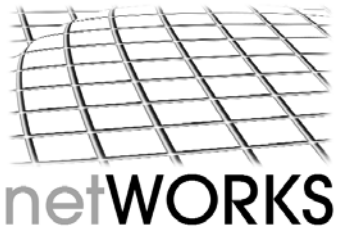

netWORKS-Papers

Number 8: **The Challenge of Securing the Public Interest – Environmental Policy Action in the Ensuring Local Authority in Germany**

Theoretical identification of current pressure points and changes in municipalities

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Imprint

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Introduction

In recent years, the long discussed concepts of “liberalisation,” “deregulation,” and, not least of all “privatisation” have gained in practical urgency and relevance, particularly at the local level. These watchwords, which signal the changing relationship and growing distribution of public functions between the State and the private sector, have meanwhile developed more strongly into instruments of – often undifferentiated – political contention, regardless of whether the desire for “lean government” is at issue or the endeavour to integrate private expertise and, not least of all, private capital in the performance of public sector functions. For some years now, and especially at the local government level, outsourcing and numerous forms of municipal function privatisation have enjoyed increasing popularity as has the organisational development of some cities into “municipal groups.” This points to far-reaching institutional change taking place in German municipalities, which is radically transforming the fiscal and legitimatory basis of towns and cities.

The traditional image of local self-government, in which the municipality is, by virtue of Article 28 (2) of the Basic Law, an all-embracing guardian managing “the affairs of the local community,” has long been superseded by changes in the performance of municipal functions, as functions and services have been entrusted to privatised units or to completely private enterprises as “municipal agents.” In the operative business of municipal environmental protection – particularly in utilities (energy, gas, refuse, water, sewage) – the shift to the private sector is highly visible to both the municipality and local residents. It is accompanied by a change in municipal, i.e., public and democratically legitimated responsibility for performing and/or guaranteeing services. This is not in itself a disquieting development, for the integration of private know-how as well as private capital in times of financial difficulty is to be welcomed in the interest of effective task performance, and is quite usual in various forms of public private partnership (PPP), be it in municipal environmental protection or in urban planning.

Owing to the outsourcing and privatisation of municipal services in utility sectors, (strategic) planning, control, monitoring, and coordination functions in local authorities are becoming more important in comparison to operative service delivery. This is accompanied by a change in traditional notions about the institutions “municipality” and “local self-government.” The outcome of this transformation process remains to be seen. There are opportunities and risks for municipal environmental policy competencies and strategies as well as democracy theoretical risks to the survival of municipalities in their present institutional form. And opportunities for re-politicisation and opening up new universes of discourse are developing. This publication accordingly examines the legitimation of local government activities and changes in the scope for municipal action.

Chapters 1 and 2 describe the externally provoked developments and problems in municipalities and certain topical modernisation and reaction strategies in order to provide a primarily empirical, descriptive overview of the activating factors of and areas affected by institutional change. Chapters 3 and 4 are more analytical in nature. Local self-government in Germany is first of all defined from a formal, constitutional perspective against the background of liberalisation and privatisation trends in network infrastructure

systems. For this development does not “privatise away” the constitutional responsibility of the legitimated decision-makers in local government for “affairs of the local community.” The issue of minimum requirements for privatising municipal functions is raised by the constitutional conditions for such privatisation in the light of the guarantee of local self-government under Article 28 (2) of the Basic Law and the position of municipalities in the structure of the State, and the democratic and political function of local self-government. The concept of “own responsibility” in performing local government functions plays an important role. On the basis of discretionary and differentiation criteria for the privatisation of municipal tasks (mandatory and discretionary self-government tasks), the legal bounds of such privatisation are developed from – so to speak – the “self-government duty” of municipalities under Article 28 (2) of the Basic Law. Following a more democracy-theoretical line of argument, we go on to examine what effects the self-government guarantee has on local authorities with respect to their politico-democratic function for the community.

The changes in municipal tasks and control potential in the field of network infrastructure systems are described and analysed in chapter 4 to illustrate the transformation from a “service” to a “ensuring local authority” (ELA). It is assumed that the transformation processes in municipalities can be characterised as institutional change – from a service to a ensuring local authority. Taking as our point of departure a shift in the understanding of government in the ensuring State, the consequences for a concept of the “ensuring local authority” are then theoretically underpinned for each of the changing dispositions of the public sector, before the changed functions and socio-ecological control resources are discussed on a more operative, practical level, focusing on the example of transformations in network infrastructural sectors in order to trace the bounds of this model.

The Concept of Public Interest

The title of this publication contains the term “public interest.” Its use inevitably raises a number of questions: firstly, that formulated by Offe (2002), who asks Whose interest is the public interest? Then there is the question of the content of public interest (What is the public interest?) and, finally, the question of procedures for determining the public interest. We are primarily concerned with this last consideration.[1]

In the debate on the future of municipal public services, the public interest concept is both central, owing to its strong moral implications, and vague. In a democratic and pluralist society it must necessarily remain imprecise. Ideas and interests differ and societal values and value systems are never absolute but always relative. And individuals and society have a fundamentally limited faculty of cognition, which renders any “objective,” scientific definition of the public interest impossible (Schuppert 2002: 21). Public interest can therefore not be defined a priori. The substantive indeterminacy of the concept permits, indeed imposes a definition of public interest as a political task to be entrusted to democratic processes (Schuppert 2002: 23 ff.), where, in modern pluralistic societies, it is formally

1 Substantive approaches to public interest in relation to the delivery of services for the public are not the subject of this study. The public interest concept is treated as the opposite to particular, sectoral, individual interests, in whatever form.

and procedurally determined (Fuchs 2002: 92). Any such definition can, however, never be more than provisional; the public interest is subject to a permanent imperative of political negotiation. However, the problem with a purely procedural definition of the public interest is that it robs the concept of all content, rendering obsolete its function as a regulative idea for democratic, political action (Fuchs 2002: 100).

A way out of the dilemma between the impossibility of defining the public interest substantively and the lack of standards implied in proceduralised definition is offered by pluralizing the concept: "public interests" (Schuppert 2002: 27 ff.), which can be appropriately weighted and determined in institutionalised procedures. Societal decision-making processes for determining the public interest are, however, not free of particular interests and power influences. It is the task of the State to organise and institutionalise decision-making processes in such a way that decisions on the substantive interpretation and weighting of public interests can be regarded as legitimate and accepted (Schuppert 2002: 35). In the traditional fields of municipal public services, liberalisation and privatisation have brought about fundamental changes in decision-making processes and power constellations. At both the State level, and, as we will see, even more so at the local government level, this poses the challenge of safeguarding the public interest – procedurally and substantively. This study is accordingly also concerned with "formulating explicit normative requirements for a public-interest orientation in changed governmental (in this context municipal) control" (Trute 2002: 332).

Procedure

The purpose of this both analytical-descriptive and theoretical work is to provide a preliminary substantive structure for the "Aid to Strategic Decision Making for Sustainable Infrastructure in Local Authorities" to be produced in the course of the project, and to supply the normative grounding for this product. A further volume to be published in 2005 will offer proposals for the instrumental design of the manual and a discussion of the new institutional arrangements between local council, administration, citizens, and the business community.

A mix of various sources and survey methods has been used in collecting data and empirically substantiating theoretical propositions. On the one hand, published empirical studies were used which to some extent have the status of "grey literature" (probably the most common form). To determine the extent and type of privatisation in municipalities, reports on local authority holdings were analysed in a project-specific empirical survey. To confirm research hypotheses and to obtain indications of new trends and a better defined picture of developments and of interest and actor constellations in typified local authorities, (1) expert workshops were organised, (2) the discussions held at research association / milestone workshops with representatives of field partners and members of the filed advisory council accompanying the project were analysed, and (3) expert interviews (individual and group interviews) were conducted with representatives of the field partner municipalities. Interviewees were selected from three different functional areas of municipal activity: the political level (*Dezernent*: chief of section), departmental administration

(*Amtsleiter/Abteilungsleiter*, head of department), and utilities. Group interviewing and differentiation into three functional actors/categories in a municipality opened a range of perspectives on problems and subject matter and provided data on differing, functionally differentiated experience and strategies in handling the transformation of network-related infrastructure systems.

This work thus relies on the support of many experts. We extend our heartfelt thanks to them and to our colleagues from Difu and in the netWORKS research association, whose critical accompaniment has made the completion of the study possible.

The following report emerged from work in the netWORKS research association. The goal of the project is to study the socio-ecological transformation currently taking place in utility industries. Particular attention is paid to the transformation process in water management. Proposals are being developed on how change can be shaped and guided along a corridor of sustainable development. The main focus is the scope for formative action by local government.

The research projects underlying this publication have been sponsored by the Federal Ministry for Education and Research under the ref. number 07VPSO8A. The authors are responsible for the content of the publication.

1. Taking Stock of Externally Provoked Developments and Problems in German Municipalities

Far-reaching institutional change[2] is currently taking place in German local government, which is radically transforming and sometimes calling in question the economic, fiscal, and legitimatory basis of municipalities. In the first place, external developments and problems affect local authorities and municipal delivery of public services. Such developments include the local government budget crisis, caused by deteriorating macro-economic fundamentals and the impact of structural fiscal policy decisions taken by federal and state governments, as well as the liberalisation, privatisation, and commercialisation of formerly public utility sectors. EU competition policy has opened previously protected public services generally delivered by municipalities, to public and private competition. Finally, local authorities have been particularly affected by demographic processes, which have rendered obsolete the paradigm of growth-oriented urban development and planning.

1.1 Local Government Budget Crisis and Investment Requirements

The financial situation of German local authorities has deteriorated dramatically in recent years. On the income side, the drastic decline in trade tax revenues has had an especially negative impact. With growing welfare expenditures, there is hardly a municipality left that can balance its budget. The situation is all the more critical because the problems are not

2 Cf. Libbe/Tomerius/Trapp (2002) on local authorities; Göhler (1997) on the theoretical grounding of the institution concept and institutional change.

so much home grown as due to superordinate economic and political decisions. This development puts considerable pressure on local authorities to adjust.

1.1.1 Current Situation: The Most Serious Financial Crisis Experienced by German Municipalities

On the basis of financial data for all local authorities and especially for cities, the 2003 Local Government Finance Report shows that German municipalities are in the greatest financial crisis since the founding of the Federal Republic. It is reflected in the growing municipal financing deficit and especially in record shortfalls in municipal administrative budgets, as well as by the inexorable decline in municipal investment (DST 2003a).

The 2003/2004 financial forecast for local government budgets confirm how dramatic the financial situation has become. According to central local authority organisations, municipalities had for the fourth time in a row to accept record deficits, a low in investment, and a strong increase in welfare expenditure. The total deficit for local government budgets in 2003 rose from € 4.7 billion in the previous year to € 9.7 billion. In 2004 a rise of about € 10 billion is expected. In 2003 investment fell by more than 8 % to a good € 21.6 billion. This was more than 35 % or € 11.8 billion below the level of local government investment in fixed assets in 1992 (DST 2004a).

The most important reasons are not negligent spending but dramatic downturns especially in trade tax revenues. The income from trade tax remaining to local authorities after transfer of federal and state governments allocations will be almost 7 % lower in 2004 than in 2000 (DST 2004a). In recent years some cities have suffered a fall of over 50 %. The alarm signal set off by Munich's mayor shows just how problematic the situation has become. In the summer of 2002, Christian Ude declared the Munich municipality to be bankrupt and imposed a budget freeze. According to press reports, all Munich companies quoted in the DAX were making a profit but none were paying trade tax.

1.1.2 Municipal Investment Requirements

The financial numbers issued by the Federal Statistical Office show that about 60 % of public sector investment in Germany is undertaken by local authorities. In a recurring municipal investment requirements assessment,[3] the German institute of Urban Affairs (Difu) has shown that some € 686 billion need to be invested by local authorities during the decade from 2000 to 2009 if the municipal infrastructure is to be maintained or constructed in sufficient quality and quantity to meet statutory or other standards (Reidenbach et al. 2002). The assessment addresses not only the investment needs of all German towns, cities, and counties, but also those of municipal joint authorities, hospitals and enterprises such as utilities.[4] The greatest investment needs (26 %) were in transport (roads and pub-

3 Cf. Reidenbach et al. (1992).

4 It should be noted that these figures are based on a ratio calculated for 1999 and that the study contains no forecast of further "material privatisation" (on the status of outsourcing and privatisation see also chapter 2.4).

lic transport) followed by social infrastructure (19 %), water and environmental protection (18 %).

Owing particularly to the age structure of the infrastructure, especially water supply and sewerage systems, local authorities face enormous challenges (Kluge/Scheele 2003: 9). To meet the need for continuous rehabilitation and maintenance of the German water supply and sewage systems, the federal government estimates that between € 150 billion and € 250 billion are required over the next 15 to 20 years (Heymann 2000: 12). For the public water supply, Difu estimates a required € 29.8 billion and for sewage disposal € 62.8 billion, which, taken together, gives an annual investment of about € 9.26 billion. This money will largely have to be invested in the often century-old, dilapidated pipeline and sewerage networks. These heavy investments will make tremendous demands on local authorities in the years to come.

69 % of the municipal investment needs calculated by Difu concern the old federal states, and 31 % the new states of East Germany. Per head of population, however, almost twice as much investment is needed in East German municipalities than in West Germany. The difference is due in the first place to the continuing backlog demand in the East, but it also reflects the greater holdings of East German municipalities in housing stock. West German towns and cities also require a great deal of investment: more and more urgent is the rehabilitation and modernisation of existing municipal infrastructure. In the first 30 years after the Second World War, considerable amounts were invested in West Germany. Buildings were constructed, streets, sewerage systems, which now have to be modernised or replaced. In the new federal states the results of decades of neglect have to be repaired. Neglecting the existing infrastructure over a longer period will have considerable repercussions for the quality of life and the economic attractiveness of Germany.

Comparing the current level of investment by local authorities with the estimated requirements shows the need for a marked increase in municipal investment, which has been falling in recent years. However, given the present financial situation, local authorities are unlikely to achieve any such increase on their own.

1.1.3 Conditions Outside the Purview of Local Authorities

In order to assess the persistence of municipal budgetary problems, they should be considered in the broader context of their underlying conditions.

After phases of consolidation in the first half of the 1980s and the 1990s (Mäding 2003a), local authorities as a whole entered a third round without having any appreciable reserves to draw on. For many years now, many municipalities have been working with budget consolidation plans, many have been financing the growing administrative budget deficits with cash advances, which accumulate.

The situation is particularly critical because the factors prevailing since the 1980s can hardly be influenced by local authorities. These factors can be treated only in brief (in depth ibid.):

- In the first place there are the effects of *socio-economic trends*: the practical constraints of globalisation increasingly limit governmental scope for action. They tend to lower the macro-economic taxation ratio and make local, erratic tax shocks more likely. Large, transnational groups are particularly successful in achieving maximum tax minimisation for themselves. Moreover, persistently high unemployment weighs on municipal budgets – especially with the increasing slide of larger sections of the population into dependence on social assistance. But it also weakens municipal revenues via the municipal share in income tax. Finally, the links between demographic change (chapter 1.3) and public, particularly local government finances are so far apparent only in outline. The key words in this connection are rising average costs in providing social and technical infrastructure, growing welfare burdens owing to the ageing of society, and the costs of integration generated by necessary immigration.
- In second place are the *general conditions generated at the national and supranational levels*: not only international competition between locations but also institutional deficit criteria (from the state local government statute and Article 115 of the Basic Law to the Maastricht Treaty) limit (federal, state, and local) scope for action. Particularly alarming for local authorities on the revenue side is the fall in trade tax for which higher levels of government bear the responsibility, and government access to the trade tax allocation, from the German Unity Fund to the Solidarity Pacts I and II and municipal participation in the 2000 tax reform (Vesper 2002: 164). Not only have falls in revenue caused by higher levels of government without expenditure relief been burdening municipal budgets for decades but also higher spending imposed by the State without adequate increases in income. Violation of the principle of connexity is rife in social legislation and is reflected “in hundreds of individual rules on standards (from EU environmental standards to the duty under state legislation to provide an equal opportunities commissioner for a certain size of municipality)” (Mäding 2003a: 8).

The future can be expected to bring new burdens. The problem of the level of the municipal share in total inland revenue in comparison with the importance of municipal functions for the country as a whole is exacerbated on both the revenue and expenditure sides. The structural problem of the regional distribution of local revenues in the face of regional expenditure priorities will worsen primarily between economically strong and economically weak regions, between cities and their urban fields, and between large cities and small towns. Nor should the problem of creeping autonomy losses due to European rules been forgotten (Mäding 2003b).

