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Water supply and sewerage in Germany

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1. *Definitions and terminology*

The paper aims at giving an overview of water supply and sewerage/waste water management in Germany.

Water supply and sewerage are major fields of the provision of (infrastructural) public services which in the international (Anglophone) discussion are mostly termed (public) *utilities.* The EU introduced the term *services of general economic interest* (SGEI) to refer to this service sector. In Germany one frequently speaks of *Daseinsvorsorge* ('basic provision for subsistence') [1]. In the following the term (public) *utilities* shall preferably be used.

2. *Legal setting*

At the outset the legal setting and frame shall be sketched within which the delivery of water supply and sewerage takes place in Germany.

EU level

[1] In France, the term *service public* or more specifically the term services publics industriels et commerciaux, in Italy *servizi pubblici* or *servizi di pubblica utilità* and.in Spain *servicios públicos.*

The European Union (EU) has increasingly engaged itself in environmental water protection and water management. Thus, the *Water Framework Directive* that was adopted by the European Parliament and the European Council on October 23, 2000 (and amended on August 12, 2013) has set the legal frame for the water resource management in EU member States. It was targeted at the ecological protection of rivers, lakes, groundwater etc. Moreover, the Drinking Water Directive of November 3, 1998 hinged on protecting human health.

The market liberalization policy which the EU has pursued since the 1990s aiming at achieving a 'single market' for capital, goods and services was bound to have an impact on the provision of public services, in particular of water supply and waste water management, that have typically been delivered by local authorities and local level utilities in local contexts.

The EU's drive to introduce competition into the service provision in the water sector has proceeded on several tracks.

For one, the European Court of Justice (ECJ) which has acquired the reputation of being a pronounced advocate and steward of the EU's integration and market liberalization course has handed down a number of rulings that tended impinge on organizational discretion of local authorities by making them comply with EU public procurement rules (see Marcou 2016a, 22). In the *Teckal* case (of November 18, 1999) the ECJ decided that the local authority is bound to commission a public service to an external provider by way of competitive tendering unless (known as the 'in house' exception) that provider is subject to direct local authority control in a similar way to as an in-house operator. However, in the *Acoser* case (of October 15, 2009 the ECJ) has significantly modified its position by ruling that (nota bene!) in the case of water supply (sic!) direct contracting (that is, without tendering) to mixed (municipal/private) company was acceptable.

Second, a significant norm-setting push came in 2011 when the EU Commission proposed to revise the existing EU procurement rules by introducing a Concession Directive which was meant to make competitive tendering obligatory also for energy and water supply that so far had not been subject to EU procurement. In the ensuing public and political debate the EU Commission' s intention to include water provision in the Concession Directive turned out a particularly controversial bone of contention. On the front line of opposition stood particularly the German local authorities and public utility companies and associations, for instance the influential Association of Municipal Enterprises (*Verband Kommunaler Unternehmen, VKU*) that demanded that water supply should be exempted. The conflict got a wider political and in part ideological dimension as a European Citizen Initiative 'Right2Water' was formed that within a short time gathered up to 1.5 million signatures. Critics and opponents claimed the Concession Directive would foster the 'privatization of water', particularly by opening the door for international water companies that stand ready and poised to make inroads into the national as well as local water markets. After the protracted negotiations conducted among the EU actors the Concession Directive (2014/23/EU)[2] that was approved on February 2 2014 by the European Parliament and the European Council did not include water supply. Thus, at the end water supply has remained exempt from EU competitive procurement rules.

The general impetus of the European Commission to make competition and procurements rules prevail in the provision of public services (in EU terminology: services of general economic interest) experienced a conspicuous moderation and relaxation in the context of the Treaty of Lisbon which was signed by the EU member States on December 12, 2017. In a protocol annexed to the Treaty and sharing its constitutional law status the EU has recognized that the local authorities are given a 'wide discretion… in providing, commissioning

[2] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0023&from=DE

and organizing services of general economic interest as closely as possible to the needs of the users'[3] .In this conspicuous provision the EU has apparently indicated, by letter of EU constitutional law, its readiness to lessen, if not suspending its market liberalization and competition rigour with regard to public utilities ('services of general economic interest') and to accept the local authorities making use of 'wide discretion' in organizing service provision.

