

INCOMPLETE PRIVATISATION AND THE POROSITY OF PUBLIC VALUES

Handling discrepancies between public values and privatised services, avoiding reverse privatisation.

Paper for the Public values session, NIG conference November 8, 2007
Michiel A. Heldeweg (Twente University, LEGS department)¹

This paper presents an attempt at a legal approach to addressing wrongful privatisations, avoiding reverse privatisation or even re-publicisation as answers to (unavoidable) negative discrepancies between public values and related public services.

In no. 58 of the paper a short overview of the steps from the leading question to the concluding remarks is presented.

This paper is still in the draft stages as especially footnotes and cases have not yet been fully elaborated, let alone finalised. This should not handicap the NIG debate of the 8th of November 2007. If, however, these shortcomings somehow do disturb reading, the author wishes to apologise sincerely for the inconvenience.

I. Introduction: discrepancies

1. Once privatisation of the production or delivery of public goods or services, such as energy, public transport or health care (hereafter the 'delivery of public services'), has been realised, in the sense of a transfer of property rights in the organisation of these services to the market, a *discrepancy* may unveil itself between the desired and the actual realisation of public values involved.

Public values are taken here to be translated into: type and specific technical characteristics of the public services involved, such as with regard to its nature, and for example its frequency or the tariffs of this service (hereafter the 'public quality'); to organisation of these services, such as requirements regarding, labour conditions, and sustainability of the private producers or suppliers involved, as well as the social acceptance of the (social) cost of privatisation (hereafter the 'public organisation') and to conditions regarding the interaction between the new, private producer or supplier and the new consumers, as in equal treatment or fair play,² and the relations with third parties, as in public openness (hereafter the 'public interaction').

Discrepancy is taken to relate to (on the one hand) *desires and expectations* of government with regard to public quality, public organisation and public interaction and (on the other hand) the *actual* public quality, public organisation and public interaction as realised in practise. This discrepancy may be positive or negative, in terms of improving on public values or placing a burden on them. This paper is only about negative discrepancies (hereafter, discrepancies). Furthermore, discrepancies may be of a static or a dynamic nature. *Static* discrepancies refer to given public values, regarding quality, organisation and interaction, that have (simply) been safeguarded or enforced poorly, thus creating a chance at a discrepancy between expectations and the actual facts – where public quality organisation and interaction may be found wanting. *Dynamic* discrepancies refer to the possibility of a change in views concerning relevant public values with the result that the actual public quality, organisation and interaction may be up to previous standards but not to the most recent desires in terms of new parameters.³

¹ Michiel A. Heldeweg is an associate professor of Constitutional and Administrative Law at the Faculty of Management & Governance at the University of Twente. <http://www.mb.utwente.nl/legs/staff/heldeweg/>

² Both these examples relate to Dutch legal principles of proper administration, valid in administrative decisions vis-à-vis citizens. Legal protection may also be regarded as a matter of public performance.

³ An in-between category of discrepancy may be that public values have (as it turns out) been poorly described and in practise lead to a discrepancy in views on their interpretation – which may be brought under a fallacy in safeguarding (static discrepancy), but also under a silent change in views or a dynamic interpretation of vague terms (dynamic discrepancy).

2. In this paper both static and dynamic discrepancies are considered problematic and hence the leading question is whether there is a 'regulatory fix' for this phenomenon of discrepancies on the realisation of public values in cases of privatisation of public services. Both types of discrepancies are considered relevant but only to the extent of their regulatory appraisal, so only with regard to whether or not the values involved can be adequately addressed in *regulation* – in principle providing for all necessary means of actual enforcement; while enforcement as such is not part of this study. With regard to the problem of static discrepancy this implies that willingness and capacity to enforce is not addressed in this paper, but the adequacy in principle of regulatory safeguards (can these be adequate?) is. The same 'adequacy in principle', phrased above as the possibility of a 'regulatory fix', is at stake with regard to dynamic discrepancy. In the shadow of the regulatory fix attention is also paid to the alternative or complement of a 'property fix', which means safeguarding – against static or dynamic discrepancies – by means of retaining property rights, such as shares.

3. Firstly this paper will address some examples of (expected) discrepancies (par. II). Secondly (in par. III), the nature and especially the porosity of public values are analysed. Thirdly, the aspect of privatisation as a normative transformation is clarified (in par. IV) and subsequently (in par. V) the regulatory impediments that result from this transformation are addressed. Finally, options for a way out of discrepancy problems are put forward and discussed (in par. VI). Paragraph VII presents some concluding remarks.

II. Cases of (expected) discrepancies

4. The Dutch privatisation history presents some cases as interesting illustrations of the problem of discrepancy as raised in the introduction. In two cases the discrepancy had an *ex post* character, in that the problem surfaced after privatisation had been (partially) realised. Two other cases illustrate how fears for discrepancies caused an *ex ante* hesitance to fully privatise a public service.⁴

II.1. The CEO-salaries case

5. This case is about the extreme increases in salaries paid to CEO's in privatised public sector activities. Important examples come from the energy, health, housing and educational sectors.⁵ Clearly, these instances gave rise to considerable political and public debate as it was felt, both by the public and by the Dutch cabinet, that the increases or amounts as such were 'outrageous' and not compatible with the nature of the *public* services rendered. Presumably, this view was concerned with the 'public organisation' aspect of public values related to privatisation. Organisations within this sector should offer salaries in keeping with the nature of the public service at large, putting the latter, clearly, before the aim of personal profit. This was the main point of critique, which also gave rise to presenting the salary of the prime minister as a limit standard for all wages in the public sector – even within privatised organisations.⁶ In the margin of this key point, another source of scepticism was that the presumption that privatisation is about creating profit or competitiveness incentives, also with respect to salaries, as a means to enhance services, simply does not apply as long as privatisation merely amounts to the creation of quasi-markets (as an oligopoly in which CEO's have no real fear of a sudden loss of income or position).

⁴ The reader who wishes to scan this paper rather than read or study (carefully), should know in advance that the cases are meant to illustrate the issue rather than being actual objects of research and hence knowledge of the cases is not essential to understanding this paper.

⁵ Examples of extreme salaries yet to be included. Note that, strictly speaking, most Dutch universities have not been privatised but have become public independent agencies (quango's).

⁶ A difference of opinion can be traced with regard to whether or not privatised providers are financed by government for the services rendered or merely by transactions with 'consumers'. PM

6. In response firstly a statute was introduced compelling privatised organisations to make their system of salaries or even specific salaries (per position) transparent and public. It was believed that this requirement would lead to moderation (as a mechanism akin to 'naming and shaming'). Secondly, when this first response did not lead to a significant change in salaries, a statute was proposed that will indeed set a fixed maximum wage for privatised public sector organisations. (PM – the legislative narrative is still in needs of some elaboration.)

7. This case shows how *ex post*, after privatisation, it became clear that public values with regard to the 'public organisations' aspect, differed from the standards for setting CEO-wages in practise. In part this may be a result of implicit (and in hindsight, incorrect) presumptions on how the CEO-salaries might develop in a privatised context (as mentioned in the above), but the discrepancy may also be seen as the result of a change in opinions regarding CEO-wages in privatised public sector organisations. Finally, the example shows that because of privatisation, the instruments for remediation of the discrepancy seemed more limited. If government still held shares in the companies involved, this would offer the opportunity of setting limits on a case to case basis (through the Board of Governors), within the companies involved. There are indications that this was done to some extent,⁷ but for some years the view was also held that property rights of government in private companies should be used only as an 'emergency brake' where strategic discussions might endanger the certainty and universality of rendering the public service involved (and being able to, if necessary, *republicitise*, without unacceptable cost). As to the regulatory solution problems could arise if putting a cap on salaries result in discriminating CEO's in privatised companies from companies from other private companies. (PM-Elaborate)

II.2 The Housing corporations case

8. This case is relevant to our subject because it is concerned with an attempt by the Dutch cabinet to regain control over the capital reserves (of over 3,5 billion euros) that have been built up over years with the privatised housing corporations. These corporations have the legal form of a trust or a society and have as their sole task to provide for public housing. Many were established directly after the introduction of the Housing act of 1902, which provided for a mechanism under which private organisations were, under certain specific conditions (such as having the exclusive objective of enhancing public housing facilities), eligible for government funding for housing projects. Subsequently, corporations were established by, for example, Socialist/Trade union, Catholic and Protestant initiatives, on the communal level ('gemeente'), sometimes related to housing for special groups, such as public servants, teachers, military and railway personnel.⁸⁹

In the course of the 1980's and 1990's many corporations merged, resulting in the present number of about 500. This wave of mergers collided with the fact that in 1993 government decided to largely withdraw from public housing, reducing its influence on the sector but also its funding, requiring of the corporations to largely arrange for their own finances. As originally corporations were involved in building, renting out (to presently 2,5 million tenants) and the maintenance of social housing projects, today the corporations are (also) actively involved in building owner-occupied property, often as a means to provide for profits that can be used for other tasks, amongst which, increasingly, also the improvement of liveability of urban areas, also involving housing for special interest groups, such as elderly or handicapped citizens.¹⁰

⁷ The previous Chancellor of the Exchequer, dr. Zalm, stated such in a television interview (Pauw & Witteman, 17 October 2007). PM other sources.

⁸ Presently arranged in Article 70 of the Housing Act (Woningwet).

⁹ Resulting in a rise in the number of corporations – 40 in 1890, 300 in 1914 and 1341 in 1922 – see <http://www.haagwonen.nl/info.asp?ID=73> [20.10.2007] PM- Replace with primary source.

¹⁰ Vide (19 October 2007)

<http://www.vrom.nl/pagina.html?id=19597&ref=http://www.google.nl/search?hl=nl&sa=X&oi=spell&resnum=0&ct=result&cd=1&q=woningcorporaties&spell=1>

Presently the role of the corporations is regulated in the Crown order on Management of Rented Social Housing,¹¹ as based on the Housing Act 1991.¹²

9. In the late spring of 2007 the minister of Housing took up on the policy objective of revitalising 40 seriously degraded urban areas, by suggesting that the corporations would deposit their acquired capital reserves in a *public* fund managed by the minister (in amounts of 750 million euros per annum over a period of 4 years).¹³ The corporations were reluctant to comply, as they felt they themselves were best equipped to successfully address the problems of these 40 areas and that the proposed scheme would lead to considerable bureaucracy and to an undesirable redistribution of capital between the richer and the poorer corporations.

In the course of the struggle, in the summer of 2007, the Chancellor of the Exchequer interfered by threatening the corporations with a unilateral levy of 3 billion euros, so as to seize the necessary capital involved. In response the corporations, represented by their own umbrella, called Aedes, broke off their negotiations with the minister of Housing and suggested that an attempt to introduce the dreaded levy would be answered by a law suit on the basis of expropriation.

After the summer holiday, shortly before the yearly cabinet budget was presented in September 2007, the minister of Housing and the corporations came to an agreement, which amounted to a donation by the corporations of 250 million euros per annum over a period of 10 years into a *private* investment fund, from which corporations could cheaply lend money for extra investments in the 40 most seriously degraded urban areas. It is still unclear whether the money that goes into the fund is actually going to be spend, or that only the rents from this fund will be spend – and with this it is also still unclear whether the creation of this fund (of some kind) will lead to a redistribution of capital from the richer corporations to the poorer ones (especially those in the aforementioned 40 areas). Furthermore, some suggest that the idea of creating a fund was primarily initiated by the desires of the Chancellor of the Exchequer to meet budgetary requirements under the EMU-scheme.

10. Clearly, this case points at the condition under which an independent organisation in a private legal form is put under pressure to direct its reserves to causes indicated by central government. Or, putting it differently, corporations were found insufficiently responsive to public policy objectives; a discrepancy between the public quality of services delivered by the corporations and the desires of the cabinet (with regard to neighbourhood renewal and the allocation of the corporations capital reserves – referred to by the Chancellor of the Exchequer as ‘public money’).¹⁴ Different to the CEO-case, the ‘gap’ in this case should be considered as a static discrepancy, as the public interest itself is not in debate (in terms of new parameters of quality), but rather the way in which it is to be addressed. To bridge the gap, firstly a regulatory fix was sought, by means of negotiations towards a voluntary solution (in the form of a covenant),¹⁵ but when it proved impossible to voluntarily rally the corporations behind the policy targets, the cabinet chose to threaten the corporations with a tax seizure, in fact seeking a ‘property fix’, qualified by the corporations as an attempted expropriation.¹⁶

¹¹ Besluit beheer Sociale huursector, Besluit van 9 oktober 1992, houdende regels betreffende instellingen, werkzaam in het belang van de volkshuisvesting. OJ (Staatsblad) 1992, 555.

