Understanding - from the 7th update in January 2013 until the tenth, final one, on 11 September 2013 – substantially expanded the list of economic policy

conditionality on water reform. While in the previous updates, water reform only took the space of one paragraph, in these versions four or five paragraphs discuss the required steps. These updates mentioned the results of a public consultation process, talked about a regulated water utility, a metering programme and it assigned the Commission for Energy Regulation the task to “carry out consultations to determine the framework for household water charges.” (Article 54 of the 7th Update of the Memorandum of Understanding On Specific Economic Policy Conditionality, 2013)

The Troika left Ireland before the introduction of water charges and even before the installation of water meters had finished. Country-specific recommendations after 2013 do not mention water charges, but the European Commission’s continued support for the issue can be read from the Country Reports. The introduction of water charges triggered mass protests in Ireland over 2014-2015 and eventually forced the government to suspend the charging system in 2016 (Hilliard, 2018). The Irish Country Report from 2017 criticised this reversal of reform.

Germany, Italy and Romania all received country-specific recommendations about improving market access and promoting competition in network industries (Germany in 2011, Italy in 2012 and 2013 and Romania in 2013). CSRs were also unsatisfied with the allegedly high share of in-house awards for the delivery of economic services in these countries and it promoted the opening up of these contracts to public procurement procedures. In this respect, the Italian case provides the most detail, as Italian CSRs advocated the adoption of specific laws promoting competition, not only in network industries in general but also in local public services in particular. On top of this, the Country Report of Italy from 2013 brings water as a negative example where no progress has been made in terms of promoting competitiveness and efficiency, while in the gas sector the separation of operator from network manager is welcomed. The criticism of the Commission came after Italian citizens voted with a more than 95% majority in a referendum to repeal the law that allowed private sector the management of local public services (Bieler, 2015; Erne & Blaser, 2018).

What are the links between the reform proposals of the EU’s new economic governance in these countries, and the principles identified in the previous sections of the paper? It turns out that the full cost recovery principle is not only a controversial element of the Water Framework Directive, but in the NEG phase, it was also used by the Irish authorities to justify the attempted introduction of water charges. However, instead of an environmental principle, these documents refer to it as a budgetary principle. The introduction of cost recovery pricing of water in Ireland is seen as a tool to improve the budgetary balance rather than as a way to achieve environmental goals.

In the Memorandum of Economic and Financial Policies, that served as the basis of the Memorandum of Understanding from December 2010, the Irish side stated that they are “also planning to move towards full cost-recovery in the provision of water services” (Memorandum of Economic and Financial Policies page 8, paragraph 24). There is further evidence from subsequent program documents that the goal of the introduction of water charges is not environmental but rather budgetary. The sixth update of the MoU says that “The authorities will also consider and provide an update on the general government debt and deficit treatment implications of establishment of Irish Water.” (Memorandum of Understanding on Specific Economic Policy Conditionality – Ireland - Sixth Update, 2012: 24) The seventh and the eighth update demanded that over time, the Irish government’s budgetary perspective should “be based on Irish Water becoming substantially self-funded” (Memorandum of Understanding on Specific Economic Policy Conditionality – Ireland - Seventh Update, 2013: article 66, Eight update, 2013: article 51.)

We can also observe remarkable consistency across time in the Commission’s position on another important aspect of water pricing. Already in its communication on “Pricing policies for enhancing the sustainability of water resources” published in 2000, the Commission identified metering as the key first key step towards achieving cost recovery, also for individual households. As it turns out from the final (4th-10th) updates of the Irish MoU, the commission was following very closely the initial steps of the process of water meter installation, to the extent that the 9th and the 10th update (from 2013) contain detailed data provision annexes on “the quantum of pre-installation surveys completed and water meters installed by geographical area”.

As opposed to commodification, improving access and affordability would be the main steps taken towards decommodification. Access to and affordability of water services appear very rarely in the NEG documents. In terms of expansion of access rights, the problems with access to clean water were noted in NEG documents issued for Italy and Romania and in one instance for Ireland. Quotes exclusively come from Country Reports, and they comment on already decided government measures or rather, they denounce government for not taking action on certain issues. In specific, governments are criticized for not addressing sufficiently quickly or resolutely geographical or socio-economic inequalities in water access. The 2014 and 2015 Country Reports of Romania mention water under the heading “Roma integration”. The 2014 report mentions that “84% of Roma households report lack of water, sewage or electricity.” (Country Report of Romania, 2014: 19) The 2016 Country Report highlights the differences between urban and rural areas, stating that “limited access to basic utilities negatively impacts the quality of life” [in rural areas]. “In 2014, 27 % of the rural population was connected to the public water system (92.7 % in urban areas), and only 5.3 % was connected to sewage (82.8 % in urban

areas) (Country Report of Romania, 2016: 61). The Country Report of Italy from 2015 points out “lacking or non-functioning water infrastructure, particularly in the South” Country Report for Italy 2015: 59).