Thus, to sum up, the EU Commission (and the ECJ as well) has largely exempted the water sector from competitive procurement rules while conceding the local authorities a 'wide discretion' in deciding how to organize the services.

Federal level

Following the constitutional reform of 2006 the federal level (Federation, Bund) has the legislative competence to comprehensively regulate the water resources. The accordingly amended (federal) Water Resource Act (*Wasserhaushaltsgesetz*) of July 31, 2009 broadly covers the protection of surface waters (inland lakes, rivers etc), coastal waters and ground water. At the same time it transpose the EU W*ater Framework Directive* of October 23, 2000 into national law. Similarly the EU *Drinking Water Directive* of November 3, 1998 has been followed up by the (Federal) *Drinking Water Ordinance (Trinkwasser-Verordnung*) of 2001 (amended in 2006) (see Tiroch & Kirschner 2011, Umweltbundesamt 2017, 39 ff.).

Under the federal constitution (*Grundgesetz*) the (11.024) municipalities (Städte, *Gemeinden*) and, to somewhat lesser degree, the (294) counties (*Kreise)*[4] are awarded and constitutionally guaranteed the right to local self-government (*kommunale Selbstverwaltung)*, that is, the "right to regulate all local affairs on their own responsibility within the limits prescribed by the laws" (article 28

[3] see https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2007.306.01.0001.01.ENG

[4] Figures in 2013, for details of the two-tier territorial structure of local government see Kuhlmann & Wollmann 2019, 100 figure 3.3…

Grundgesetz) (see Kuhlmann & Wollmann 2019, 95 et seq.). In constitutional doctrine and tradition broad competence 'to regulate all local affairs ' essentially pertains to the responsibility and mandate to provide public services to the 'local community' and to organize such services.

For the rest, in line with the federalism-typical vertical division and distribution of functions between the federal and the Länder levels the federal legislation largely refrains from regulating and interfering with the institutional order and organizational matters within the Länder and their 'semi-sovereignty' (Eigenstaatlichkeit). Hence, the legal regulation of the provision of public services lies largely in the responsibility of the Länder.

Länder level

In the constitutions of the (13) federal States (Länder)[5] the right of the municipalities to exercise local self- government (*kommunale Selbstverwaltung*) (and counties) is laid down and guaranteed as well. This essentially encompasses the responsibility and mandate to provide public services to the local community and to organize them.

For one, legal provisions setting out the legal frame of the so called 'm*unicipal economy' (Kommunalwirtschaft)* of which the public utilities are essential part.As stipulated by the legislation individually enacted by the Länder the economic activities of the municipalities, including the provision of public services (in EU terminology: 'services of general economic interest') are guided by a so called 'trias of limits' (*Schrankentrias*), to wit, the locality principle (*Örtlichkeitsprinzip*) (according to which a municipal utility must operate only within the territorial limits of the respective municipality), the subsidiarity principle (*Subsidiaritätsprinzip*) (under which the economic activity can be

[5](plus three City States (Stadtstaaten) that combine Land and municipal functions

operated publicly/municipally unless it can be better/more economically performed by a private actor) and the public purpose principle (*öffentlicher Zweck-Prinzip*) (according to which the operation has to focus on the public/general instead of any other, particularly profit-seeking, interest). Historically and ideally the 'trias of limits' aimed at making sure that the operation of public utilities should not impair the realm of the private enterprise sector.

In the *municipal charters* (*Gemeindeordnungen*) adopted by each of the Länder the municipalities are authorized to pass municipal bye-laws (*kommunale Satzungen*) in which the local citizens and enterprise may be ('coercively') obliged to make 'use' of the municipally provided (drinking) water or to be 'connected' with the municipally provided sewerage system(*Anschluss- und Benutzungszwang*)[6].

Moreover, the Länder passed individual *Local Rates Acts* (*Kommunalabgabengesetz*) which authorize the municipalities to fix the fees (*Gebühren*) to be charged for the use of public services (for instance the consumption of drinking water) or the contributions (*Beiträge*) which, for instance, real estate owners are liable to pay to have their property connected with the sewage system.

