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## The Application of Administrative Law to Privatization

### I. Introduction

In recent years, faced with the pressure of the opening up of the markets and with public finances in a budgetary deficit, the Confederation, as with most Cantons and Communes, have studied or implemented new means of managing the administration of public tasks where reliance upon private partners or the use of private law structures instead of administrative units plays an important role. This phenomenon has generally been called "privatization" of the administration or certain public sectors. The issue of a "privatization" of public office has also often been evoked<sup>1</sup>.

This "privatization" approach corresponds to the clear cut separation in Switzerland between the private and public sector. Indeed, unlike European countries such as France or Italy, Switzerland has never had entire sections of its Economy owned by the State<sup>2</sup>. Thus, Switzerland has never experienced privatization's within the French meaning of the term, such as those which were carried out on large national corporations such as RENAULT, BULL or the UAP.

On the other hand, as with other European countries, Switzerland is facing the opening up of the markets in the specific areas of telecommunications, transport and energy. The activities of the administration, in areas which were traditionally run by the State by reason of their non profit making character or the need to guarantee services at a reasonable cost for the entire population, are losing their character of tasks pertaining to the State<sup>3</sup>. Technological developments and changes to economic structures have transformed these areas into ordinary activities which private

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<sup>1</sup> See in particular KOLLER T., "Die Überführung öffentlichrechtlicher in privatrechtliche Arbeitsverhältnisse", in *Rechtliche Probleme der Privatisierung*, Berne 1998, pp. 121 ff.

<sup>2</sup> The Confederation only intervened in a punctual manner in order to sustain certain sectors of the economy which were in difficulty. See for example the Federal judgement dated 22<sup>nd</sup> June 1984 regarding the alienation of the participation of the Confederation in the share-capital of the Société générale de l'horlogerie suisse SA (RS 934.13).

<sup>3</sup> WIEGAND W. & WICHTERMANN J., "Die Überleitung von Rechtsverhältnissen", in *Rechtliche Probleme der Privatisierung*, Berne 1998, pp. 51/52-53; ZÄCH R., "Privatisierung und Wettbewerb in Wirtschaftsbereichen mit Netzstrukturen", in *Rechtliche Probleme der Privatisierung*, Berne 1998, pp. 1/4-5.

companies are keen to take over on a partial or complete basis. This change to the economic environment has naturally obliged the Confederation, the Cantons and the Communes to modify the judicial structures of the administrative bodies responsible for these activities<sup>4</sup>.

Also, the Federal administration<sup>5</sup>, as with certain Cantonal and Communal administrations, have implemented reforms to their administrative structures in order to introduce within certain services or decentralized administrations, operational methods which resemble those of the private sector<sup>6</sup>. Such reforms, generally carried out in accordance with the NEW PUBLIC MANAGEMENT<sup>7</sup> approach, introduce an element of privatization within the civil service itself.

Thus, the "privatization's" exist in varying degrees at every level of the civil service, whether centralized or decentralized.

However, even though they have in common the intervention of third parties, reliance upon a sub-contractor for the cleaning of State buildings cannot be compared to the transformation of TELECOM PTT, which used to be an area run by a public corporate body governing the management of the telecommunications monopoly, into a public law limited company responsible for providing, in competition with private corporations both in

<sup>4</sup> See the Federal department of economy, *Lignes directrices pour une politique économique axée sur la croissance*, Berne 1999, in particular pp. 23 ff.

<sup>5</sup> For an summary of the important reforms carried out in the Federal administration since 1994, see *Chancellerie Federale, Réforme du gouvernement et de l'administration, Rapport final de la Direction du projet*, approved by the Federal Council on the 18<sup>th</sup> October 2000 (the report is available on the Confederation web site at: [www.admin.ch/ch/f/rvr/bericht/bericht.pdf](http://www.admin.ch/ch/f/rvr/bericht/bericht.pdf)).

<sup>6</sup> BIAGGINI G., "Verfassungsrechtliche Grenzen der Privatisierung", in *Rapports suisses présentés au XVème Congrès international de droit comparé*, Zurich 1998, pp. 67-68; ZIMMERLI U. & LIENHARD A., "'Privatisierung' und parlamentarische Oberaufsicht", in *Rechtliche Probleme der Privatisierung*, Berne 1998, pp. 167/169-180.

<sup>7</sup> See in particular several recent studies considering this method: EFFENBERGER J., "New Public Management und öffentliche Hochschulen am Beispiel der Wissensverwertung", ZBl. 1998, p. 545; KOLLER H., "Regierung und Verwaltung", *Droit constitutionnel suisse*, Zurich 2001, pp. 1131/1149-1151; HABLÜTZEL P., HALDEMANN T., SCHEDLER K. & SCHWAAR K. (éd.), *Umbruch in Politik und Verwaltung: Ansichten und Erfahrungen zum New Public Management in der Schweiz*, Berne 1995; HUNZIKER A. W., *Prozessorganisation in der öffentlichen Verwaltung - New Public Management und Business Reengineering in der schweizerischen Bundesverwaltung*, Berne 1999; MAIER P., *New Public Management in der Justiz - Möglichkeiten und Grenzen einer Wirkungsorientierten Gerichtsführung aus betriebswirtschaftlicher und rechtlicher Perspektive*, Berne 1999; MASTRONARDI P. & SCHEDLER K., *New Public Management in Staat und Recht - Ein Diskurs*, Berne 1998; MASTRONARDI P., "Staatsrecht und Verwaltungsorganisation - Reflexionen am Beispiel des New Public Managements", AJP 12/95, p. 1541; MEYER C., *New Public Management als neues Verwaltungsmodell - Staatsrechtliche Schranken und Beurteilung neuer Steuerungsinstrumente*, Bâle 1998; RICHLI P. & MÜLLER T., *Öffentliches Dienstrecht im Zeichen des New Public Management. Staatsrechtliche Fixpunkte für die Flexibilisierung und Dynamisierung des Beamtenverhältnisses*, Berne 1996; SCHEDLER K., *Ansätze einer wirkungsorientierten Verwaltungsführung. Von der Idee des New Public Management (NPM) zum konkreten Gestaltungsmodell*, 2<sup>e</sup> éd., Berne 1996; SCHEDLER K. & PROELLER I., *New Public Management (UTB)*, Berne 1999.

Switzerland and abroad, telecommunications and broadcasting services together with related products and services<sup>8</sup>.

It is therefore necessary to carry out a classification of the different types of privatization in order to be able to understand the consequences of the application of administrative law and, in particular, the conditions attached thereto, the terms of implementation and their effects.

These activities have one point in common: the carrying out of public tasks, whether a mission entrusted by a constituent or the legislator to the State, which in turn performs these via the intermediary of its administration. Reliance upon private bodies does not fundamentally transform the public nature of the tasks directly or indirectly carried out by the State. Indeed, a private body performing a public task on behalf of the State acts as if a body of the latter, vested with State powers; as a consequence its acts are governed by public law in the same way as if carried out by the administration<sup>9</sup>. The judicial relationship between the State and the citizens thereof are only modified if the State renounces the public character of a task, thereby surrendering it to the private sector.