¹² OJ (Staatsblad) 1991, 439.

¹³ This initiative was preceded under a previous cabinet by an attempt to close a covenant between the State (minister of Housing) and the corporations on the basis of which corporations themselves would engage in major investments in seriously degraded urban areas. See also NRC Handelsblad, 16 November 2007.

¹⁴ Parliamentary documents (Kamerstukken) 3 juli 2007, PM debate on Voorjaarsnota (‘Springbudget’).

¹⁵ Consider that Articles 41 and following of the BBHS hold an instructive competence of the minister of housing vis-à-vis individual corporations. [not considered ‘suitable’ here: elaborate why... PM]

¹⁶ Shortly after the corporation’s umbrella (Aedes) and the minister of Housing did reach an agreement (on the private fund) the latter proposed, in a speech to the Association of supervisors to housing corporations, on 10 October 2007, that she would pursue the competence to sack (members) of internal boards of supervisors (to individual corporations) in case of evident mismanagement... (VROM <http://www.vrom.nl/pagina.html?id=34302> [20 October 2007]).

II.3 The Schiphol case

11. This case is interesting as it shows how the Dutch central government has been at odds on whether or not to privatise the Dutch (inter)national airport of Schiphol (the 'NV Luchthaven Schiphol')¹⁷ in which the Dutch state holds 75,8%¹⁸ and the cities of Amsterdam and Rotterdam hold 21,8% and 2.4% of shares.

The two former cabinets, 'Balkenende II and III',¹⁹ pushed for privatisation of Schiphol, by reducing government shares in NV Luchthaven Schiphol to a minimum of 51 % (allowing for 49% of shares to be privately owned). This was considered a desired scenario to enable the Schiphol management to more effectively meet competitive challenges and acquire additional investment capital.

Because the Charter of Schiphol corporation requires an 80% endorsement to the decision to sell the state shares, it was imperative that the city of Amsterdam agreed. Amsterdam however, didn't, as it felt that sales of shares would amount to a considerable loss of control over investment decisions (with a possible shift from passenger and freight transport to office buildings around the airport; and a shift to investing in other airports across Europe (and beyond)) and tariffs. Furthermore, annually Amsterdam benefits by the dividend on its shareholders position (and to sell a profitable airport is seen as putting 'quick gains' before a continuous source of income). Finally, the importance of being able to influence environmental performance criteria through the shareholder position was presented as an asset of being a major shareholder.

The chancellor to the Exchequer (dr. Zalm) and the city of Amsterdam did not reach agreement, and subsequently Amsterdam vetoed the sales of state shares in an official Schiphol shareholders meeting on the 30th of September 2006. The Chancellor of the Exchequer announced that he would propose an annulment by the Dutch Crown (effectively the cabinet) of the decision by the shareholders.²⁰

12. The switch in central government in 2007 came with a change in partnership from Christian-democrats and (Social-)Liberals (cabinets Balkenende II and III) to a Christian-democrats, Social-democrats and Christian-unionist (Balkenende IV) coalition, and a more moderate (or sceptic?) view on privatisation. In the coalition agreement the position was taken that the new cabinet would not seek placing state shares in Schiphol on the stock market, but instead to do seek others means by which capital may be derived from the shareholders position without diminishing shareholder control in the corporation.²¹ Then, on the 18th of October 2007, the cabinet published its decision not to sell its shares in Schiphol. Main consideration is that the position of Schiphol as a main port is related to public interests, such as the environment, and hence to ensure confidence with all parties concerned as to optimally safeguarding these interests, is of utmost importance. Given that with regard to the option of selling state shares in Schiphol such confidence is lacking with co-shareholders, and given that it is insufficiently clear that placing state shares with private parties will create advantages as to efficiency and to safeguarding public interests, the cabinet decided not to pursue a sale of state shares.²²

13. This case exemplifies an *ex ante* evaluation of the possibilities of ensuring proper safeguards as to public interests, more specifically concerning the Schiphol environment and giving priority to (investing in) services from Schiphol airport (at a reasonable price,

¹⁷ 'NV' stands for Open Corporation, meaning that bearer shares in the Schiphol corporation may be traded on the stock market.

¹⁸ http://www.minfin.nl/nl/onderwerpen,staatsdeelnemingen/overzicht_staatsdeelnemingen/Index.html (20 October 2007).

¹⁹ May 2003 – June 2006 and July 2006 – February 2007.

²⁰ On the basis of Article 268 Gemeentewet Local Government Act.

²¹ PM Coalition agreement February 2007.

²² Letter by the Chancellor of the Exchequer, 18 October 2007, Fin 2007-00652. The Chancellor does refer to support for the possibility of an arrangement for a super dividend as a means of withdrawing capital from the shareholder position (for new investments in Schiphol), but this remains an issue to be studied further.

and instead of elsewhere or, as far as Schiphol is concerned, in real estate rather than transport). Clearly co-shareholders, and also the cabinet itself have fears of a possible future discrepancy between desired protection or improvement of public interests and the realisation thereof under a regime where government has a seriously diminished shareholder position in Schiphol. From this it seems evident that the governmental bodies involved have insufficient trust in the possibilities of a regulatory arrangement to adequately protect and improve these public interests in this particular instance – even if it is considered that there were also doubts concerning efficiency improvement (for private corporations on the market for air traffic infrastructures) and concerning the timeliness of selling shares now (considering that Schiphol is doing so well and may be expected to continue to do so at least for a number of years).

II.4 The Twence case

14. Similarly, the Twence case shows *ex ante* hesitance with regard to safeguarding protection and enhancement of public interests – joined with doubts on efficiency improvement ('market failure') and wrong timing ('quick gains'). The case is about a waste treatment plant in Twente, a region in the east of the Netherlands, of which the majority of shares is owned by the municipalities of that region.²³ The Region of Twente is an administrative organisation for cooperation between the municipalities involved and has taken up on the plan to sell off the shares in the plant in order to use the capital (of an estimated € 2-300,000) to be invested in regional innovations, such as infrastructural works.²⁴

Remarkably and distinct from the Schiphol case, where the Schiphol management was very much in favour of privatisation, the directors and the Board of Governors of Twence are in favour of a continuation of the majority share holder position of the region (and prefer other means, such as paying out all profits by means of a dividend, to create the capital reserve needed for innovation projects).²⁵ Furthermore, directors and governors think that interests of Twence and the Twente region coincide, tariffs can be kept on a low level, and waste treatment may be continued successfully and combined with providing energy and warmth from incineration of waste and aiding in the reduction of CO2 emissions.

From press releases it has become clear that (members of) municipal boards are very much in doubt as to the timing of the sale of shares (as they expect the value of Twence to rise considerably in the next decade), but also because the fear that once the share holder position is lost, there will be insufficient safeguards as to keeping the tariffs for waste treatment low (as many expect that it will take a long time before true competition will come to exist in the business of waste treatment – if ever) or, as to making use of other public benefits, such as the aforementioned environmental and energy considerations.²⁶ On the 11th of October 2007 the council of the Region of Twente decided to postpone decision making, as support on the sale of shares was considered insufficient to push forward.²⁷ Furthermore, it was announced that further research would be done to work out possible scenarios regarding future relations between the region and Twence, should the shares be sold at a later date. The outcomes of this research are expected in January 2008 and a definitive decision on whether to go ahead with selling shares is expected in spring 2008.

²³ 82% of shares are owned by the municipalities belonging to the Region of Twente; 15% is owned by the energy company Essent and 3% by the waste treatment company Noord-Groningen.

²⁴ The so-called 'Agenda for Twente' (<http://www.regiotwente.nl/en/regiotwente1/agendavantwen/>). On this point see: <http://www.regiotwente.nl/en/publicaties/persberichten/00410/> (29 October 2007)

²⁵ Letter by the board of Governors, 24 september 2007,

<http://www.twence.nl/shared%20resources/downloads/brief%20aan%20Twentse%20raadsleden%20inzake%20aandeelhouderschap%20Regio%20Twente%2024-9-2007.pdf> .

²⁶ See press releases by the regional paper <http://www.tctubantia.nl/search/index.jsp> or nationally (NRC) <http://archieff.nrc.nl/?modus=l&text=twence&hit=1&set=1> and <http://archieff.nrc.nl/?modus=l&text=twence&hit=2&set=1> (all internet sources 29 October 2007)

²⁷ See

http://www.regiotwente.nl/vergaderingen/regioraad/24_okt_3_Bijlage_5_Besluitvorming_inzake_belang_RT_in_Twen_.pdf/ (29 October 2007).

15. This case too, presents us with *ex ante* hesitation as to (amongst other considerations) the safeguards for public interests, both concerning tariffs and possibilities to improve on environmental and energy interests – apart from what is required by law. Clearly, hesitation relates to whether a true market for waste treatment will come to exist, but also on the issue of avoiding discrepancies in terms of a sufficient effort in respect of the public values involved.

Interestingly, the management of Twence itself is in favour of a continuation of the present share holder involvement of government, especially from the viewpoint of continuity. Possibly this, by contrast, strengthens the case that indeed a true market for waste treatment is on the rise and in time competition will guarantee more efficiency and hence even reduce tariffs – but for now one can only conjecture on this issue.

III. The nature of public values; the porosity problem

16. In the face of these cases it seems that the problem of discrepancies may be addressed in two ways: by avoidance *ex ante* and after revealing itself by remediation *ex post*. Given that the question of whether a regulatory fix is attainable is central to this paper, an important preliminary question is whether, also considering the cases described in the above (par. II), the nature of the discrepancy – static or dynamic – requires that the analysis is differentiated in order to not overlook the possibility of different ‘scenarios’ in judging the capacity to provide for regulatory solutions respectively for both *ex ante* and *ex post* discrepancies – as the box below graphically suggests on the basis of the aforementioned cases.

Response	Ex ante	Ex post
Nature of discrepancy		
Static: public interest unchanged & clear	Schiphol Twence	Housing corporations
Dynamic: public interest unclear or changed		CEO-salaries

17. As this matrix shows, to consider a difference in scenarios regarding *ex ante* (regulatory) provisions to avoid discrepancies, does not really surface in the presentation of the Schiphol and Twence cases. In both cases particular public interests were presented as being of such importance that there was reluctance to leave their protection to regulation only. In more general terms however, we can not rule out the possibility that some public services or some public values are (by nature) more susceptible to change than others.

Furthermore, as the Housing corporations and CEO-cases have been presented as instances of static versus dynamic discrepancies, one may wonder if this calls for separate analyses, possibly leading to different answers. Both cases show an attempt by policy-makers to redress the discrepancy by both regulatory and property responses; ranging from covenants, via introducing legislation, to shareholder influence and taxation. Whether this is an outcome that offers sufficient underpinning for the assumption that in the analyses of *ex post* cases we need not differentiate between static or dynamic discrepancies, is yet unclear.

So, what is needed firstly is a clearer perspective on what is meant by static versus dynamic, and whether there is a difference between public services and public values in terms of their susceptibility to dynamics.

III.1 ‘Porosity’

18. As to the understanding of the concepts of static and dynamic discrepancy, we may apply the notion of the 'open texture' of empirical concepts as introduced by Friedrich Waismann in his 1949 paper on Verifiability.²⁸

This open texture (or porosity)²⁹ notion refers to: '*The fact that (...) there is no such thing as a conclusive verification (which – MAH) is connected with the fact that most of our empirical concepts are not delimited in all possible directions, 'Try as we may, no concept is limited in such a way that there is no room for any doubt.', 'We tend to overlook the fact that there are always other directions in which the concept has not been defined. And if we did, we could easily imagine conditions which would necessitate new limitations.*'³⁰

But we need to be careful in our definition as: '*Vagueness should be distinguished from open texture.*' Vagueness refers to using a word in a '*fluctuating way*', whereas open texture refers to the non-exhaustiveness or the '*possibility of vagueness*'; '*Vagueness can be remedied by giving more accurate rules, open texture cannot.*', '*I shall never reach a point where my description will be completed: logically speaking, it is always possible to extend the description by adding some detail or other. Every description stretches, as it were, into a horizon of open possibilities: however far I go, I shall always carry this horizon with me.*'

In terms of conclusive verification of empirical statements Waismann's analysis presents us with two types of incompleteness, expressed in:

1. '*the existence of an unlimited number of tests*' ('... it is impossible to conclude the description of a material object, or of a situation.');
2. '*the open texture of the terms involved*' ('... our factual knowledge is incomplete (..): there is always a chance that something unforeseen may occur.'), which may mean two things: a. required acquaintance with '*some totally new experience*' (unforeseen, as a blind man who can suddenly see) or b. '*That some new discovery was made which would affect our whole interpretation of certain*' (such as the invention of electricity).