Local government level

As authorized by the municipal charter (*Gemeindeordnung*) of the respective Land the municipalities (12.300 in 2017) have the competence of adopting (quasi-legal) municipal bye-laws (*Satzungen)* to regulate certain matters within their respective territory. For instance, the municipal councils pass municipal bye-laws (*kommunale Satzungen*) on water supply and sewerage. In such bye-

[6] By some questioned as a constitutionally problematic infringement on property etc. rights the 'coercive' obligation ('… zwang' sic!) is generally seen justified by its rationale to serve the 'public good' and 'safety and health' at large.

laws, among others, the obligation of local citizens/households (as well as enterprises) is laid down to be make use of the municipally provided (drinking) water supply and of the municipally provided sewerage and waste water management services.

Moreover, as authorized by the local rates acts of the Länder the municipal bye laws may also fix the fees (*Gebühren*) to be paid by the user for (drinking) water consumption or for waste water services. By the same token, municipal bye-laws may define the contributions charged on real estate owners to have their plot connected with the sewerage system (see Umweltbundesamt 2017,41).

3. *The key competence and mandate of the local authorities to provide water supply and sewerage*

As afore mentioned, under the federal constitution (*Grundgesetz*) as well as under the constitutions of the individual Federal States (Länder) the (some 12.300) municipalities (Städte, *Gemeinden*) have the "right to regulate all local affairs on their own responsibility within the limits prescribed by the laws" (article 28 *Grundgesetz*).

In Germany's constitutional and local government tradition the right and political mandate of local self-government essentially encompass the responsibility and mandate provide public services to the local community. Among these water supply and sewerage traditionally loom large. The provision of public services makes the core of the 'municipal economy' (*Kommunalwirtschaft*) which is traditionally considered as a basic element of local self-government (*kommunale Selbstverwaltung*). While in the pertinent Land legislation water supply is assigned as a facultative task of self-government (*freiwillige Selbstverwaltungsaufgabe*), the provision of sewerage

and waste water management is traditionally considered as a 'sovereign' (*hoheitlich*), that is by definition a public/municipal task (see Citroni 2010,194).

Historically this key responsibility of the local authorities dates back to the mid-19th century when, in front of the economic dynamics and social woes of rampant industrialization and urbanizations, the municipalities saw themselves compelled to engage themselves in water supply and sanitation in what was called 'municipal socialism' while the then Manchester Liberalism-minded central governments of the German States largely refrained from such involvement (see Wollmann 2016b, 314-315). In coping with these tasks the local authorities often turned to establishing local units and enterprises. These utilities (traditionally called 'municipal works', *Stadtwerke*) have become and remained a ('path-dependent') defining feature of Germany's local level public service provision.

2.2. *The right and 'discretion' of the local authorities to decide and choose the organizational form of service delivery*

The principle of local self-government (*kommunale Selbstverwaltung*) is traditionally understood to essentially comprise the competence and autonomy (the so called organisational 'sovereign' right, *Organisationshoheit*) to regulate their internal organizational structure. Hence, it is up to them to make the strategic decisions about the organisational of forms and cooperation in the provision of the public services, including water supply and sewerage.

As aforementioned in protocol annexed to the Treaty of Lisbon of December 12,2017 the EU has recognized the 'wide discretion' of local authorities 'in providing, commissioning and organizing services of general economic interest as closely as possible to the needs of the users':

In exercising their organizational autonomy the municipalities act with the legal frames laid down particularly in Land legislation, such as the earlier referred to legal provisions regulating the 'municipal economy' (*Kommunalwirtschaft*).

As was argued above, since the EU Concession Directive of 2014 has exempted the water sector from procurement regulation and as the ECJ judicature (in the *Acoser* case decision) has shied away from applying competitive tendering to water provision the legal impact of the EU on local decision appears scarce.

Particularly the 'locality rule' laid down in Land legislation on 'municipal economy' has a double effect. For one, due to the locality principle the municipalities and their utilities are bound to limit the activities to the territory of the respective community and prevent them to extend their operations outside and beyond. At the same time, the principle shields off competitive 'intrusion' and rivalry from outside which gives the municipal utility concerned a quasi-oligopoly status and turns the municipal area into a kind of 'protected' 'competition-free' local market. On the top of it, because of the usual geographic proximity to the water sources and disposal sites or facilities the municipal water supply and waste water disposal units have a sort of 'natural monopoly'.