Therefore to examine a privatization comes down to assessing whether or not the State continues to carry out all or part of a public task<sup>10</sup> and, should the response be in the affirmative, to examine to what extent a private company can be involved in the performance of a public task. The answer to such a question shall depend on the methods of management of the public tasks by the State.

We shall distinguish five main forms of management, which shall be considered in turn: direct management (II), decentralized management (III), management delegated to a private body (IV.) the management of a minimal service (V.) and the surrender of management of a public task (VI). Each of these forms of management corresponds to a certain degree of privatization.

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<sup>8</sup> Articles 1 to 3 of the Federal law dated 30<sup>th</sup> April 1997 regarding the organisation of the Federal institution of telecommunications (Law on the institution of telecommunications, RS 784.11; hereafter "LET"). All Federal laws are available on the Confederation web site ([www.admin.ch](http://www.admin.ch)) at the address <http://193.5.216.31/ch/fr/rs/index.html>. They are classified in relation to the reference at RS.

<sup>9</sup> ATF 116/1990 Ia 461/464, *X. c. Syndicat d'améliorations foncières de Cudrefin-Bellerive-Vallamand*.

<sup>10</sup> Regarding the definition of public tasks, see in particular DEGIACOMI F., *Erfüllung kommunaler Aufgaben durch Private*, Zurich 1989, pp. 14 ff; EICHENBERGER K., "Zur Problematik der Aufgabenverteilung zwischen Staat und Privaten", ZBl. 1990, pp. 517/519 ff; MÜLLER A., "Staats- und verwaltungsrechtliche Kriterien für die Privatisierung von Staatsaufgaben", AJP 1/98, pp. 65/66 ff.

## II. Direct Management

The administration directly manages a public task where it entrusts its implementation to a service which is attached to its hierarchy, and which has no judicial autonomy. At the very most, such a service may enjoy a certain administrative autonomy in the form of a service mandate<sup>11</sup>. This model corresponds with the traditional organization of central administration<sup>12</sup> and is well adapted to the carrying out of authoritative tasks.

Direct management is entirely governed by administrative law. The tasks are carried out in a public law context, via the usual instruments of administrative law, in particular that of a decision. However, the predominance of public law does not exclude a certain degree of privatization. Such privatization is, however, limited to the acquisition of means which the administration requires in order to function: the administration remains solely responsible for the carrying out of its tasks, but may rely upon private bodies in order to secure the means with which to carry out its activities.

Traditionally, the administration has acquired from private providers supplies or certain services which are necessary to carry out its tasks. Such operations, known as "*Hilfsgeschäft*"<sup>13</sup> or auxiliary tasks, have always been considered as being a part of the normal management of a public task and were declared to be subject to private law. These were the "first" privatization's, to the extent that the State preferred to rely upon services provided by private companies rather than provide such services itself. This type of reliance upon the private sector is inherent to the functioning of the civil service. The State cannot exist in a complete autarky and provide all the supplies or services which it needs in order to function, whether these be pencils, paper, computers or technical maintenance.

The essential question is to assess where the State draws the line between those activities which it wishes to carry out directly, and those for

<sup>11</sup> See for example article 44, paragraph 1 of the law dated 21<sup>st</sup> March 1997 on the organisation of government and the administration (RS 172.010; hereafter "LOGA"), which is the legal basis of service mandates in the Federal administration. These mandates impose upon the services concerned a definition of their products or groups of products and to equip themselves with an analytical accounts. In return, they benefit from a budget allocation per group of products, which gives them a certain operational flexibility.

<sup>12</sup> For a general presentation of the central administration, see MADER L., "Bundesrat und Bundesverwaltung", *Droit constitutionnel suisse*, Zurich 2001, p. 1047.

<sup>13</sup> BRAND J., BRÜHLMANN J. R. & DERKSEN H. P., "Subventionen und Mehrwertsteuer", StE 1995, pp. 488/490; ZBl. 1985, pp. 319/320; ZBl. 1979, pp. 130/136-137. See also IMBODEN M., "Der verwaltungsrechtliche Vertrag", Basel 1958, pp. 1/54; IMBODEN M. & RHINOW R. A., *Schweizerische Verwaltungsrechtsprechung*, Vol. 1, 5<sup>e</sup> éd., N° 47 B I, p. 287, Basel/Stuttgart 1976; ROSENSTOCK P., "Das Privatrecht als Instrument der Nutzungsplanung", RNRF, 49/1968, pp. 129/148.

which it wishes to rely upon the services of third parties. This line is variable and changes with time.

For many years, the State has increased its request for services from third parties by reason of the transfer of certain activities, such as the management of cleaning services, the maintenance of computer systems or vehicles, to private companies<sup>14</sup>. Privatization takes on a more aggressive form where activities which used to be carried out by the administration, are now the responsibility of private companies. Contrary to the auxiliary tasks which usually corresponds to activities which do not come under the ambit of the State such as the manufacture of paper or computer equipment, all maintenance services may be provided by public bodies.

This transfer of tasks, defined as "*outsourcing*"<sup>15</sup>, does not have a direct effect on citizens. They solely concern the internal workings of the administration<sup>16</sup>. Furthermore, as this is an organizational measure, a legal basis is not necessary in principle. Moreover, reliance upon private service providers does not generally provoke a reaction from the population which is totally unaware of the transfer. However, such operations often result in the redundancy of civil servants or employees who were up until then responsible for the carrying out of such tasks.

The aim of the administration is to secure a service which is at least the equivalent of that which had hitherto been provided by the public servants, but at a lesser cost. Furthermore, the administration is relieved of the responsibilities linked to the management of the personnel. From an economic point of view, "*outsourcing*" is certainly cost effective for the administration, resulting in less costly and sometimes more efficient means<sup>17</sup>. However, from a social point of view, the compulsory redundancy of employees raises more problems. It may even bear a slightly shocking aspect where the administration fires members of its personnel, only to offer that they be employed by the private company entrusted with carrying out the work, at greatly reduced salaries<sup>18</sup>.

"*Outsourcing*" is a direct form of privatization, which is easy to justify from a political point of view due to its minimal impact on citizens and

<sup>14</sup> MOOR P., *Droit administratif*, vol. III, Berne 1992, pp. 108-109.

<sup>15</sup> See for example WEBER R. H., "Outsourcing von Informatik-Dienstleistungen in der Verwaltung", ZBl. 1999, p. 97.

<sup>16</sup> For example the administration transferred in 1994 to a private company the management of the *Dépot fédéral des chevaux* (source: press release of the Federal Military department).