19. In short, our definitions of empirical objects, but likewise of legal terms referring to values, persons, objects, processes and situations, will be *incomplete* (as there are always new characteristics we may add) and *provisional* (as there may always be new and unforeseen circumstances of experience, recognition and interpretation).³¹ *Vagueness*, however, concerns exhaustive definitions that are merely used more freely.

This conceptualisation may be used to clarify the formerly introduced notions of static and dynamic discrepancies and determine the relevance of their distinction with regard to a regulatory or property fix. In order to achieve clarification, however, firstly we need to address the typology of public values in relation to public services.

III.2 Types of public values³²

Public values are described here as values designated by government as in need for protection or improvement/enhancement through certain services (as defined in par. I).

20. This description presumes a primacy of government over determination of values as *public* values (more than merely societal or collective values).³³ This reflects the premise or legal axiom of a systemic responsibility of government for safeguarding and/or the

²⁸ F. Waismann, Verifiability, Originally published in *Proceedings of the Aristotelian Society, Supplementary Volume XIX* (1945); Reprinted version in Antony Flew, ed., *Logic and Language*, the First Series (1951). See <http://www.ditext.com/waismann/verifiability.html> (21 October 2007).

²⁹ See the second footnote in Waismann's article.

³⁰ Citations from this article in this subparagraph are shown in Italics and go without specific page reference as the available text is not fixed in pagenumbers. PM.

³¹ See the second footnote in Waismann's article.

³² The provisionality is to Waismann the core problem of porosity (p. 124 original edition).

³³ Public values are divided into: types of public goods and services and types of legal conditions under which public goods and services are delivered.

³³ Reference to lists as presented in Public Values workshop NIG 06. PM

realisation of these values through public services under certain conditions.³⁴ This paper focuses on cases of realisation through privatised organisations or agencies, within the context where government retains the aforementioned final- or system-responsibility;³⁵ government still holds the power to change the rules of the game (or governance structure) or indeed the general determination or definition of public values involved, but the existing governance structure is designed to keep government outside the game as it is played – apart from safeguarding the rules by supervision and sanctioning.³⁶

The mere existence of systemic responsibility for specified public values brings with it that privatisation does not turn the services involved into mere private services; these will remain services in the public interest (in short 'public services'), regardless of their production or delivery being privatised. For government the drawback of this is that when a (fear of a) discrepancy arises, government can not escape responsibility.³⁷

21. As was proposed in the first paragraph public values may pertain to:

- the 'public quality', which entailed both *type* and *technical characteristics* of the public services involved, such as with regard to its nature, and, for example, the frequency of its delivery and the related tariffs.

On a closer look this description includes two aspects that may or may not always be easily distinguishable.

On the one hand the *typology* dominates in terms of the essential match between the public value as a desire for protection or enhancement of a public interest (such as defence, safety, judicial review, energy, transport, telecommunication, and fair trade) – in the more abstract sense in which such values are often found in leading considerations preceding the Articles of a statute, or as they may be phrased in the wording in an Article attributing a regulatory power with regard to this value to some public body or office. Often this is a deliberately vague notion, requiring further elaboration.

This elaboration takes shape in specific technical *characteristics* of the service which should match the 'desired public value', in terms of its *intrinsic* characteristics, described in quality parameters (with corresponding standards or requirements, sometimes with numerical and exhaustive, non-porous(!) precision). These intrinsic characteristics are typical to the particular service, and are described in the technical properties of the service (as in voltages, time, distance, number, frequency and size of deliveries, and calculated risk) in as much is considered necessary to ensure that the desired value is – at heart – matched, also considering the need to meet other public values, such as those that rest in environmental interests.³⁸ The public quality is also a measure or how different public values (rooted in different interests) are weighed against each other.

Typology and characteristics both are intrinsic qualitative enunciations of the public value – public service *translation*.³⁹ As such they should be positioned as a category apart from the extrinsic enunciations of this translation, which goes beyond the determination of the required public service, and takes its public quality as a given, by focussing only on the translation in terms of 'the way in which, or the conditions under which', with all the values and corresponding criteria connected hitherto, and

³⁴ Axiom in the sense of a declarative legal act by which government makes this interest its responsibility.

³⁵ Opposite to 'systemic responsibility' there is specific or operational responsibility, which is based on specific powers to influence operational activities.

³⁶ Which may also be something that is privatised – often in practice we find that government does claim certain powers of instruction (as on tariffs and permits & concessions for access to markets) and hence it carries a more operational or specific responsibility (congruent with these powers).

³⁷ Note that the legislative proposal on CEO-salaries refers to a certain set of organisations that are considered as public services organisations. The match between this list and the determination of public values is not researched here. (PM: legal persons with a legal task (RWT's) or the public subsidy criterion).

http://www.regering.nl/Actueel/Persberichten_ministerraad/2007/september/21/Ministerraad_akkoord_met_nieuwe_beloningsstructuur_publieke_sector).

³⁸ Note that interests are regarded as perceived (individual or collective) needs, whereas values are understood as (morally, socially, politically or legally) acknowledged needs (as a basis to a – moral, social, political or legal – claim or duty).

³⁹ As to which they reflect at least the 'minimum' or 'essential content' of (understanding) this translation.

which we will name *public performance*, which encompasses the two aspects as mentioned in the first paragraph:

- *organisation* of these services, illustrated in par. 1 by requirements regarding labour conditions (including certainty, payment, safety and voice)⁴⁰ and (economic and ecologic) sustainable activity of the private producers or suppliers involved; in short: the 'public organisation'. In referring to other public values, it needs to be understood that these now relate (not to the service itself – in terms of transactions with the party personifying the desired value⁴¹ – but) to the internal management of the organisation that delivers the services and its overall strategy (possibly also regarding other services or transactions). On a different level, 'organisation' may also be understood to refer to the economic or societal cost of the privatised system as a whole, compared to alternative governance structures, such as rendering public services through public offices;
- relational conditions regarding the *interaction* between the new, private producer or supplier and the new consumers (as in equal treatment or fair play), and the relations with third parties; in short: the 'public interaction'. The 'interactional' public values are primarily rooted in general views concerning legal conditions with regard to an organisation involved in delivering public services and its outside world, both in terms of the public at large, public organisations, private organisations and individuals (citizens, consumers and third parties under external effects of transactions in the public service).⁴² Apart from general principles of private law, which will be applicable when public services are rendered by private law transactions (such as contracts) public law principles may apply, such as on public accountability, taking account of stakeholders interests, dispute settlement procedures or on the aforementioned principles of 'proper administration'.

22. It is proposed here to distinguish intrinsic values (*public quality*; regarding type and characteristics of services) and extrinsic values (*public performance*; regarding service organisation and interaction). The intrinsic aspect relates to the government primacy over determining the general interest by acknowledging specific public values and weighing them against each other. This is a responsibility characteristic to government. In legal terms the determination transforms collective interests into a legal duties of care by government – at least in terms of a systemic responsibility –, a duty that apart from its positive element (to protect or improve...) also has a negative element (not to invade on other public values).⁴³ The extrinsic aspect builds on this determination of the public value and connected services, by setting the basic rules for the realisation of these services; basic rules which are accommodated to the governance structure chosen as a mode of realisation. Setting these 'rules of the game', as in privatisation, is also primarily a responsibility of government, but now other public values do not delineate, let alone restrict the quality of realisation of the underlying public value, but merely mould the way in which a service is rendered. Putting it another way: the extrinsic aspect is about the 'price' to pay, not about the 'product' itself.

23. It is interesting to see how the above value-translations compare to other appraisals. Concerning public services in *network* infrastructures (such as energy, drinking water, telecommunications and public transport) the Dutch cabinet pointed at 5 general public values: **a.** universal service (certain services need to be available to all for about the same price); **b.** protecting 'tied costumers' (those who can not choose their supplier need

⁴⁰ 'Certainty' refers to, for example, the legal protection of a workforce in the course of privatisation, but also, after privatisation, in the course of contracting out for public services (procurement; as for example in recent years in The Netherlands in municipal household care and regional public transport). 'Voice' refers to mechanisms for employees influence on company decisions or accountability of the employer to a representation of employees.

⁴¹ Such as the patient in a health care treatment, the offender caught by the police, a public office in an infrastructure tender, and the inhabitants of an area below sea level protected by dikes.

⁴² The latter refers to distributive inequalities, which in administrative law relates to the principle of *égalité devant les charges publiques*. PM

⁴³ The latter of which limits the powers of interference by government on private liberties.

protection against monopolistic treatment); **c.** certainty of continued delivery (a sufficient level of robustness or resilience of delivery (even) in cases of unforeseen events); **d.** safeguarding qualitative, environmental, safety and health requirements (no breach prescribed standards involving these public interests); **e.** efficiency of the market and fair trade supervision (both the costs of delivering network services and of supervisory activities over fair trade shouldn't exceed socially accepted standards).⁴⁴ These five public values for network services may be compared with the above four categories of two intrinsic and two extrinsic types of value-translations.

- 'universality' (a) and 'protecting tied customers' (b) may be taken to relate to interactive values, in terms of distributive justice and equality. As far as the latter is concerned there may also be a relationship with qualitative values in the sense that a service should provide, for all customers in a minimum package;⁴⁵
- 'continuity' (c) refers to 'organisation', as a primordial requirement to arrive at 'public quality' (is the organisation economically viable and resilient to 'breakdowns?');
- 'safeguarding' (d) immediately concerns the public quality of public service (in as far as the safeguards directly refer to the delivery of service - for else the organisational values may be at stake.
- 'efficiency' (e) may be taken to relate especially to 'organisation' in terms of the collective efficiency of the very governance structure that has arise on the basis of privatisation - a requirement that may also have a dynamic aspect in the sense of privatisation being more conducive to innovation.⁴⁶

III.3 Perspective

24. So what does this categorisation amount to? Clearly, different categorisations reflect a different perspective or angle. The above public values for networks seem to be triggered primarily by the fear for a monopolistic asymmetry between private parties - with the 'safeguarding clause' as a ragbag of moral constraints, which voice a fear that government should, apart from taming the (monopolist 'beast' within), let the protection of other, generally accepted public values slip. Or perhaps even expressing the fear that general regulatory safeguards may not suffice and protection should be sought from within: in rules specifically linked to the governance structure as such, as in property safeguards (through shares in companies that have been allowed to render public services) - as we saw in both the Schiphol and Twence case.

25. The classification in terms of intrinsic and extrinsic values (or rather enunciations of the desired public values - public services translation), takes the angle of determining the public quality as against the public performance, with the aim of more clearly delineating decisions in terms of the *id quod* and the *modus quo* distinction: *which* public services are required, given certain desired public values, and *how* should these services be delivered. On this basis - hopefully - the debate on static or dynamic discrepancies may be more clearly addressed.

26. Both the enunciations for quality and for performance may be porous - in terms of incompletely and provisionally defined. The stance taken in this paper is that privatisation decisions are always incomplete, either because of omissions (causing static discrepancies - which may also rise because of vagueness) or because of unforeseen circumstances or newly formed opinions (causing dynamic discrepancies).

⁴⁴ Parliamentary documentation (Tweede Kamer), 1999-2000, 27018, *Liberalisering en privatisering in netwerksectoren*, nr. 1, Publieke belangen en marktordening (notitie), par. 2.

⁴⁵ In which case all customers are considered as 'tied', which is often true for those networks that do not allow competition within, but only competition on being granted the right to be the sole provider through the network (for a given period); these 'monopolist networks' often are monopolist also in the sense that there are no alternative or substitute networks (as in electricity against gas) - then all customers are tied to services from this network.

⁴⁶ NYFER 2003, Publieke belangen in private handen, p. 53 (met verwijzing naar Nyfer, 2000: Regulation versus Innovation.) See <http://www.nyfer.nl/HTML/index.html> .