2.2. *Types of organizational variance*

The organizational forms among which local authorities may choose in organizing the provision of water supply and sewerage have a broad variance and scope (see BWEW 2015, 18, Umweltbundesamt 2017, 49)[7]. The options include:

- administrative units and personnel operating within the municipality's general ('core') administration (in-house, *Regiebetriebe),*

[7] See for an, in part differing, discussion of the various organizational forms see Krüger 2011, 568-569, Wollmann 2016a, 3-4, Kuhlmann & Wollmann 2019, 214).

- operational units that, while managed separately, remain integrated into the municipality's 'core' administration (*Eigenbetriebe)*[8],
- units or enterprises (utilities) which, while remaining in municipal ownership, are legally, are given a legally, organizationally and also financially separate status. Legally they may be private-law based (as limited, *GmbH*, or joint stock companies, *Aktiengesellschaft*) or public-law based (public organization, *Anstalt*). In the international debate such organizational 'hiving off' of public service provision (and of public functions more generally) has come to be labelled 'corporatization' (see Grossi & Reichard 2016, 297)[9]. In another debate one speaks of 'MOE's' (municipality-owned enterprises). When covering more than one public service (water, electricity, public transport etc.) they are also termed m In another debate one speaks of 'MOE's' (municipality-owned enterprises). When covering more than one public service (water, electricity, public transport etc.) they are also termed *multi utilities;*
- mixed public/municipal – private companies (PPP's)[10] the formation of which is facilitated by the organizational private law variant (in limited or stock companies) facilitates private investors acquiring minority or majority shares to form mixed (public-private companies). A variant of the *mixed company* is the *organisational public-private partnership* (*PPP*) which is made up of public/municipal and private shareholders and can be distinguished from *contractual PPPs* in which the organisation remains in public (municipal) ownership and the involvement of the private investors is based on often complicated contractual arrangements. In a *contractual PPP* a municipality solicits private finance for an

[8] Both „Regiebetriebe" and „Eigenbetriebe" come close to what is called régie directe in France, munipalizzate in Italy and direct labor organiziations in the U.K. In the language of principal agent theory one may also speak of 'internal agencification' (see Torsteinsen & Van Genugten 2016, 207).

[9] In the language of principal agent theory one may also speak of 'external' agencification' (see Torsteinsen & Van Genugten 2016, 207).

[10] For the French variant of *societé d'économie mixte locale*, SEML see Marcou 2016b.

infrastructure project and in many cases private sector companies will also build the facilities and operate the relevant services (see Grossi & Reichard 2016*);*

- the joint institutional 'roof' of 'special purpose associations' (*Zweckverbände*) in which, as a form of intermunicpal cooperation, several municipalities (and their companies), cooperate in service provision (the water associations, *Wasserverbände*, follow a similar inter-municipal organizational logic.

2.3. 'Landscape' of water supply and sewage providers

Based on their right and autonomy of local self-government (*kommunale Selbstverwaltung*) each of the municipalityy each municipality is entitled to decide in principle on its own whether and how to organize the provision of water supply and sewerage for the local community. The multitude of (some 12.300) of municipalities (averaging 5.700 inhabitants) makes for a high territorial fragmentation and organizational variance in water supply and sewerage/waste water management.

Water supply

Water supply is provided by in total 6.065 operational units/enterprises (in 2012, for these and the following figures see BDEW 2015, 31)..

The overwhelming majority of them (some 4.500, that is roughly three quarters out of 6.065) are mostly organized as (often quite small) in-house (*Regiebetriebe*) or quasi-inhouse (*Eigenbetriebe*) municipal entities which applies particularly to rural areas with small municipalities. The comparatively low operational capacity of this (majoritarian) segment of utilities in the water supply sector is indicated by the fact that, while amounting to about three

quarters of all utilities, they provide merely some 22 percent of the entire water volume.