The investment agenda in NEG documents – Is it social?

Water politics in Europe has redistributive aspects not only because of the potential commodification of water but also through the financing of large-scale investment projects in water infrastructure. The previous discussion on the consequences of environmental legislation at the EU level revealed that the fundamental question is how the costs of and the returns from water-related investments are shared between private and public actors.

Investment in water is also present in the NEG documents. In fact, the two CSRs that specifically deal with water (issued for Ireland in 2016 and 2017) both recommend prioritising government expenditure in water services. Investment in water is never a stand-alone item but is usually part of an integrated approach to public infrastructure, housing and urban planning (Ireland) rural development (Romania) or environmental projects (Italy). Outside the CSRs, all four countries received advice on public investment in water in Country Reports, but exact figures only appear in the Irish and Romanian reports of 2016 and 2017. Moreover, in the Irish Country Report of 2016, the need for investment is justified on the basis that it can compensate for the preceding “seven years of sharply reduced government investment” that “have taken a toll on the quality and adequacy of infrastructure” (Country Report Ireland 2016: 4, 61)¹⁰.

There is little in the CSRs or in the Country Reports on the intended role of public versus private actors in carrying out these investments. Also, there is no sign of a “social” investment agenda in water, contrary to the claims made by scholars on the overall development of the European semester (Zeitlin & Vanhercke, 2018). For example, in the case of Ireland, in the Country Reports, the Commission justified its reiteration of the support for water charges on the basis that water charges could raise revenue for much-needed infrastructural investments in water. In a statement, the optimism of which verges on wishful thinking, the 2016 Country Report for Ireland even predicts the acceptance of water charges on the basis that this is the only way to secure funding for investment in water. “The necessity to invest heavily in water infrastructure is now widely recognised. The constraints or negative effects that poor water supply and wastewater treatment facilities impose on growth, competitiveness, housing development and the environment are fully apparent already. In turn, this seems to favour a

¹⁰ The report however is oblivious of the reasons why there was underinvestment in the first place. It does not mention that the Financial Assistance Program and earlier, cost-cutting recommendations by the EU have played their part in underinvestment.

gradual acceptance of water charges for households and the single utility model, following a difficult start for Irish Water.” (Country Report Ireland 2016: 62).

The CSRs and CRs issued for Germany have moved towards a more straightforwardly public investment directions in recent years. The Country Specific Recommendations of Germany in 2015, 2016 and 2017 all call for an increase in public investment across all levels of governments and for an increase in the fiscal space available for municipalities. The emphasis on municipal finances is crucial from the perspective of the water sector as in Germany, the provision of water services is the responsibility of municipalities, but at the same time municipalities are under severe fiscal pressure due to Germany’s debt-brake rule (Bajohr, 2015).

Conclusion

The European governance of the water sector spans two main policy areas: internal market rules on the one side and environmental policy on the other. In this paper, I have pointed out that commodification attempts have been present in both areas and these attempts were revived in the New Economic Governance framework of the EU after 2010. In general, market creation is possible by incorporating water services in European market structures, or alternatively by adopting environmental rules that favour market mechanisms such as cost recovery.

How do the processes in the water sector analysed in this paper fit theories of European economic and political integration? Where does water as a policy area fall among the different views on the interaction between economic and political integration and on the politicization of European integration? In the water sector, vertical integration is the dominant mechanism by which Europeanization advances, as the supranational authority of EU law has an increasing impact on national and local level actors (Erne, 2017, 2018). Attempts at vertical integration and the fight against them have been prominent in the water sector. No matter how rudimentary and experimental, the attempts at political intervention to create a common market in water by EU-level actors are a clear sign of vertical pressures. There is a secondary theme of horizontal market integration, mostly through capital movement across borders triggered by the EU-level investment decisions of water sector multinationals (Hall & Lobina, 2007; Kishimoto et al., 2015).

We saw continuity and consistency in the vertical mode of integration across countries and over time (from the “pre-crisis” to the “post-crisis” - new economic governance - period). Laws adopted in the “old” community method apply uniformly to all member states and have generated similar pressures across them. Even though the recommendations and policy prescriptions formulated under the framework of the new economic governance are nominally

country-specific, in practice we saw that they are largely uniform across the four selected countries and that they continue many of the themes that were already present in Community legislation.