So, Waismann's conceptualisation translates in *static* discrepancies referring to vagueness (parameters are determined exclusively, but may not be sufficiently precise) or to incompleteness in the sense of limited criteria (or 'tests'; some parameters have been described, but the list may be elaborated with other parameters for given types of services) and *dynamic* discrepancies referring to incompleteness in terms of 'open texture' (as new types of services, through technological breakthroughs, or new public values or a re-determination, through new policy objectives, emerge).

27. Discrepancies are always *ex post* phenomena, as they appear after privatisation. But the chances at such discrepancies should trigger *ex ante* awareness and safeguards. These safeguards may be found in regulatory or property provisions, but it should be understood that the ability or room to apply or invoke such provisions may differ considerably in terms of whether they are employed before or after privatisation. An *ex ante* provision may prevent discrepancies or, if not (because incompleteness is unavoidable!), may make the use of these provisions, given their embeddedness in the 'rules of the game', an acceptable intervention. *Ex post* interventions that do not rest on provisions as included in rules of the game, have the disadvantage of being 'after the fact' and being less easily accepted and hence more costly or less successful – which is caused by the phenomenon of normative transformation, which is discussed in the next paragraph.

IV. Privatisation as a normative transformation and the normative lock-in

28. All in all our focus lies with *ex ante* safeguards to enable *ex post* solutions for (static or dynamic, but certainly unavoidable) discrepancies. Our primary quest is to determine if a regulatory fix is possible which allows government to live up to its intention in privatisation, namely to limit its involvement to system-responsibility. Where a regulatory fix falls short, the property fix emerges, but the cost may be that privatisation is fundamentally hampered.⁴⁷

IV.1 Normative transformation

29. Privatisation is a *normative transformation*. This transformation is twofold. Firstly, the delivery of public services is left to *private parties*, and as a consequence transactions concerning the particular services become market transactions, in a *contractual form*. This contractual form may reflect perfectly horizontal delivery of services, as in public utilities, but may also relate to the exercise of a public competence, as in an M.O.T.-test (vehicle inspection), where the decision on approval remains a unilateral one. Furthermore, privatisation may lead to liberalisation, in which there is a market for the public services concerned and more than one 'provider' compete. In privatisation without liberalisation, transactions may take shape in contracts, but these are 'flawed' in the sense that the only freedom that the 'client' has is to decide whether or not to enter into a contract. In privatisation with liberalisation, economically speaking there are 'open contracts', to the extent that the price becomes a matter of negotiation or at least of competitive setting.

30. Secondly, privatisation amounts to a *transfer in property rights* in the provider. The ownership of the providing organisation is transferred to the market in the sense of private parties on the market. In full privatisation all shares rest with private actors, but hybrid privatisation, in which government still retains some shares, is a well known feature. The hybrid constellation may be a choice for transitory reasons. Often privatisation is a first step to liberalisation, but government is not willing to immediately engage in the assumption that a market for public services will emerge and that public

⁴⁷ The view is taken that privatisation relates to a transfer of the property rights in the organisation of the public service.

values are properly safeguarded through regulation. Hence some shares remain government owned – at least 49 or 50+%, or possibly less but as golden shares, nominal but with the possibility to outvote other share holders – to provide for an ‘emergency brake’ should undesired discrepancies arise. The property safeguard is then a fix for a, hopefully temporary, incompleteness of privatisation arrangements.⁴⁸

The transfer of property rights, to whatever extent, is important particularly for two reasons: control over the operations of the organisation (especially strategically)⁴⁹ and a claim on residual and presumptive rights.

- The first point, *control* over operations, is relevant to be able to strategically direct the firm to more profitable or otherwise more desired areas and hence increase on shareholder or other values. Some years ago the ruling view on this point seemed to be that as long as there was sufficient trust in the workings of the market, or a market could if necessary be construed – as through a government tender for, say, regional public transport (even in areas with low population density) – privately owned companies would respond to a market for public services and there need not be a fear for continuity of services. In the last few years some worries have surfaced as hedge-funds and large foreign state owned companies (especially from China and Russia) (legally) seized control over companies involved in public services.⁵⁰ To, especially, ensure continuity it has again become an issue if to retain property rights as a means of safeguarding continuity (and other public values involved).⁵¹
- The second point refers to the fact that private parties have acquired property *rights* in the providing organisation (such as energy or telecom companies) and – normally - these rights include a claim to *residual rights* over the exploitation of the property; that is over the benefits which remain once all production and transaction costs are subtracted from the incomes of delivering services.⁵² Furthermore, property rights may, assuming that they are held in organisational assets that may be regarded as an economic resource, include so-called ‘presumptive rights’. These, according to Demsetz, amount to: ‘(...) *control of yet unarticulated rights. Presumptiveness is necessary because the virtual infinity of rights makes present knowledge of all possible rights impossible. The person or group deemed to be owner of an asset is presumed to exercise as yet unspecified rights when there is occasion to acknowledge them.*’⁵⁴ In essence this notion reflects incompleteness in defining (the bundle of rights to control) a property. In practise it may mean that ownership of an infrastructure or network will include the right to newly discovered uses.⁵⁵ Clearly the possibility of laying claim to presumptive rights may be both a trigger to innovation and to willingness of private parties to invest in providing organisations. Furthermore, presumptive rights may pose a threat as a privatised provider may decide to focus his organisation more on providing for private services, even as his organisational assets were meant primarily for public services, which may be hived off or neglected.⁵⁶

31. The essential point behind these descriptive remarks is that privatisation is a normative transformation, through the introduction of new legal relationships, in the

⁴⁸ Note that these may relate to either the matter of fair trade or to the protection of (other) public values (such as universal service).

⁴⁹ Shareholders primarily have a say in mission and strategy, but also in key decisions such as management appointments. Hence indirectly there may be a strong operational influence, certainly if there is a majority shareholder.

⁵⁰ PM Interview Mandelson in Handelsblatt 22 July 2007 (<http://www.handelsblatt.com/news/Politik/International/ pv/ p/200051/ t/ft/ b/1297815/default.aspx/eu-erwaegt-goldene-aktien-gegen-staatsfonds.html>) and statement Commission on reciprocity (PM).

⁵¹ On the basis of Article 56 of the EC Treaty States need be careful so as not to distort the free flow of capital as a result of taking ‘golden shares’ or a majority share-holder position in private enterprises. Article 86 of this Treaty does, however, offer some room as to Services of General Interest.

⁵² PM On residual rights..

⁵³ Arguably privatisation could also refer to the ownership of public rights, but this category is not addressed in this paper.

⁵⁴ Demsetz 1998, 145/6.

⁵⁵ Taking account for possible negative externalities.

⁵⁶ The fears expressed in the Schiphol case fit with this scenario. PM – other examples.

shape of contracts between private parties, and through the introduction of private property rights in public services organisations (and their assets). Thus privatisation presents us with a shift to another legal governance structure, namely that of private or civil law. Civil law in turn has its own leading legal principles and with regard to property rights, generally national legal orders have a specific regime for protection against 'regulatory takings' or 'eminent domain' (expropriation in the general interest).⁵⁷

IV.2 Normative lock-in

32. As the normative transformation is deliberately sought – for the symmetry of open contracts and the creation of private property to incite competitiveness and hence to reach higher efficiency, quality and effectiveness⁵⁸ – at the same time public services (organisation and transactions) are placed in a different legal arena. Because this arena is different, the aspired advantages of privatisation stand a chance of being realised, but at the same time, the complex of legal incentives and safeguards that make up the normative core of this arena, creates a barrier against interventions from other legal arena's, such as that of public law. The public law arena holds powers and safeguards concerning unilateral legal interventions (regulations, orders, acts, etc.), but to interfere in 'privatised operations' in the private law arena has two sides to it:

- a. interference that infringes in civil law rights may be restricted or come with a special price tag, and
- b. interference with the workings of the civil law arena may well disturb or even curb trust in the inner workings of its system and reduce or even paralyse the incentives it holds.

33. Both points amount to what may be described as a *normative lock-in*, as normative transformation, through privatisation, reduces or hampers possibilities for remediation of (privatisation) discrepancies. Apart from possible disincentives of government interference, the regulatory discretion of government will be (more) limited, both in terms of:

- c. the legal determination of the public quality (of services) involved, and
- d. with regard to setting the legal conditions for public performance (for delivery).

Phrased in economic terms, the normative transformation causes an increase in government legal (and most likely monetary) transaction costs with regard to amending (privatisation) discrepancies.

This 'hypothesis' is in (serious) need of some evidence relating to the (immediately) above points a to d.. We will first address c and d and then a. and b.

34. As to c. (determination of *quality*), the Housing corporations case gave an example of this in that government decided to push for different or more radically pursued priorities than the corporations aimed for. Clearly government may at some point after privatisation decide that different types of services should be added to the package – for instance on the basis of the decision that it is a public values that all citizens have an internet connection or UMTS available (across the country). Furthermore, specifications could be considered by government to be lacking, as for example a stricter standard is required for ambulance services in emergencies.

To call for these quality standards may be presented as to require for something that may be taken to already be included in the privatised package, under the assumption that they are implicitly there, either from the outset or as a logical possibility as new technologies allow delivery – clearly, this will relate to a vagueness of conditions in the privatisation or willingness to apply the argument of analogy (if those, than why not also

⁵⁷ Explicate examples – as on the basis of Article 14 of the Dutch constitution.

⁵⁸ Apart from ideological reasons, such as, simply, to keep government out of affairs that – within boundaries – private persons should be able to deal with by themselves.

these similar services – perhaps with a hint as to the cost-effectiveness).⁵⁹ The alternative would be that there is agreement that government is asking for extras, but nevertheless government is of the opinion that the privatised providers should adjust to the public desires even at a certain cost – considering that these are not disproportionate.⁶⁰

35. As to d. (setting *performance standards*), the argument is fairly similar as again government may require of privatised providers that they adjust their organisation or their modus operandi vis-à-vis the customers in a way which leads to more production costs (as in better labour conditions or in more or more frequent services) or more transaction costs (as, for example, government requires that a more diligent treatment of costumers, such as by introducing complaints procedures, is necessary).⁶¹ New performance standards could also involve a loss in opportunities, as for instance restrictions are introduced with regard to CEO-salaries (which may lead to a lesser quality in management)⁶² or if certain (more) profitable (private) services are prohibited (for example because they are considered incompatible with delivering public services).⁶³ Again, all these issues may rise as: a. presumed or implied standards (already included in or analogous to existing standards – and merely brought to the fore); b. new standards due to technological innovation; c. new standards due to new political views on involved public values.

36. As to a. (infringement on *civil law rights*), The image of arena's, as used in the above, is somewhat artificial, or should, if we do want to stick with it, be expanded to the image of an Olympic or athletic stadium in which different arenas or activities are interlocked or overflow. Public law and private law may have different core values, forms and institutions, but generally there are overlaps and interconnections.

To start with, many legal systems accept that governments may act also as a private law party, and this opens up the possibility of using contract law as a means for making the desired adjustments to overcome discrepancies (in which government pays to get the extra's into the service package). However, there are important limitations to this. Firstly, contracts may be most fitting with the civil law arena, but they cannot serve to compel, as they rest on mutual agreement.⁶⁴ Secondly, in many legal systems the use of private law legal acts (such as a contract) by government is subject to restrictions, such as: **a.** that this use is not allowed if it conflicts with the possible use of available public law instruments,⁶⁵ **b.** that this use is explicitly regulated on grounds of public values (such as in tender procedures, in view of fair trade);⁶⁶ **c.** that this use is subject to general principles of public law, such as the equality principle and the good faith principle.

⁵⁹ As to costs the argument may be to simply add or alter a service at the providers cost (of introduction and delivery) or to add or alter and then let the customer decide whether to use and if to use, to pay.

⁶⁰ Similar as to how government may by regulation put a(n extra) burden on citizens (tax or otherwise) and not be obliged to compensate unless the burden is disproportionately divided among citizens – see more under no. 56 ('as to a').

⁶¹ Mind that extra requirements in provider – costumers or employer – employee relations could also result from court law.

⁶² If indeed the argument holds true that there (still) is symmetry between wages and performance, (even) above the level of top government salaries.

⁶³ Mostly because of considerations of fair trade, such as with saving costs by using an infrastructure paid for by public services, or using information gathered through public service.