Based on the statistical data on 1.558 enterprises that make up some 25 percent of the total number of water supply utilities and classifying them by the water volume they manage these 1.558 utilities break down in the following categories (see BDEW 2015, 32, UBA 2017, 49):

- 19 percent: in (public law-based) intermunicipal special purpose associations (*Zweckverbände*),
- 18 percent: mixed municipal/private companies, organized mostly as private law based companies (limited or joint stock companies)
- 17 percent: private law-based ('corporatized') municipal companies (limited or joint stock companies),
- 13 percent: public law-based ('corporatized') municipal companies,
- 10 percent: quasi in-house operations (*Eigenbetriebe*)
- 10 percent: public-law based municipal ('corporatized') operational entities (*Anstalten*
- 1 percent: in-house operation (*Regiebetrieb*)
- The high percentage of (public-law based or private-law based) 'corporatized' forms which add up to some 40 percent speaks of readiness of the to make use of operational forms that are legally, institutionally and also financially separate from 'core' administration. In fact, in the course of time 'corporatization' has accelerated (see Grossi & Reichard 2016). Concomitantly the percentage of water supply provided by quasi in-house (*Eigenbetriebe*) and in-house (*Regiebetrieb*) is comparative low (in total about 11 percent) and has been receding.
- The comparatively high percentage of *Zweckverbände* points at the interest and disposition of municipalities to cope with the territorial fragmentation by embarking on intermunicipal cooperation.

- The share (of some 18 percent) of mixed municipal/private companies reflects the fact that private sector companies (particularly internationally operating French and German service 'giants') have entered the local water markets by acquiring (as a rule minority) interests in municipal companies (see below 2.4.).
- The public law-based organizational forms outpaced the private-law based ones (see BDWE 2015, table p. 31) which can plausibly be explained by certain comparative advantages which come with the public-law based status, such as, such as exemption from some taxes (such as VAT), a better credit rating and cheaper loans (see Lieberherr et al. 2016, 256) as well as, due to setting public sercie-type fees, Gebühren', avoidance of competition control ('flight into the fee regime', 'Flucht in das Gebührenrecht') (see below 2.7.).
- It should finally be recalled and highlighted that depending on their size the existing water companies differ enormously in their water delivery capacity. According to available data about 1.6 percent of the water companies (obviously the large companies, municipal utilities, *Stadtwerke*, in big cities) supplied 46,7 percent of the water volume, while 33,80 percent of them (apparently the utilities, *Regiebetriebe* and *Eigenbetriebe* in the multitude of small rural municipalities) delivered just 1.2 percent of the water volume (see Gawel 2016, p. 561 table 2).

Sewerage/waste water management

In the sewerage/waste water management sector the municipalities operate through some 7.000 municipal enterprises (utilities). So in the field of sewerage the 'density' of (often 'extremely small-scaled' (*Umweltbundesamt* 2017, 49) municipal entities (utilities) is even higher than in the water supply sector. As under German legislation the responsibility of the local authorities for sewerage

is legally defined as a 'sovereign' ('*hoheitlich'*), that is public task and mandate the operation and provision of sewerage so far been carried out (almost) entirely in a public organizational form. Broken down by the size of local population connected with sewerage and waste water treatment the (entirely municipal/public) organizational form differs as follows (see BDEW 2015,32, Umweltbundesamt 2017, p. 50 figure 17).

- 35 percent: municipal quasi-in-house enterprises (*Eigenbetriebe*)
- 34 percent: municipal units under the roof of a intermuncipal special purpose association (*Zweckverband*)
- 16 percent: public-law based organization (*Anstalt*),
- 7 percent: in-house operation (*Regiebetrieb*)

2.4. Privatization of water supply

Since the 1990s Germany's water sector experienced the entry of private sector service providers, particularly by international 'giants', such as the French Veolia and Suez as well as the German RWE and E.on.

This process set in and was driven by a number of factors that stood in line with the international development. For one the neo-liberal policy shift which got its first thrust in the U.K. under *Margaret Thatcher*'s Conservative government and spread from there to other European countries was politically and ideologically premised on the belief and promise that private service delivery was superior to the private sector by offering 'better service for less money'. On the top of it, the view to achieve additional budgetary resources by selling public assets to private investors was promoted by the budgetary plight and pressure which in Germany emerged from the costs of German Unification and

generally mounted in the wake of the world-wide financial crisis of 2008 (see Wollmann 2016b, 320 et seq.).

The earliest case of privatization occurred in the East German City of *Rostock* (some 200.000 inhabitants) where shortly after Unification, in 1992, the municipal council decided to sell the public WaterWorks (covering water supply and sewerage) to *Eurowasser*, a French-German consortium in which the French water 'giant' *Lyonnais des Eaux-Dumez* and the German *Thyssen Handelsunion* held 49 respectively 51 percent of the stocks. The municipality's driving motive to sell its assets was its post-Unification financial plight and the expectation that the internationally engaged private sector companies would have the money and skills to make the urgently needed investments while achieving achieve low water prices.