1.1.4 The Status of Local Government Finance Reform in Germany

In March 2002, the federal government set up a commission on the reform of local government finance.[5] Since that date, a wide range of new taxation and financing models

5 Chaired by the federal minister of finance and including representatives of the federal government, state governments, industry, trade unions, and central local authority organisations.

have been debated with great urgency. Only two subjects were chosen from the whole bundle of local government financial problems for the commission to address:[6]

- trade tax reform,
- the merging of unemployment assistance and social assistance for employable persons, the so-called Hartz IV Act.

There are two competing models for reforming trade tax. The first is the so-called modernised trade tax model (North Rhine-Westphalia and central local authority organisations[7]) which provides for a broader basis for taxation and widening the circle of those liable to taxation.[8] The second model provides for the replacement of trade tax by higher income and business taxes accompanied by an increase in the share of value-added tax (Confederation of German Industry/Association of the Chemical Industry model). The majority of the commission opted for a modernised trade tax. But this recommendation was not accepted by the federal government. Instead, a local industry tax was proposed eliminating all elements independent of earnings. Under pressure from local authorities, the government modified this decision to retain old elements independent of income and add new ones.

In assessing impacts, it is important to understand the difference between trade tax payment and burden. Currently applicable law recognises partial offsetting of trade tax against income tax in the case of unincorporated firms. This rule was extended still further in the bill, so that, although with a tax factor under 400[9] unincorporated companies would in fact be liable to trade tax, they would be given relief.

For trade tax reform purposes, model calculations were carried out for 253 municipalities to allow the effects of reform on certain types of local authority to be assessed. The results show that, measured in terms of percentage change, the suburbs of West German core cities and municipalities in the new federal states benefited most under the local government model. The model proposed by the Confederation of German Industry would require core cities to raise their rates for additional income and corporation tax considerably, producing substantial differences vis-à-vis the urban field.

6 What follows is based on a lecture given by Michael Reidenbach at a Difu contact meeting in 2003 (Reidenbach 2003).

7 Cf. Deutscher Städtetag (2003c).

8 With their model for the modernisation of trade tax by widening the circle of taxpayers to include the self-employed and broadening the basis for trade tax to include interest and shares of interest on income from tenancies, leases and leasing rates, the central local authority organisations wanted to ensure that trade tax is more stable and abundant, that the links between industry and local authorities are not weakened, that all economic entities contribute to financing the municipality in which they are located, and that the financing of municipal functions is not shifted to residents (DST 2003b).

9 The tax is assessed on the basis of a uniform basic assessment figure with a percentage (municipal percentage). The municipal factor fixed by the entitled authority is decisive in determining to amount of impersonal taxes (trade tax, land tax A and B) in municipalities. According to the Federal Statistical Office, the average municipal factor for trade tax in Germany was 386 % in 2002. The lowest state average for trade tax factors in 2002 was to be found in Mecklenburg-West Pomerania (314 %), Brandenburg (323 %), Thuringia (335 %), and Schleswig-Holstein (341 %). Of the city states, Hamburg has the highest municipal factor, namely 470 %. North Rhine-Westphalia, where the average trade tax municipal factor was 426 %, had the highest rate among the non-city states, coming before Saxony with 426 %.

The Act for the Reform of Trade Tax agreed in the conciliation committee on 19 December 2003 provides essentially for lower trade tax apportionments. All other reform recommendations were rejected. This should give local authorities relief in the amount of about € 2.5 billion from 2004 onwards. From 2005, this relief will increase to about € 3 billion with a rising tendency. In this way, local authorities are to be given more scope for urgent local investment.

The new tax revenue estimate for 2004 to 2008 confirms the forecast € 2.3 billion in additional income (DST 2004c). Nonetheless, local authorities regard the outcome of the reform discussion as no more than a "drop in the ocean." "The compromises in the conciliation committee on trade tax and on the merging of unemployment assistance and social assistance are completely inadequate to make the cities financially viable again. In spite of the appreciable consequences for the public, the federal and state governments have taken the legitimate demands of local authorities very insufficiently into account," according to chairwoman Roth of the German Association of Towns and Cities in late 2003 (DST 2003c). Meanwhile, the merging of unemployment assistance and social assistance from 2005 on is now considered to be a further burden rather than a relief. Under the original plans, the merger would, the Munich municipality estimates, have left a gap of at worst € 70 million in the welfare budget, according to the mayor (Süddeutsche Zeitung 10 February 2004).[10] After months of negotiations, government and oppositions have now agreed on a compromise in the conciliation committee. It provides for local authorities to receive € 3.2 billion from the federal government from 2005 onwards to meet the cost of accommodating recipients of unemployment benefit II.

1.1.5 Tight Finances as a Permanent Push Factor for (Partial) Privatisation of Municipal Enterprises

The persisting budget crisis puts local authorities under considerable pressure to adjust. The remarkable consolidation course on which local authorities have embarked has been accompanied by a dramatic decline in local government investment. Further cuts in municipal facilities appear to be inevitable. It is not surprising that the political debate is highly emotional. Objectively, many functions have been outsourced and privatised (cf. chapter 2.3). In reality this reflects a widespread sense of helplessness. There are no convincing purely fiscal arguments for the further sale of municipal property.[11] Economic theory offers no satisfying approach to determining the content of municipal action or activities in the

10 All things considered, the German Association of Cities and Towns estimates relief for 2004 at not even € 1.5 billion (with a financing deficit of almost € 10 billion). The announced additional revenue of € 2.5 billion from lowering the share of the federal and state governments in trade tax and other corrections to trade tax has been considerably reduced by bringing forward the tax reform. It was also claimed that reducing the trade tax apportionment did not constitute a reform of trade tax but was merely the long overdue correction of a wrong decision made by the federal and state governments. For this reason local government finance reform would have to remain on the agenda in 2004, as well (DST 2004a).

11 See chapter 2.3. on the reasons for increasing outsourcing; see chapter 3.1. on constitutional requirements and limits.

public interest (Vesper 2002: 172).[12] The dilemma currently facing cities is evident. Not without polemic intention, the mayor of Munich Christian Ude accordingly remarked in 2003 that the easy recommendations published in the economics sections of newspapers to the effect that cities should sell their enterprises were answered in the feature section by claims that the cities were abolishing civilizational achievements (Ude 2003).

It is hence no wonder that local government keeps an extremely wary eye on the impact that the outcomes of European and national competition policy debates can have on the provision of services for the public by local authorities.

1.2 Upper Tier Government Moves towards Liberalisation and Privatisation – "Services of General Interest," and Market Liberalisation in the Current European and International Debate

In recent years, the policies of the EU Commission on liberalisation have increased tension between the market freedoms of the EC Treaty (free movement of goods, capital, and payments, and the right of establishment) as well as the principle of public services, which has been expressly entrenched in the EC Treaty since 1 May 1999 under Article 16 ECT in conjunction with Article 86 (2) ECT.[13] And a broad discussion on the safeguarding of public services serving the general community – in EU parlance services of general (economic and non-economic) interest – has contributed little to clarifying fundamental questions about the status of general interest services in the context of EC Treaty market freedoms and how public interests can be safeguarded under European competition policy – despite the copious documentation produced on the issue, including the Commission Notice on services of general interest in Europe (European Commission 2000) and reports from the European Parliament (Committee on Economic and Monetary Affairs, "Langen Report," October 2001) on this Commission communication and the communication to the Laeken European Council.

In the discussion on the relationship between local services and EU competition law, the associations of municipalities, in particular the Association of Municipal Enterprises (VKU) have placed some hope on protection for municipal enterprises under Articles 16 and 86 (2).EC Treaty. However, most experts agree that the legal implications of Article 16 ECT as a political declaration of intent and appeal for action do not go beyond an objective guarantee for the existence of services of general economic interest (Jung, in: Calliess/Ruffert 2002, Art. 86 Rn. 13; Schmidt 2003: 239). All policy making in the EU and member states must, however, respect the functioning and existence of these services without deriving any concrete political imperative for action. Moreover, the special status of services of general economic interest under Article 16 ECT come to bear when weighing up whether an exception to the Treaty competition rules can be made pursuant to Article 86 II ECT should the full implementation of EU competition law jeopardise the exis-

12 This was also the reaction of a disputant to a paper presented by Libbe/Trapp on "Liberalisation and Privatisation in Utility Sectors. Challenges for Local Environmental Policy," Difu dialogue on The Future of Cities, 18 February, 2004.

13 On the importance of Article 16 and Article 86 II ECT for the delivery of municipal services in the European internal market see Schmidt 2003: 225 ff., especially 230 ff. and 237 ff.; Frenz 2000).

tence of such services. Article 16 ECT, being a norm that allows for no subjective legal positions, cannot offer privileged status to municipal enterprises, i.e., exemption from competition and especially the aid provisions of Articles 81 ff. ECT (Schmidt l.c.; Kämmerer 2002: 1042 f.) The European Court of Justice has, after all, ruled that the power of defining what is to be understood by services of general economic interest under Article 86 II ECT is vested in the member states by virtue of the power of member states to make economic policy (ECJ I 1997: 5699, 5779, 5815, 5834). However, the court regards Article 86 II as providing for an exception to EU competition rules that requires narrow interpretation (ECJ op. cit.: 5778 and 5834), where the onus of proof for the existence of such an exception lies on the member states (ECJ op. cit.: 5782 and 5843). The precondition for exemption pursuant to Article 86 II EC Treaty, namely that "the application of … [the] rules [on competition] does not obstruct the performance, in law or in fact, of the particular tasks assigned to [undertakings]," according to the court, is to be deemed to pertain not when performance is literally impossible but when it constitutes an unreasonable demand. The services do not have to be completely prevented nor the survival of the undertaking entrusted with their performance be in jeopardy. It would be sufficient if it were necessary to safeguard the rights granted to the undertaking so that the delivery of general interest services by the undertaking in question under economically viable conditions is not seriously endangered (ECJ op. cit.: 5699, 5782 f.; see also Papier 2003: 693). In accordance with the exceptional nature of Article 86 II EC Treaty, however, it is unlikely that a claim that EU-wide competition created economically unviable conditions for a public undertaking performing a service – for example, owing to mandatory tendering – would suffice to gain exemption from EU competition law.[14]

1.2.1 The European Commission "Green Paper on Services of General Interest"

On 21 May 2003, the EU Commission published the "Green Paper on Services of General Interest" (European Commission 2003) which had long since been announced. The green paper addressed a number of central, fundamental issues concerning the relationship between competition policy and public services, including:

- Definitions and differentiation of key concepts ("services of general interest," "services of general economic or non-economic interest," "public interest obligations," or "public undertaking"),
- The regulation, financing, evaluation of services of general interest, including the subsidiarity of European rules and the scope available to member states to regulate services of general interest.
- Measures for balancing services of general interest and competition policies in the EU internal market.
- Questions of the European conception and new regulatory instruments for services of general interest and their use (e.g., a general European directive).

14 On further conditions of Article 86 II EGV see Jung, in: Calliess/Ruffert 2002, Art. 86 Rn. 44; Schmidt 2003: 230 ff.

As far as the initially difficult distinction between the concepts “services of general interest, of general economic interest, and general non-economic interest” is concerned, the green paper at least explains that basically three categories of service are to be distinguished for the purposes of EU competition policy:

1. large network industries,
2. other services of general economic interest,
3. services of general non-economic interest

In addition to this attempt to clarify concepts in the confusion of the European context, the green paper provides a catalogue of 30 main questions, listed at the end of each chapter. In this way the Commission sends the ball back into the court of the member states, obviously with the intention of intensifying the discussion between itself and member states on the classification of public services in the framework of European legal policy. In September 2003, the German federal government and state governments issued a joint opinion on the Commission green paper. The national umbrella organisations of local authorities in Germany (German Association of Cities and Towns [DST], German County Association, and the German Association of Towns and Municipalities) have also taken the Commission green paper as an occasion to issue a joint opinion, which was produced in late August 2003 by the National Association of Central Local Community Organisations (2003).

The European Commission classifies network-related economic activities, in particular, as “services of general *economic* interest.” For the water, sewerage, and waste sectors, this means that the EU competition law rules under Articles 81 ff. EC Treaty apply – including the arrangements pertaining to State aid.[15]

On the question of competition in the field of services of general interest, the Commission appears to hesitate between an attitude of “general mandatory tendering for these services” (DG Competition) and “taking special account of services of general economic interest.” No clear line is in sight. However, political efforts, especially by the Directorate-General for Competition, appear to be going in the direction of “general Europe-wide tendering” for economic services that can be delivered not only by public agencies but also by private-sector undertakings.

The Position of the Federal and State Governments on the Green Paper of the EU Commission[16]

In their September 2003 position paper (Cf. Bundesrepublik Deutschland 2003), the federal and state governments welcome the issuance of the Commission’s green paper as

15 For details on the interaction between Article 16 EC Treaty and the rules of EU competition law under Article 81 ff. EC Treaty see Schmidt 2003: 225 ff.; looking at the example of waste management see Frenz 2000: 611 ff.

16 A review of the comments of the federal and state governments and of the National Association of Central Local Community Organisations provides a good overview on current tensions between EU policies and EU law on the one hand and national competencies and local government general interest services on the other.

initiating a process of consultation. They go on to formulate decidedly critical positions in the framework of this process.

- Definition of the regulatory competencies of the EU and member states

  Competence for European regulation in specific sectors should be vested in the EU only with regard to services of general *economic* interest. The EU should be entitled to regulate services of economic interest only if they are of *Community-wide importance* owing to their dimensions and structural interlinkage. The EU has no competence in respect of non-economic general interest services. Moreover, the subsidiarity principle under European law requires that decisions on the definition, form, organisation, and financing of services of general interest within the framework of existing sector-specific arrangements be the responsibility of the competent authorities in the member states.

- Issue of an EU framework directive for services of general interest?

  The issue of a framework directive for services of general interest is rejected alone on account of lacking EU competence, and also because it is considered materially unnecessary.

- Distinction between economic and non-economic general interest services

  The federal and state governments give priority to drawing a clear distinction between economic and non-economic general interest services. Since classification of a service as economic implies the application of EU market freedoms (such as the free movement of goods, the freedom to provide services, and the freedom of establishment), as well as EU competition law and the law relating to State aid, this aspect is of great practical importance. As the legal position now stands, it is to be assumed that a service is non-economic if no profit is to be gained on the relevant market but only the costs of the public service covered. The role of the “intention to make a profit” would have to be clarified with regard to its demarcation. Useful would be a positive list of areas – for example, in social and cultural activities – where it can be assumed that a service is non-economic.

- Clarification of financing and legal issues pertaining to State aid and the award of contracts

  As far as the granting of financial compensation for services of general interest is concerned, it is to be assumed that member states have a margin of discretion. This discretionary power exists in any case for areas which are not subject to specific sectoral regulation under Community law. In this context, the federal and state governments call for a clear European legal framework for the application of State aid rules under Article 88 ff. EC Treaty in the interests of legal certainty. With reference to the recent ECJ ruling on the financing of public transport in Germany (Altmark Trans, C 280/00, judgment of 24 July 2003, published in NVwZ 2003, Nr 9, 1101 ff.) they claimed that it was now clear that certain government compensation payments did not fall within the meaning of the EU State aid concept if they were granted merely to cover the cost of performing

public service obligations. However, specific questions still need to be discussed. They include the modalities for calculating costs liable to compensation and the still unsettled relationship between European law relating to State aid and the award of contracts.

The Position of Central Local Authority Organisations on the EU Commission Green Paper

In their view of the Commission Green Paper, the central local authority organisations in Germany stress subsidiarity, legal certainty, consumer protection, and freedom to define.

According to the German model of government, local authorities are not only national authorities with regulatory and supervisory functions but also direct *providers* of general interest services. Local authorities and their undertakings provide such services in accordance with the model of distributed, accessible services for the public. It is thus a question of providing citizens with locality-related, local services to be provided in principle only within the territory of the authority, and with the local authority being generally restricted to a *ensuring function*.

However, this contradicts the model of the EU Commission, which assumes equitable competition in the provision of services between private and public (municipal) undertakings.

The key local authority demand with respect to the freedom of definition is that, within a uniform European framework, local authorities must continue to be *free to define* local services in terms of quality and quantity and also to *provide* these services themselves or through their undertakings. Not covered by this demand are areas that have been liberalised under EU law (National Association of Central Local Community Organisations: 2).