⁶⁴ Of course sometimes contracts or covenants are 'agreed' upon in the shadow of legislation (i.e. the threat that if the private party does not go along, the legislator will unilaterally introduce a less favourable arrangement – this falls under the option that will follow suit in the main text.

⁶⁵ This is known in the Netherlands as the 2-Lane doctrine (Twee-wegenleer; the 2 lanes being those of public and of private law, leading to a certain policy target). The underlying consideration is that these public law instruments are there for a reason, generally because the legislator considered them the best option (and safeguard) to reach certain public objectives.

⁶⁶ See the EC public services/procurement directives: Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, *OJ(2004) L 134* and Directive 2004/17/EC of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, *OJ(2004) L 134*.

Furthermore, if public law instruments are used to unilaterally bring about the desired changes several limitations may apply, firstly concerning competence itself (no. 37) and secondly concerning infringement on private wealth or property rights (no. 38).

38. With regard to a lack of or limitations to *competence*, we should consider that the notions of 'sovereignty of parliament' or the 'sovereign' legislator' will, in most legal systems, provide for sufficient underpinning to ultimately ensure that discrepancies may be adjusted. As far as lower regulators,⁶⁷ this may well be different as, generally, they rely for their competences on what powers the legislator has previously bestowed upon them (in general terms or when a specific privatisation arrangement was introduced by statute) – and so it remains to be seen whether a regulator that wishes to intervene does indeed hold sufficient powers.⁶⁸

More importantly and concerning both legislator and lower regulators, fundamental (human) rights may restrict powers, either absolutely (as in discriminating – negatively – between races or in introducing a permit system for the freedom of speech) or relatively, by giving substantive or procedural conditions under which a limitation of these rights may be allowed (by exception). These conditions will be prohibitive in that if they are not met, the limitation is invalid, and they may also entail that a limitation is allowed only if, apart from being in tune with other requirements, proper compensation is provided for. Clearly, the case of eminent domain provides an example, as generally expropriation is possible only in certain cases (involving the public interest), through an official procedure (possibly through a court) and under condition of paying damages.

39. Next point under possible infringement on *civil law rights* concerns damaging private wealth or property rights. Assuming that the power of unilateral interference is in principle provided for, we should consider especially that,⁶⁹ if this intervention infringes on individual wealth, it may come with a price tag. As legal systems differ this aspect can be presented only in very general terms,⁷⁰ and even then does not exclude that some legal systems may see it differently.

The basic rule is that a legal unilateral intervention in existing rights does *not* warrant financial compensation for individual losses of wealth. In this general sense the general interest has priority over private interests (and government may be efficient),⁷¹ but of course such interventions are allowed only if indeed aimed exclusively at serving a public interest – which also implies that in principle they are addressed to abstract categories of citizens (including of course, firms/providers) and hence apply to all individual members of such a category equally. In as far as citizens share in the public interest; they will be favoured by this interference.⁷² Otherwise, as to non-concurring private interests, there may be a burden. This will be compensated for only in two general, yet specific cases of inequality; that of incalculable and disproportionate risk (see no. 40) and that of specially protected rights (see no. 41).

40. Firstly, the circumstance of inequality, concerning a burden due to an *incalculable and disproportionate risk*. Many government interferences are calculable risks. A provider making use of an infrastructure owned by government, may deduce from a positive legal

⁶⁷ These are not only independent regulatory agencies, but also (other) decentralised government bodies of which legislative or regulatory powers depend on decisions of the supreme legislator (below constitutional legislation).

⁶⁸ For example in introducing new taxes. Consider also the 'back-door option' where limitations or requirements are formulated in (policy) rules concerning supervision and sanctioning. PM Furthermore, there may be cases where a constitution directly attributes regulatory powers to regulators. Finally, in the Twence case the aspect of competence is relevant as municipalities have no competence for creating their own public interest enterprise regime.

⁶⁹ The following bypasses matters of (other, especially more formal) principles of proper administration; such as careful preparation of an administrative act and providing for citizens to be heard.

⁷⁰ And is in need of further comparative research!

⁷¹ Not being required to negotiate with each citizen involved or have to compensate each citizen who is burdened.

⁷² As when government introduces environmental restrictions: the general environmental interest will often partially concur with individual environmental interests.

indication of a task or responsibility for its upkeep that at some point government may have to temporarily shut down services for reasons of maintenance work. Often, however, government interventions are the result of an unforeseen or, as to its specificities, even unforeseeable risk, as the result of adherence to new public values or to a fundamentally new view on how to pursue (or translate) an already acknowledged public value (into new enunciations as criteria for public services). If the latter is the case, then interference leads to a duty to compensate if there is disproportionality in how the burden of this intervention is shared. If one or merely a few citizens (and firms) carry (most) of the burden for the benefit of all (as it is the general interest that is served), then compensation to the extent of the disproportionality is to be provided for.⁷³ If public service lies in the hands of several private providers, a government intervention to, in short, enhance this service may escape the obligation of compensation (on these grounds) – as the burden is shared amongst all that are involved as providers. If the number of provided is limited (to 1 or 2) or if, with a larger number of providers, some providers are hurt substantially more because of other (substantial activities that are jeopardised, than the need for compensation may come into play.⁷⁴

41. Secondly, inequality concerning a burden in *specially protected rights*. In effect this category amounts to the obligation of compensation in cases where the criteria of risk and proportionateness are substituted by the requirement of (an occurrence of) rights that are socially or societally considered of such importance that infringement needs to be compensated (fully).⁷⁵ In short two subcategories should be named:

- property rights, as ownership is protected in two senses:⁷⁶
 - a.** (explicit) expropriation of a property as government seizes property under the doctrine of eminent domain (with well known examples under spatial planning, but, concerning public services also seizure of the ownership of (vital) infrastructures).⁷⁷ Sometimes these acts follow a war or revolutionary upheaval in society⁷⁸ or a near bankruptcy in the (industrial) services involved – so either the legal safeguards temporarily do not apply or the private shareholders involved have little to no value to seek compensation for.⁷⁹ A government seizure of ownership of an infrastructure may be a form of reverse privatisation or publicisation, for strategic economic reasons, closely linked to public values such as ‘continuity’.⁸⁰ Generally compensation to the full is considered appropriate and procedurally compensation is arranged for before ownership is transferred.⁸¹
 - b.** (implicit) ‘*regulatory takings*’ as government introduces regulations that, although not with the aim of expropriation, limit the use of property as such that effectively the owner feels he has lost control to the extent that is comparable to being compulsorily

⁷³ This doctrine is generally known as ‘(in)égalité devant les charges publiques’ ((in)equality in the face of the public burden). PM

⁷⁴ As this is a general analyses to pursue definite conclusions is useless.

⁷⁵ Protection of these rights is in itself a public value.

⁷⁶ The distinction made may seem somewhat artificial as in some legal systems both subcategories are considered as one doctrine. Furthermore the sub b. category may, in some systems touch upon or blend in with the category as discussed above.

⁷⁷ Cases where government seizes property of a, formerly open access, such as the electromagnetic spectrum, lie outside this scope (and as to compensation fall under the already discussed category). See: *A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study*, by Arthur S. de Vany; Ross D. Eckert; Charles J. Meyers; Donald J. O'Hara; Richard C. Scott, *Stanford Law Review* © 1969, p. 1499-1561. The compensation for nationalisation requires further research.

⁷⁸ Notably (former) communist regimes, were compensation was considered unnecessary as private property ceased to exist, but also, for example, post Second World War nationalisation of Renault by the French State (in response to collaboration with the German occupant). PM

⁷⁹ Compare the British Leyland Motor Company case. PM

⁸⁰ Possibly refer to the 2001 British Railtrack case (after liquidation; introduction in 2002 by state dominated Network Rail – not for dividend company that owns and operates the British railway infrastructure). PM

⁸¹ ‘Direct condemnation’ instead of ‘inverse condemnation’. PM Also compare, in respect of international relations and investments, the 1962 UN Resolution 1803, concerning Permanent Sovereignty over National Resources, which holds that in the event of nationalisation, the owner shall be paid appropriate compensation, by the state, in accordance with international law (which need not be full compensation as some – developing – countries may find themselves unable to do so). PM

disowned (as in the above).⁸² In short a general criterion to determine a taking is whether or not the private owner can still use his or her property right profitably or whether there is still room for a 'reasonable beneficial use'.⁸³ If the regulatory restrictions are in breach of (one of) these criteria, then compensation is in place.⁸⁴ Introducing a new tax, as was suggested in the Housing corporations case, may under certain conditions be regarded as an example of a taking – or perhaps even of expropriation. Clearly the precise impact, in terms of whether the delivery of services remains an economically viable option,⁸⁵ will be an important factor in judging upon the need or amount of compensation.⁸⁶

Consider, regarding both a. and b., that one or more providers of a public service may make use of a state owned infrastructure. Apart from 'imperial' legislation or regulation, underpinned by parliamentary sovereignty or the like, this state property provides a title of 'dominion'⁸⁷ to introduce restrictions (having effect on the cost-effectiveness of) public services delivered through this network. Different legal systems present different views on normative aspects of such a mechanism. Some consider the '*id quod*' in terms of the above question of whether dominium is used to escape from safeguards attached to imperial powers, and some hold conditions as to the kind of 'dominion' regulation that is allowed: only restricted in as far as is strictly necessary considering the prime use of the infrastructure. Furthermore, the '*modus quo*' or way in which such dominion powers are exercised may be subject to public law restrictions and hence limitations as the above may again surface.

- (other) *individual rights of non interference*, again in two types of cases:
 - a. cases in which government has explicitly guaranteed (in the course of privatisation) that certain private interests (in assets) would be protected, thus ensuring that private parties are willing to invest. Such a provision could be part of a legislative arrangement or of the conditions under which privatisation took place.⁸⁸
 - b. cases where implicitly non interference or a promise thereof may be assumed, considering the nature of a legal arrangement, as in specific procurement/tender cases, where private parties have a only short term to make a profit and/or where making profits is very dependent on the set conditions (almost as in discrete contracts) or investments are risky and/or considerable.

Consider, both concerning a. and b., the case of a tender procedure for public transport. Possibilities for *ex ante* or *ex post* provisions concerning discrepancies will be subject to rights and duties, powers and privileges embedded in definitions and conditions of the procurement/tender procedure, whether more general or more specific, and possibly both as written and unwritten rules (also regarding subsequent granting of a concession or permit and civil law rules for transport contracting). In this tightly woven fabric of commitments, obligations and responsibilities, the freedom to unilaterally intervene on behalf of public values is likely to be subject of legal scrutiny, in search of explicit and implicit limitations.⁸⁹

⁸² Especially known as the US doctrine, pertaining an infringement of the 5th Amendment: 'Nor shall individual property be taken for public use, without just compensation.'

⁸³ See Needham, Planning, Law and Economics, An investigation of the rules we make for using land, Routledge London/New York, 2006, p. 46-48 (and –PM- Paul, E.F. (1987) Property rights and Eminent Domain, New Brunswick NJ, Transaction books). Also PM – research on Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922): government purportedly wanted to regulate the subject property, but the severity of regulation made the intervention go "too far" by depriving the owner of the property's value, utility or marketability, denying him or her the benefits of property ownership thus accomplishing a constitutionally forbidden de facto taking without compensation.

⁸⁴ As said in an earlier footnote (supra, nr. 76), in elaboration on this point in some systems the criteria may merge with those Eminent Domain (with full compensation as a rule) and in others with disproportionate burden due to an incalculable.

⁸⁵ And when the tax is specifically aimed at one provider, this may alternatively bring this matter under the above *égalité*-doctrine.

⁸⁶ Note that to scrap an earlier tax-exemption (as in the case of the housing corporations) may be hurtful but may, dependent on the specific circumstance of the case, be considered less damaging – as the private party has already 'cashed' an perhaps need only be compensated by a transitional period.

⁸⁷ From the Latin 'dominium'.

⁸⁸ For now, this is a theoretical concept – the search for examples still has to take place.

⁸⁹ This point needs precise underpinning with cases - PM.

42. The (jural) opposite to the immediately above a. and b., is to assume that the mere existence of a special regime for a public service, may be taken to implicitly provide government with a legal title to introduce alterations or restrictions regarding the public service involved on grounds relating to its understanding of and desire to protect or enhance the public values or its translation into enunciations pertaining to that service. This argument of '*implied powers*', however, passes over the fact that the privatisation as a normative transformation has activated a new set of rules, and legally protected interests within a civil law framework – with distinctive barriers with regard to governmental intrusion, which essentially create the setting in which private providers may have a willingness to deliver.