<sup>17</sup> See for example, in the detailed report of the Federal Council dated 17<sup>th</sup> June 1996 addressed to the Management Commissions of the Federal Chambers (available at the web address [www.admin.ch/ch/d/vkb/effi/dbf/db96-f.html](http://www.admin.ch/ch/d/vkb/effi/dbf/db96-f.html)), section 21-16 regarding the cleaning of buildings, care taking services, garden and running services.

<sup>18</sup> To our knowledge, this type of situation occurred shortly after the transformation of SWISSCOM into a public law limited company in relation to the personnel employed for the cleaning of certain buildings.

the limited number of civil servants actually affected by such a reorganization. The following stage is the decentralized management of certain public tasks.

### **III. Decentralised Management**

The hierarchical structure of central administration, in charge of directly managing public tasks, is the classical form of administrative organization. With the evolution of State activities, in particular in the area of the administration of services, an operational flexibility of the administration, via the creation of autonomous public or private law bodies responsible for specific tasks, became necessary.

This process, known as "decentralization", led to an important development of a para-State administration with access to varied judicial structures. It consists in the delegation of the performance of State tasks to bodies which were separate from the Federal administration, and which benefited from a greater or lesser autonomy from the central administration. In particular, contrary to the administrative units making up the central administration, these bodies are not subject to the hierarchical power of the executive. The latter exerts a more flexible control of a supervisory nature over their activities.

Decentralization may take on numerous public law forms, as long as the intended operation has a legal basis, that there is a public interest justifying the operation and that the principle of speciality is respected<sup>19</sup>(A.). It does not lead to a privatization of the means of performing the public tasks, to the extent that the decentralized entity is based on public law. However, it may allow a privatization of the structures of the decentralized body, on the level of management, finance and the status of its employees (B.).

#### **A. Conditions Pertaining to Decentralisation**

##### **1. A Legal Basis**

The principle of legality requires that, in the context of public law, the administration must observe the law and must only act if and to the extent that it is permitted by law. In accordance with this principle, which applies

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<sup>19</sup> JAAC 1989/54 N° 36.

in particular to the organization of public powers, for third parties to be entrusted with the carrying out of public tasks or to be associated thereto, the legislator must have provided for such a transfer or association by way of a law<sup>20</sup>.

This being the minimum content of the law on decentralization, one must distinguish between whether the decentralized entity is a public or private law body.

The legislator is free to choose the form which it wishes to grant a public law body. Indeed, contrary to under private law, public law does not recognize the principle of *numerus clausus* of the different types of company. Nevertheless, the form of the entity must respect any constitutional requirements linked to the public task in question and allow it fulfil the aim sought by the decentralization. In order to satisfy the requirements set by the principle of speciality, public tasks entrusted to the decentralized body shall be clearly defined. Furthermore, the law shall provide for the essential elements of the structure in question, whether the financing, the operational means, the powers and the composition of the entity's bodies, as well as any supervisory powers.

Where the carrying out of public tasks is entrusted to a private law corporate body, the legislator is bound by the mandatory provisions of the Civil Code and the Code des obligations governing corporate bodies (the *numeros clausus* principle). In such a case, the legislator shall define the public task which is to be carried out by the private law corporate body, as well as the terms of its performance and its financing.

## 2. Public Interest

Decentralization must be in the public interest. In principle, it must not result in the carrying out of the task being deficient, less efficient or more expensive for individuals, nor must it put into question the continuity of the service. Quite the opposite, decentralization should allow the administrative authorities to benefit from more competitive or efficient services. However, compliance with this requirement is difficult to control. Furthermore, the legislator may give a more restrictive definition of the concept of public task during the drafting of the decentralization legislation. In such a case, the continuity of the public service must be considered according to the new legal definition, and not the extent of the services provided by the State prior to the decentralization.

Thus, the Federal parliament defined the post office universal services as "the provision of services pertaining to postal services and payment

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<sup>20</sup> ATF 100/1974 Ia 169. *Stump*: ATF 104/1978 Ia 440/446-447. *Gabathuler*.

services. In matters of postal services, the services including the deposit, collection, transportation and the distribution of deliveries and are as a general rule provided on all working days, and at the very least for five days a week". The duty of the post office is to guarantee free access to these services, which is to say access "of good quality (...) offered throughout the country according to same principles and at equitable prices"<sup>21</sup>.

This general formula, including undetermined judicial concepts, henceforth represents the yardstick with which the public service is to be measured.

### **3. Speciality**

The principle of speciality means that the decentralized body must not have the ability to define its own competence. As soon as a decentralized body carries out State tasks, its activity must remain within a clearly defined legal framework. Without such a limitation, the decentralized body may develop State activities without respect for the constitutional and legal rules which normally govern the administration.

Consequently, where the legislator creates a decentralized body and entrusts it with the carrying out of a public task, it is under the obligation of precisely and restrictively defining the competences of the body, so that its activity may be limited to a framework as defined by the law. The principle of speciality thus requires that decentralization may only apply to specific tasks.

### **4. Supervision**

By definition, a decentralized body enjoys a certain autonomy in that is separate from the central administration and is therefore not subjected to hierarchical power. However, in that a decentralized body carries out State tasks, it is necessary to control its activities; this is generally carried out by one of the bodies of the public collective which created the body in question, whether the government or one of the departments which makes up the central administration.

This supervisory power, less restrictive than the hierarchical power, mainly consists of a control of the legality of the acts of the decentralized body and only includes the right to issue general directives regarding its operation. There is no single model of supervisory power. Its terms vary

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<sup>21</sup> Article 2 of the Federal law dated 30<sup>th</sup> April 1997 regarding the organisation of the Federal post office corporate body (Law on the organisation of the Post Office, RS 783.1; hereafter the "LOP").

according to the structure of each decentralized body and the tasks entrusted thereto.

The main forms of supervisory control are as follows:

- The right to appoint certain bodies, which allows an indirect control over the running and the management of the entity;
- The right to make general directives, which do not include that of issuing specific instructions regarding individual cases;
- The right to request activity reports or to carry out inspections;
- The right to constructively approve prescriptions issued by the entity, in order to ensure the respect of superior law;
- The right to challenge certain decisions, to the extent that these would be in contravention with superior law and, in particular, where they would exceed the limits of autonomy;
- A right of control in financial matters;
- The right to examine complaints relating to the activity of the decentralized entity<sup>22</sup>;
- The more general right to supervise respect of the law by the decentralized entity, which solely allows the supervisory authority to sanction a breach of the rules which apply to the entity. It does not authorise the supervisory authority to act in the place of the entity.

It is important to note that this list of powers which may be held by a supervisory authority is neither mandatory nor is it exhaustive. In each case, the powers of the authority are different so that they may be adapted to the supervisory requirements of the body in question. In any event, subject to the general right to assess complaints and that of ensuring compliance with the law, these powers only exist where provided for by the law.