- Principle of subsidiarity

  This includes above all the demand for local authority autonomy in defining services of general interest.

- Legal certainty

  From the Community point of view, legal certainty also means *investment certainty*. This concerns primarily cases where it is often unclear in practice whether certain municipal services and their financing fall under Community law relating to competition and State aid. Local authority organisations place great hopes in the pending European “guidelines on the application of State aid rules to services of general economic interest” which may lead to an “exemption directive” for certain areas (cf. p. 3 of the opinion).

- Framework directive for services of general interest

  Furthermore, the central local authority organisations point out that they consider a *framework directive* on general interest services to be *unnecessary* for the purposes of

legal certainty. They are more worried about violation of the subsidiarity principle and the risks entailed in European standardisation of local services that require differentiated treatment.

They also clearly rejected the proposal advanced in the European Convention for a future European constitution to provide supplementary competence in Article 16 EC Treaty for EU regulation of the principles and conditions of general interest services. Ignoring the subsidiarity principle could jeopardise the local self-government model (cf. p. 3 f. of the opinion).

- Freedom of definition

  The local authorities demand freedom of definition above all with regard to restrictive rules on the choice of service providers. Without spelling it out, this position clearly aims to achieve dispensation from legal rules on the award of contracts where such arrangements would limit local authority *options for providing services themselves or having them provided by municipal undertakings*.

  Furthermore, the local authority organisations demand freedom to arrange for financing and compensating additional costs for the imposition and performance of public service obligations (cf. p. 3 of the opinion). In this respect they are likely to have had the current discussion on the financing of public transport and municipal utility integration in mind.

The answers of the National Association of Central Local Community Organisations to the individual questions listed in the Commission green paper present concretised positions which provide greater insight into the main points of legal conflict from the point of view of German local government policy (cf. for details: Bundesvereinigung der kommunalen Spitzenverbände 2003: 4 ff.). They can be recapitulated as follows.

- The EU ought to make arrangements for services only where it is justified by a special, economic, Community interest.
  - ⇨ This is the case only for large network industries.
  - ⇨ The EU has no competence with regard to other services of general economic and non-economic interest.
  - ⇨ Article 16 EC Treaty – and para 31 of the Commission green paper – stress the responsibility of national authorities for the functioning of services of general economic interest; Article 16 EC Treaty vests no additional, "active" regulatory competence in the EU; the EU and its Community policies are therefore to be restricted to a "passive, supporting role".[17]
- In the case of services of general economic and non-economic interest that are of only local or regional relevance, EU competition law cannot claim to apply.

17 On this point there is clear agreement with the position of the federal and state governments on the Green Paper, cf. chapter 1.2.2.

- ⇨ A practicable differentiation of services of general economic and non-economic interest is therefore urgently needed.
- ⇨ It would be useful to specify the conditions under which or the cases in which intra-Community trade suffers through services of general interest.
- ⇨ In the view of the German central local authorities organisations, intra-Community trade is not impaired in the following cases:
  - where the activity serves to satisfy local needs;
  - where the activity is limited to the municipal territory;
  - where the activity benefits local residents in their majority;
  - where the specific sphere of action is clearly defined.

- Extending the EU legal framework beyond large network industries is not needed.
  - ⇨ In particular, liberalisation of the water market is to be rejected for reasons of environmental and health protection.

- A general Community framework for services of general economic and non-economic interest is not desirable.

- It is necessary to draw a boundary between services of general economic interest and non-economic interest on the basis of concretising criteria.
  - ⇨ Particularly important criteria in this regard are the lack of intention to make a profit and the predominance of financing from public funds.
  - ⇨ Services in the social, cultural, and educational sectors should not be considered economic where
    - they perform a public function going beyond mere market correction,
    - performance of the task is largely financed from public funds,
    - there is obviously no intention to make a profit.

- It is up to member state to define public service obligations except for large network industries.

- Additional sector-specific public service obligations are not necessary.

- Existing arrangements for network access are sufficient for cross-border services; on the whole, however, a level playing field should be established in member states.

- The undifferentiated application of EU law relating to competition and State aid creates major practical problems for municipal services.
  - ⇨ A purely business administrative comparison between private and public undertakings falls short; aspects such as security of supply, price, and quality considerations need to be taken into account.
  - ⇨ The additional criteria mentioned cannot necessarily be imposed in public tendering processes.
  - ⇨ Tendering procedures entail substantial transaction costs and a great deal of regulatory effort.

- ⇨ Where services are provided by private undertakings, the municipality loses influence and there is a risk of deficient democratic control.
- ⇨ Moreover, there is danger of a loss of quality in oligopoly markets.
- ⇨ Supplementary service for SMEs, in employment and urban development provided by municipal undertakings are lost owing to tendering procedures.

- Legal certainty as to the applicability of the law relating to State aid leads to delays in investment and high transaction costs in local authorities.
  - ⇨ The notification procedure under Article 88 III EC Treaty is too protracted and jeopardizes private investment in municipalities; responsibility for notification should be shifted to member states or to national jurisdictions.
  - ⇨ Local authority allocations should in principle not be State aid subject to notification; the ECJ ruling on public transport (C 280/00 – Altmark Trans judgment of 24 July 2003, published in NVwZ 2003, Nr. 9, 1102 ff.) is welcomed, according to which certain public service compensation is not necessarily to be considered State aid.
  - ⇨ In should be possible to calculate the additional expenditures incurred in providing services of general economic interest by means of a clear procedure.
  - ⇨ Existing Community law requires no interference with existing allocations by means of public contract award procedures; general mandatory tendering – apart from specific, existing arrangements – is not called for under Community law.
  - ⇨ The appropriateness of compensation for services of general economic interest should be measured against usual market costs for such services; these are costs that the undertaking would have charged on the basis of commercial management considerations taking the market situation into account.

- Selective entry ("cream skimming") by individual undertakings into the market for services of general economic interest may risk major consumers being separated off and infrastructure costs increasing substantially for the remaining consumers.[18]

- The evaluation of services of general economic interest should be limited to network services regulated by Community law; in any case, not only economic but also social and ecological criteria should be applied with equal weight.

The Position of the Association of Municipal Enterprises (VKU) on the Commission green paper

It is not surprising that the Association of Municipal Enterprises also prepared an independent opinion (VKU 2003b) on the green paper, for it mainly addresses areas in which municipal undertakings perform services of general economic interest. Welcoming the initiative of the Commission, the VKI makes it clear at the outset that it considers the Commission green paper to address the central social policy issue of the EU, namely the divi-

18 The local authority associations appear to be referring to the well-known problem of "cherry-picking" by large private utilities.

sion of competencies between the EU and the member states, between public and private sectors in the framework of the European model of society.

The VKU's priority interests are equality of opportunity for municipal undertakings in relation to the private sector as well as legal certainty. It also points to other key aspects that need to be taken into account in discussing services of general economic interest:

- services of general economic interest as essential elements in the European model of society
- principle of subsidiarity,
- legal framework at the EU level,
- State aid,
- services of general economic interest and relations with the water sector.

From the start, the VKU states that the transfer of services of general economic interest to private-sector third parties, i.e., the question of "public tenders," is a matter of life and death for municipal utilities. General mandatory tendering procedures are considered to risk driving small and medium-sized municipal undertakings from the market in the course of oligopolisation.

The main answers supplied by the VKU to the questions listed in the Green Paper can be summed up as follows.

- Inclusion of services of general *economic* interest in the catalogue of EU objectives alongside the establishment of the European internal market is seen as logical and desirable.

- No further competencies for services of general economic interest over and above those provided in Articles 86 and 94 in conjunction with Article 308 EC Treaty are considered necessary.

- No EU competence with respect to services of general *non-economic* interest is believed necessary.

- A general framework directive is regarded as superfluous.

- The creation of a Community framework for the water sector over and above the Water Framework Directive is emphatically rejected. The same holds for waste management.

- The VKU proposes the following criteria for distinguishing between economic and non-economic services:
  - ⇨ There must be a market if services are to be deemed economic.
  - ⇨ There must be no urgent requirements (e.g., public interest reasons of outstanding importance such as public health, sustainable operation, environmental protection, and security of supply) opposing the application of market mechanisms; whether

there is an “urgent reason” should be decided from the perspective of the member states.[19]

- With regard to sector-specific obligations, the VKU points to the high level of water/ sewage supply and disposal security in Germany and to the problem of (re)financing infrastructure costs. It sees no need for any action on other sector-specific public service obligations.

- EU competition law is seen as hindering the provision of services of general economic interest by municipal undertakings in various ways:
  - ⇨ Mandatory tendering for services provided in municipal joint authorities could undermine effective forms of intermunicipal cooperation.
  - ⇨ It is expected that general mandatory tendering for municipal infrastructure tasks and for concessions in general would eliminate the municipal freedom of organisation, in many cases preventing the transfer of municipal undertakings, impairing equality of opportunity between private and public undertakings, and affecting the principle of the neutrality of property systems entrenched in EU law.
  - ⇨ The notion of “inhouse business” not subject to tendering procedures should be further developed.
  - ⇨ Local authorities must be allowed to choose whether they wish to have a service provided by a municipal undertaking or by a private-sector third party. If this is not the case, the local authority would be reduced to exercising a “ensuring function” incompatible with the guarantee of self-government model.[20]
  - ⇨ Without equal opportunities for municipal undertakings in competition, a check to the formation of monopolies and oligopolies would be eliminated.

- European benchmarking would have to include not only purely economic criteria but also customer and performance-related qualitative and ecological criteria.

- On questions of financing, the VKU points to the opinion issued by the central local authority organisations, stressing that public-sector allocations in compensation for public interest additional costs were not subsidies or State aid; the “appropriateness” of compensation was to be calculated on the basis of usual market prices or comparable payments, taking account of commercial management considerations and the market situation.

- In a strikingly comprehensive statement on the subject of “evaluation” – possibly attributable to the German modernisation discussion – the VKU states that

19 The VKU appears to have in mind the similar problem of Article 86(2) EC Treaty – exemption from the competition rules of the Treaty if they prevent or substantially jeopardise the performance of services of general economic interest. See above introductory chapter 1.2.

20 This diverges from the position of the central local authority organisations, who see the core task as being to provide citizens with community-related local services delivered within the municipal territory, the local authority being normally restricted to the role of guarantor (cf. chapter 1.2.3).

- evaluation should be entrusted to a neutral party,
- it should be coordinated with national evaluation bodies,
- European and national evaluation criteria should be harmonised,
- data relating to competitive opportunities and trade secrets should be treated as confidential,
- in water supply, the aspects security of supply, drinking water quality, consumer and environmental protection, health care, and general acceptable charges should be prioritised.

Comments on the opinions of the local authorities organisations

The opinion of the National Association of Central Local Community Organisations provides a clear, up-to-date overview of the many ways in which the traditional areas of municipal activities in the field of public services are affected by EU competition policy and the related rules in the EC Treaty and secondary EU law and have even been substantially modified in areas relevant for competition in the EU internal market. This being the case, it is hardly surprising that the local authorities organisations wish to fend off the danger of European competition policy that is encroaching more and more on local government functions, at least in Germany and Austria, holding out in the “last bastions” of municipal services erected against EU-wide competition.

Local authority associations appear to be in fundamental agreement with arguments about EU competencies in the field of services of general economic interest, and with the position the federal and state governments on the Commission green paper. In areas or sectors where cross-border competition in the European internal market cannot be seen to play an important role, the principle of conferred powers of the EU (cf. Schwarze 2000, Article 5 point 7 ff.) and the subsidiarity principle expressly anchored in the EC Treaty mean that the Union cannot regulate services of general economic interest unless it is granted specific competence to do so under the Treaty. This applies with regard to services of general economic interest whose relevance is restricted to the local or regional territory, and to services of general non-economic interest. As far as the latter are concerned, it would indeed promote legal and investment security in local government if a positive list of areas were to be drawn up which are not subject to European competition law, and accordingly not under the law relating to State aid because irrelevant for internal market competition.

In questions of competition, however, the comments of the local authority organisations also make it clear that what is at stake is not only the municipality as a territorial authority providing public services, but increasingly the position of municipal undertakings which have long performed municipal functions in protected monopolies. A certain defensiveness on the part of municipal enterprises and their representative organisations is understandable, for they are risking everything. If according to most state local government statutes the economic activities of local authorities is in any case normally limited to the

municipal territory[21] – whereas in practice the situation is often different owing to lucrative supra-local business opportunities and tolerant municipal supervisory authorities – the loss of a municipal contract in competition can mean the economic end for a municipally oriented undertaking. Meanwhile, there are doubts about exempting certain public services at the local level as far as possible from application of EU competition law and from the law relating to State aid and the award of contracts. By definition, it is understandable that intra-Community trade would not be impaired if a specifically defined activity satisfies local needs, is limited to the municipal territory, and benefits the majority of local residents. But it is doubtful whether the demand for exemption from all EU State aid arrangements can be maintained in the future development of the law – even in sectors like utilities where, to ensure transparency in EU-wide competition, tendering procedures for contracting authorities including the publicly controlled undertaking are mandatory once certain thresholds are exceeded. Any such demand can be made basically only for services of general economic interest whose relevance is restricted to the locality or region and for services of general non-economic interest in, for example, the social and cultural fields.

This is also true for the demand that local authority allocations to municipal undertakings should not be classified as State aid requiring notification. If services are offered in competition with private undertakings in the European internal market or beyond, it is difficult to justify any demand to exempt these activities from the rules on State aid.

Overall, the position of the local authorities organisations – especially the VKU – continues to be one of marked scepticism towards the instrument of public tendering procedures. There is no denying the danger that tendering procedures could prove a pseudo-instrument in transparent and fair competition if after a certain time private oligopolies form, which may thwart the sense and purpose of tendering procedures – to ascertain the best offer in competition – through cartel-type agreements. Nevertheless, practice shows that criteria like “quality and price of service” and “security of supply” can very well be formulated in tender specifications. Particularly as regards technical environmental standards, it is now generally recognised and confirmed by national and European case law that they may be included in the specification of services without constituting inadmissible “extraneous criteria.”[22]

The loss of local authority influence through the transfer of functions to private agents depends very much on the extent to which the local authority has reserved control options to itself for tendering procedures and terms of contract and how urgently it enjoins the contractor to exercise self regulation. Sanctions in the event of unsatisfactory service delivery play an important role in this respect. Otherwise, in most municipalities, the monitoring and control of municipal companies is not yet so advanced that local politics can no longer be accused of exercising inadequate control.

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21 Amended state local government statutes, like those in Bavaria, North Rhine-Westphalia, and Saxony-Anhalt, now permit cross-municipality activities in agreement with neighbouring authorities and, as in North Rhine-Westphalia and Saxony-Anhalt, even allow activities abroad with the permission of the municipal supervisory authorities.

22 For example in public transport, ECJ C-513/99, judgement of 17 September 2002 – Concordia Bus Finland –, point 53 ff., published in NVwZ 2002, 1356 ff. = ZUR 2003, Heft 4, 32 ff.; for detailed treatment of the subject see Cremer 2003: 265 ff.

The demand of the VKU generally to exempt forms of intermunicipal cooperation in joint authorities from mandatory tendering has recently become of much greater practical relevance. The EU Commission has recently judged the transfer of sewage disposal in the Lower-Saxony municipality of Hinte to a water association not to be a purely administrative measure but a service concession for which, in accordance with the EC Treaty principles of transparency and non-discrimination, a reasonable degree of publicity in the interests of market opening and competition must be ensured (cf. DStGB AKTUELL 1404-07). In June 2004 the Commission issued a reasoned opinion calling on the German government to desist from infringing the Treaty, which means that the second stage in the preliminary proceedings for infringement proceedings under Article 226 EC Treaty was reached.

