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Office of the United Nations High
Commissioner for Human Rights
(OHCHR)
Special Rapporteur on the human rights
to safe drinking water and sanitation
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Privatization and the human rights to water and sanitation/ Questionnaire to non-State actors

Dear Sir or Madam,

We thank you for the opportunity to participate on the consultation.

You will receive our answers below.

We agree with the publication on your website.

Please feel free to contact us for further explanation.

Yours faithfully

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Allianz der öffentlichen Wasserwirtschaft e.V. (AöW) [engl. Alliance of Public Water Management]

The Allianz der öffentlichen Wasserwirtschaft e.V. (AöW) is the representation of interests of public water management in Germany. Our members come from all federal states. The AöW is an alliance of institutions governed by public law and companies of water supply, wastewater disposal as well as river basin management performing their service exclusively themselves or by means of independent institutions in organizational forms governed by public law. Alone through the Membership of German Alliance of Water Management Associations (DBVW) over 2000 water organizations are represented in the AöW.

1. Please describe briefly the role and responsibilities of your organization in the water and sanitation sector, particularly concerning assessment or promotion of private provision.

The *Allianz der öffentlichen Wasserwirtschaft e.V.* (AöW) is the representation of interests of public water management in Germany. We were founded in the year 2007. Our members come from all regions in the federal states. We are an alliance of public institutions and public operators of water supply, wastewater disposal as well as of river basin management, performing their service exclusively by themselves or by means of independent public institutions in organisational forms governed by public law.

Current situation and trends

2. In your view, what the role has the private sector played in the water and sanitation provision in the countries your organization works in (or at the global level)? How has this role evolved in recent decades? Please provide examples.

There are no clear statistics on this. However, we perceive that there was a clear trend towards more Privatstation or PPP contracts in the 2000s. At present until 2010, such measures are viewed critically on the basis of experience gained to date and are rejected for the water sector by the public.

The Profile of the German Water Sector can be used as a basis (https://www.dvgw.de/medien/dvgw/leistungen/publikationen/branchenbild_engl_2015_langfassung.pdf, point 4, Forms of business organisation and size structure, p. 30). An updated sector picture will be published on the World Water Day 2020.

For drinking water supply in 2015: 65% public (40% water output) and 35% private (60% water output) companies. It is not clear/unknown to what percentage purely private companies are 100% in public ownership, so that the actual percentage of merely public ownership is higher than 65%. It is also difficult to make an assessment of so-called "Stadtwerke", which have other supply tasks in addition to water supply. In these constellations, the commitment of private shareholders is often concentrated on the energy sector.

Sewage disposal: According to the Federal Water Act (§ 56 Wasserhaushaltsgesetz), sewage disposal is only reserved for legal entities under public law. Public wastewater management in Germany is a state duty that is performed by communities and cities as a local authority responsibility. In this respect, a pure privatization in the wastewater disposal sector is not possible. However, there are still contractual constructions between the public sector and private companies existing, according to which the private sector has a great weight in the fulfilment of tasks, but to the outside a public law construct appears. Legal questions then arise in practice for the individual constructions, which are answered differently by the courts. The questions mainly concern fee law, value added tax and public procurement law.

We are not aware of any detailed investigations in this area, often they fail because of the transparency of the contract constructions. In this respect, it is also not

possible to judge whether the current legal framework has a favourable or unfavourable effect. However, the legal framework allows in principle for contractual constructions with private parties, but the validity in each case is difficult to verify.

Statistics on the water sector, in which the shares of private companies are also shown, are not known – although this would be appropriate for a proper answer.

3. Why do public authorities allow or even attract privatization of water and sanitation services? What would be the alternatives for public authorities?

In our view, the German government has no official expectations of privatization in the water sector. The prevailing opinion in the political landscape is as follows (Mainstream): “The German Basic Law (Article 28 Para. 2) and most constitutions of the federal states ensure the local self-government of municipalities.