The choice of supervisory measures must be made at the time of the creation of the body by the legislator. It is for the latter to grant the supervisory authority means of control which are commensurate with the mission conferred upon the entity. Thus, where the entity has a wide range of powers with important consequences for those being administered, the more important decisions could be subjected to the prior approval of the supervisory authority.

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<sup>22</sup> See for example the ATF 107/1981 ii 385/388 ff, *Dieter Bachmann*, as well as article 71 of the Federal law on administrative procedure (RS 172.021) which institutionalises the law relating to complaints on a Federal level.

The legislator must also be careful as to the terms implementing the supervision measures. Thus it is necessary to be satisfied as to the means made available to the administration entrusted with a supervisory role, as well as its ability to put these into operation. Indeed, there is no point in granting means of control in a law creating a decentralized entity, if the supervisory authority makes no use thereof. A management report or an accounting report is of no use if, on the one hand, it is buried by the supervisory authority without any real analysis, and on the other hand, if its contents are not regularly verified by controls at the heart of the entity.

## **B. Privatisation of the Structures**

### **1. Management**

From a management point of view, the legislator may impose upon the decentralized entity that it be managed in accordance with principles similar to those which apply to private companies. The transformation of the old Intellectual Property Federal Office ("IPFO"), which directly administered public tasks relating to intellectual property, into an autonomous public corporate body enabled the implementation of management rules pertaining to the private sector which would have been difficult, if not impossible within a central administration. Thus, article 1 para 3 of the Federal law governing the status and the tasks of the Intellectual Property Federal Office<sup>23-24</sup> provides that this public law corporate body is managed according to the principles of corporate economics.

Again, the reform of the post office deeply changed the internal functioning of its administration. The old post office was in fact organized in the form of a Confederation public corporate body, but it did not have a judicial personality. It had a limited judicial and financial autonomy<sup>25</sup> and essentially functioned as an administrative authority. The new structure is still that of a public corporate body, but now it has a judicial personality<sup>26</sup>. Its role as a provider of public services is clearly defined at article 3, paragraph 1, LOP: "The aim of the post office is to provide, both in Switzerland and abroad, services which comply with legislation relating to the post office and public transport". The post office is to achieve this aim

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<sup>23</sup> RS 172.010.31; hereafter the "LIPI".

<sup>24</sup> The institution shall hereafter be referred to the "IPFO".

<sup>25</sup> On this point see the summary of the main elements of the old judicial post office regime in the Message of the Federal Council dated 10<sup>th</sup> June 1996 relating to the law on the organisation of the post office and the law on the institution of telecommunications, FF 1996/III, pp. 1260/1263-1265.

<sup>26</sup> Article 2, paragraph 1, LOP.

by complying with the strategic objectives which are set every four years by the Federal Council<sup>27</sup>.

It is true to say the judicial envelope of the post office is clearly that of public law: it is a decentralized federal administration responsible for carrying out public tasks. However, under the judicial surface, the LOP has enacted a thorough remolding of the rules governing the internal operation of the post office in order to bring its structure closer to that of private sector companies<sup>28</sup>.

Within the limits of the objectives defined by the Federal Council, which set the general economic direction of the company, the Board of Directors is responsible for the corporate strategy of the post office, sets the financial plan as well as the budget, and supervises the management, which is the responsibility of the management<sup>29</sup>. As pointed out by the Federal Council, *"this allocation of tasks between two managerial bodies corresponds to the classical organizational model of large companies"*<sup>30</sup>. Other than the make up and powers of the Board of Directors and the management of the company, the LOP sets out no further provisions regarding the internal organization of the company. This question comes under the ambit of its autonomy in order to give it a flexible managerial basis.

This type of organization of a public administration, based upon the model of private companies, is a form of privatization of the internal administrative structures. The public law envelope remains intact, but the internal workings of the entity is thoroughly transformed in order to correspond with the operational means of a private company. It is a subtle form of privatization which side-steps the political debate as to the replacement of public law entities with a private company, whilst at the same time achieving a similar result.

## 2. Financing

With regard to financing, management by a decentralized administration allows an easier transfer of the financing of the general budget from the State to the service recipients, who pay for the services provided. It comes to a form of financial privatization of a State activity<sup>31</sup>.

<sup>27</sup> Article 6, paragraph 1, LOP.

<sup>28</sup> Also see the law dated 20<sup>th</sup> March 1998 on the Federal Railways (RS 742.31; hereafter "LCFF") which transformed the Swiss railway network into a public law limited company to be managed in accordance with principles of the corporate economy (articles 2 & 3, paragraph 3, LCFF).

<sup>29</sup> Articles 9 & 10 LOP.

<sup>30</sup> Message dated 10 juin 1996, above cited, p. 1279.

<sup>31</sup> MÜLLER A. & JENNI V., "Rahmenbedingungen bei der Privatisierung kommunaler Aufgaben – Eine aktuelle Übersicht", AJP 9/99, pp. 1071/1072; TSCHANNEN P., "Privatisierung: Ende der Verfügung?", in *Rechtliche Probleme der Privatisierung*, Berne 1998, pp. 209/213.

Once again, the Intellectual Property Federal Office represents a very interesting example of the Federal authorities' approach in this area. The financial resources of the company can be broken down into three separate elements: taxation on the activities pertaining to State sovereignty, payment for the provision of services and indemnities paid by the Confederation for services provided by the company which benefit the Economy<sup>32</sup>.

The taxes mainly correspond with the price of delivering and renewing titles to intellectual property, the keeping of the registers and the authorization for collective management companies<sup>33</sup>. The taxes differ from the payments usually received by the central administration for similar activities, to the extent that they must be sufficient to fully cover the cost of these activities over a four year period. The [public corporate body] must therefore have an accounting system which enables it to precisely assess the cost of each of the acts which its agents must fulfil. This cost is then fully borne by the citizen who uses the company's services. The financing of administrative tasks is therefore in a way "privatized". The citizen no longer benefits from services indirectly financed by the State general budget through his taxes. He directly pays the price of the administrative act from which he benefits. In this way, the State transfers the financial burden of its activity from the general State budget to the citizen who uses the public corporate body's services. In order to avoid any abuse by the company, the rate of taxation is naturally subject to the approval of the Federal Council<sup>34</sup>.

Payment for the provision of services is an even stronger example of the privatization of the Intellectual Property Federal Institute. The public corporate body may provide services independent of its brief within the framework of the application of intellectual property law. These services are charged at a market price<sup>35</sup>. Consequently, the IPFI may in such a case make a profit for the provision of such services. Such profit must be set aside for future investments in the public corporate body and retain a reasonable relationship with its needs<sup>36</sup>.

The purpose of these financial provisions is to allow the IPFI to acquire a financial independence which would allow it to independently ensure the financing of its running and development costs, subject to the compensation paid by the Confederation for general services provided benefiting the Economy. Such a structure privatizes the financing of the

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<sup>32</sup> Article 12 LIPI

<sup>33</sup> Article 13, paragraph 1, LIPI.