In addition, the Düsseldorf higher regional court has recently ruled on a complaint filed by a private firm that an agreement under public law between two local authorities concerning refuse to be collected by the one on behalf of the other is subject to the provisions of the Act on Restraints on Competition relating to the award of contracts.[23] This threatens to seriously limit the scope for local authorities to cooperate in municipal economic activities. If this view is confirmed by other contract award appeals divisions, the question will become increasingly urgent as to what intermunicipal scope remains to local authorities in the field of public services subject to market rules, especially in the light of the constitutional guarantee of local self-government under Article 28 (2) of the Basic Law. In effect, local authorities must continue to be able to cooperate across their borders in economically and ecologically useful ways and in the legal forms provided for under state legislation on joint authorities. However, this becomes problematic when, for example, a service provider can make a competitive offer that is more economic for the contracting authority and its residents. Moreover, in tendering procedures, the requirement of supra-local, intermunicipal cooperation – and hence the advantages that a joint authority solution can offer – could be one of the decisive quality criteria in the specifications. In the light of Article 28 (2) of the Basic Law, it would be extremely questionable if the obligation to call for tenders were able to undermine economically and ecologically useful intermunicipal cooperation and, from the point of view of the legitimated local policy makers, to reduce the options for forward-looking cooperation in the region to a minimum . This raises fundamental questions about the relationship between national and European law and constitutional law (guarantee of self-government under Article 28 (2) of the Basic Law “within the framework of the laws”). In particular, it must be asked whether the European law relating to the award of contracts as implemented by the national Act on Restraints on Competition does not have too great a negative impact on a core area of intermunicipal organisational powers.

However, given the legal fact that municipalities and municipal undertakings become subject to the law relating to the award of contracts as contracting authorities upon reaching the thresholds set by the EU, the freedom of organisation is not eliminated per se. In the choice made by the local authority – subject to competition law – it is still possible to award the contract to a municipal undertaking, and in practice this is still always done. Ob-

23 OLG Düsseldorf, Beschl. v. 5.5.2004 – Verg 78/03.

jectively, the model of local self-government according to Article 28 (2) of the Basic Law does not require the municipality or its undertakings to provide services themselves. What is crucial is that adequate local public services are delivered in the interests of citizens. The thesis that a truncated “ensuring role” for the municipality is simply incompatible with the self-government model guarantee and hence unconstitutional is thus untenable. This is clearly the view taken by the National Association of Central Local Community Organisations, which rightly points to precisely this ensuring role of the municipality as one of its essential functions with respect to services for the public delivered by both the public and private sectors.

However, there is just cause for alarm about so-called “cream-skimming,” selective market entry. In the energy sector, for example, “cherry-picking” has indeed led to major accounts being charged much less than minor consumers. The danger that infrastructure costs could rise substantially for the remaining consumers would, however, not arise if appropriate regulation made it clear that small consumers also have a real choice and have to be served by supplies entering the market (legal obligation to provide services to consumers on request).

There remains the crux of a risk not be underestimated of private oligopolies forming through intensified competition, which, not least of all because of tighter public funds, is driven essentially by price. It is the responsibility of local authorities themselves in their duty towards the public to formulate and lay down longer-term quality criteria in their invitations to tender – what counts is the economically most acceptable offer and not the lowest. On the other hand, greater responsibility will be imposed not only on the cartel supervision authorities but also on the award chambers of procurement review authorities and the civil courts in the context of procurement complaints not to decide on the award of contracts purely in terms of cost but also to give lasting weight and validity in competition to qualitative, for example ecological aspects as demanded by the contracting authority There is meanwhile little doubt that municipal undertakings in the utilities sector, too, have no choice but to accept Europe-wide competition (which most have done and, as in the liberalised energy industry, successfully), nor that the trend in the EU towards tendering procedures is irreversible. As regards public transport, experts also agree that insisting on island solutions means losing time and options for action, and that it is preferable to prepare to face competition. To this extent, demands for the further development of inhouse business not subject to tendering procedures are questionable. The vague criteria governing it have mainly generated legal uncertainty and currently await clarification by the European Court of Justice. For, in the medium and long term, the EU is more likely to restrict than expand the possibilities for in-house awards. On the other hand, the municipal undertaking would welcome clear criteria for in-house awards to compensate the restrictions imposed by the locality principle and commitment to a single customer or contracting authority, its “home” municipality.

1.2.2 The European Commission "White Paper on Services of General Interest"

After the comprehensive consultative process on the green paper,[24] the Commission of the European Communities adopted the anticipated White Paper on Services of General Interest on 12 May 2004, recording the conclusions from the debate and describing how it sees its future role in the development of high-quality services of general interest (cf. European Commission 2004b). The Commission focuses on a strategy to ensure that all citizens and enterprises in the Union have effective access to high-quality and affordable services. It points to the responsibility of public authorities for defining public service missions at the level of the member states. Otherwise, the Commission does not consider it necessary to give the Community additional powers in the area of services of general interest to ensure the proper functioning of these services. Apart from comments on the importance of services of general interest for the European model and for ensuring social and territorial cohesion, the responsibility of public authorities for the provision of general interest services is stressed (chapter 2 of the white paper). In accordance with Article 16 EC Treaty, the Commission sees the Community as sharing responsibility with the member states for ensuring that their policies enable operators of services of general economic interest to fulfil their missions. It is primarily for the relevant national, regional and local authorities to define, organise, finance and monitor services of general interest. However, member states should pay attention to the increasingly complex tasks of the regulatory authorities and provide them with all necessary instruments and resources.

As the outcome of the green paper consultation process, the Commission defines a number of guiding principles for future policy (chapter 3 of the white paper). It stresses the need to establish the conditions for citizen-focused public regulation strictly respecting the subsidiarity principle and makes proposals for sector-specific regulation in areas that, like large network industries, clearly have a Europe-wide dimension. The goals of an open, competitive, internal market and access for all citizens and enterprises to high-quality and affordable services of general interest are seen as compatible. Universal services are regarded as a key concept, providing for a certain standardisation of services. In future, the Commission wants to see a high level of consumer and user rights that enable physical safety, security and reliability, continuity, high quality, choice, transparency, and access to information from providers. In the view of the Commission, the implementation of these principles requires the existence of independent regulators with clearly defined powers and duties. They should include powers of sanction to monitor the transposition and enforcement of the universal service concept, and provide for the active participation of consumers and users. Furthermore, the Commission remains convinced that systematic evaluation and constant monitoring are essential to maintain and develop accessible, high-quality, efficient, and affordable services of general interest in the EU. Despite the emphasis placed on the subsidiarity principle, with local authorities performing a ensuring function, this clearly demonstrated the Commission's intention to coordinate and interconnect national, regional, and local regulation more strongly.

24 The outcomes of the consultative process were comprehensively documented and analysed by the Commission (cf. European Commission 2004a).

As far as the thrust of Commission policy and the regulatory framework are concerned, the following points are important with regard to legal certainty, financing, and the awarding of contracts at the local level:

- Attaining the objectives of public services in competitive, open markets

  The Commission interprets the pertinent Article 86 (2) EC Treaty to mean that the effective performance of a general interest task prevails, in case of dispute, over the application of Treaty rules. But missions are protected rather than the way they are fulfilled. In this regard the Commission again points to the competitive objectives of the European Union and especially to the need to ensure a level playing field and transparency for all providers and the best use of public money.

- Respecting diversity of services and situations

  The Commission makes it clear that the proposal for a Directive on services in the Internal Market only covers services that correspond to an economic activity. Furthermore, certain activities which may be considered by member states to be services of general economic interest are excluded from the scope of the proposal, such as transport, postal services, and electricity, gas and water distribution services. The proposed directive neither requires member states to open up services of general economic interest to competition nor does it interfere with the way they are financed or organised.

- Adoption of a framework directive

  The Commission does not consider it useful to present a framework directive, since it is not clear what added value such a directive would offer, so that none is envisaged for the moment. However, the issue would have to be re-examined once the Constitutional Treaty has come into force with the new legal basis for services of general interest (Article III-6 of the Convention draft provides for a European authorisation bill). However, the Commission intends to step up its efforts to ensure “full consistency” (chapter 4.1 of the white paper) in the area of services of general interest. A report is to be submitted on the subject before the end of 2005.

- Clarifying and simplifying the legal framework for compensation and public service obligations

  In view of the considerable legal uncertainty which had been pointed out, the Commission proposed public funding should be exempt from the obligation of prior notification as long as it is proportionate to the actual costs of the services and certain thresholds are not exceeded. This should apply in the sense of exemption from the obligation of prior notification especially for compensation paid to local providers of services of general economic interest. Compensation which exceeds certain thresholds will have be notified to the Commission. In addition, a Community framework that sets out the criteria for assessing compensation granted for services of general economic interest.

- Providing a transparent framework for the selection of undertakings entrusted with a service of general interest

  The Commission makes it clear that providers of services of general economic interest, including in-house service providers, are undertakings that are subject to the competition rules of the Treaty. The unsettled questions concerning financing and State aid, as well as issues of compulsory tendering are to be addressed separately. With respect to State aid, the Commission refers to the rulings of the ECJ (especially the Altmark case) and to the planned Community framework for State aid. With regard to tendering questions, the new directives on government procurement (Directive 2001/18/EC of 31 March 2004 relating to the coordination of procedures for the award of public works, supply and services contracts and Directive 2004/17/EC of 31 March 2004 relating to the coordination of procedures for the award of contracts in the water, energy, transport and postal services sectors, OJ L 134 30 April 2004) and the consultation on the Green Paper on public-private partnerships and on Community law on public contracts and concessions (cf. Europäische Kommission 2004c and chapter 1.2.3 below) are to be taken into account.[25]

- Reviewing sectoral policies

  In addition, the Commission plans to review sectoral policies. As far as the water sector is concerned, the Commission intended to publish the results of the assessment it has undertaken before the end of 2004; the liberalisation of this sector is accordingly still on the agenda.

As indicated by the “key issues” of the debate stressed by the Commission, the white paper is just as unlikely to assuage the fears of local authority organisations about further competence drain or uncertainty about the definition of economic and non-economic services, as well as unsettled issues concerning the scope of EU competition law. The political decision-making process is by no means concluded.

1.2.3 The Green Paper on public-private partnerships and on Community law on public contracts and concessions[26]

Local authorities and their undertakings had awaited this green paper with particular interest, for they hoped the Commission would clarify the issue of mandatory tendering in an endeavour to integrate private partners. On first perusal, however, these hopes seem to have been in vain, because the paper adds nothing new.

On the basis of certain features which the Commission considers to characterise a public-private partnership (PPP) without providing a Community-wide definition – a long duration

25 In the Green Paper on public-private partnerships and on Community law on public contracts and concessions published on 30 April 2004, the EU Commission raises the issue of whether Community law on public contracts and concessions ought to be amended in view of the development of public-private partnerships. Public consultation continued until 30 July 2004, so that the results could not be dealt with in this publication.

26 Europäische Kommission 2004c.

of the relationship, essential public sector objectives and control, and the distribution of risks between partners – the green paper focuses on the law on public contracts and concessions relevant for PPPs.

Essentially, the Commission distinguishes between "PPP on a purely contractual basis," i.e., PPPs based solely on contractual links between the different players (point 21 of the green paper), and the so-called institutionalised PPPs, i.e., PPPs that are put in place by creating an entity held jointly by the public partner and the private partner (point 53).
The Commission makes it clear that the selection of a private partner by awarding a "concession" (definition under point 9 ff.),[27] and in particular municipal "service concessions," are subject to certain procedural requirements. Even leaving aside the applicability of certain directives on the award of contracts, Articles 43-49 of the EC Treaty and the principles of transparency (especially public notification of the project), equal treatment, proportionality, and mutual recognition are to be respected. The ECT has ruled (cf. case C 324/98 Teleaustria) that advertising must be sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed (point 28 ff. of the Green Paper). In view of the difficulty of drawing a line between public contract and service concession, the Commission is apparently considering adopting a draft directive on procedure or even homogeneous rules for all PPP projects (points 34-36).

For the phase following selection of the private partner by the public sector, the Commission places value on the principle of transparency with regard to the contractual arrangements for assessing risk, evaluating performance, and on the duration of the partnership (point 44 ff.).

As for institutionalised PPPs, the Commission pays particular attention to the legal aspects of awarding contracts with regard to a so-called ad hoc entity (point 57 ff.). This refers to cases where a new quasi-public entity is set up. The Commission points out that EU law relating to the award of contracts applies if the functions are awarded to this entity by an act that can be designated as a public contract of concession. Over and above the private sector financial interest, the Commission calls for clear and objective criteria for the contracting authority in selecting the most economically advantageous tender, so that a private partner can be selected without breaching Community law. The principles of transparency and equal treatment are explicitly stressed (see also point 61). In a footnote (note 51), the Commission recalls that EU public procurement law also applies if a task is awarded by unilateral act, for example, a legislative or regulatory act. This point raises considerable doubts, since it is unclear what legal instruments are meant, whether administrative organisational decisions are included or not, what defining criteria are to apply, etc. (see above the current problem of intermunicipal organisational forms and the applicability or non-applicability of public procurement law).

The Commission once again points out that public sector participation in a PPP provides no exemption from EU procurement law. The Teckal ruling of the ECJ (case C 107/98)

27 With reference to the Commission Interpretative Communication on Concessions under Community Law, OJ C 121, 29.4.2000.

supports this interpretation of the law as regards the exemption of inhouse awards, leaving the definition of inhouse award as vague as before (point 63 f.).

Finally, the Commission points out that the principles of transparency and equal treatment require that other potentially interested parties be given an opportunity to perform activities even where a PPP has been entirely taken over by a private economic operator by means of a transaction involving a capital transfer. Circumvention of EU law by capital transfer and subsequent transfer of functions is not permitted (point 67 ff.).

1.2.4 Services of General Interest and the Liberalisation of Markets under International Trade Agreements (GATS)

It remains to be seen how much pressure current negotiations at the WTO level on the "General Agreement on Trade in Services" (GATS) will exert towards liberalising traditional local authority areas of responsibility. GATS provides for the mutual opening of certain services at the international level, not yet compulsorily but likely to be agreed by negotiation (e.g., between the USA/EU and developing countries). Water supply and sewage disposal are also mentioned in this context.

From a legal point of view, it should be pointed out that the GATS does not lead per se to the liberalisation of trade in services, but that WTO member have to open up to international markets under so-called specific commitments. In principle, WTO member states are free to determine the degree of access for services from other WTO countries. They can make market access subject to specific provisions, restrictions, and conditions (details Pitschas 2003: 676 ff.).

Local authorities organisations are watching the development of the GATS closely and with concern. The negotiator for European member states is the European Union. Some quite pessimistic scenarios have been drawn up predicting certain restrictions on municipal action. First legal opinions on the effects of the GATS rounds on public services are cautious. On the one hand, it is pointed out that governmental areas of action are not subject to the GATS and that there is no compulsion to privatise public undertakings. On the other hand, more intensive competition is considered possible as a consequence of opening up relevant public service[28] sectors (Pitschas 2003: 687). In any case, it is up to WTO member states to regulate both the "whether" and the "how" of market opening and the supply of services in their territory. The development of negotiation strategy will thus determine whether the concern expressed by local authorities organisations is justified or not.

28 The uncertainty is surely also caused by terminological confusion. The GATS does not contain the terms "services of general interest" or "public services." It speaks of services supplied in the exercise of government authority. This is a broad definition, since there is even greater terminological chaos at the global level than in the EU. In general it means that the GATS does not apply for such government services. But what services are to be defined as "governmental" is highly controversial. The following questions are decisive: Is there competition? Are commercial objectives pursued? If the answer to one of these questions is Yes, the services are no longer governmental for the purposes of the GATS. Therefore all "services of general interest" or "public services" cannot be exempted under the GATS (Hauer 2004).

The National Association of Central Local Community Organisations and the VKU, commenting on the Commission green paper, consider it necessary to maintain the present distribution of competencies between the EU and member states and want the Commission in the course of trade negotiations to prevent expansion of the status quo in the EU – for example with regard to the liberalisation of water supply. Otherwise, they call for comprehensive transparency in negotiations, including parliamentary control to ensure the legitimation of the outcome. The federal and state governments also insist in their opinion that member states of the EU are in principle free to exclude certain sectors from GATS negotiations, especially if the opening up of these areas to competition would jeopardise the quality, availability and affordability of these services. This includes the power to retain services of general interest as a private or public monopoly.

The EU Commission takes note of member states' concerns in the White Paper on Services of General Interest (pp. 25 f.) and promises to continue to ensure that the positions taken by the Community in international trade negotiations will be fully consistent with the EU's internal regulatory framework regarding services of general interest.

1.3 Demographic Change and Shrinkage Processes

A third externally provoked development that largely escapes municipal influence is demographic change and the concomitant shrinkage processes. The process began as long ago as the early 1970s with a strong decline in birth rates, and will result in shrinkage throughout Germany. The phenomenon of shrinking cities has existed in (West) Germany since about the mid-1980s, but demographic decline set in initially in regions with old and dying industries like coal, steel, and shipbuilding (Ruhr District, Saarland, Bremen). The process was thus not induced by demographic developments. The causes were primarily economic. The initial confinement of the problem to certain localities and regions meant that the issue was addressed politically only in a limited time and space framework and primarily from an economic point of view.