Selfgovernment comprises all matters concerning the local community. Local self-government means autonomy in terms of bylaws, supreme power in terms of organisational, personnel, financing, regional and planning issues of cities, municipalities, associations of municipalities and administrative districts in accomplishing the tasks assigned to them. Municipal regulations and the water laws of the different federal states stipulate that drinking water supply is usually and wastewater disposal is always an obligation of the municipalities. On this basis, municipalities decide on the local implementation and organisation of water supply and wastewater disposal for the citizens’ benefit. Based on the different constitutional provisions of the federal states, different forms of business organisation are possible for the implementation of water supply and wastewater disposal on the municipalities’ own responsibility as part of their organisational sovereignty.” (see point 3.1, p. 18, Profile of the German Water Sector 2015).

The decision is not made by the federal government but by the respective municipalities, cities and towns. The motives were often of a financial nature (budget) and not borne for reasons of public welfare. As has been shown in the case of Berlin, the public authorities even achieved high sales proceeds by guaranteeing private profit guarantees. The consequence, however, is that water prices for customers rose. We have also learned from other cases that, although the private company has to take over upcoming investments, it will be reimbursed when the contract ends. This is therefore a debt outside the general tax budget which can be interesting especially for indebted municipalities. Thus, privatization is solely in the financial interests, which affects the affordability of the service.

On the other hand, there neither hardly any transparency with regard to the transfer of profits to the private shareholders, nor is there any transparency with regard to the specific agreement reached with the private sector. It is therefore difficult to quantify the extent to which privatization has had a negative impact on customers.

The federal government does not provide any clear support exclusively for the public sector in the water sector. This may lead in some situations to pressure to privatize.

The cooperation and collaboration of the public authorities is an adequate response to those who have only liberalisation, competition, commercialisation and ultimately privatisation as a solution to the increasing challenges.

4. In your view, have International Financial Institutions (IFIs) recently encouraged privatization? Could you provide concrete examples?

The priorities for the World Bank, the International Monetary Fund, the European Union and the World Trade Organisation are to involve the private sector through public-private partnerships, joint ventures and foreign direct investment. The prerequisites for this are the (partial) privatization of public utilities, investment security and risk minimization for private companies, and an overemphasis on the economic value of water. This is accompanied by the subjugation of states to international credit conditions, investment agreements and private sector contracts, which reduces national, socio-economic alternatives for action. This underestimates the social and ecological value of water.

See recent World Bank Report „Quality unknown“, 2019 (<https://openknowledge.worldbank.org/bitstream/handle/10986/32245/9781464814594.pdf?sequence=8&isAllowed=y>): “With a shortage of public funds, investments in water treatment need to be made more attractive for the private sector by lowering risks and assuring a fair return to investors.” (p. 110-111) or „A range of guarantees and risk reduction schemes are available to favorably tilt the risk-reward ratio, making private investments in the sector more attractive.“ (p. 115)

5. In case of economic crises, have the promotion of privatization increased?

Yes, see before. We do not have detailed statistics on this.

For Portugal 2014 (source: Germany Trade&Invest (GTAI), Privatisierung von Staatsbetrieben schreitet in Portugal voran, 14.01.2014,) „Die "Troika" aus EZB, IWF und EU hatte dies 2011 zur Bedingung für ein 78 Mrd. Euro-Rettungspaket gemacht. Einsparungen von 6,7 Mrd. Euro wurden dadurch bislang erzielt. Das Land will den EU-Rettungsschirm Mitte 2014 verlassen. Weitere Vergaben von Konzessionen an Privatfirmen in der Wasserwirtschaft sind vorgesehen.“ (Translation: The "troika" of ECB, IMF and EU had made this a condition for a EUR 78 billion rescue package in 2011. Savings of EUR 6.7 billion have been achieved so far. The country wants to leave the EU rescue package in mid-2014. Further awards of concessions to private companies in the water sector are planned.)