<sup>34</sup> Article 13, paragraph 3, LIPI.

<sup>35</sup> Article 14 LIPI.

<sup>36</sup> Article 16 LIPI.

Institute by ensuring it is paid for by the private corporate and individual bodies which use its services.

This form of structure is for the moment limited. As from the 1<sup>st</sup> January 2002, the new "Swiss institute for therapeutic products", created in the form of an autonomous public corporate body, which shall bring together the departments of the Federal Office of health and the Intercantonal Office for the control of medical products. This independent institute shall take on the essential sovereign tasks (authorization to release on the market and supervision thereof), and centrally coordinate the activities relating to therapeutic substances<sup>37</sup>. It is likely that this institute shall function on the basis of a financial model similar to that of the IPFI<sup>38</sup>.

It is possible to envisage that in the future a part of the regulatory tasks of the State may be carried out by autonomous decentralized entities which would be financed by the recipients of their acts. The implementation of service mandates within the central administration<sup>39</sup> could well be a prelude to such a transformation. It would, however, be appropriate to proceed upon such a course with caution.

Indeed, the desire to provide a more efficient and cost effective public service which is behind the actual reforms in the Federal administration is laudable. It can only serve to improve the operation of the administration, to the benefit of the citizens. But privatization of the financing, which seems to have to accompany such reforms, raises more sensitive questions. As long as the financing of the administration is provided by way of taxation, each corporate body or individual person contributes in proportion with its tax burden. However, where the services are directly paid for by the recipient thereof, the financial capacity of the latter is irrelevant. Rich or poor, he has to pay the same amount in order to receive the service.

Such a change is admissible where we are concerned with specialized areas, such as intellectual property rights or where State intervention consists in the regulation of a particular area of activity<sup>40</sup>. In such cases, a minority of citizens are affected and the obligation to pay a relatively large

<sup>37</sup> See in particular articles 68 ff. of the Federal law dated 15<sup>th</sup> December 2000 relating to medicine and medical utensils (Law on therapeutic products, LPT), FF 2000, pp. 5689 ff.

<sup>38</sup> DETEC is also presently preparing a future "National Security Agency".

<sup>39</sup> At the present time, the units which benefit from this regime are the Institut suisse de météorologie, the Office fédéral de topographie, the Centro Sportivo di Tenero, Swissmint (ex- Monnaie fédérale), the Ecole fédérale de sport de Macolin, the Office fédéral de métrologie, the Division direction des mensurations cadastrales, the Caisse centrale de compensation, the Division Service civile, the Office fédéral de la communication, the Institut de virologie et d'immunoprophylaxie, the Instituts de recherche agronomique and Haras fédéral.

<sup>40</sup> Article 23, paragraph 4 of the Federal law dated 8<sup>th</sup> November 1934 on banks and savings institutions (law on banks, RS 952.0; LB), provides for example that "the expenses of the commission and its secretariat must be covered by income". The banking institutions subjected to the Federal Commission on banks therefore bear these costs.

tax does not constitute an obstacle to the securing of a service which is essential to survival. However, this system should not be extended to public services which respond to a need of a large section of, or the entire population, such as health, transport or educational services<sup>41</sup>.

### 3. Personnel

A decentralized administration offers conditions which are more favorable for a reform of the status of personnel than those of a central administration. The ability to base the status of personnel on a material legal basis rather than to a law subject to the approval of parliament and possibly the entire population, attenuates the often exacerbated reaction of a part of the personnel when faced with a change to a public law status which has existed for several years<sup>42</sup>.

To the extent that the law which created a decentralized entity has not specified the law applicable to the personnel, such an entity may, within the boundaries of its autonomy, opt for a regime which appears to be more favorable to it in order to allow it to accomplish its tasks, and in particular it may adopt a private law status<sup>43</sup>. The status would then be completely privatized.

An intermediate solution consists in taking advantage of decentralization in order to relax the status of employees. Thus, article 8 paragraph 1 LIPI solely provides that the status of the IPFI employees comes under public law and entrusts the Federal Council to enact the necessary provisions. On this basis, the Federal Council passed an Order dated 30<sup>th</sup> September 1996 governing the status of the personnel of the Intellectual Property Federal Institute<sup>44</sup>. The regulatory text provides in particular for the hiring of personnel by means of a public law contract, rules similar to those of the law of obligations in cases of redundancy and flexible terms of remuneration which take into account qualification, length of service and the actual services provided. These provisions correspond to a more flexible regime than that which the Confederation attempted to introduce within

<sup>41</sup> Regarding this point see WAGNER PFEIFER B., "Staatlicher Bildungsauftrag und staatliches Bildungsmonopol", ZBl. 1998, pp. 249/261-267.

<sup>42</sup> On this point, see BELLANGER F., "L'évolution du statut de la fonction publique dans l'administration décentralisée", in *Fonction publique vers une privatisation?*, Zurich 2000, pp. 43 ff.

<sup>43</sup> It should be noted that even where it adopts a private law status, a decentralised administration carrying out public tasks remains bound by constitutional principles governing administrative law, in particular the principles of legality and equal treatment. Furthermore, to the extent that such an administration introduces public law obligations in its private law contracts, it is very likely that an administrative tribunal, hearing a claim from a public agent would qualify the work relationship as a public law contract, in spite of a material legal basis providing for private law.

<sup>44</sup> RS 172.010.321.

the Federal administration in its Federal draft law on Confederation employees<sup>45</sup>.

Again, article 62b of the Federal law dated 30<sup>th</sup> June 1927 regarding the status of civil servants<sup>46</sup> allowed the Federal Council to authorize the post office to take into account the services of its employees in the calculation of their pay, and to create a flexible rate of pay on a grid basis without ceiling, relating to the work market<sup>47</sup>.

These two examples illustrate the flexibility of the operation of the decentralized administrations, the modalities of creation of which facilitate the adoption of management methods which are often quite remote from those of a centralized administration. In particular, at the heart of a decentralized entity, it is easier to instigate a reform of the status of the personnel and to introduce management methods of work relations which are close to those which apply in the private sector. Once again, the limited character of such a reform makes it more discreet and more readily acceptable on a social and political level.

#### **IV. Management Delegated to a Private Body**

The third means of managing public tasks is that of the collaboration between the State and private corporations<sup>48</sup> or individuals for the carrying out of public tasks. Article 2 paragraph 4 LOGA specifies that "the Federal legislation may entrust administrative tasks to organizations and private or public law bodies which are outside the Federal administration." Enacting these provisions, articles 7, 8 and 9 of the Order on the organization of the government and the administration<sup>49</sup> distinguish between the central administration, a decentralized administration and the participation of third parties to the carrying out of public tasks. The latter method allows the use of private law structures on top of internal operational methods which are close to that of the corporate Economy. The State privatizes the entity in charge of the carrying out of public tasks<sup>50</sup>. There are two possible solutions: the creation of a private company headed by the State, or the transfer of public tasks to private bodies which are independent of the State.