It was not until the structural upheaval in the East German states that the subject came to be seen in the national context, becoming a major urban development issue. Only when the problem had taken on such dimensions that it could no longer be denied (cf. Göschel 2003: 75) did the political authorities react with the "City 2030" programme of the Federal Ministry for Education and Research (BMBF),[29] and the programmes "Urban Redevelopment East"[30] and "Urban Redevelopment West"[31] launched by the Federal Ministry of Transport, Building and Housing (BMBW). Over the next two decades, demographic decline will also successively impact most West German cities, developing into a nation-wide phenomenon.

This being the case, the technical infrastructure is often oversized and has to be adapted to reduced needs. This will be expensive for local authorities, which are already in financial straits. Conflicts of interest arise among the actors involved in the adjustment process

29 Cf. www.stadt2030.de
30 Cf. www.schader-stiftung.de/Wohn_wandel/86.php._
31 Cf. www.stadtumbauwest.info/index1.html

(local politics and administration, utilities and housing companies, private citizens and private enterprise) that can be resolved only by constructive cooperation.

1.3.1 Demographic Developments and Local Authorities

Demographic developments affect all levels of government in the federation, but they have a particular impact on the local level because a declining population and an ageing society make themselves felt “where the people live: in the towns and cities” (Schmidt 2002: 5).

Four primary processes underlie demographic change (Mäding 2003c: 7), which can differ from municipality to municipality:

- *Natural population development*: in some West German communities there is still an excess of births over deaths whereas East German communities record a general excess of deaths. However, in the coming decades the trend is towards general death surpluses in West Germany, as well.

- *International migration across Germany’s borders*: Germany as a whole is likely to continue to show a net gain, but exact figures are difficult to obtain for individual communities. As in the past, large cities and agglomerations are likely to continue to receive most migrants (Mäding 2003c: 4).
- *Extensive internal migration*: the most important such process is East-West migration, which has again been rising since 1997 to the disadvantage of East Germany.
- *Suburbanisation:* in the years to come, continuing suburbanisation can be expected in East and West Germany if appropriate countermeasures are not taken.

East German cities are shrinking for three, parallel reasons: progressive suburbanisation, outmigration by mainly younger people to West Germany, and an excess of deaths over births. Only international migration has been bringing people into East German cities, but not at a rate to compensate the other processes (Göschel 2003: 75). While the picture is largely uniform in East Germany, the situation differs from city to city in West Germany.

The shrinkage process engenders challenges for almost all areas of local policy. Demographic change is therefore a central framework condition for local authority action (Mäding 2003c: 5). In housing policy, strategies need to be developed to deal with vacancies, to maintain the attractiveness of residential areas, and prevent cities from disintegrating. One possible option, especially for the social infrastructure, is to maintain a “short-distance city” for residents by concentrating development in the urban core.

Other problem areas include the decline in property prices owing to vacancies and the lack of skilled labour, which makes the city less interesting for the establishment and expansion of business and industry (Göschel 2003: 76).

Moreover, there is less demand for administrative services in all areas, from the registry office to the residents’ registration office. Only from an ecological point of view could cities experience relief owing to the increase in green areas due to demolition and decreasing

traffic. However, this will not compensate for the other burdens. Well-founded recommendations on how local authorities can deal with the problem of demographic decline have not yet been developed (Schmidt 2002: 13).

1.3.2 Current Figures

Demographic Developments in Germany

The birth rate of 2.1 children per women necessary for Germany to reproduce its population has not been attained since the early 1970s. Since then it has, with slight fluctuations, been 1.4 children per women in West Germany, so that only two-thirds of the parents' generation are being replaced and the demographic pyramid is narrowing downwards more and more (Schmidt 2002: 6). In East Germany, the birth rate, which had been higher than in West Germany before the demise of the GDR, declined to an even lower level (Mäding 2002: 11). Since the 1970s, population growth has hence been due mainly to international migration. On average, there was an annual net gain from immigration of 165,000 between 1960 and 1999 (up to 1990 only West Germany) (Mäding 2002: 11).

According to the forecasts of the tenth Coordinated Population Projection of the Federal Statistical Office, between 68.5 and 81 million people will be living in Germany in 2050. The underlying assumption is that the birth rate will stay at about 1.4 children per woman and that the East German birth rate will reach this figure by 2010. There are currently no signs of the birth rate increasing. Consequently, too few children continue to be born. The spread of about 12.5 million in this forecast is to be explained by differing assumptions about immigration (ranging between + 100,000 and + 300,000) and the rise in life expectancy. For 2050, the middle scenario predicts a population of 75 million for 2050. In the case of constant life expectancy and no immigration, the population would be only 54 million (Statistisches Bundesamt 2003).

Regional Trends

The situation is particularly dramatic in East Germany. The East German population is forecast to fall from 15 million (1998) to 9 million (2050) (Göschel 2003: 75). East German cities face a particular problem. In addition to the outmigration of mainly younger and skilled people to West Germany and the low birth rates, progressive suburbanisation is leading to population losses and the fragmentation of East German cities. Owing to concentrated suburbanisation, the population of the cities is expected to fall by 25 per cent by 2050. This will produce novel urban regions disintegrating into unconnected sub-areas (Hannemann 2002: 4 f.).

Growing disparities are becoming apparent everywhere in Germany. Where the population is still growing, population density is already disproportionately high, and vice versa (Mäding 2002: 34). In Schwedt/Oder, for example, the age structure will have reversed between 1970 and 2040. Whereas in 1970 35 per cent of the population were still children and only 5 per cent were pensioners, by 2040, 8 per cent will be children and 42 per cent

pensioners. More than half the population will then be older than 55 (Steintjes 2002: 75). The number of residents will probably fall from the current 41,000 to 22,000. The goal of compensating for death surpluses by immigration is likely to prove unrealistic for most communities after 2010/2020 in the old federal states, too. It is therefore necessary to develop concepts to organise shrinkage (Hollbach-Grömig 2002: 101).

Demographic change differs in speed not only between West and East Germany but also from region to region and locality to locality. The future is therefore unlikely to bring relatively uniform development as regards population size, change, and age structure between states (Färber 2002: 9). Even for forecasts at the national level there is considerable uncertainty (Mäding 2002: 25). The more localized the perspective, the more difficult demographic development becomes to predict, since it is taking place at a different pace from state to state, from region to region, and from community to community. This is because internal migration (suburbanisation and East-West migration) is an additional, key factor for the individual community. Even an up-to-date overview is difficult owing to local differences in internal migration (Mäding 2003c: 4). Further imponderables are changed conditions (e.g., Immigration Act, home ownership allowance) or the number of immigrants from Eastern Europe due to eastward enlargement of the EU.

1.3.3 Impacts on the Built, Political, and Economic City

The concept of city has several dimensions and should therefore be differentiated for analytical purposes. Mäding (2003c: 6 ff.) distinguishes between the city as an economic and life space, the built city, and the political city. These different concepts of the city interact in complex ways. Shrinkage processes generally risk diminishing the attractiveness of a locality owing to vacant housing, which reinforces demographic decline. This vicious circle has a stronger spatial impact at the district level than at the overall city level, and a stronger effect at the city level than at the regional level, but it affects all three dimensions of the city.

The *city as economic and life space* is the totality of its social and economic processes. Cities are nodes in fields of spatial interdependence. For the city as economic and life space, shrinkage means both declining demand for private goods and services and falling demand for public infrastructure. This entails rising unit costs, growing catchment areas, and long distances in the city. Vacant housing leads to falling property prices and encourages segregation within the city. Overall, potential investors are discouraged, and competition for young people increases.

The *built city* is the sum of the spatial appearance (density, height, open spaces, city edge), the distribution of indoor and outdoor activities, the physical infrastructure and relations with nature. As in the urban economic and life space, shrinkage of the built city means falling demand for private goods and services and for infrastructure. Increasing vacancies promote intra-urban segregation processes. In contrast to the city as economic and life space, shrinkage of the built city also has positive aspects. Falling settlement pressure means that the city retains open spaces. Demolition and ecological upgrading

enhance the quality of the residential environment. Ecological relief is also brought by the decline in road traffic and the concomitant fall in noise and exhaust gas pollution.

The organisation of the city as a territorial authority, democratic decision-making, competence to take action, financial capacity, politico-administrative efficiency, as well as the division of labour and cooperation between the public and private sectors constitute the *political city*. Since tax revenues and state government grants are coupled with population figures, a falling population saps the financial capacity of the city, diminishing its scope for action. At the same time, local political and administrative authorities must try to minimise the negative effects of shrinkage, since voters regard it as a manifestation of failure, which tends to jeopardise politicians' chances of re-election. New planning instruments are needed, since the old ones are growth-directed and are therefore no longer effective.

1.3.4 How can Shrinkage be Dealt With at the Local Level?

Demographic change raises the question whether the process can in any way be guided and controlled by municipalities. It is obvious that the four primary processes of development mentioned in chapter 1.3.1 are not very amenable to influence by municipal authorities. Only with a general attractiveness policy can cities try to gain residents through inmigration and thus compensate for death surpluses (Mäding 2003c: 9).

The ageing and declining population threatens to diminish the long-term potential for economic growth in Germany (according to the Frankfurter Allgemeine Zeitung on 7 August 2003 from 1.5 per cent to 1 per cent). This restricts local government financial resources still further. The capacity of political actors to channel or in any way influence shrinkage processes is limited (Mäding 2003c: 8). It can be considered a hopeless undertaking to convert shrinkage into growth (Häußermann/Siebel 1987: 119 ff.). A small-scale "cushioning" of problems is at best possible, which will require a different approach from neighbourhood to neighbourhood, depending on the specific situation.

The sole political, administrative, and urban-development paradigm of the modern city has been growth in all areas from the number of residents to the infrastructure. It held sway in Germany until the "Urban Redevelopment East" programme was developed, although shrinkage trends had become apparent in regions with old industries as long ago as the 1980s. This had been the case not only in Germany but also elsewhere in the world (rust belt in the USA, Manchester and Liverpool in the United Kingdom) (Göschel 2003: 75). Abandonment of the old growth model and adoption of a shrinkage paradigm makes a new type of urban development accessible, posing challenges for planning law and planning instruments (Göschel 2003: 75). The needs of older people have to be taken more strongly into account, since in future they will constitute half and more of the population in many cities.

If it is to influence demographic change in a positive direction, urban development planning and policy must have a long-term thrust. Extensive incongruence in temporal development necessitates the coordination of city-wide and district-related analyses and concepts if the spatial control dilemma is at least to be limited. Since demographic change is a cross-sectional task affecting all departments and policy areas, it is absolutely neces-

sary for local politics and administration to overcome vertical specialisation and cooperate in the interests of reducing the organisational control dilemma. It will be vital to bring all the relevant local actors together to achieve consensus on coping with shrinkage. The duration of change, covering generations, is a major challenge which has to be reconciled with short electoral periods to ensure that reaction times are appropriately extensive (Mäding 2003c: 9).

Passivity on the part of actors (especially in local politics and administration) towards demographic change or the blocking of consensus by individual actors generate a vicious circle with regard to shrinkage (circular-cumulative processes and positive feedback). Outmigration empties housing and brings economic decline, making the neighbourhood less attractive. This reinforces outmigration to better-off districts or other cities. The longer this vicious circle has been operating, the more difficult it is to break. Municipal actors have to develop suitable strategies which have to differ in their specifics from municipality to municipality and from neighbourhood to neighbourhood. In general, however, three basic strategies can be identified, which can also be combined (Institut für Landes- und Stadtentwicklungsforschung des Landes Nordrhein-Westfalen 2002: 25 f.).

The *expansive strategy* aims to retain centrifugal migration within city bounds. One measure for attaining this goal is the comprehensive designation of building land to facilitate the construction of one and two-family homes within the municipal territory, thus slowing suburbanisation. The establishment of new businesses and industries aims to attract additional residents to the city. This strategy is promising only if reliable forecasts are available that suburbanisation can successfully be contained within the city bounds and new residents attracted. If it fails, the municipality faces substantial follow-up costs. The expansive strategy intensifies intermunicipal competition in Germany.
The second strategy is that of *housing stock maintenance and improvement*, which aims to maintain the attractiveness of spatial structures and to retain the population in inner-city neighbourhoods through targeted programmes, particularly addressing young families, and the development of housing stock. The attractiveness of the residential environment is to be improved. This can serve as a preventative measure for cities that have not only marginally been affected by shrinkage.

Cities confronted by inevitable shrinkage should *plan shrinkage*. The opportunities offered by a declining population should be used to enhance the quality of life, thus slowing and channelling shrinkage. Cities must in particular be made attractive for young families so as to improve the age structure of the population. Derelict land should be transformed into useable open spaces and infrastructure facilities converted or downsized.

1.3.5 The Consequences of Demographic Change for Network Infrastructure Systems

Even short-range population movements, as in suburbanisation, are important for the functioning of our infrastructure systems. A 30 per cent fall in population increases the cost of technical infrastructure systems by between 25 and 30 per cent for the remaining residents, depending on investment. This does not include costs incurred by any downsiz-

ing that may prove necessary. Every rise in costs in this area is a locational disadvantage for local authorities, which has to be avoided or at least minimised (Koziol 2002: 19). Moreover, the density and quality of supply suffer when fewer residents pay charges but fixed costs remain unchanged (Gisch 2003: 8). For water supply and sewage disposal, fixed costs constitute 80 per cent of costs (Müller 2002: 57).

Furthermore, critical limit values and thresholds in infrastructure supply have to be taken into account to maintain the efficient functioning of networks (Spars 2001). In obedience to the growth model, there was a trend towards systematically oversizing networks (planning with a margin for contingencies). For this reason urban shrinkage often renders networks uneconomic and, in extreme cases, unable to function. Because of the long periods for which technical infrastructure is planned, high basic investment determines the operative capability, environmental compatibility, and the long-term fixed costs. It is therefore essential during planning to take account of realistic estimates of future developments (Koziol 2002: 15). Otherwise, the practical implementation of urban redevelopment concepts is called in question (ISW 2002: 3).

The Consequences for the Water and Energy Sectors

Since the unification of Germany, per capita water consumption in East Germany had fallen by 50 per cent even before the consequences of population decline made themselves felt (Koziol 2002: 16). Between 1991 and 1998, water consumption in Germany as a whole fell by 14 per cent. In future, per capita consumption is likely to fall still further as a result of new technology. The technical infrastructure can be adapted to this decline only to a limited degree and only in the medium term. Particular problems are to be expected during the summer holiday period, because water turnover in the network drops within 48 hours (Müller 2002: 57). For a long time planners continued to expect rising demand, which, it was assumed, would develop in proportion to the demand for electricity. This often led to considerable expansion of capacities (e.g., sewage treatment plants) which are already too large for present needs. However, the financial situation of local authorities makes new investment almost impossible (Kluge et al. 2003: 29 and 42).

The lower flow rates caused by shrinkage can produce deposits and anaerobic conditions in networks, leading to odour nuisances and corrosion. Because water is retained in lines for a longer period, water supply can be affected by deposits in the pipeline network. There is also a danger of bacterial aftergrowth in drinking water. In areas with basement-routed lines,[32] it is necessary to relay piping, which causes additional costs (Koziol 2002: 17 ff.).

In districts with basement lines, they have to be relaid at considerable cost, like the water mains and sewers, when buildings are demolished. Legal problems can also arise. In the event of downsizing, payments for ordered services can still fall due pursuant to long-term

32 In heavily built-up, prefabricated housing estates, network infrastructures, with the exception of sewerage systems, are no longer laid in the ground but in specially build underground structures (collectors or interceptors). From the mid-1970s, these collectors were built as part of housing development, i.e., mains and distributing lines were laid through basements. These sections are referred to as basement lines.

district heating contracts. Often new facilities have to be scaled down to counter housing vacancies, at considerable cost for operators (Koziol 2002: 18).

More dispersed settlement structures with lower settlement density generate substantial follow-up urban technology costs in the medium and long term (Hollbach-Grömig 2002: 112). These follow-up costs affect not only residents, businesses, and the municipality but also utility infrastructures. It also seems only a matter of time before consumers can longer bear further price rises (Kluge et al. 2003: 31). Especially in the water sector, there is a lack of practicable parameters for assessing the technical and economic consequences of shrinkage (Koziol/Walther 2003: 2).