The perhaps the most conspicuous case evolved in 1999 in the *City State (Land) of Berlin* (3.7 million inhabitants, capital of the Federal Republic) when in 1999 the Berlin's parliament and government decided, following international tendering, shares of the municipal BerlinWaterWorks (*Berliner Wasserbetriebe*) to consortium consisting of the French Veolia and the German counterpart RWE, both international 'giants' with a broad portfolio in public services (electricity, water etc.) provision. As the two private investors acquired a total of 49.9 percent of the stocks, while Berlin retained a 50.1 ('golden share') majority the sale was not a privatization in the strict sense but the formation of a mixed public/private company.

In the *City of Stuttgart* (some 630.000 inhabitants, capital of the federal State/*Land* of Baden-Württemberg) the municipal council, in 2002, decided to sell its municipal utility (*Stadtwerk* which provided electricity, gas, district heating as well as water supply) to EnWB, the third largest private sector energy and water company next to RWE and E.on. With a price tag of some 2 billion

Euro it was the largest transaction in the city's history. The concession contract was to elapse on December 31, 2013.

At this point the case of the *Thüga* company deserves being highlighted as well although its main operational field is electricity and gas provision with water supply rather being a side track. Yet the eventful history of the company tells an intriguing and exemplary story on the water supply as well. Founded in 1831 (!) as a municipal company (*Stadtwerk*) it had a changeful development which entered a particularly dynamic phase sinc the late 1990s[11]. The liberalization of the national energy market which was set off by federal legislation in 1998 in the wake of the pertinent EU Directive triggered two different and (in the cases of *Thüga* and *E.on* peculiarly interrelated) trajectories. On the one side, the (neo-liberal) market opening prompted the big private sector energy companies to strengthen up their individual competitive capacity, inter alia, by way of mergers. Thus VEBA and VIAG merged to become the new energy 'giant' *E.on*. On the other side, the municipal utilities (*Stadtwerke*) sought to improve their competitive standing (and avoid being pushed out of the market towards the then foreboded 'demise of the municipal utilities', *Stadtwerkesterben*, see Wollmann 2016b, 317) by also seeking mergers and cooperations.. At this point the *Thüga* company embarked upon a conspicuous expansion course by acquiring (as a rule minority) shares in a growing number of municipal utilities. Thus, by the beginning of the 2000's *Thüga* put together the by far largest net of electricity, gas and also water providers totalling up to 90 municipal utilities. A spectacular junction of *Thüga'*s and *E.on*'s institutional and economic developments took place when in December 2004 E.on decided to become shareholder of *Thüga*. Hence, by becoming a mixed company, Thüga was, in a way, partially privatized.

[11] On the history of Thüga see 'Thüga. 150 Jahre Thüga: https://www.thuega.de/die-thuega/150-jahre-thuega/

The above sketched cases of (wholesale or partial) privatization exemplify a development that gained momentum since the early 1990s and in the course of which in almost half of the largest cities private companies acquired (as a rule minority) stakes in the *Stadtwerke* with the French 'giants', Veolia and Suez and their German counterparts RWE and E.on being the main investors (see Bönker et al. 2016, 76).

2.5. Remunicipalization

In the course of the 2000s a movement towards remunicipalization has set in as municipalities began to buy back previously sold assets or to 're-insource' previously 'contracted-out' services (see Wollmann 2016b, 323 et seq.).

This 'comeback' of municipal ownership and operation is well illustrated by the way when, why and how the above sketched cases of privatization have been reversed.

In the East German City of *Rostock* in 1992, as the earliest case of the privatization of municipal utilitiies in Germany, the municipal water works had been sold to *Eurowasser*, a private sector consortium made up of the French *Lyonnais des Eaux* and the German *Thyssen Handelsunion*. When the 25 years concession contract elapsed, the municipal council in 2013 decided to turn water supply and sewerage back to a municipally owned company (*Nordwasser GmbH)*. The latter was joined by 28 neighbouring municipalities that formed a special purpose (water and sewerage) association. The driving motives of remunicipalizaton were the wish to reduce the water price and to generate revenues for the municipal budgets.