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<sup>45</sup> Message from the Federal Council dated 14<sup>th</sup> December 1998 regarding the law on the Confederation Personnel, FF 1999/II, pp. 1421ff.

<sup>46</sup> RS 172.221.10

<sup>47</sup> Message dated 10<sup>th</sup> June 1996, above cited, p. 1327

<sup>48</sup> Hereafter "corporate bodies" shall refer to private corporate bodies and individuals.

<sup>49</sup> RS 172.010.1; hereafter "OLOGA"

<sup>50</sup> TSCHANNEN P., above cited, p. 212.

### A. Creation of a Private Body Headed by the State

The State may create a private law corporate body in order to entrust it with the carrying out of a public task. It may also obtain a similar result by merging a public law entity with a private law corporate body or by transforming a public law entity into such a corporate body<sup>51</sup>.

In such a situation, the private law body in question is normally controlled by the State and has as its sole purpose to act in the public interest. Such an entity has the same function as a public law entity. The private law structure has solely been chosen by the State for motives of opportunity: the use of such a structure generally makes it easier to recruit personnel via private law employment contracts and to benefit from a more flexible means of operation.

For example, within the limits of Cantonal competence, in order to equip the army, the Confederation may use armaments companies, create private law limited companies or take shares therein<sup>52</sup>. The implementation of such a task falls upon the Federal Council, which is empowered to create private law limited companies in the name of the Confederation, to purchase shares and to sell them. This reform has had as a consequence the transformation of the four institutions of the Armament Group into private law limited companies<sup>53</sup>, held by a private law holding company called the RUAG Suisse, of which to date the Confederation is the sole Shareholder<sup>54</sup>. Its corollary is the modification of the service relationship of the employees of these companies. Public law relationships have been replaced by those of private law<sup>55</sup>.

Again, the Confederation created SKYGUIDE, which is a limited company of mixed Economy as defined by article 762 Co, a non profit making organization, the aim of which is to "*provide services in the area of civil and military air travel, in sectors which have been granted to it by the Confederation*". The legal basis of this creation is article 40 paragraphs 1 & 2 of the Federal law on aviation<sup>56</sup>, which entrusts the Federal

<sup>51</sup> MÜLLER A., above cited, pp. 71-72; VON BÜREN R., "Die Rechtsformumwandlung als Voraussetzung einer Privatisierung", in *Rechtliche Probleme der Privatisierung*, Berne 1998, pp. 21/24-25. Also see the study by VON BÜREN R. on the transformation of the Banque cantonale de Berne from a public corporation into a limited company: "Die Rechtsformumwandlung einer öffentlich-rechtlichen Anstalt in eine private Aktiengesellschaft nach OR 620 ff", RSDA 2/95, p. 85.

<sup>52</sup> Article 1 of the Federal Law dated 10<sup>th</sup> October 1997 on Confederation armament institutions (RS 934.21; hereafter "LEAC").

<sup>53</sup> This is the Swiss Aircraft and Systems Enterprise Corp., the *Entreprise suisse d'armement SA*, the *Entreprise suisse de munitions SA* and the *Entreprise suisse d'électronique SA*.

<sup>54</sup> BIAGGINI G., above cited, pp. 85-88

<sup>55</sup> Article 6, paragraph 1 LEAC. Also see the Ordonnance dated 25<sup>th</sup> March 1998 regarding the transformation of the service relationship of the Confederation armament institutions, which governs the transitory regime (RS 934.216).

<sup>56</sup> RS 748; hereafter "LA".

Council with the organization of the service of air navigation and authorizing it so "*entrust the civil air service, entirely or in part, to a non profit making mixed Economy limited company, the majority of the capital of which belongs to the Confederation and whose statutes must have been approved by the Federal Council*".

This transfer of tasks resulted in the express desire of the legislator to privatize the activities of SKYGUIDE, and to remove the company from Federal administration, both on the level of its operation and organization as well as on a financial level<sup>57</sup>. Thus, articles 5 to 11 of the Order on air navigation<sup>58</sup> contain general principles for the organization and management of SKYGUIDE. In particular, article 9 paragraph 1 of the Order on air navigation defines the elements making up the receipts of SKYGUIDE which are not to be subsidized by Confederation. Consequently, SKYGUIDE does not depend on the Confederation budget, and must finance its services.

The choice of a private law structure has nevertheless no effect on the relationship with the citizens where the entity in question carries out a public task on behalf of the State. Indeed, in such cases it acts as if a State body, vested with State powers. Its acts are therefore governed by public law<sup>59</sup>.

This type of implementation is a form of decentralization combined with the privatization of its structures. The private law entity remains headed by the State, which owns all or part of its capital. The ulterior stage consists in the transfer of the responsibility to carry out a public task to a private entity independent of the State.

## **B. Transfer of Public Tasks to Private Persons Independent of the State**

The performance of public tasks by private law bodies independent of the State concerns the intervention of private law corporate bodies or individuals, controlled by private persons, carrying out State activities. The purpose of such persons is to make a profit, distinct from the public

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<sup>57</sup> Message from the Federal Council regarding a modification of the law on air navigation, FF 1992, pp.587/606-608.

<sup>58</sup> RS 748.132.1; hereafter "OSNA".

<sup>59</sup> Above cited ATF 116/1990 Ia 461/463. Even under the hypothesis where a corporate body were to enter into a private law contract with a citizen, it would not have complete contractual freedom. Indeed, where the corporate body were to carry out a public task via its private law contracts, it continues to be bound by the fundamental principles governing administrative law. The private law instrument is integrated into the general framework of public law which governs the State activity.

interest<sup>60</sup>. With a view to making a profit, they can be interested in carrying out a public task on behalf of the State, which transfers to them a part of its public law prerogatives. According to the nature of their relationship with the State, they intervene as a concessionary, delegate or auxiliary, and is responsible for the carrying out of a public task<sup>61</sup> of general interest.

This transfer is subject to the usual requirements in matters of the transfer of public tasks to entities which are separate from a central administration: the existence of a legal basis and a public interest, the creation of appropriate supervision as well as being subject to the principle of speciality<sup>62</sup>.

These methods of collaboration between the State and private law bodies in order to carry out public tasks reveal a more elaborate form of privatization. The state intends to maintain a public service but decides to leave the performance of such a service to a private body for either economic or technological reasons.

### C. Consequences of Delegated Management

Privatization within the framework of decentralized management is a form of soft privatization in the context of public law. The structure is that of public law, with modifications only to the internal operational rules in matters relating to management and the relationship with employees. As a general rule, the citizen does not notice any change in his relationship with the administration, subject to the issue of taxation.