The Consequences for Public Transport

As demographic change results in a much older population, access to public transport services must be ensured, since old people are particularly dependent on a functioning local transport system (Schmidt 2002: 13). The fall in the size of households and the increase in living space per resident (so-called lag effect) diminishes population density around each public transport stop or station, and lines are used less, increasing costs and necessitating a reduction in networks. But an ageing society is also increasingly dependent on public transport services. If this is to be taken into account, the density of networks should be increased, which, if present standards are to be maintained, would lead to substantial additional financial burdens for transport undertakings and the municipality.

Another age group, the under 20s, is also particularly dependent on public transport. But this age group is becoming much smaller, so that student transport, which has hitherto been an important source of finance for transport undertakings, will diminish (Bracher/Trapp 2003: 31).

1.3.6 Actor Interests and Conflict Lines

The differing interests of actors in local politics and administration, the housing and utilities industries, as well as private citizens and private enterprise produce conflict lines that need to be taken into account and handled consensually in urban redevelopment, including infrastructure development (cf. detailed treatment in Bolay 2004).

Actor Interests

Both private citizens and business are customers for the infrastructure services supplied by utilities. Both are in principle subject to the obligation to accept services,[33] but also expect them to be provided. Supply is also expected to operate smoothly during and after redevelopment and to cost them as little as possible. Especially in East Germany, water rates have rising strongly in recent years, largely not as a result of shrinkage. Constantly rising rates will not be accepted for ever, as protests in Thuringia show (Schlegel 2004: 3),

33 Regulated by the state local government statutes.

since there is no alternative to the services provided for the public and businesses and costs can be cut only by restricting demand.

Owing to the long depreciation periods for infrastructure networks, it is in the interest of utilities to use them for as long as possible. In the course of urban redevelopment, networks have to be adapted in such a way that they can be operated at lower cost. Many housing companies in East Germany face bankruptcy owing to rising vacancies and prior debts, and are eager to demolish vacant housing rapidly without conceding any advantages to competitors. This is apart from the consequences for the technical infrastructure. Local political and administrative authorities have the task of managing the community as a whole. For urban redevelopment, this means that a consensus has to be reached between actors and that citizens and the private sector have to be involved. Without overall consensus between the most important actors in the municipality, all urban redevelopment risks being blocked and condemned to failure.

Conflict Lines Between Actors

In urban redevelopment, the conflict line “type of redevelopment” emerges on the question of how to proceed. This conflict will affect most cities envisaging redevelopment for buildings and infrastructure. There are two scenarios for the demolition or downsizing of buildings. Dispersed downsizing means that single buildings are demolished, whereas extensive downsizing involves the demolition of entire streets or even districts. For utilities, extensive downsizing is advantageous because their own costs can be minimised by shutting down networks (Koziol 2001: 46). Where more than two large housing companies are involved, interests are general balanced by opting for dispersed demolition, bringing the disadvantage of continuing high expenditure on networks for utilities. Local political and administrative authorities therefore have to take account of the interests of utilities from the outset to avoid a good solution for the housing industry proving an expensive solution for the utilities sector.

The second conflict line “redevelopment centre – periphery” can arise in the context of urban redevelopment. As a rule, the political aim is a return to the historical, identity-constitutive cores of cities. Shrinkage processes are to be countered by redirecting residents from the newer, peripheral neighbourhoods to the city centre to prevent the disintegration of cities. These neighbourhoods are to be completely demolished once vacant. The municipality confronts the housing and utility undertakings across this conflict line. In the districts to be abandoned, the large housing companies generally have the largest stocks, which they are unwilling to give up, especially when they have already been rehabilitated. This is also were the newest infrastructure lines are located, which often have yet to be written off. As with the conflict line “type of downsizing,” a consensual soluation has to be found. A complete reinstatement of the city core will scarcely be possible. Intermediate solutions are to be sought.

A third conflict line in urban redevelopment concerns financing, which obviously no actor wishes to assume. Grants from the “Urban Redevelopment East” programme have not been available so far for redeveloping infrastructure, so the costs have to be borne in full

by local actors. The conflict line “cost financing” divides utilities from citizens and private companies. Both sides have an interest in letting the other side bear the costs of redevelopment and downsizing. Then there is the question of whether or to what extent housing companies should share the costs of redevelopment and downsizing. Local politics occupies an intermediate position between actors, having to take everyone's interests into account, ensure local attractiveness, and possible contribute to financing the redevelopment and down-scaling of infrastructure networks. One way to mitigate this conflict is to obtain grants from the federal and/or state governments. Ultimately, a balanced financing structure involving all actors should be developed and implemented by local government, taking account of the actors’ financial strength.

In dealing with all three of these conflict lines, local government must negotiate a viable compromise with the actors affected. Since, despite the privatisation trend, local authorities still hold a majority interest in most utilities (Trapp/Bolay 2003), influence can and should be specifically exerted on utility undertakings in the pursuit of municipal policy. The same is true for municipal housing companies. Successful urban redevelopment which deals productively with shrinkage requires the assertion of local authority influence.

2. Municipal Modernisation and Reaction Strategies for Change

In reaction to these changes, modernisation processes are taking place that have been initiated by local authorities themselves and have generally met with a positive response. They include efforts to modernise administration, to review the range of local government tasks, and, in consequence, to outsource municipal functions from the core administration to hived-off entities. Cutting across these are various trends (expansion of direct democracy elements like the direct mayoral elections or citizen initiatives and citizen referendums introduced into in local government constitutions) towards greater – at least verbal – citizen focus and more intensive involvement of citizens in the “civic community.”[34]

2.1 Administrative Modernisation and the New Control Model

In the light of the precarious budgetary position, and under the impression of international, primarily Anglo-American debates on New Public Management, as well as Dutch experience,[35] municipalities have begun since the early 1990s under the leadership of the

34 Other modernisation and reaction strategies are various forms of cooperation: intermunicipal cooperation, strategic cooperation between municipal undertakings, or strategic cooperation with local stakeholders. Since these strategies are to be dealt with at a later stage in the project, they have not been taken into account at this point.

35 The so-called “group model” was initially developed in the Dutch city of Tilburg. This model concedes wide-ranging resource responsibility to the administration. Moreover, the administration is granted management scope by the political authorities. The decisional powers of departmental heads are laid down and what decisions are to be made centrally (KGSt 1993). A “group control service” unit is established between municipal administrative entities and the political leadership with three addressees: political authorities are supported in particular with information relevant for goal-setting and control, services and performance are analysed, reviewed, and strategically coordinated for administrative

Cooperative Association of Municipal Authorities (KGSt), Cologne, to introduce elements of the so-called New Control Model in their administrative procedures. The KGSt concept is guided by the vision of transforming local government into a public service provider. The primary goal is to enhance efficiency and reduce costs while strengthening customer focus.

2.1.1 Conceptual Basis and Status of Implementation

One of the key elements is the merging of specialist and departmental responsibility at decentralised positions in the administration. Although they are expected to conclude target agreements with top administration, covering a bundle of services and a budget, everyday arrangements for attaining goals are to be decided autonomously. The traditional detailed budgetary rights of the local council to deal with individual categories of expenditure (personnel, non-case resources, transfers, etc) are abandoned, the council now addressing only the overall budget. Goals and budgets are agreed between political authorities and the administration in a contract management framework. Performance and price-fixing agreements with the municipality are also necessary for services supplied by municipal undertakings or private service providers on behalf of the municipality. The budgets allocated to departments cannot be increased. Deviations have to be compensated by departments within their own budgets. Only in well-founded, exceptional cases can the administration receive additional funds. How well the department works is measured by the degree to which it fulfils the performance agreement. To ensure that self-controlled, partly autonomous departments can still be managed as a single local government administration, a central organisational unit is set up to support the local council and top administration in strategic governance and controlling tasks (cf. KGSt 1993).

To provide effective control of administration, input and output are linked and the numerous single administrative activities are combined into a manageable number of products. The goals to be attained are set for each product. Product orientation can be effective only if accounting is integrated (KGSt 1993: 20 f.). Another element of output control is to introduce quality management into local government administration to improve customer focus (KGSt 1993: 22).

From a conceptual point of view, this meant the economization of administration and an idealised orientation on competitive principles. The structures to be established in the framework of the New Control Model are to be driven by competition. The KGSt proposes quasi-market competitive elements for this purpose such as intermunicipal performance comparison and comparison with the private sector. Moreover, it believes “genuine” competition between local authorities and private and nonprofit providers to be increasingly important (KGSt 1993: 22 f.).

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departments, and control instruments are constantly developed, and, finally, controlling is provided for spun-off undertakings. In this way the political and administrative responsibilities are to be clearly defined and distinguished.

There is little empirically founded material available on the success of reforms in Germany with the exception of a few case studies (Reichard 2001a: 20). The survey on the status of administrative modernisation conducted at regular intervals by the German Association of Cities and Towns (DST) among its member municipalities does, however, show that the concept of the New Control Model has been adopted by the vast majority of local authorities (Grömig 2001: 11). However, municipalities have as a rule applied only single elements of the model. They have by no means implemented it "holistically." Owing to the financial straits in which municipalities find themselves, modules have been used that promise rapid savings. Budgeting has played the most important role for this reason, since this module creates behavioural incentives not to exploit available resources to the full (Budäus 2002: 26). Other focal points have been the introduction of cost-performance accounting, the definition of products, organisational restructuring, and the integration of expert and resource responsibilities. On the other hand, reporting, controllership, and contract management, as well as output control and personnel management are still in the development stage. Elements of the concept relating to the external dimension of modernisation, such as the relationship between administration and local council, control of holdings, and quality management, have hardly been implemented at all. Elements of competition have been very rarely used (Kodolitsch 2003: 2; Hilbertz 2001: 11).

Provisionally it can be said of administrative modernisation "that the NCM as an overall concept has yet to go beyond the design and experimental stage in any German local authority, and that there is hence no current example of a comprehensive New Control Model" (Jann 2001: 89). Introduction of NCM modules has brought a certain increase in efficiency – through the recent shift from internal modernisation towards outwardly oriented administrative action (see chapter 2.4) – and improved citizen focus and transparency in administration (Reichard 2001b: 9; Hilbertz 2001: 10). "Overall, however, there has been no breakthrough. The bureaucratic-hierarchical structural pattern continues to predominate. Sometimes it is nothing but a masquerade. Control of core administration, facilities, and holdings has seldom been effective. In particular, the political understanding of control has yet to develop in the right direction ("control at a distance") (Reichard 2001a: 20). Moreover, unrealistically brief time frames have often been set. It was not to be expected that local authorities could have completed the reform process within only ten years. Administrative reform was "more a matter of generations than a short-term issue" (Reichard 2001b: 8).

Integration is also lacking in the implementation of NCM modules. It has been overlooked that the reform impact of single elements can come to bear only in conjunction with other reform elements (Budäus 2002: 31). Reform endeavours to date therefore show little gain in control (Banner 2003: 17). The initial, one-sided concentration by local authorities on internal reform is also problematic. Much better results would have been attainable by strengthening competition and citizen focus (Reichard 2001a: 21).

A major obstacle to implementing the planned reforms has been the difficulty for local authorities to cut costs while modernising the administration (Reichard 2001a: 21). In many municipalities it also proved impossible to integrate the political level in the reform process. It has often operated only within the administration, while the political authorities

have sometimes rejected structural changes and new instruments (Hilbertz 2001: 10 f.). 30 per cent of the municipalities included in the latest DST survey stated that the process had been hampered by reservations on the part of non-salaried politicians about reforms (Grömig 2001: 17). Within the administration, too, employees in many municipalities have considerable reservations about the reforms. 43 per cent of the municipalities surveyed by the DST stated that municipal employees showed too little acceptance of reform (Grömig 2001: 17). This is attributed to a failure to involve employees in the process and a lack of information (Hilbertz 2001: 11). Managerial staff, too, feel threatened by the planned hierarchy reduction and drag their heels. Thus, 38 per cent of the municipalities surveyed consider reservations at the executive level to be a serious obstacle to implementing the reform process (Recihard 2001b: 17). None of these impediments were seen as an absolute block to reform, all can in principle be overcome by qualified reform management. However, this is what is lacking in most municipalities in question (Mäding/Kodolitsch 2001).

2.1.2 Criticism of the KGSt Concept of the New Control Model

One key criticism of the model is that the ideal-typical separation of politics from administration and from policy making and policy implementation is untenable, since it takes too little account of the logic of political decision-making processes (Jann 2001: 89) For instance, majority parties in local councils and the municipal administration are closely interlinked. Most bills in the local council are prepared by the municipal administration, meaning that the administration is intensively involved in formulating political programmes. In this regard they often cooperate closely with the majority political group in the council. Since the voter does not generally distinguish between administration and majority political group, the majority is held responsible for mistakes made by the administration. It is therefore in the interests of the majority to retain as much influence over the administration as possible. Moreover, owing to the political nature of the implementation process, a distinction is often not drawn between programme formulation and implementation (Bogumil 2002: 135 f.). Hence, the original reform motto of the KGSt, “The council decides What, the administration How” has not prevailed, since it has little to do with the political self-conception of the council as the voice and advocate of the citizens. If it were to be imposed, it would “weaken the initiative function in favour of the control function, and largely expel the council – although under local government constitutional law it is an administrative institution – from management of the administration” (Mäding 2005).

This does not mean that control via graduated, largely autonomous loop systems is impossible in principle. But cooperation between politics and administration has to be more complexly organised “than naïve notions about the simple separation of the two areas assume” (Jann 2001: 89). Bogumil considers it necessary to differentiate between the various task areas of local government administration. A clear line between politics and administration in routine areas that require little political control is no problem. But the implementation of municipal planning and formative tasks requires constant intervention

and correction by political authorities, since they concern the local quality of life and the balancing of interests (Bogumil 2002: 136).

The control of administrative output in the NCM is also criticised. It is seen to be extremely difficult to attain qualitative goals and to measure the effect of measures (Mäding/ Kodolitsch 2001).

Little attention is paid to criticism from a women's policy perspective. This is not surprising. The NCM has conceptually ignored women's policy. Nevertheless, women's and equal opportunities commissioners are firmly integrated in the modernisation process, without, however, always being integrated in the control and decision-making bodies. Conceptual concentration on financial measures is also judged critically. On the one hand, certain aspects of administrative modernisation, such as the introduction of flat hierarchies or customer focus, are demands long since made by women's and equal opportunities commissioners. The introduction of performance-related criteria in the pay system also tends to be welcomed. On the other hand, outsourcing and hiving off processes are seen as having exacerbated the employment situation for women, in particular. Overall, the reform process can be said to have done little to advance women's interests. Women's issues play hardly any role in the processes of change (Rudolph/Schiremer 2004: 115-143).

2.2 Municipal Task Review

This chapter provides a descriptive insight into "task review" as a local authority reaction strategy to the financial crisis and (if possible) into the nature and extent of the planned and implemented task concentration in the sense of focussing on "core" municipal functions. This brief treatment cannot evaluate task review and its various normatively charged objectives and forms.

The basic thesis is that, in reaction to financial straits, local authorities outsource tasks (goal review) or (at least) question the efficiency of performance and quality/standards (implementation review). The pressure to act has increased enormously in recent years owing to the structural crisis in government finances – especially at the local level. If the figures on the local government financial crisis mentioned above (cf. chapter 1.1) are taken seriously, selective and one-off task review is no longer adequate. It must become a permanent and comprehensive activity (Dieckmann 1995: 95). Local authority task review is integrated into a web of relations and conditions ranging from the municipal financial crisis and budget consolidation policy, administrative modernisation (cf. chapter 2.1), to privatisation and the outsourcing of local government service delivery (cf. chapter 2.3). While the acute financial situation of local authorities has been the practical activating factor for task review, which is intended to help cut public expenditure, task review is also a "central demand in administrative modernisation" (Färber 1998: 189). One possible way to limit and reduce public spending in municipalities is to privatise and outsource local service delivery.

"Traditionally, German local authorities perform a wide range of tasks" (Püttner 2002: 52). As a rule, they have not devolved to the municipality under a superordinate, purposively

structured meta-plan. The need for them has developed in response to requirements, traditions, and culturally determined convictions defined in specific, historical, and technical-material contexts (Bull 1997: 343). Traditional functions have, however, very rarely been reduced (Bull 1997: 344), so that the range and extent of State and municipal functions has progressively grown.