In the City of *Stuttgart* in 2002 the municipal company (*Stadtwerk*) had been sold to the private sector companyr *EnBW* in a contract expiring in 2013. In June 2010 a (binding) local referendum was overwhelmingly approved to remunicipalize the public service provision, including water supply. In

compliance with the referendum the municipal council decided to buy back the assets from *EnBW* following the expiring of the contract in 2013. So the provision of public services, including water supply, has returned to municipal ownership and operation.

In the City State (Land) of *Berlin* in 1999 the Berlin Water Works had become a a mixed municipal/private company as, following international tendering, the French Veolia and the German RWE acquired shares totalling 49.9 percent with Berlin retaining the 51.1 'golden share' majority. In June 2007 a local initiative group called 'citizen initiative Berlin Water Table' launched a referendum procedure under the slogan ' We Berliner want our water back'. After an extended and heated public controversy the (binding) local referendum demanding 'remunicipalization' was held on February 13, 2011 and overwhelmingly approved. Subsequently in complying with the referendum the Land of Berlin repurchased the shares from RWE and Veolia in October 2012 respectively in November 2013. As a result the Land of Berlin is the sole owner of the Berlin Water Works again.

In 2004 the *Thüga* company had undergone a spectacular organisational and economic change as the private sector energy 'giant' E.on acquired a stake in *Thüga.* In 2009, again spectacularly, E.on decided to give up its stake in *Thüga* and to sell its share to a consortium made up of municipal utilities for the price of 2.9 billion Euros[12]. This 'mega' deal of remunicipalization also included the water provision components. The reason for E.on's retreat was, besides shrinking profits extractable from holding shares in municipal utilities, in the pressure exerted by the European Commission and by Germany's Federal Anti-Trust Agency (*Monopolkommission*) that aimed at strengthening competition in the energy sector by trimming the stakes that the international 'giant' companies have in municipal utilities (see Krüger 2011.569). Made up of a network of

[12] For this sequence of events see see 'Thüga. 150 Jahre Thüga: https://www.thuega.de/die-thuega/150-jahre-thuega/

some 100 municipal utilities with a total of 20.000 employees, a turnover of some 20 billion Euro and supplying some 4 million clients with electricity (a smaller contingent with water) *Thüga* has returned to be in the sole municipal ownership.

In a tentative assessment the hitherto occurred process of remunicipalization renders an ambiguous picture.

On the one hand, the aforementioned examples suggest that the process of remunicipalization in the water sector has recently gained traction particularly since the time-limited concession contracts between the local authorities and private service providers have been elapsing. The decisions by the local authorities to take water provision back in their own operation instead of again contracting them out have often been prompted by the local citizen and finally decided by local referendums. Besides the local authorities have been led by the expectation to generate revenues for the municipal budget. As the expiration of many existing concession contracts appears to be imminent and as the European Commission and the federal government are, in order to foster competition, likely to keep up the pressure on the big international providers to withdraw their involvement in the local utilities the process of remunicipalization can plausibly be expected to continue.

On other hand, in tackling remunicipalization the local authorities are facing a number of difficult hurdles. For one, as mostly laid down in the concession contracts, the private sector providers are, at the termination of the contract, entitled to claim financial compensation for the investments done by them during the period of operation. The size of such compensation claims may easily deter municipalities from buying back and rather induce them to renew the contract with the provider or look for another private provider. Moreover, the local authorities may not (any more) dispose of the skilled personnel needed to adequately take the operation back into municipality responsibility and

operation. Not surprisingly so far many concession contracts have, following their expiration, been renewed (see Wollmann 2016b, 324). Hence, the further course of remunicipalization needs to be assessed with caution (see Wollmann 2018, Bönker et al. 2016, 81 et seq.).

2.6. *Cost efficiency and price problems in water service provision and reform approaches*

A critical debate about the cost efficiency and the price level in Germany's water sector has been evoked by a World Bank report of 1995 in which its fragmentation in a myriad of providers and the lack of competition were called out as main cases for these shortcomings (see Gawel 2016, 539).

In discussing these deficits and possible reforms the distinctions needs to be called to mind between the price (*Preis*) and the fee (*Gebühr*) system. The user payment for water supply and waste water disposal are fixed either as (private service type-based) prices (*Preis*) or as (public service type) fees (*Gebühren*). The former ('price') is determined by the respective municipal utility within a private law contract (mostly in close cooperation with the local authority proper), while the latter ('fee') is fixed on the basis of a bye-law (*Satzung*) adopted by the municipal council and hence is a public service-type payment.