However, in cases of delegated management, the change goes deeper. The structure itself is modified: the entity in charge of the performance of a public task is no longer subject to public, but private law. Thus, only the transfer of the public task is governed by the law, questions relating to the organization of the private law entity mostly escapes the reach of the legislator. In such a case, a privatization of management, financing and the status of the employees is automatic. It is the natural corollary to the choice to create a private law form in order to manage a public task. It necessarily intervenes where the task is transferred to a profit making company independent of the State.

<sup>60</sup> Regarding the distinction between public interest, profit making purpose and public utility, see unpublished ATF dated 30<sup>th</sup> April 2001 (2A.545/2000) in the case of the Banque cantonale vaudoise against Administration cantonale des impôts du canton de Vaud.

<sup>61</sup> See in particular on this point, KNAPP B., "L'exécution de tâches publiques fédérales par des tiers", in *Schweizerisches Bundesverwaltungsrecht – Organisationsrecht*, Bâle 1996, N° 90-101.

<sup>62</sup> See for example article 43 of the Federal law dated 7<sup>th</sup> October 1983 on the protection of the environment (RS 814.01; LPE), which authorises the delegation of performance tasks, in particular in matters of control and supervision, to individuals.

The importance of such a structural transformation is, however, limited by the fact that delegated management does not modify the nature of the administrative relationship. A private body carries out a public task on behalf of the State and acts as a State body, vested with the power of the State. The body providing the services to the citizen changes, but the conditions for performing the services remain the same as if it were a public administration.

Therefore privatization solely concerns the structures and not the relationship between the citizen and the administration thereof. A modification of such a relationship occurs at a more advanced stage of privatization, where the State limits itself to the provision of a minimal service.

## **V. Management of a Minimal Service**

The liberalization of several sectors of the Economy such as rail, postal or telecommunication services results in a redefinition of the activities of the State. Up until then the manager of a monopoly or main provider of services, the State becomes an economic actor amongst many others in a market which is opened to competition. Such an evolution brings about a redefinition of the tasks of the State, the consequences of which are twofold: on the one hand, a partial or total privatization of the entity which had until then been entrusted with the services, and on the other the definition of a minimal service, to be guaranteed for all citizens. The extent of the privatization will depend on the method according to which the minimal service is managed. There are two possible models: administration by a public administration or a competitive tender.

### **A. Management by a Public Administration**

The management of a minimal service by a public administration is appropriate where the law expressly grants to a public law entity the responsibility of providing the universal service. This is generally the body which previously held the monopoly for which the reserved area of activity has been reduced to the extent that it only covers the basic services. In other sectors of activity, the public entity is free to choose the services which it intends to provide over and above the minimal service.

The reform of the Post Office was based on such a model. It resulted in a double legislative modification with the aim of modernizing the

structure of the post office<sup>63</sup> and to define the extent and the modalities of the universal service<sup>64</sup>.

The post office Federal law dated 30<sup>th</sup> April 1997<sup>65</sup> aims to guarantee the provision of postal services and payment services throughout the country<sup>66</sup>. With this aim in mind, it specifies the obligations of the post office by defining the services which it must provide in these areas under the heading of "universal service"<sup>67</sup>. This means the provision of free access, good quality, and availability throughout the country in accordance with the same principles and at equitable prices<sup>68</sup>. In postal matters, the services must in particular ensure the deposit, collection, transportation and distribution of deliveries will be provided on all working days, and not less than five days a week<sup>69</sup>. In order to finance the service, the post office has a monopoly over all items sent by post which consist of letters and parcels weighing up to 2 kg<sup>70</sup>. These services are defined as "reserved", the legislator not wanting to refer to a monopoly. All other services which are "not reserved" are provided by the post office in direct competition with private operators<sup>71</sup>. The limit between the two types of service may evolve to the extent that it such an evolution may be necessary in order to guarantee the good operation of the universal service<sup>72</sup>.

In principle, the new structure of the post office should allow it to provide the universal service specified by the LPO whilst at the same time making a profit. The management of the post office according to corporate Economy principles may however be in conflict with a wide definition of the universal service. The emotions raised in Geneva by the post office at the rue du Beulet<sup>73</sup> illustrates the possible lag between the expectation of

<sup>63</sup> See above point III. A.

<sup>64</sup> The reform of the Swiss railways was based upon a similar model. In particular see on this point BIAGGINI G., above cited, pp. 88-89; LENDI M., "Privatisierung und Marköffnung im Eisenbahnwesen – Erste Schritte durch die Bahnreform", RSDA, Numéro spécial 1999, p. 40; WIEGAND W. & WICHTERMANN J., above cited, pp. 93-94.

<sup>65</sup> RS 783.0; hereafter "LPO".

<sup>66</sup> Article 1, paragraph 1, LPO.

<sup>67</sup> Articles 2-4 LPO; by way of comparison, the minimal service in rail transportation matters is assessed every four years under a service convention drafted by the Federal Council together with the Swiss railways (article 8, paragraph 1, LCFF).

<sup>68</sup> Article 2, paragraph 2, LPO

<sup>69</sup> Article 2, paragraph 1, LPO

<sup>70</sup> Article 3, paragraph 1, LPO. Are however excluded from the reserved services the carriage of expedited mail as well as international parcels and post office deliveries abroad (article 3, paragraph 2, LPO).

<sup>71</sup> In order to avoid any distortion of the competitive market, article 9, paragraph 4, forbids the post office from using a part of its reserved service products in order to reduce the price of free services.

<sup>72</sup> Article 4, paragraph 2, LPO.

<sup>73</sup> Reference to the parliamentary text: the parliamentary intervention occurred on the 16.12.99; the Mémorial only appeared up until 18.11.99.

citizens who desire a service to be provided in close proximity, and a strict interpretation of the concept of services which are "freely available to all" which would allow a more economical management. The latter was successful in that the citizens had no judicial means to request a judicial control of the application of the LPO. At the very most they have the ability to file a complaint before the Federal Council in its capacity as the post office supervisory authority.

Indeed, such proceedings must be admitted, even if not specifically provided for by the LPO<sup>74</sup>. A supervisory authority must always be able to ensure that the law is respected by the decentralized entity<sup>75</sup>. It may consider complaints regarding a breach of the legal rules by the decentralized administration in question. This supervisory power is institutionalized under article 71 paragraph 1 of the Federal law dated 20<sup>th</sup> December 1968 regarding administrative procedure<sup>76</sup>, according to which "*any person may at any time complain to the supervisory authority of the facts which require an official intervention against an authority in the public interest*". The impact of this essentially political control appears nevertheless to be somewhat limited. However, it is no more limited than the control which existed prior to the reform of the post office.

The choice of the type of management for the minimal service by a public law entity reveals the desire of the State to keep a part of the previous public service. It also responds to the difficulty in privatizing large administrations<sup>77</sup> which have been running a monopoly on behalf of the Confederation for a number of years.