Task review as such is not a new phenomenon, coming repeatedly to public attention in the lee of the cyclical development of public finances (Fiedler 2001: 105; Färber 1998: 189). Since the mid-1970s,[36] working groups at all levels of government[37] have been looking into the question what public functions really have to be performed by the public sector and, if so, at what level of quality. There is broad consensus on the need "for administrative authorities to shed ballast and thin out the many detailed standards and regulations" (Fiedler 2001: 105). However, task reviews have not been able to record success in the sense of practical consequences, at least not at the various governmental levels, or, if so, only in marginal areas (Bull 1997: 344; Färber 1998: 189 and 206; Fiedler 2001: 105). Färber's study of the attempts at governmental and municipal task review up to 1998 comes to the conclusion that, with few, marginal exceptions, "hardly any material reduction in tasks worth mentioning has taken place[38] (Färber 1998: 206). "Generally speaking, instead of really reducing functions, it is merely decided to perform them in a different way. Services are reduced, the quality and depth of performance is diminished, control density is thinned out." (Bull 1997: 344).

The normative charge of State and municipal task review can differ. To put it simply, at the one pole are approaches that interpret task review in neo-liberal terms as an instrument for downsizing government, pruning it back to its most elementary core tasks (ensuring internal and external security through the military, police, and judiciary). This notion goes along with "lean administration." In this case task review is reduced to goal review. In essence, it focuses on the nature and extent of material government or municipal tasks, calling them into question (Färber 1998: 200). This interpretation of task review is thus concerned with the fundamental reorganisation of relations between the public and private sectors. The other pole could be described as a reduction of task review to implementation review, which attempts to optimise the production conditions and procedures for public tasks in order to use scarce public resources more efficiently and possibly make resources available for other, more important areas/functions. The aim is to maintain government and municipal scope for action (KGSt 1989: 7). The provision of services by government and municipality is not questioned.

2.2.1 Defining Task Review and its Thrust

Generally speaking, task review can be understood in the first place as "adaptive planning to cope with the always present discrepancy between public tasks and available

36 See for example the first KGSt report on "task review" in 1974.
37 The first scientific treatment of a task review procedure was the report on the task review in Hamburg by Dieckmann published in 1977.
38 Püttner concludes that "German towns and cities have assumed their tasks with careful thought and have not engaged in superfluous activities" (2002: 57).

resources" (Bull 1997: 350). Even if the ideal-typical neo-liberal pole may convey this impression at first glance, task review is not usually aimed merely at cutting back public functions. It is an approach which, "through critical, substantive analysis," seeks out the government or municipal tasks no longer to be performed by the public sector itself (Färber 1998: 189) and those that it can or should retain. Task review is hence a procedure for the "systematic calling into question of existing public tasks and of the instruments and administrative procedures employed in performing them" (Färber 1998: 190). One goal of task review is "to deploy scarce public resources optimally through procedurally effective and efficient governmental action" (Färber 1998: 190). If this is the case, it would be the "ideal instrument" for budget consolidation (Färber 1998: 189). Thus, in his systematisation of budget consolidation options, Mäding (1994) cites task review as a rational, institutionalised administrative procedure, which, as a variant of local savings policy, combines the integration of the two goals service restriction and efficiency enhancement.

2.2.2 Objectives of Task Review

Over and above the main goal of budget consolidation, Dieckmann mentions other (secondary or intermediate) goals such as task reduction and outsourcing (e.g., privatisation), restriction of task standards, and the rationalisation of task performance (Dieckmann 1995: 95). Task review is thus not a mere savings strategy or simply "cut-back management" (Färber 1998: 189), but a key element in holistic administrative modernisation.

2.2.3 Uncertainty about the Potential of Task Review and Empirical Findings

As we have seen, the effect of task review on the empirical extent of tasks has been marginal to date. However unambiguous this finding might be, there is nevertheless great uncertainty about the *potential* effects of municipal task review. Over 80 per cent of municipalities examined in a survey conducted by Coopers and Lybrand[39] considered "a fundamental task review to be necessary" (Gruhn/Müller 1997: 5). And a task review "resulting in a restriction of the services offered was considered by 83 per cent of municipalities to be appropriate for reducing municipal spending" (Gruhn/Müller 1997: 17). "Room for savings were seen primarily in discretionary services in the fields of 'sport and recreation' … and 'culture'" (Gruhn/Müller 1997: 5). This finding is in keeping with the results from Bergish-Gladbach, where the municipality subjected its activities to a task review of its own. In the task analysis phase of the process (taking inventory of tasks and products and discussing them in the light of future tasks), The Bergisch-Gladbach administration listed 204 discretionary and 284 mandatory tasks (Barden 1996: 12). This amounts to 41 per cent discretionary self-government tasks and 59 per cent mandatory tasks, raising hopes of considerable potential for budgetary consolidation. However, these

39 The 1997 study by C&L Deutsche Revision (cf. Gruhn/Müller 1997) is based on a survey among member municipalities of the DST; 124 municipalities were included in the study, which had a response rate of 80 per cent.

hopes fade somewhat when not *tasks* but *expenditures* are considered. For most municipal expenditures are determined either in detail or in principle by non-municipal laws and regulations (Weil 2003: 54). According to Weil, discretionary municipal expenditures generally amount to far less than ten per cent (Weil 2003: 54). This sets formal (not political) consolidation limits for a goals review if one considers that any material privatisation justified on the basis of a goals review is possible only with regard to discretionary self-government tasks[40] (cf. 3.1). In the field of mandatory self-government tasks, only an implementation review with regard to (government) defined (minimum) standards and quality and to the efficiency of performance can come to bear. Thus, at least as far as financial consolidation potential is concerned, an implementation review of municipal tasks appears to be more promising.

Regardless of the limited scope for action, 82 per cent of municipalities had undertaken a task review by 1997 (Gruhn/Müller 1997: 17). However, the carrying out of a task review is not to be equated with the implementation and imposition of practical measures, was we have seen. Apparently there is a discrepancy between the (publicly articulated) demand for a review of tasks and the (political) capacity to enforce the desired measures. For diminishing quality and privatising and outsourcing municipal functions often have to be politically justified and defended against interest and lobby groups. Seen objectively, the pressure for budget consolidation must be so great that political decision makers take unpopular measures and fight out conflicts with the administration and citizens.[41] The findings of the study by Coopers and Lybrand are not surprising that “the willingness to actually restrict services … grows in proportion to the size of the fiscal deficit per resident” (Gruhn/Müller 1997: 17).

One fundamental problem in task review processes is defining their ambit and defining public tasks from a normative perspective (Färber 1998: 191). In order to circumvent this problem, Mäding suggests a working definition, according to which “public administrative tasks … in the politico-administrative system (are) precisely defined, goal-related obligations or powers to take action vested in public institutions, which are performed through activities undertaken by specific agencies by specific means” (Mäding 1078, quoted by Färber 1998: 191). There is nevertheless a fundamental problem of definition. Do the tasks of a municipality include all tasks in the “municipal group” (i.e., also services/tasks performed by hived-off municipal undertakings) or only the tasks that are located organisationally within the (core) administration? If only the latter were to be subjected to the task review process, the direct consequences of organisational privatisation would be to exclude the services and tasks of municipal undertakings from systematic review by floating them off[42] (Färber 1998: 203). And the proportion of outsourced tasks and municipal undertakings is considerable, as we saw in chapter 2.3. This means that fewer and fewer tasks and financial resources are dealt with by the core

40 See the legal classification of municipal tasks in Naßmacher/Naßmacher (1999: 149) for an exact distinction between discretionary and mandatory self-government tasks and delegated (mandatory tasks performed on instruction and on behalf of higher levels of government)

41 As Püttner puts it: "... when they are in financial straits, municipalities have willy nilly to accept confrontation in cases of excessive subsidies” (Püttner 2002: 57).

42 This may be not be a problem since organisational privatisation can generally be assumed to bring greater efficiency (cf. chapter 2.3.2).

administration via the administrative budget. For spinning off municipal undertakings involves relocating financial resources and accounting in the context of the administrative budget. In some municipalities, the turnover earned by companies in municipal ownership already substantially exceed the administrative budget (Trapp/Bolay 2003: 42). Hiving off entities from the core administration thus involves the administration itself abandoning controllable resources for consolidation.[43]

Over and above definition of its ambit, any task review requires two other distinctions to be drawn (Bull 1997: 350 f.). First, the various legal forms of municipal functions have to be distinguished, and, secondly, the differentiation of tasks must be accompanied by differentiation of the responsibilities involved in their performance. Only if these differentiations are sustained can task review be used as a systematic procedure for concentrating public sector activities on core functions by task reduction and outsourcing (Fiedler 2001: 109). The first differentiation into discretionary and mandatory self-government functions and delegated functions (mandatory functions performed as directed by and on behalf of higher levels of government) (cf. chapter 3.1.3; Naßmacher/ Naßmacher 1999: 149) define the scope for municipalities to privatise a function materially or functionally or to influence standards of performance. The (second) distinction identifies different levels of municipal responsibility for tasks.[44] A distinction can be made between direct responsibility for performance, ensuring responsibility, support/backing responsibility, and the abandonment of all governmental responsibility for tasks through material privatisation (task privatisation) (Fiedler 2001: 109 f.).

2.2.4 Lack of Empirical Material on Effects Attained

Up-to-date, comprehensive, and well-founded empirical surveys and analyses of the effects of task review processes in German municipalities are still lacking or at least not to be found despite thorough research. From the point of view of scientific substance, there is therefore nothing to add to the statement by Färber (1998) and Bull (1997) that there has – presumably still – been no noteworthy material reduction in tasks, and that generally "only" another form or quality of performance has been decided.

This is confirmed by a 2002 survey by the German Association of Cities and Towns (DST) on "measures for budget consolidation" (DST 2002).[45] Human resources measures predominate among the cross-sectional steps taken (e.g., job freezes, the elimination of positions, or reviews of pay grading). As far as individual plans are concerned, the DST survey identified the "cutting of investment in sewage disposal" as a key measure affecting the infrastructure areas under study by netWORKS. With regard to business enterprises, the emphasis in the municipalities surveyed was on "targets for the level of

43 It is a moot point to what extent this effect is compensated by the fact that the hived-off municipal undertakings, then generally operating under competitive conditions, are obliged by the pressure of market competition to consolidate their position in their turn by improving efficiency, thus reducing the need for municipal subsidisation.

44 On the concept of levels of responsibility in the ensuring local authority see chapter 4.1.2.

45 148 member municipalities of the German Association of Cities and Towns from all states of the federation participated in the survey conducted in the first half of 2002 (DST 2002).

cross-subsidisation," "higher profit transfers by municipal undertakings" and the "sale of interests" (DST 2002). A look at the measures carried out and planned across the whole range of individual plans, shows that most measures are described as "reductions", "cuts," or "savings." Measures described as involving "closure" or the "discontinuance" of a task or service are rare. Although all these concepts are not entirely distinct or semantically unambiguous, it can nevertheless be assumed that the first category points primarily to a change in task performance, i.e., a "reduction" or "cuts" in funding, and consequently a lowering of quality standards rather than the complete abandonment of the service. Similarly, "closure" does not necessarily mean the complete relinquishment of a service. If, for example, a measure is called "closure of facilities" in youth welfare, such as a youth club, this does not mean to say that municipal services will no longer be provided. For this example could also be interpreted as meaning that tasks and services from several facilities are to be concentrated or combined. This produces a change in the quality of task performance rather than a quantitative cutback in the services offered.

2.2.5 Conclusion

The process of rationally grounded task review in municipalities can also result in the privatisation of municipal services and undertakings. As the scarce empirical insights into the real effects of task review processes show, hardly any noteworthy material reduction in tasks has taken place. Instead, a different (more efficient) form or quality of task performance is often opted for. The decision to privatise or abandon a service made in the course of a rational task review process is to be seen as fundamentally different from the hasty sale of municipal "family silver" in the face of dire financial distress to give the municipality a bit of air to breath. The latter can ultimately lead to unintentionally "saving the administration to death" (Färber 1998: 200).

2.3 Outsourcing and Privatisation in Local Authorities[46]

In municipalities, outsourcing and privatisation can assume many forms. Basically, "outsourcing" means the institutional-organisational and fiscal transfer, accompanied by organisational privatisation, of a municipal, undertaking/function governed by public law from the core administration to an autonomous entity. Outsourcing can be implemented in public legal form, but is often linked to formal privatisation. In the literature, the term privatisation subsumes a range of widely differing legal procedures and constructs. The probably predominant distinctions are between *asset privatisation, organisational privatisation, functional privatisation, and task privatisation*, which also underlie this study (Burgi 2001: 603).[47]

46 This chapter is an abridged and somewhat revised and supplemented version of the publication by Trapp/Bolay (2003) on "Privatisation in Municipalities – An Analysis of Reports on Participating Interests."

47 Burgi, in: Hendler/Marburger/Reinhardt/Schröder 2001: 107 ff.; Fischer/Zwetkow 2003a: 282; in the literature other, sometimes much more detailed distinctions are drawn; e.g., Krölls 1995: 130 f. identifies nine forms of privatisation; this is taken up by Peine 1997: 354.

Organisational privatisation (often referred to formal privatisation) involves the replacement of municipal administrative entities (authorities) by legal persons governed by private law.

Functional privatisation takes place when, at the request of a governmental agency, a private party makes a private (i.e., non-governmental) contribution to a State task in a functional capacity (Burgi 1999: 145 ff. and passim; Peine 1997: 357 ff.; Schoch 1994: 974). It is characteristic of functional privatisation that the responsibility for performing a task transferred to the third party is not equivalent to the responsibility borne by the State. It serves to fulfil State responsibility: functional privatisation provides administrative assistance. This means, for instance, that preparing, implementing, and, under certain circumstances, financing and performing functions are passed to a private entity (Burgi 1999: 145 ff.).[48] Sometimes functional privatisation is further differentiated into "genuine" and "pseudo" forms. In the first case purely private agents are involved, and in the second the legal entity governed by private law that is involved is a municipal entity set up through organisational privatisation and, as such, is to be seen as part of the municipality (Burgi 2001: 603; Fischer/Zwetkow 2003a: 282).

Task or material privatisation is the transfer of a task "as such" to a private party, i.e., the withdrawal of the public sector from function fulfilment, involving a reduction in municipal services and generally the sale of the required facilities and equipment (Tomerius 1999: 156 f.).[49] Here, too, a distinction can be made between "genuine" and "pseudo" task privatisation. Whereas limited-term concessions are a case of "pseudo" task privatisation, the complete transfer of tasks including the irreversible sale of a municipal agency (e.g., a municipal limited liability company) constitutes "genuine" task privatisation (Burgi 2001: 2001: 603; Fischer/Zwetkow 2003a: 282).

Asset privatisation, finally, means the sale of municipal assets in no, or at least no direct connection with the performance of municipal tasks (e.g., the sale of municipal participating interests) (for a general treatment of asset privatisation see König 1995: 8 ff.).

At first glance, the classification of privatisation might appear abstract. But in municipal practice it has considerable significance, because each form of privatisation implies certain legal preconditions for the types of municipal task (cf. also chapter 3.1.3). Not only abstract privatisation concepts but also different forms of undertaking are to be distinguished, and especially different forms of corporate cooperation (Kluge et al. 2003: 11 f.)[50]

- *The direct labour organisation* (Regiebetrieb), the *semi-autonomous municipal agency* (Eigenbetrieb), and the *municipal enterprise* (Eigengesellschaft) (private municipal company), as well as the *joint authority* (Zweckverband) are the "classical" forms of

48 Schoch 1994: 974; Wahl in: Schmidt-Aßmann/Hoffmann-Riem 1997: 303.
49 It is a moot point whether such sales of municipal assets – e.g., a theatre building – are, seen in isolation, to be regarded as a level of material privatisation or as "mere" asset privatisation.
50 On the following see Kluge et al. (2003: 11 f.) and Fischer/Zwetkow (2003: 148 ff.).

municipal undertaking.[51] The following forms of cooperation and interlinkage between actors (undertakings) are also current:

- *contracts of lease and management and service contracts* are to be counted as functional privatisation. Facilities and equipment remain the property of the municipality, which also retains the responsibility for investment. But responsibility for operation is transferred to the private partner in order to benefit from its market knowledge and know-how (Fischer/Zwetkow 2003b: 148 ff.; Kluge et al. 2003: 11 f.).
- "Characteristic of the *operator model* is that the contractually agreed services are provided by a private third party, and the municipality has to pay this enterprise for providing it. But the municipality is still under obligation to perform or ensure orderly performance of the task" (Kluge et al. 2003: 11).
- In the *cooperation model* or joint venture, mostly private firms hold an interest in municipal undertakings in which the municipality has a decisive say by retaining a majority holding (51 per cent) (49-51 per cent model).[52]
- The award of a *service concession* involves the complete withdrawal of the municipality for a limited term. This is problematic when the subject matter of the concession is a mandatory municipal task. For genuine material privatisation is not permissible for mandatory self-government tasks (cf. chapter 3.1.3).