To assume implicit powers, however, is to assume the presence of a coherent normative system in which implied powers naturally appear as necessary and proper devices to the realisation of underlying values; devices that, had existing circumstances have been fully thought through, had most likely been introduced explicitly. For government call on systemic responsibility to underpin implicit powers is a far cry from such a normative context, especially as privatisation is introduced to explicitly distance (if not disconnect) the public service from the desired public value in the sense that to providers and to costumers it is subject to transactions on the basis of 'reciprocal' private interests (translation into enunciations of service is one-sided). Hence the normative integrity is absent or exists only on either side of the barrier between the public and the private. At best, a special regime for public services may entail *inherent powers*, powers connected to express power in the sense that without these the express powers loose their meaning. Even so, to assume that such power may be relied upon to avoid the transaction costs of unlocking property rights, i.e. offering compensation, seems unlikely at best.⁹⁰

In contrast, a more likely consequence of a special regime for delivery of a public service may be that government is more limited in its powers to unilaterally redress discrepancies, as was indicated *in fine* under no. 41.

43. Finally, 'as to b.' (interference in *incentives*). Any unilateral intervention by government in the workings of privatised rendering of public services stands a chance of infringing on the effectiveness of the privatisation scheme. Whether to interfere in the symmetry of contracts (for example by introducing special safeguards to protect the costumer) or in residual claims or presumptive rights (for example by taxation or *post hoc* limitations to the (unforeseen) use of new technological possibilities) may and often will have effect on the private law incentives that were meant to enhance efficiency (and quality) in the delivery of public services. With each intervention the question will have to be answered whether it will affect the effectiveness of these incentives, and if a negative influence is expected, whether the marginal benefit for the underlying public value overrides the marginal cost on privatised operations' efficiency. In effect the question is whether these government interventions are in fact the kind of interferences that 'we, as a government, were planning not to employ anymore.' The examples of CEO-salaries or the treat of taxation of corporations are typical of interfering in incentive structures.

Although this issue seems relevant only in terms of the efficiency of the governance structure – as it falls under the 'public organisation' aspect – it should be remembered that legal systems may also hold general provisions meant to provide for *protection* of 'the *free market*', as this is considered the most appropriate and hence default governance system for transactions concerning respectively delivery of goods and services. Furthermore, in the context of supranational co-operation, such as in the European Community (EC),⁹¹ the concept of an 'internal market' is regarded as

⁹⁰ PM on implied and inherent powers. M.A. Heldeweg, Ongeschreven rechtsbeginselen en geïmpliceerde bevoegdheden als opmaat voor een autonoom bestuursrecht?, In: Koning, H. en E.M.J. Crombag (red.), *De autonomie van het bestuursrecht*, 2001, Boom Juridisch, p. 11-55.

⁹¹ For the non-lawyer: presently the EC (next to Euratom) is the supranational 'pillar' within the EU (European Union) framework (that also encompasses two inter-governmental pillars). Once the Lisbon-Reform Treaty (as

indispensable in the achievement of an 'ever closer union'.⁹² Hence safeguards may be, and within the EC have been introduced to overcome and prohibit barriers to the free flow or exchange of capital, workforce, and services. The EC-Treaty holds general free trade provisions, such as to prevent the occurrence of cartels (see Article 81 EC-T), but also, for example, rules concerning state aid (Article 86) or special conditions concerning (the possibility of designating certain companies as) Enterprises of General Interest. Especially the latter and the Treaty provisions on protecting the free flow of capital (in Article 56 EC-T) are important when a government wishes to retain control over private companies.⁹³ If governments want to redress discrepancies (*ex ante* or *ex post*), they have to reckon with the fact that the services involved may be regarded as provided for by private companies and market transactions and that interventions need be 'market-conform'.

44. All of the above (no's 34-43), even though sketchy for reasons of generalisation, amounts to support the hypothesis that the normative transformation causes a legal lock-in which in turn leads to an increase in government legal (and most likely monetary) transaction costs with regard to amending (privatisation) discrepancies by a unilateral regulatory intervention. These are transaction costs for *unlocking*, as private parties under privatisation hold legal interests embedded in the new privatised legal context; interests that are protected by law concerning competences, expropriation, special rights, takings, *égalité* and as such protecting the free-market, amounting to requirements in terms of due cause, due procedure and (possibly) proper compensation.

V. Regulatory and property considerations

45. If government fully intends to continue the privatised regime, regulatory options (in the face of discrepancies) for safeguarding new aspects of public services or legal conditions for delivery thereof are limited. A 'regulatory fix', whereby government has full discretion to *ex post* unilaterally⁹⁴ redefine the public quality or public performance of services,⁹⁵ would indeed legally amount to *republicitisation* (or reverse privatisation) – a.k.a. regulatory taking or expropriation. Effectively public property would be restored as private residual claims or presumptive rights would be at the grace of government, and contractual relations between provider and customer would be established in the shadow of potential governmental intervention.

Clearly, such as state of affairs would conflict with legal restrictions as presented in the above, but also with the essential systemic choice for privatisation, in terms of a government withdrawal to systemic responsibility and the primacy of market incentives.

46. In short, there is no 'regulatory fix' for discrepancies as the suggestion of a fix as was possible within the publicised state of affairs, is that of strong public regulatory control. But strong public control often came with weak incentives, and hence was traded in for strong private incentives and a loss of public control; to regain control will be restricted or costly to uphold private incentives. If, in the face of (feared) discrepancies, that consequence is not accepted, the choice is simple: a return to the regulatory fix of the public realm – amounting to republicitisation (at a cost)⁹⁶ – or a continuation under privatised realm, accepting at best a accommodated regulatory approach, whereby

a substitute to the earlier 'European constitution') is signed (in December 2007) and ratified (in 2008) there will be only (one) supranational EU.

⁹² PM

⁹³ See also the recent decision of the European Court of Justice in the Volkswagen case (on legal protection of government influence) <http://www.curia.europa.eu/en/actu/communiqués/cp07/aff/cp070074en.pdf> C-112/05, 23 October 2007.

⁹⁴ Multilateral regulation is a theoretical option (see 9.) but will entail co-regulation and questions as to government's primacy over the definition of public values – or as to the legitimacy of possible redefinitions.

⁹⁵ Not solving incompleteness as such, but the existing apparent problem of it, as it is fully capable of remediation.

⁹⁶ Of compensations and of the loss of all that was invested in the privatised structure.

regulatory (and other) instruments are chosen so as to fit best with privatisation – also entailing a marginal analysis (see no. 43).

47. So the quest is directed towards *ex ante* and/or *ex post* avoidance or remediation of discrepancies, in respect of privatisation. The proper approach to this will, in practice, have to be determined in view of contextual variables, such as the nature of the services, of the enunciations for quality and performance, of the parties involved, and of other relevant contingency factors,⁹⁷ as these variables may well influence the risk of discrepancies and the ability and willingness to change the existing *modus operandi*. Comparing options for remediation, in the light of contextual variables, goes beyond the scope of this paper. What it can offer is a set of general options along the lines of willingness to respond to discrepancies optimistically or pessimistically, as in:

- a. *ex ante* opting for ruling incompleteness out entirely;
- b. *ex ante* hoping for the best and not taking safeguards for if and when *ex post* discrepancies do arise (note that a may amount to b);
- c. *ex ante* arranging for the best possible (institutional) mechanisms, respecting privatisation, to address *ex post* discrepancies (note that a may combine with c).

48. Before presenting these options (as a pattern card to choose from; considering the aforementioned contextual variables), one preliminary matter remains. In the Introduction of this paper, it was suggested (in no. 2) that a 'property fix' could be the alternative to a 'regulatory fix'. As we have just discussed how a 'regulatory fix' is bounced off by the systemic choice for privatisation, the question may be raised if the property fix is indeed an alternative.

From the above, however, scepticism on this option is in place. If unilateral control through regulation is a possible threat to privatisation, all the more reason to assume that governmental property rights will share in that appreciation. For government to own considerable property rights in a private provider, is indeed in principle incompatible with privatisation – as this is about government discarding property.

To retain hold of substantial property rights in privatised providers, so as to maintain control over its operations, and effectively be able to prevent or correct any discrepancy is in effect a 'publicised' state of affairs. At least, if the government property position is to be understood as aptitude to control similar to government's regulatory objective of serving public values. We should, however, consider that to hold property in a privatised provider may be about more than control only, or that control may be understood in different ways.

49. Government property in privatised providers may alternatively serve:⁹⁸

- a. to *actively influence substantive* decision making, in the sense of not only strategic, but also operational decisions. This would only be possible if shares provide strong management influence, especially through appointment of managers. Especially if government is also one of a provider's main customers (as in, for example, waste disposal),⁹⁹ then an entanglement or blending of 'roles', concerning operational issues, should not surprise. Even minor discrepancies could be addressed through this type of bundled 'control'.
- b. to *passively influence substantive* decision making, in the sense of 'merely' influencing strategic decisions on mission, major organisational and labour matters, choice of markets, major bids, et cetera, especially through appointment of governors

⁹⁷ Such as political and social climate (trust; civil society), the state of the economy and the aptitude to (technologically) innovate.

⁹⁸ Provide general source for this categorisation. PM Compare White paper on government participation in private companies Nota Deelnemingenbeleid rijksoverheid 2002, (Parliamentary documents (Tweede Kamer), 2001-2002, 28165, nrs. 1-2).

⁹⁹ At the University of Twente, presently M.L. van Genugten is finalising her PhD. thesis on the discriminating alignment hypothesis applied to public services, using waste disposal cases as empirical illustration. This example is derived from her information from some of these cases.

- (who in turn appoint and control managers). Again, it may be assumed that this offers some form of 'control', but minor discrepancies will stay out of focus.¹⁰⁰
- c. to *keep out others* or ensure the company's *continuity* (in the country where the government share holder resides). Here the aim is arrange for a protective shield against dangers that may jeopardise the continued delivery of public services. To avoid a hostile take-over or ensure the company's economic vitality and sense of place (although this matter touches on option b.) a very passive presence as a share holder may suffice. Needless to say that in such a case avoidance of or overcoming discrepancies is left to regulatory interventions.
 - d. to *make money*. Government may hold shares simply because it sees possibilities to make a profit through dividend or shareholder value (when shares are sold at a later date). Clearly, this aim falls outside the scope of discrepancies (apart from it that the shares may be held in companies that are not involved in public services. This option may be considered unfitting for government.¹⁰¹
 - e. as a *remains of large investments*. Especially in cases of network providers, the existence of government shares in the provider may be a consequence of the need of prior infrastructural investments, which at some stage, when (sunk) investment costs have been retrieved as much as possible, and share prices are good, will be sold off. Often though, management of the infrastructure and providing for services will be separated, and only shares in the private provider are sold off (unless a-d apply). Infrastructures may be kept in government possession as strategic positions (possibly as in c.), also ensuring that the network itself will remain a 'market place', accessible only through tenders & concessions, permits or other mechanisms, but guaranteeing that the connected services will be continued. In the latter case discrepancies may be addressed by the dominion powers vested in the infrastructure,¹⁰² in case of mere remains of sunk costs, addressing discrepancies will fall outside government scope, certainly as shares are sold off or only mere remnants remain.
 - f. all of the above as a *temporary circumstance*, with intent of enabling a public service or otherwise desirable activity to be initiated (in circumstances as the above infrastructural costs or otherwise considered to high a risk for the private initiative only) or in the transitory stages of privatisation, to retain control, ultimately as an emergency brake to safeguard public values. In effect the latter arrangement amounts to a property fix, as temporary quasi-privatisation; with the danger of extended duration, as in the Schiphol and Twence(?) cases, which ultimately fall outside the scope of privatisation.

50. These six options categorise a variety in government property involvement, whether or not enshrined in legislation. In practise options may overflow, blend or mix, as legal constructs often defy imagination, for instance through a multi-layered structure of organisations and enterprises. On an even level, a crossover may be found where strategic option b. is employed so reticently that it effectively amounts to (influence on) sacking and appointing governors only, and only in circumstances where this is considered necessary as an emergency brake because services are in serious disrepute.¹⁰³

¹⁰⁰ Which should not be a major concern as these will probably be least difficult to tackle otherwise – that is, through regulation.