For Greece statements of the EU Commission here:

<http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2012-008837&language=EN>

<http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2012-009662&language=GA>

see also a Letter to World Bank:

<https://gwenmoore.house.gov/uploads/mooreifcletter%20final.pdf>

Private provision

6. In your experience, if the private sector is involved in provision of water and sanitation services, what process was undertaken prior to the decision to adopt this model of provision? What types of concerns have been considered in such decisions?

The decision was not made by the government but by the respective municipalities, cities and towns. The motives were often of a financial nature (budget) and not borne for reasons of public welfare. As has been shown in the case of Berlin, the public authorities even achieved high sales proceeds by guaranteeing private profit guarantees. This is even allowed under European state aid law (EU Commission, Guidance Paper, 2012, https://ec.europa.eu/competition/state_aid/studies_reports/swd_guidance_paper_en.pdf). The consequence, however, is that water prices for customers rose. We have also learned from other cases that, although the private company has to take over upcoming investments, it will be reimbursed when the contract ends. This is therefore a debt outside the general tax budget. Thus, privatization is solely in the financial interests, which affects the affordability of the service. Furthermore, the consideration depends on the negotiating position of the public authorities; in the case of an indebted municipality, it can be assumed that the position is not strong.

7. How could public authorities use the features of private providers to foster the realization of the human rights to water and sanitation (HRtWS)? Is private provision positive for the progressive realization of the human rights to water and sanitation? If yes, in which circumstances?

With regard to access and quality, there are strict rules in Germany which must be observed by both private and public companies. Privatization has an impact above all on affordability and investment. We are not yet aware of any positive experiences in this regard.

The responsibility for achieving the human right to water must lie solely with the state; it must not be transferable and may only be exercised by the public authorities. At the same time, the local level and the people must be closely involved in this responsibility and democratic control must be possible. In fulfilling this task, the state can, where it needs support, hire private companies. However, this must not be to the extent that it loses its responsibility and scope for shaping the task.

8. How have instruments and mechanisms in place allowed the users (and non-users) to complaint and get remedy from private providers?

We are not aware of any explicit legal claim. However, it is possible that the courts will take aspects of Human Rights on Water into account if the supply is blocked. We are not aware of any uniform handling in this regard.

In addition, the costs for water supply and sewage disposal are taken into account in the calculation of the basic provision for welfare beneficiaries (§ 22 SGB II). So the minimum on Human Rights on Water should be guaranteed for welfare beneficiaries.

To what extent the private company bears a collection risk depends on the individual contracts with the public authority.

9. Do private providers advocate for stronger regulation? If so, why?

We cannot judge that.

10. How has been the relationship between private providers and public authorities at the local level? What are potential concerns public authorities and users face vis-à-vis private providers?

"The German Basic Law (Article 28 Para. 2) and most constitutions of the federal states ensure the local self-government of municipalities. Selfgovernment comprises all matters concerning the local community. Local selfgovernment means autonomy in terms of bylaws, supreme power in terms of organisational, personnel, financing, regional and planning issues of cities, municipalities, associations of municipalities and administrative districts in accomplishing the tasks assigned to them. Municipal regulations and the water laws of the different federal states stipulate that drinking water supply is usually and wastewater disposal is always an obligation of the municipalities. On this basis, municipalities decide on the local implementation and organisation of water supply and wastewater disposal for the citizens' benefit. Based on the different constitutional provisions of the federal states, different forms of business organisation are possible for the implementation of water supply and wastewater disposal on the municipalities' own responsibility as part of their organisational sovereignty." (see point 3.1, p. 18, Profile of the German Water Sector 2015)

Only for water supply: From local self-administration (Article 28 (2) of the German Basic Law follows a far-reaching freedom of design with regard to the "how" of the performance of tasks. It opens up a wide range of privatisation options (formal privatisation of public institutions), the involvement of private parties within the framework of various models of functional privatisation, but also the type of material partial privatisation within the framework of mixed-economy enterprises (sale of company shares to "genuine" private parties).