Under a minimal service, the State privatizes a part of its tasks. It only recognizes that a limited part of postal services are of public interest. Only the minimal service still has a public character. Such a privatization naturally has an effect on the citizen. It limits his right to access to the public services to the elements thereof which form part of the minimal service. The other services belong to the market, and are therefore subject to ordinary market rules. The State has withdrawn from this sector, where the post office now intervenes as another company, with the added competitive advantage of the ability to avail itself of the structure used for the operation of the minimal service for the provision of free services.

<sup>74</sup> GRISEL A., *Traité de droit administratif*, Vol. I, Neuchâtel 1984, p. 197; KNAPP B., *Précis de droit administratif*, 4<sup>e</sup> éd., Bâle 1991, ch. 13.

<sup>75</sup> ATF 107/1981 II 385/388-392, Dr. Dieter Bachmann.

<sup>76</sup> RS 172.021; hereafter "PA".

<sup>77</sup> In January 1999, the post office employed 36'461 public agents and the Swiss railways 30'492 public agents. These two administrations represent 60.90 % of the total number of public agents subject to the StF.

## **B. Offer for Competitive Tender**

The minimal service may furthermore be privatized by way of competitive tender. Any private corporation may then participate to the call for tenders organized by the Confederation in order to become the minimal service provider for several years.

Under such a system, the role of the State is limited to defining the minimal service and to ensure that the concessionary operator complies with its obligations. Moreover, the State completely withdraws from the market.

This is, however, not a total privatization of a sector of activity, unlike the hypothesis of a surrender of the management of the public task, to the extent that the State ensures the provision of a minimal service, allowing all citizens access to the provision of the service. It is true that the State no longer takes part in the process, but has instead created a judicial framework ensuring equivalent services to those which it provided itself prior to privatization. The provision of a minimal service is a public task carried out by a private company or a public law entity with an industrial and commercial character acting as if a private operator.

This approach was adopted for the liberalization of the telecommunications market<sup>78</sup>. SWISSCOM, which became a public law limited company<sup>79</sup>, was granted a transitory concession to provide a universal service, for a period of five years for land line phones, and of ten years for mobile phones<sup>80</sup>, as from the entry into force of the LTC on the 1<sup>st</sup> January 1998. In return, SWISSCOM is obliged to provide a minimum service throughout that period. The choice of SWISSCOM was necessary, for it was the only company able to provide such a service due to its past monopoly. However, upon expiry of the two concessions, the corresponding service will be subject to a public tender and could be granted to a private operator.

Under this model, privatization of both structures and tasks is complete. The State only intervenes as the regulator of the minimal service. This approach is only possible where the private operators are interested in taking up the management of the minimal service, for the time being provided by SWISSCOM. Should no operator express an interest, the State would then once again impose the provision of a minimal service upon

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<sup>78</sup> For a detailed analysis of the privatisation procedure in the telecommunications sector, see BIAGGINI G., above cited, pp. 81-85; TSCHANNEN P., above cited, pp. 219-222; WEBER R. H., "Liberalisierung und Privatisierung in der Telekommunikation", RSDA, Numéro spécial 1999, p. 24.

<sup>79</sup> Article 2, paragraph 2, LET.

<sup>80</sup> Article 66 of the law dated 30<sup>th</sup> April 1997 on telecommunications (RS 784.10; hereafter "LTC").

SWISSCOM. Such a situation would mean a failure of the universal service model put up for competitive tender in the telecommunications sector. It would demonstrate the limits to the privatization of certain public services.

## VI. Surrender of the Management of Public Tasks

The definition of State public tasks is variable. It varies according to the evolution of both ideas and needs. The State takes on new tasks and relinquishes others which are handed over to the private sector. In the latter case, the State surrenders the responsibility for a specific task.

On a Federal level, such a decision means a Constitutional change to the extent that the competence of the Confederation must be specified in an article of the constitution<sup>81</sup>. On a cantonal level, subject to specific constitutional provisions, a legislative amendment may suffice.

Surrender of the task meant that the constituent or the legislator not only considers that the task is no longer in the public interest, but also that it is not necessary to guarantee a minimal service. Therefore, it is no longer for the State to provide such a task. This is an absolute form of privatization, where the State completely withdraws from a sector of activity in so far as it used to provide a service<sup>82</sup>.

In the case of an economic activity, only market rules prevail: it is for the corporations to freely assess if they wish to have an activity which is analogous to that previously carried out by the State. Making a profit replaces the taking into account of a general interest. Such was the case when the canton of Soleure entirely privatized its cantonal bank<sup>83</sup>.

On a social level, State withdrawal may be compensated by an increase of charitable activities by associations or private individuals. This last example generally demonstrates the interests represented by State services and the void left behind by the withdrawal of the State.

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<sup>81</sup> KNAPP B., "Quelles limites constitutionnelles aux privatisations?", RSDA, Numéro spécial 1999, pp. 1/5.

<sup>82</sup> Within this meaning, TSCHANNEN P., above cited, p. 215.

<sup>83</sup> BIAGGINI G., above cited, p. 91. See the analysis by LEU R. E., GEMPERLE A., HAAS M. & SPYCHER S. regarding the privatisation of the Banque cantonale de Berne: *Privatisierung auf kantonaler und kommunaler Ebene*, 2<sup>e</sup> éd., Berne 1997, pp. 53-70; also see the more general study by BÜHLMANN J., *Privatisierung von Kantonalbanken dargestellt am Beispiel der Zürcher Kantonalbank* Berne 1996.

## VII. Conclusion

Privatization's correspond to an evolution of administrative structures resulting from both the liberalization of certain markets and the desire to reduce administrative operational costs. For these two reasons, it is possible to find privatization, in varying degrees, at all levels of a centralized or decentralized administration.

The use of public law decentralized structures allows a form of privatization which is almost as extreme as the delegation of a public task to a private body. The introduction in a public corporate body or a public law company of free market principles for the management or the transfer of financing onto the consumers may have just as important an effect on the conduct of a public task as the delegation of the provision of the task to a private body. Such a reform is, however, politically more appropriate to the extent that the entity created by the State is subject to public law. Even though the content has been privatised, the form has been preserved.

From a judicial point of view, in a majority of cases, the citizen is not affected by this phenomenon. The management of public tasks by a public administration or by a private body acting on behalf of the State does not modify the judicial relationship between the State and those who are being administered. Differences appear where the State surrenders all or part of its tasks either by reducing a public service to a minimal content, or by completely ceasing to carry out such activity.

However, from a psychological point of view, there is a major difference. The fear of a reduction of the quality of the services or a loss of political control by the administration results in a large part of citizens being opposed to a change to the administrative structures which mean reliance upon private bodies. The same is true of certain civil servants, who fear a change to their status. These fears are naturally translated into a political reaction. Recent popular votes in Switzerland rejecting privatisation in certain Cantons illustrate such fears.