¹⁰¹ Ideologically or because these investments involve major risks and such risks should not be taken at the possible expense of the taxpayer. Compare the Ceteco-affair in the Netherlands, where one of the Dutch provinces lost considerable amounts of money in share value, which led to the Decentralised government finances act (Wet financiering decentrale overheden (Wet fido), setting new rules for treasury management. <http://www.minbzk.nl/onderwerpen/openbaar-bestuur/financien-provincies/financiele-functie/financiering> .

¹⁰² As such providing an alternative to the use of (a., b. and) c. with regard to the private provider(s). Mind the restrictions formulated in no. 41.

¹⁰³ For example in the Dutch NS case of January 2nd 2002, when the minister of traffic and transport requested of 'her' governors in the Dutch railroad enterprise, NS, to sack the incumbent NS-director-president because of his responsibility for not meeting the 80% punctuality requirement (which 'staggered' at 79,9%!).

<http://www.ns.nl/servlet/Satellite?cid=1074533958309&pagename=www.ns.nl%2FPersbericht%2FPersberichtenDetail&p=1071490150742&c=Persbericht> (27 October 2007).

Of course the choice of option will relate to political views and (other) contextual variables, and with a specific choice of share holder position, as being a minority or majority share holder, or possibly (as a minority share holder) holding a golden share and thus maintaining control. We need to keep in mind that some of these options, especially concerning golden shares, may be prohibited by law.¹⁰⁴

51. So although control by which to be able to address discrepancies may not always be the prime consideration, often government property in private providers will (latently) amount to useful influence, at least in more serious discrepancy cases. As the Schiphol and Twence cases show the relevance of the property fix also lies in the *ex ante* prevention of discrepancies. In these cases to retain control through property rights is motivated also by the desire to actively enhance public interests as part of the provider's mission.

In this respect we need to be aware that in *liberal democratic states* regulatory options reflect the state versus society divide in terms of the democratic primacy over determination of the general interest (or over public values) versus private primacy over special (individual or group) interests (or over private values). Under this ideological divide direct (command and control) regulation may restrict citizens in their pursuit of private values and interests, but to command them to actively and expressly be involved in enhancing the general interest is not in keeping with democratic principles – setting aside the duty to pay taxes, or (in some countries, the duty) to vote. If citizens are brought into action to that avail, this amounts to the performance outside political choice, merely as an objective execution of clear tasks – as a (quasi-) civil servant¹⁰⁵ (or as a tax-payer or member of the electorate). Alternatively, citizens and companies may be entertained in public interests through indirect or self regulatory arrangements – indirect regulation being known as promoting specific behaviour through providing economic incentives (such as taxes, subsidies and tradable public rights) and self regulation as being based on personal conviction that the desired behaviour is morally superior.¹⁰⁶ However, as subsidies ('indirect') or private certification ('self') may certainly enhance public interests, we need to be aware of two major constraints:

- both regulatory options operate only on a voluntary basis.¹⁰⁷ Under indirect regulation, citizens and firms have an option to choose the undesired (and economically less efficient or advantageous) behavioural option; self regulation has voluntarism at its very core. Hence the public values under such scheme stand a chance of not expressly or implicitly being served, as providers may decide to choose different options;
- should this be different then we need remember that the involvement in promoting public values is subject of a translation of these values in private interests or technically specified obligations, as is the case under indirect regulation, or, under self regulation, so that the parties involved are often not compelled to the course of action to which they have proclaimed to be committed.¹⁰⁸

52. Pointing at these constraints is not to proclaim them (inherently) invalid, as they may play an important role in the pursuit of public values, but their particular characteristics may explain government use of property rights in private providers of public services, so as to ensure active involvement in underlying public values. Through participation in Schiphol or Twence, government can direct their mission statements to

¹⁰⁴ Considering its influence on the free flow of capital: a golden share will keep private investors out and thus hampers the free flow of capital (other than on the basis of actually holding a majority of shares).

¹⁰⁵ Objective in the sense of on the basis of functional and professional criteria. Quasi-public servants may be found in privatisation of the exercise of granting public law rights (such as certificates, and permits).

¹⁰⁶ PM

¹⁰⁷ The above reference to civil servants may be related to this point, as regulations for civil servants do not compel to work for government, except for when this states is forced upon a person as in compulsory military service...

¹⁰⁸ Under covenants, parties may bind themselves horizontally, such as companies in a particular branch of industry. When government is involved there seldom are vertical sanctions to a breach of covenant, at least non other than the threat of unilateral legislation.

include, for example, promoting sustainability or employing green-initiatives, such as in lower airport tariffs for cleaner planes or using incineration warmth for urban heating projects. As regulatory options can not (directly) or may not (through indirect or self regulation) trigger these initiatives government property may provide the 'fix'. Then again, from the viewpoint of this paper, in the end these cases are the least interesting as the problem of discrepancy is less likely to occur, with government steering the provider's activities.

53. So both regulation and property rights are only compatible with privatisation in moderation, attuned to privatisation as a choice of principle. Even though we know that the world is full of 'hybrids', if only for analytical clarity, now we will look into some basic remedial options to discrepancy, given privatisation.

VI. Options addressing discrepancy problems

54. In no. 47 it was suggested that options to address discrepancies along the lines of willingness to respond to discrepancies optimistically or pessimistically, according to:

- a. *ex ante* opting for ruling incompleteness out entirely;
- b. *ex ante* hoping for the best and not taking safeguards for if and when *ex post* discrepancies do arise (note that a. may amount to b.);
- c. *ex ante* arranging for the best possible institutional mechanisms, respecting privatisation, to address *ex post* discrepancies (note that a. may combine with c).

We will first elaborate on these options, of which a. and b. may also be found 'opportunistic', and c. 'institutionalist'. The ordering will be slightly amended, placing **a.** under 'purely *ex ante*' (as the possibility of *ex post* problems is to be eradicated or excluded), **c.** as '*ex ante* arranging for *ex post* problems' (as the latter are considered inevitable), and finally **b.** as 'purely *ex post*', as nothing is done *ex ante* to prevent discrepancies or to lower the burden of *ex post* having to address any of these.

55. The option of treating the problem 'purely *ex ante*', aiming for a complete 'translation', by trying to eradicate or exclude (the chance at) incompleteness. Under this heading we may point at three possible actions:

- a. aim for *complete determination*

With regard to some public values – public services translations, government may assume that enunciations can be complete (for instance by pure technical/numerical definitions) and stable (as closed texture; with no likelihood of new political or social demands) and hence the problem of discrepancies will not arise. It remains to be seen whether this option is in fact naïve, as in principle all public values/services may be prone to reconsideration at some point in time. On the other hand, some public values/services will have undergone relatively fewer changes over the last years or decades than others, and their descriptive characteristics may be more technical by nature, and hence this option may within reason be entertained, especially as institutional safeguards, as discussed under no. 56, may entail transaction costs that on marginal analysis are not or less cost-effective than aiming for completeness.¹⁰⁹

A similar cost-effectiveness analysis may lead to not even bother to *ex ante* try and define a public value/service completely because the cost of reaching completeness probably will not outweigh the cost of *ex post* remediation of discrepancies – a conclusion that may even apply to very wicked and dynamic public values/services.¹¹⁰

Alternatively, in practice a middle ground may be sought combining an effort at complete determination and the hope or assumption that, should a discrepancy arise, the costs of remediation will be limited, and hence the issue may be left to purely *ex post* response, as in 57a. and 57b.¹¹¹

- b. fully *hive off services* to the 'free market'

¹⁰⁹ A search into possible examples is underway... PM

¹¹⁰ Compare the analysis on cost-effectiveness regarding the problem of incomplete contracts. PM

¹¹¹ See footnote 109.

Admittedly an option that falls outside our scope, but is named as it could be a reasonable response to a wicked problem of incompleteness. If, given the nature or dynamics of a public value/service, not only complete determination could prove impossible but hesitance also creeps up in view of costs concerning attempts at institutionalisation or costs of merely responding to discrepancies *ex post*, then this option comes into play. The answer could then be that privatisation is to be taken to the extreme in that the matter fully becomes an issue of the 'free market'. Government involvement will then be limited to fair trade, and not to ensuring continuity of service or otherwise protecting or enhancing the public value/service – as the 'volatility' of the latter requires a market type of allocative coordination rather than one through a politico-administrative, hierarchical governance structure. Naturally, for this conclusion to be drawn, apart from politico-legal considerations (for instance with regard to distributive justice), the costs of the options to address discrepancies will have to be weighed against the total costs of the service as such. Furthermore, a problem of this nature may give rise to other options such as not privatising (or not to the extent that is researched here- so leaving open major property rights of government in providing the service and effective and efficient control over discrepancies), and the option of a fundamental conversion or transformation of the public value itself or of its translation in (enunciations of) a public service. Perhaps volatility in the determination of a values or service is an indicator for not having found the proper level of definition of the interest at stake.¹¹²

c. *full and active dominion control* over the private provider

This option also, as the afore (under 55b.), falls outside the scope of this paper, but now because it leans on majority share holder control (through a majority of shares or a golden share providing a majority influence in decision making) as a means to (also) avoid incompleteness, as with this (operational) control over the private provider, discrepancies can be adequately addressed before or as they occur – but clearly such control reflects a state of affairs which may, at best, be described as quasi-privatisation.¹¹³

56. The option of *ex ante* providing for *ex post* interventions, departs from the assumption that in most cases incompleteness is inevitable and that in most of these cases it is comparatively more cost-effective¹¹⁴ and/or preferable to the efficiency of the privatised governance structure¹¹⁵ and/or to legal principles such as legal certainty (in the protection of property and other rights),¹¹⁶ to institutionally provide for mechanisms to guide the adjustments necessary to remediate a discrepancy. The three options which seem most fitting are:

a. *to periodically republitize and reprivatise*

This approach amounts to a temporary suspension of privatisation and is well known in tender procedures amounting in a competition for the market on public services such as public transport (regionally or nationally), (certain types of) health care, and labour re-integration or employment agencies. In fact, in this option government periodically republitzes the property rights concerned, only to reprivatise them again on the basis of new definitions and new bids.

This option aims at institutionalisation by incorporating the need for adjustments in the privatised governance structure. It may be positioned between the discrete public

¹¹² Somewhat artificially it may be said that to define the public value of children being able to have access to TV-entertainment, and to have this arranged by a separate tender, is probably less efficient than to address this issue in terms of the peoples right to access to TV (regardless of further specification of a target group and specific kinds of programmes). At the same time this example may also support the hiving off option (perhaps leaving open the public value of sufficient access to information in emergencies).. PM.

¹¹³ To research this option as against the regulatory fix option remains a personal point of interest for a next contribution on the topic of reverse privatization.

¹¹⁴ Considering transaction costs of the purely *ex ante* or purely *ex post* options (no. 55 and 57).

¹¹⁵ Considering possible impact of remediable activities on trust in the structure: private incentives may become less effective out of fear for government interference.