We know of only one federal state that they have anchored a privatisation brake in their constitution. This is the federal state of Bremen (Article 42 IV a Bremen State Constitution, https://www.transparenz.bremen.de/vorschrift_detail/bremen2014_tp.c.75088.de). Otherwise, at least material privatisation is excluded if a state law or state constitution formulates water supply as a compulsory task. This is regulated very differently in the federal states.

In federal law, Section 50 (1) of the Federal Water Act (Wasserhaushaltsgesetz) stipulates that the water supply serving the general public (public water supply) is a task of public service ("Daseinsvorsorge"). However, this only means that the state has a special responsibility, but not that its privatisation is excluded.

The possibility of privatisation of the municipalities means that the municipalities must at least observe the principles of the European internal market when making

organisational decisions regarding water supply: non-discrimination, equal treatment, transparency. A so-called in-house allocation under purely public ownership is only possible under certain conditions. In order to avoid privatisation in individual cases, the first successful citizens' initiative Right2Water reached an exception for water in the EU Concessions Directive. This creates a wide organisational scope for municipalities. This regulation is subject to the review by the EU Commission, which should have taken place in April 2019 (see Recital 40, 84, Article 12, Article 53 (3) of the Concessions Directive, <https://eur-lex.europa.eu/eli/dir/2014/23/oj>)

11. How have private providers contributed to or harmed the realization of the HRtWS? Please give examples.

We cannot judge that.

12. What is the nature of the information available on service provision? Does it allow for the adequate accountability of private providers and public authorities?

There is not a clear transparency with regard to the transfer of profits to the private shareholders, nor is there any transparency with regard to the specific agreement reached with the private sector. It is therefore difficult to quantify the extent to which privatisation has had a negative impact on customers.

We are not aware of any detailed investigations in this area, often they fail because of the transparency of the contract constructions. In this respect, it is also not possible to judge whether the current legal framework has a favourable or unfavourable effect. However, the legal framework allows in principle for contractual constructions with private parties, the validity of which is difficult to verify.

13. Who monitors the performance of private providers in respect to the normative content of the HRtWS and how? Who intervenes when there are risks of human rights violations and how is it done? Who imposes penalties in case violations occur?

There is price control under cartel law, but it only compares prices between comparable companies. There is no examination of affordability.

Ensuring sustainability is the responsibility of the local authorities; we are not aware of any effective review or possibility of adjustment on private providers.

14. What are the main challenges public authorities face regarding availability, accessibility, quality and affordability when private actors provide water and sanitation services? Please give examples.

It is difficult to guarantee long-term security of water supply in the sense of Human Rights on Water beyond the term of a fixed-term contract with a private company. The financial interests of the contract partners are regularly at the forefront.

15. Do you know any case of corruption involving private provision of water and sanitation services? Please give the necessary details.

We cannot judge that.

16. Has the private sector shown more capacity to mobilize funds than the public sector? Could you please give concrete examples?

That depends on the individual case. However, if loans are taken out from the private sector, these are guaranteed by the public hand in order to obtain favorable interest rates.

17. In your opinion, is there power imbalance in a public-private partnership? Could you please give concrete examples of effects of this relationship?

Yes, especially regarding the prices for the fee-payers or the investments.

The involvement of private shareholders does generate proceeds from the sale. However, the public "partner" also has an interest in the performance and fulfilment of its tasks. The private "partner" on the other hand bears the entrepreneurial risk. He must generate profits from his commitment, or at least cover his own costs of the commitment. There is a conflict of interest between the "partners". It is to be feared that, in dealing with this conflict, the companies will incur hidden costs in order to generate more profits. In any case, there is a risk that this conflict will be carried out at the expense of the fee-payers. The higher the privatization is, the higher the service charge will be.

18. When there is private participation in the water and sanitation sector, to what extent the private actor brings its own financial resources to the service?