As to 'price control' the (private service type) user prices set by the service-providing municipal enterprises (utilities) in principle fall under the (federal) cartel and competition law. Accordingly a user price fixed by an enterprise may be invalidated (by the Federal Anti-Trust Agency, *Bundeskartellamt*, or by the corresponding Land agency) if it amounts to an "abuse" of the market position. Such 'abuse' is affirmed if the price exceeds the production costs 'in inappropriate scale' (Gawel 2016, 542). Although so far the cases in which such 'abuse' has recognized and sanctioned have been rare the competition scrutiny

by the anti-trust agencies likens a "Democlesian Sword" hanging over the price-setting practice and makes the providers wary.

When it comes to the (public service type) fees (*Gebühren*) it should be highlighted that, unlike the electricity and gas (as well as telecommunication) sectors for which by federal legislation a regulatory regime has been established (implemented by and hinging on the federal Net Agency, *Netzagentur* that is in charge of approving and scrutinizing the fees setting process in these sectors), such regulatory system (including a corresponding net agency) does not exist in the water sector. Hence a regulatory check on the fees as defined by municipal bye-laws (*Satzungen*) does not take place. In view of the absence of such regulatory check of fees (*Gebühren*), on the one hand, and the "Democlesian Sword" hanging over the fixing of prices (*Preis*), on the other, the municipalities and their utilities have tended to what was called 'flight into the fee regime' ('*Flucht in das Gebührenrecht')* in order to eschew the 'price'-control (see Gawel 2016, 542).

On the backdrop of the mounting criticism of shortcomings in the country's water sector and responding to a request by the the Federal Parliament (Bundestag) the Federal Government elaborated and published in 2006 a comprehensive 'report on the modernization strategy for the German water economy and for its stronger international engagement' (see Bundesregierung 2006).

Interestingly the federal government refrained from suggesting to establish a regulatory regime to check the fee setting in the water sector although such regulatory system already exists for electricity and gas as other public services. Nor did it propose tightening the competition control on price setting. Thus the federal level obviously prefers to stay aloof from intervening more directly in the provision of water services in the subnational space.

Instead the federal government report focused on and highlighted introducing a comprehensive and transparent benchmarking system among municipalities and their utilities (nota bene: on a voluntary basis) as its key strategy to stimulate competition in the country's water sector.

Moreover in its 2006 report the federal government advised the Länder to amend their legislation on 'municipal economy' (*Kommunalwirtschaft*) by loosening the 'locality principle' (*Örtlichkeitsprinzip)* which would allow municipal utilities to operate also outside their 'native' local territory and so increase competition. By the same token, the federal government critically targets the, in its pointed formulation, 'rigid locality principle' as main hindrance for German water utilities to engage themselves abroad. Furthermore the federal government encourages the Länder to soften the traditional definition according to which the provision of waste water disposal and sewerage was understood as a 'sovereign' (*hoheitlich*), that is strictly *public* tasks and practically 'locked out' outside providers. At this point the government report admonishes the Länder make use of the opening clause already existing in the federal Water Resources Act authorizing them to admit outside (including private sector) providers in waste water management. In sum, the federal government promotes the introduction of competitive elements and incentives in the water sector while tellingly refraining from some more direct federal (legislative) intervention.

2.7 Concluding observation on the state of affairs

Notwithstanding the indicated inefficiencies and shortcomings the service provision in Germany's water sector some, as it were, countervailing positive data deserve being added *(*data from Federal government 2006*)*. Throughout the country drinking water has a high quality. Practically every household is connected with public water supply. The waste water collection and disposal have high standard as well. 95 percent of the households are connected with a centrally operated waste water treatment facility. 94 percent of the waste water

are treated according to the highest EU standard (biological purification level) – as compared to 38.8 percent in England and Wales and 36,3 percent in France. The water loss in public water networks amounts to 7.3. percent - compared to England and Wales with 19.2 percent and France with 26.4 percent and is among the lowest in EU countries,. Water consumption is 127 liters per inhabitant and day and is the lowest in Europe (second to Belgium with 122 liters).

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