¹¹⁶ From a legal standpoint to uphold protection of property or of other legal interests as a value in itself, to be appreciated more than is reflected in the possibility of financial compensation of infringements (under which these values are regarded merely as economic assets).

private contract, where there is an immediate exchange of payment by government and service by a private provider to (a third party indicated by) government,¹¹⁷ and the indefinite privatisation, where discrepancies are addressed on an ad hoc basis – i.e. as they present themselves. Effectively this option amounts to institutionalising and internalising costs, as periodical re-privatisation will be a costly legal mechanism, not in terms of compensating loss of private (residual) property rights (as these are only temporary), but because of periodically having to recalibrate the enunciation of ‘proper delivery’ of services; in response to possible changes in (value-)demands and in technological opportunities. Subsequent inviting, judging and comparing new bids to the tender, and drawing up new contracts (and dealing with legal procedures by those who lost), will also involve costs. Furthermore, there may be losses in terms of job certainty or production facilities that may, after reprivatisation, prove too asset specific or otherwise unsuited to be re-employed. Finally, periodical replublicisation may seriously reduce the effectiveness of private incentives. To balance the length of the period for contracting out between ‘not too long to avoid discrepancies’ (from becoming unacceptable), and ‘long enough to provide for an economically sound (i.e. profitable) investment’, is most important but may well prove to be very difficult. Tender procedures may prove adequate mechanisms to deal with discrepancies, but as an instrument tendering is also – and perhaps especially – considered useful to other means, such as getting the cheapest or most efficient service,¹¹⁸ given certain quality or performance demands and ensuring that governments create a level playing field amongst candidates to provide a service. These objectives will have to be weighed against the aspect of dealing with discrepancies. Finally, within tendering as a legal instrument, there is a variety of mechanisms, for instance concerning acceptance of a bid(der), selection of bid(ders), conditionality of a tender contract and enforcement. These variable characteristics can not be addressed here but may well affect the usefulness of this instrument in terms of remediation of discrepancies.

b. *to explicitly arrange for a re-regulatory competence*

In the above, the aspect of the competence, under public or private law, to remediate discrepancies was presented as a possible restriction (see no. 38). To overcome such a problem a privatisation regime may be designed in such a fashion that it includes competences of government (or a supervisory agency) to address and if necessary remediate discrepancies. The prime objective of this would be to make interventions on this basis (more) immune to the rebuttal of expropriation or takings. The arrangement could present select criteria concerning circumstances of applicability (which is also in the interest of the legal certainty of the private provider).¹¹⁹ It could be extended to also comprise procedural and substantive criteria, such as arbitration, regard for third parties’ interests,¹²⁰ a relationship with expressly articulated public values and/or circumscribed (types of) services and or and economic viability standards – such as: no new requirements that exceed the margins within which the provider can still make a profit,¹²¹ or pre-calculated (percentages of) compensation. The institutional remedy suggested here goes beyond problems of ‘vagueness’. These are often resolved through a complaint or enforcement measure taken by a supervisor and, if necessary in a court resolution (assuming that there is a court that has competence and discretion to exclusively and bindingly decide on the interpretation of legal terms).

The issue here is to arrange for a competence that addresses incompleteness and especially dynamic discrepancies, which in effect come down to government adjustment by re-regulation of public quality or public performance, after

¹¹⁷ Many construction or infrastructural contracts are an example – unless performance is incompletely defined and completion is a lengthy process and/or carry a cooperative element in them, so that in the course of performance discrepancies may arise. Delivery to a third party may be to provide for infrastructures or utilities of private providers of other services or plainly for private use (such as cable).

¹¹⁸ The so-called ‘make or buy decision’ that government is faced with.

¹¹⁹ And as such clarifies at what point government interference will come at a cost (or at least the burden of negotiations).

¹²⁰ Competitors (in the previous tender), consumers, supply-companies, citizens.

¹²¹ Comparable to the takings criteria as mentioned in no. 41(b).

privatisation (outside, but possibly also inside a framework for periodical reprivatisation, as mentioned in the above – under 56a). Clearly again, such arrangements will affect willingness of private parties to step in, and some influence on the effectiveness of incentives may also be expected. On the other hand, competence criteria may also provide for more legal certainties as private providers know that governments may be difficult ‘partners’ once political pressure is on, and often they too wish to avoid a protracted legal battle on whether their property rights were infringed upon and if so, what compensation would be fitting. Furthermore, private providers are well acquainted with these types of provisions as they often use them in their own standard service contracts; many consumers have found to their disbelief, that they signed on to a service contract that entailed the provider’s competence to unilaterally make changes in service (deliveries) conditions....¹²²

Consider, finally on this option, that the competence to remediate discrepancies, may concern either private or public law instruments of regulation, dependent on the overall legal basis for government involvement: imperial (in Latin: ‘imperium’) or dominion.

c. *to explicitly arrange for a significant property right*

This, from the viewpoint of privatisation, is the most hybrid option, and in fact a moderate version of the above option 55c. Against the option of a private provider which through government property rights (shares) is controlled by government, we may position the private enterprise:

1. which is privately owned (with majority control) but operates as *a firm within a public service organisation*. In abstract terms this resembles the supply-company model to public service. The public service organisation is established by public bodies or by private persons and has as its task to serve a particular public value by providing a particular public service. To this end its inner structure is organised as such that stake holder interests are well taken into account, thus providing the organisation with the necessary legitimacy in the further determination of enunciations to the service provided. In other words, most enunciations are determined within this organisation. The organisation itself has no other objectives than to serve the public value/service, so there is no dividend or profit that may be taken out on the basis of a residual claim. However, the public organisation may legally control a private firm which actually provides the service or otherwise is a supplier to the delivery of services, and this private firm is indeed allowed to make a profit. In terms, however, of discrepancies, the relationship between the public service organisation and the private firm under its control is of a contractual nature, in the sense that when demand changes, because the organisation adjusts enunciations of the public value/service, the supplying firm will have to adjust also or else lose out. Clearly, the public organisation has an interest in the continued service by the firm (not as profit for profit, but only with a view on the public value/service itself). Only if other firms, outside of the organisation’s control, offer a better price and transaction costs in contracting out do not exceed the difference, the picture may change. As was said before, this approach resembles that of the private supply-company image. Presently, in The Netherlands a draft legislative proposal to such a public organisation construct is on the table, called the *Maatschappelijke Onderneming* (literally the ‘Societal Enterprise’), particularly meant as a new legal personality for hospitals, schools & universities andhousing corporations, and with the aim of combining public responsibility (to stake holders) with private incentives (in the supplier-firm). The debate on a definitive proposal is still ongoing.¹²³
2. which has a *majority of private share holders*, also in terms of a majority private control, but with a strong property position of government. The latter could take form by a maximum of 49.9% of shares, or a golden share not amounting to a

¹²² Of course consumer law holds limitations (on grounds of ‘reasonableness’ or fairness) – and this is exactly why this option could also be fitting to privatization arrangements.

¹²³ Letter by the minister of Justice, of 12th of July 2007, 5494615/07/06 on the legal form of the societal enterprise. This letter also holds reference to prior studies and the draft proposal.

majority position. Again, it should be noted that the golden share position goes against principles of a free market with a free flow of capital (see no. 43 – with reference to EC legislation. The 49.9% option may formally open the possibility of being outvoted by the (combined) private share holders and hence this option differs from option 55c, that was discarded as quasi-privatisation. If in reality the moderate variation to this option does allow for effective private incentives remains to be seen. The same may be said about the effectiveness of being able to address discrepancies. Perhaps the government share holder position may at times prove adequate to remediate such discrepancies – but influence will most likely be more indirect, through strategic decision making (via governors).¹²⁴ Should avoidance of discrepancies fail, than some smoothening in the possible burden of compensation is that in part this will translates into share holder value.

57. This leaves us with the purely *ex post* responses, fully accepting open texture of public value/services, or accepting that to combat these through the options under no. 55 and 56 will lead to transaction costs (of complete contracting or institutional arrangements), that may well outweigh the risk of discrepancies.¹²⁵ In this equation the benefits of not interfering in the effectiveness of private incentives may also play a role. The options need not be discussed at length as the amount to accepting the limitations and transaction costs that come with having to unlock protected rights as enshrined in the privatised governance structure. So, briefly, the options are:

- a. if *dominion* is the basis for privatisation, such as government ownership of an infrastructure, to re-negotiate with the service provider on a civil law basis. This means that additional quality and performance requirements will reciprocally come with a price to pay to the provider. Furthermore, it remains to be seen if third party interests need to be taken into consideration.¹²⁶
- b. if *imperial* legislation is the basis for privatisation, re-regulate unilaterally and, in short, accept the costs of compensation. A problem may arise if competences do not suffice, and of course both procedural and substantive criteria restrict the possibilities of remediation, apart from the costs.

As was said under no 55b, and *ab initio* no. 57, both options may be less unpleasant if it turns out that the adjustments come without major disadvantages to the private provider, so compensation costs will be limited.

If costs are considerable, mechanisms may be sought to shift the burden. Government may, if possible, play in to this by allowing a raise in tariffs of services, so as to lay the burden with the customer. If the general interest is at stake, a subsidy or tax reduction may be possible, which means that the adjustment is made at the expense of the taxpayer – all assuming that these public-private transfers are in keeping with the rules on fair trade, state aid and the free flow of capital.

- c. finally, the extreme options of forcing the issue through reprivatisation, either explicitly, by *nationalisation or expropriation*, in the sense of seizing private property rights without proper compensation, or by taxation (that is, taxing the provider), come into the picture, if useful to gain control of the problem of the discrepancy; but these fall outside the scope of this paper as privatisation is ended.

VII. Concluding remarks

58. The leading question of this paper is whether there is a '*regulatory fix*' for the phenomenon of discrepancies on the realisation of public values in cases of privatisation of public services. The path followed with the objective of answering this question presented us with the following findings:

- firstly, the acknowledgement of the relevance of this question, through an illustration by four cases, showing *ex post* problems due to *ad hoc* discrepancies and *ex ante*

¹²⁴ Assuming that the share holder position is indeed used to this end – see the options under no. 49.

¹²⁵ As in risk = chance x damage.

¹²⁶ To elaborate this point goes beyond the scope of this paper.

hesitance to push forward in cases where privatisation was under consideration. The *ex post* discrepancies showed that a mix of regulatory and property fixes were sought to address the problem – sometimes under considerable political stress. The *ex ante* fears for discrepancies lead to a hesitance and even an explicit decision not to privatise – at least not in terms of giving up on a majority share holder position.

- secondly, from a more philosophical standpoint, in reference to Waismann's theory on porosity, presented us with an acknowledgement of the unavoidability of incompleteness of enunciations in the public values – public service translation.
- thirdly, a categorisation was presented of relevant public values/services aspects as the possible subjects of incompleteness.
- subsequently (and fourthly) the privatisation decision was placed in the context of its normative consequences. Privatisation amounts to a normative transformation, causing a normative lock-in, resulting in limitations and transaction costs for 'unlocking' privatisation, as government, in its attempt to avoid or overcome discrepancies, is confronted with some legal issues – to say nothing of the risk of reducing the effectiveness of private incentives through government interventions.
- The next (and fifth) step was to assess the regulatory and property rights responses to the problem of discrepancies in general terms, especially in terms of accommodating to privatisation as a systemic choice; full regulatory or property control ('fixes') fall outside the scope of this paper, which is in part an answer to our leading question; the options inside this scope require an accommodated and moderate approach to discrepancy problems.
- Finally, as the sixth step, options to avoid and overcome discrepancies within a privatised framework we presented and briefly analysed and compared.

59. Considering the scope of this paper, especially the options under no. 56 address the problem of incompleteness without stepping outside of privatisation and going beyond systemic responsibility. Then again, to look beyond the rim of privatisation may lead to better understanding of what options we have found within the frame, hence the options under no. 55 and 57 were presented too. Having done this three points readily present themselves:

Firstly, one may wonder if systemic responsibility allows for the type of involvement, which has been suggested, even under no 56. At the very least a retreat to systemic responsibility presupposes that minor discrepancies should be ignored and left to the privatised system; only discrepancies that raise serious doubts on the effectiveness of the whole system should be reason for government interference. Practise, however, may and probably will show that often political pressures will not allow government to confine to the pure position of systemic responsibility.

Secondly, probably the same remark applies to the understanding of privatisation as such. As was suggested in the above (no. 53), the world is full of hybrids. Even within the privatisation options (of no. 56), government involvement on operational aspects of service quality and performance may be strong, and in reality these options, regardless of their suggested moderation in keeping with privatisation, may differ only marginally from options that have been described as quasi-privatisation – if we look at their effect on effectiveness of incentives and the reduction of transaction costs as to unlocking the normative transformation.

Thirdly, regulatory or property *fixes* represent a type of government interference that analytically speaking is not in keeping with the systemic choice for privatisation (see *supra*, no. 58, fifth step).

60. Clearly, in the end, cost-effectiveness analyses seems a relevant tool in choosing between options, apart from legal and political considerations and the aforementioned assessment on the effectiveness of incentives – considered in the light of contextual variables related to the particular public value/service and other public values related to the choice of instruments. In this complexity, to provide for some sort of spectrum of possibilities is an awkward objective. This paper was written in a more modest aim of offering a legal perspective on the discrepancy problem and making an attempt at more

clarity in options and in the barriers and the delineation of options in view of privatisation as a systemic choice. In doing so some options present themselves as more interesting than others, and hopefully this may assist in *ex ante* evaluations of the desirability of privatising. As to the relation between regulation and property, in the face of the manifold of privatisation concepts, further (case-)studies are required to better prepare privatisations, so as to prevent that in the face of discrepancies, these cases end in reverse privatisation and publicisation and in a lingering distrust between governments and markets.

MAH, Enschede, 29 October 2007