See above point 16.: That depends on the individual case. However, if loans are taken out from the private sector, these are guaranteed by the public hand in order to obtain favorable interest rates.

Remunicipalization

19. Have you studied any case of remunicipalization? Why and how has it occurred? What types of difficulties has the public authority faced to establish the new municipal provider? Please, provide details of those processes.

Types of typical difficulties:

- Difficulty in determining whether an award procedure must be carried out (see for Rostock: <https://www.ostsee-zeitung.de/Mecklenburg/Rostock/Wasser-Streit-Vergabeverfahren-war-rechtens>).
- Costs for the repurchase of shares (see Berlin: <https://www.berlin.de/sen/finanzen/vermoegen/nachrichten/artikel.30112.php>)
- Compensation of the Costs for investments during the time of contract
- Re-winning Staff and know how
- No end-clause in the contract (see Stuttgart: <https://www.stuttgarter-zeitung.de/inhalt.wasserversorgung-in-stuttgart-stuttgart-kaempft-um-das-leitungsnetz.d49bb9b0-1e96-4ef4-bbc0-6216408dfe0f.html>)
- transfer obligations unclear

Some Important Studies:

- Silke Laskowski, Das Menschenrecht auf Wasser: die rechtlichen Vorgaben zur Sicherung der Grundversorgung mit Wasser und Sanitärleistungen im Rahmen einer ökologisch-nachhaltigen Wasserwirtschaftsordnung, 2010 (English summary from google books: Silke Ruth Laskowski analyzes the impact of the fundamental human right to water, focusing on Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights in connection with the General Comment No. 15 (UN Economic and Social Council, 2002) and the principle of sustainable development.)
- Our Public Water Future, 2015, <https://www.tni.org/files/download/ourpublicwaterfuture-1.pdf>
- Bündnis Entwicklung Hilft, Weltrisikobericht 2019, <https://weltrisikobericht.de/>
- Studies from OGPP: <http://www.politikberatung.or.at/studien/oeffentliche-dienstleistungen/>
- AK Wien, Vergleich Europäischer Systeme der Wasserversorgung und Abwasserentsorgung, 2018, https://www.arbeiterkammer.at/interessenvertretung/umweltundverkehr/umwelt/klimawasserluft/Wasserstudie_Langfassung.pdf
- Emanuele Lobina, Commentary on the European Commission's "Study on Water Services in Selected Member States", 2018, https://www.epsu.org/sites/default/files/article/files/PSIRU%20Commentary%20on%20EC%20Study%20on%20Water%20Services_FINAL%20final.pdf
- Spotlight Report on Sustainable Development 2019: SDG 6 – Transforming institutional dynamics of power and governance to enable universal access to water, sanitation and hygiene (WASH), <https://www.2030spotlight.org/en/book/1883/chapter/sdg-6-transforming-institutional-dynamics-power-and-governance-enable-universal>
- Heinrich Böll Stiftung/ Gemeingut in Bürgerhand, Gemeinwohl als Zukunftsaufgabe, Öffentliche Infrastrukturen zwischen Daseinsvorsorge und Finanzmärkten, 2017, https://www.gemeingut.org/wp-content/uploads/2017/06/Endf-Gemeinwohl-als-Zukunftsaufgabe_Web.pdf
- tni, Reclaiming Public Services, 2017, <https://www.tni.org/en/publication/reclaiming-public-services>
- Hall, David and Bayliss, Kate (2017), Bringing water into public ownership: costs and benefits, <https://gala.gre.ac.uk/id/eprint/17277/>
- Social efficiency and the future of Water Operators' Partnerships, 2017, https://aow.de/media/Themen/Privatisierungen/Erfahrungen/OP29_Belanger-Dumontier-et-al_Social-Efficiency-and-the-Future-of-Water-Operators-Partnerships_2016.pdf
- Here to stay: Water remunicipalisation as a global trend, 2014, <https://www.tni.org/en/publication/here-to-stay-water-remunicipalisation-as-a-global-trend>