Regarding the content of these processes, the market-creating element is dominant. The reviewed policy documents have provided ample evidence that an integrated European water market exists as an ambition among pro-market actors and it is from time-to-time manifested in overt attempts by some sections of the Commission to liberalize the European water market. However, this ambition is far from being realized. There is no liberalization directive specifically dealing with water and the water sector continues to enjoy exemptions from general liberalization directives (Bieling & Deckwirth, 2008; Crespy, 2016). While EU environmental legislation on water includes marketizing elements such as the cost recovery principle, it also has standard-setting market regulation at its core. The pro-market interpretation of environmental principles has not remained unchallenged either, as the backlash against the application of the cost-recovery principle in Ireland has demonstrated. In short, European integration processes in the water sector are dominated by *market-creating vertical intervention attempts*.

The next step in my research is to explore the links between EU-level policy ideas on the one hand and social movement mobilization on the other. How do EU-level policies become crystallization points for social movements? How does the vertical character of European integration of the water sector trigger transnational counter-reactions? For example, while in the case of the Bolkestein directive I could trace the development of market-making vertical integration on the one hand and successful countermobilization on the other, I did not see the same level of mobilization in the case of the Water Framework Directive despite its potential relevance for environmental and social justice movements. Why is this the case? Is this only a matter of different content of the legislation or is it also about different timing, framing and policy process in the two cases? I will rely on these questions as a starting point for further research.

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Annex – List of the reviewed legislation in the area of water

Directives and regulations

Council Directive 75/440/EEC of 16 June 1975 concerning the quality required of surface water intended for the abstraction of drinking water in the Member States

Council Directive 79/869/EEC of 9 October 1979 concerning the methods of measurement and frequencies of sampling and analysis of surface water intended for the abstraction of drinking water in the Member States

Water framework directive:

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.

Drinking Water Directive:

COUNCIL DIRECTIVE 98/83/EC of 3 November 1998 on the quality of water intended for human consumption

COUNCIL DIRECTIVE of 15 July 1980 relating to the quality of water intended for human consumption (80/778/EEC)

Waste water treatment directive:

COUNCIL DIRECTIVE of 21 May 1991 concerning urban waste water treatment (91/271/EEC)

“Bolkestein” directive:

Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market

Public procurement directives:

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

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

COUNCIL DIRECTIVE of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (90/531/EEC)

Concessions directive:

DIRECTIVE 2014/23/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on the award of concession contracts

Country-Specific Council Recommendations

Germany

COUNCIL RECOMMENDATION of 12 July 2011 on the National Reform Programme 2011 of Germany and delivering a Council opinion on the updated Stability Programme of Germany, 2011-2014 (2011/C 212/03)

COUNCIL RECOMMENDATION on the National Reform Programme 2012 of Germany and delivering a Council opinion on the Stability Programme of Germany, 2012-2016 11255/12

COUNCIL RECOMMENDATION of 9 July 2013 on the National Reform Programme 2013 of Germany and delivering a Council opinion on the Stability Programme of Germany, 2012-2017 (2013/C 217/09)

COUNCIL RECOMMENDATION of 8 July 2014 on the National Reform Programme 2014 of Germany and delivering a Council opinion on the Stability Programme of Germany, 2014 (2014/C 247/05)

COUNCIL RECOMMENDATION of 14 July 2015 on the 2015 National Reform Programme of Germany and delivering a Council opinion on the 2015 Stability Programme of Germany (2015/C 271/01)

COUNCIL RECOMMENDATION of 12 July 2016 on the 2016 National Reform Programme of Germany and delivering a Council opinion on the 2016 Stability Programme of Germany (2016/C 299/05)

COUNCIL RECOMMENDATION of 11 July 2017 on the 2017 National Reform Programme of Germany and delivering a Council opinion on the 2017 Stability Programme of Germany (2017/C 261/05)

Ireland

COUNCIL RECOMMENDATION of 12 July 2011 on the National Reform Programme 2011 of Ireland and delivering a Council opinion on the updated Stability Programme of Ireland, 2011-2015 (2011/C 215/01)

COUNCIL RECOMMENDATION on the National Reform Programme 2012 of Ireland and delivering a Council opinion on the Stability Programme of Ireland, 2012-2015 11258/12

COUNCIL RECOMMENDATION of 8 July 2014 on the National Reform Programme 2014 of Ireland and delivering a Council opinion on the Stability Programme of Ireland, 2014 (2014/C 247/07)

COUNCIL RECOMMENDATION of 14 July 2015 on the 2015 National Reform Programme of Ireland and delivering a Council opinion the 2015 Stability Programme of Ireland (2015/C 272/12)

COUNCIL RECOMMENDATION of 12 July 2016 on the 2016 National Reform Programme of Ireland and delivering a Council opinion on the 2016 Stability Programme of Ireland (2016/C 299/16)

COUNCIL RECOMMENDATION of 11 July 2017 on the 2017 National Reform Programme of Ireland and delivering a Council opinion on the 2017 Stability Programme of Ireland (2017/C 261/07)

Italy

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