There are as yet no empirically reliable figures giving a more or less comprehensive overview of or deeper insight into the type and extent of outsourcing and privatisation in German municipalities. Many authors dealing with the subject complain about the lack of any overview of the empirical status of privatisation at the local level (e.g., Monstadt 2003: 9; Wohlfahrt/Zühlke 1999: 14; Schefzyk 2000: 38; Leitstelle Gemeindeprüfung 2001: 30). Nevertheless, it is generally assumed that many local authority activities have been transferred to private organisations. In order to gain reliable insight into and a reliable overview of the type and extent of privatisation in German municipalities, at least for the purposes of the netWORKS project, the Difu has evaluated the reports on municipal participating interests that have meanwhile been issued by almost all major cities. The results of this analysis[53] by Trapp/Bolay (2003) are presented here in abridged form.

51 For brief explanations on these forms of undertaking see Trapp/Bolay (2003), Kluge et al. (2003) and Schefzyk (2000).

52 Depending on the extent of privatisation, a distinction can also be made between *partial or full privatisation*. Cooperation in the sense of such asset privatisation is to be distinguished from entrepreneurial ventures designed to optimise the attainment of (strategic/operative) corporate objectives. It involves cooperation between municipal and/or private enterprises that can range from loose agreements to the establishment of joint enterprises or divisions.

53 The basis of the survey is the evaluation of 36 reports on the participating interests of major German cities (including the largest 30) in 2001 and 2002. Parallel to the analysis of municipal reports by the Difu, the departments of public management (Prof. Reichard) and organisational sociology (Prof. Edeling) at the University of Potsdam in cooperation with the KGSt conducted a survey among German municipalities of the categories GK 1-4 on the holdings of German municipalities (cf. KGSt/KWI. 2003). The results of this survey have been drawn on as a check an contrast in evaluating the holdings reports. Since study design and evaluation systematics vary considerably, this is not possible for all figures.

2.3.1 The Legal Basis for the Economic Activities of Municipalities

Although the Basic Law gives no precedence to private enterprise over public service delivery, it nevertheless places restrictions on economic activity by local authorities under Articles 2 (1), 12 (1), and 14 (1) (for details see, e.g., Hill 1997). The local government acts adopted by each state (*Gemeindeordnung (GO*)) are particularly instrumental in laying down limits to municipal economic activities:

1. Public purpose must justify the activity:
   public purpose is "every public-regarding objective lying in the public interest of residents" (Heinrichs/Schwabedissen 1998, 161). According to the courts, a wide range of purposes are conceivable, such as social services, competition objectives, economic development, and safeguarding jobs. Profit-making alone is not a public purpose, although any economic activities undertaken by municipal enterprises are required to be efficient and profitable, yielding a return for the municipal budget. The decision on public purpose has to be made by the municipal council (Hill 1999, 48 ff.).
2. The enterprise must be reasonably proportionate in type and extent to the capacity of the community.
3. A private organisation must not be able to perform the task better and more economically.

These limits are broader or narrower from state to state, but essentially alike.

The fourth hurdle is the locality principle. It states that economic activity is permissible only within the territory of the municipality. However, this principle has been modified in some states, for example in North Rhine-Westphalia: "Economic activity outside the territory of the municipality is permissible only under the conditions set forth in paragraph 1[54] and if the legitimate interests of the local territorial authorities are safeguarded" (GO NRW section 107 (3)). Local authority participation in foreign enterprises poses a particular problem. It runs counter to both the locality principle and that of public purpose. Economic activity abroad is allowed under § 107 (4) of the NRW local government act if permission is granted by the supervisory authorities. Other local government acts have so far made no provision for participation in companies abroad.

2.3.2 Reasons for Outsourcing to Municipal Companies

The following economic or financial and political reasons are given for hiving off municipal enterprises from the core administration through organisational privatisation (Wohlfahrt/ Zühlke 1999: 20; Schefzyk 2000: 3 f.).

Economic and financial reasons include:

- more economical operation through commercial thinking,
- more flexible personnel policy,
- tax advantages,

54 The conditions of paragraph 1 are the three restrictions mentioned above.

- possibilities of offsetting losses e.g., through integration in a public utility (combination utility/*Querverbund*),
- generation of additional know-how,
- access to private capital.

Political reasons include:

- reducing municipal subsidy requirements and thus disburdening the city budget,
- no restrictions imposed by local government constitutional law,
- less control by the public, e.g., no need for parliamentary legitimation, since supervisory boards meet behind closed doors,
- no political obstructions to decision-making,
- weakness of political authorities in making unpleasant decisions such as price and charge increases, and in implementing rationalisation measures,
- attractiveness of neo-liberal positions and paradigms.

In the expert interviews and discussions conducted with municipal practitioners it was repeatedly pointed out that the local government budget crisis (cf. chaper 1.1) was the main push factor for the privatisation of municipal undertakings. This was the case both for organisational privatisation and for the sale of undertakings and interests in undertakings (asset privatisation). Some of the arguments taken from the literature confirmed this.

12 of the 36 reports on municipal holdings (33 per cent) provide information on why the municipality participates in companies. To some extent, the prefaces to the reports cite the reasons mentioned. “A wide range of criteria have applied in deciding to form private companies or to participate in such companies. There are fiscal, sometimes organisational, and occasionally political reasons for doing so” (Beteiligungsbericht Nürnberg 2002). Apart from the provision of services for the public, the focus is on the optimum and efficient performance of functions. By hiving off enterprises, the municipality intends to “achieve steady optimisation of the quality and efficiency in the performance of municipal tasks” (Beteiligungsbericht Köln 2002). “Especially when major investment is required, disengagement from the municipal budget is essential for the flexible and economically sensible performance of functions” (Beteiligungsbericht Erfurt 2002). The difficult financial situation of local authorities is an important topic in this context: “It will also be necessary in future to ease the burden on local budgets through the divestment of municipal enterprises” (Beteiligungsbericht Bremen 2000). Participation in companies is also intended, for example, “to maintain the attractiveness of Dresden despite the need to save” (Beteiligungsbericht Dresden 2001) and to “contribute to the quality of life in the city” (Beteiligungsbericht Bochum 2002/2003). At the same time they are intended to “ease the burden on local government administration” (Beteiligungsbericht Leipzig 2002). In all, “the importance [of municipal participation in companies] will continue to grow” (Beteiligungsbericht Potsdam 2000).

2.3.3 Choice of Legal Form Municipal Companies and Scope of Control

In deciding to hive off a task from the core budget of the administration, the choice of legal form for performing the tasks is basically free. Because hierarchies can be kept flatter, the limited liability company (*Gesellschaft mit beschränkter Haftung – GmbH*) and the stock corporation (*Aktiengesellschaft – AG*) have the advantage over public enterprises of simpler and shorter lines of decision. Furthermore, companies limited by shares are more flexible in hiring and firing, since they are not subject to public service law. The *AG*, in particular, offers local authorities disadvantages with regard to control and influence. This is because of the strong prescriptive effect of company law, which, being federal law, takes precedence over state local government law. This limits both the possibilities of drafting the articles to suit the purposes of the local authority and the organisational freedom of corporate organs. The North Rhine-Westphalian and Baden-Württemberg local government acts do, however, impose restrictions on the foundation of stock corporations, *Aktiengesellschaften*. They may be set up, acquired, or expanded only "if the public purpose is not or cannot be equally well fulfilled in another legal form" (Paragraph 108 (3) GO NRW and Paragraph 103 (2) GO Baden-Württemberg).

The choice of legal form is the critical factor in determining the future extent of political control and influence over a company (Richter 1996, 6). The stronger the staffing, financial, and contractual ties between the local authority and an enterprise, the greater will be the influence the municipal council can exercise. Wohlfahrt and Zühlke (1999: 53) take the view that legal forms that go beyond the *Eigenbetrieb*, the semi-autonomous municipal agency, are scarcely amenable to control or influence. Hence, private company forms do not have the same "democratic substance" as public companies, and "(every) hiving off is a loss of substance for civic community" (Held 2002: 100).[55]

By undertaking economic activities in private legal form, local authorities make themselves subject to the relevant company law, which, being federal law, overrides state law, i.e., in this case the given state local government act (Beteiligungsbericht Oldenburg 2002). In the case of the *GmbH*, the shareholder has relatively broad scope for action to defend its interests in the company. It is different with the *AG*, which, as we have seen, is difficult for the local authority to control owing to its strong subjection to company law. And the *KG*, too, offers little means of exerting influence, since local authorities can participate only as limited partners.

However, with the exception of the *AG* and *KG*, the public sector can – at least in theory – secure controlling influence over all the other types of enterprise mentioned. For example, local authority influence in an *Eigenbetrieb* need not necessarily be greater than in a *GmbH* fully owned by the municipality. Our thesis is that the most important factor for municipal influence is the practical form given the relationship between the enterprise and the local authority, the legal form chosen for the undertaking being of secondary importance.[56] There are three types of interlinkage between the local authority and a company by which municipal influence can be safeguarded (Schefzyk 2000: 143 f.):

55 Bogumil/Holtkamp (2002a) come to the same conclusion.
56 This assessment was repeatedly confirmed in expert interviews and discussions.

- Personnel links:
  the local authority has the right to appoint members to the different organs of the company. If the local authority has a majority of members, it can be said to have a controlling influence. If these members are bound by instructions, local authority influence is stronger still. In any case, it must have the right of control (in the most drastic case recall of municipal representatives from the company organs) if it is to be said to have a controlling position. In practice municipal representatives in corporate organs receive numerous instructions (Leitstelle Gemeindeprüfung 2001: 14).
- Financial links:
  financial links arise from participation in the nominal capital of the enterprise. The local authority has a controlling position if it holds the majority of capital. However, this must translate into a majority of votes in the general meeting if business policy is to be actively influenced.
- Contractual agreements, articles of association:
  Purposive drafting of the company articles can give a local authority a controlling position. Another instrument is the conclusion of control agreements under which the local authority retains sole power of decision. Participation guidelines for the standardisation of shareholdings have so far tended to be the exception (Leitstelle Gemeindeprüfung 2001: 14).

There are often complaints about excessive control in municipal enterprises, especially in public enterprises, because they are often subject to the bureaucratic rules of budgetary and public service law. This makes the flexible, efficient conduct of business more difficult (Röber 2001: 8). The hiving-off of municipal enterprises can, on the other hand, lead to inadequate control, because “after outsourcing tasks, personnel restrictions (may) ensue, since important members of staff transfer to the private company. Another cause may lie in the public partner being inadequately informed” (BMU/UBA 2001: 271). Municipal companies often complain that political goals and performance standards are not defined (Wohlfahrt/Zühlke 1999: 10). As a result of inadequate control, local authorities are not in a position to impose politically motivated corporate objectives. This means that municipal companies can often operate relatively independently (Röber 2001: 8 ff.).

2.3.4 Type and Extent of Privatisation in the Local Authorities under Study

Number of Participating Interests

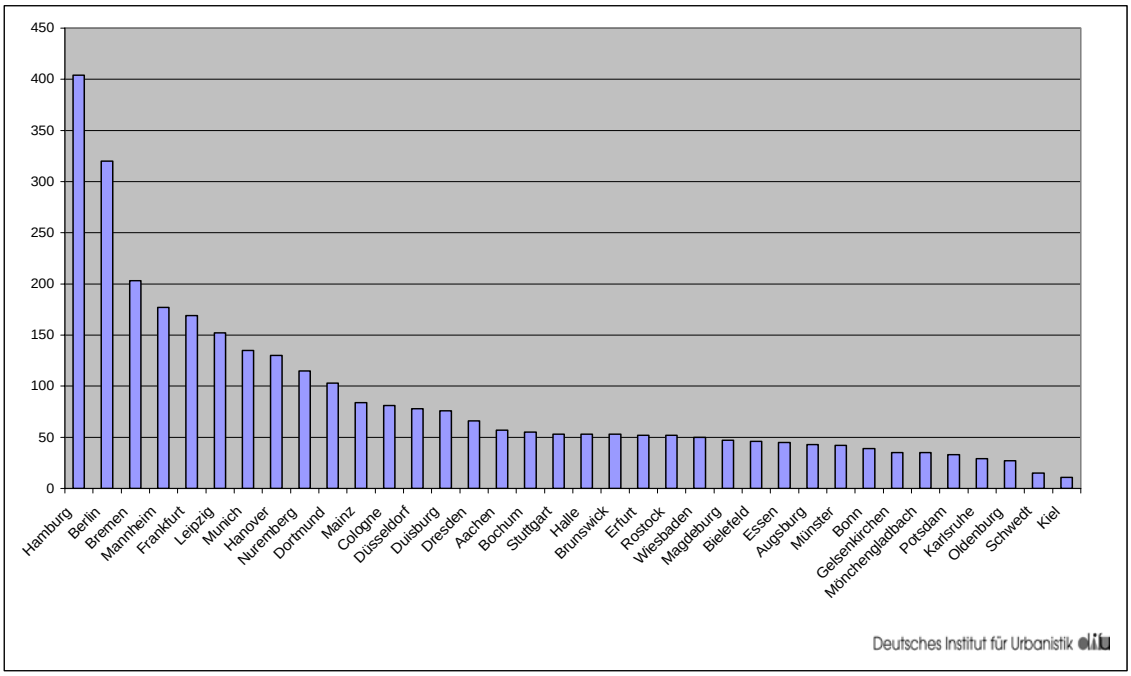
According to our analysis of the 36 reports on local authority holdings,[57] the municipalities under study together participate in a total of 3034 domestic and 178 foreign companies.

57 On method: the analysis covers all holdings included in the reports, with the exception of savings banks, associations, and foundations, as well as negligible indirect interests. In calculating total local authority holdings, enterprises were assigned to four categories in order to avoid double counting: direct majority interests, direct minority interests, indirect majority interests and indirect minority interests. Enterprises were assigned to these categories in accordance with the following definitions: A *direct interest* means that the local authority itself holds a share. An *indirect interest* means that the municipality owns no share itself, i.e., directly, but only through one of its “daughter companies.” A *majority interest* means that the

This gives a total of 3212. Hamburg leads with interests in 404 enterprises, and Kiel tails the field with only 11. On average, each municipality has 84.3 domestic and 4.9 foreign holdings; this gives an average total of 89.2.

In all, domestic holdings of German local authorities are distributed as follows.[58]

Figure 1: Number of Domestic Holdings*



*Source: Trapp/Bolay (2003: 26).

Participation by German local authorities in foreign companies is not uncontroversial, since it clearly conflicts with the locality principle and public purpose to which they are beholden. Municipalities accordingly do not hold direct interests in foreign companies but only indirect stakes through “daughter” companies. All 178 interests recorded abroad are indirect holdings via a (partly-owned) municipal enterprise. German municipalities had an indirect majority stake in 70 foreign companies, and a minority interest in 108.

Legal forms of German Municipal Companies

Many different legal forms of participation are to be found at the local authority level, ranging from the limited liability company (*GmbH*) and cooperative society (*Genossen-*

local authority holds a share of at least 50 per cent either directly or indirectly. Enterprises in which the local authority had a precisely 50 per cent stake are included because it can block any corporate decision. A *minority interest* is held by the local authority if it owns less than a 50 per cent share either directly or indirectly. If a local authority participates both directly and indirectly via a "daughter company" in an enterprise, it has been classified in terms of the larger interest. For example, an enterprise in which a local authority has a 10 per cent direct stake and a 20 per cent indirect interest via a fully-owned daughter is classified as an indirect interest. In no case were direct and indirect holdings equal. The base years for the figures in the reports are 2000 (n = 13 or 37 per cent) and 2001 (n = 22 or 63 per cent).

58 A precise overview is to be found in the appendix.

schaft) to forms like the *AG & Co. OHG*, a combination of stock corporation and general partnership. By far the most frequent is the *GmbH*[59] with 75.7 per cent, followed by the GmbH&Co. KG (limited partnership in which a GmbH acts as general partner) with 6.8 per cent, and the *AG* with 6.1 per cent (see table 1). Then come two public enterprise forms, the *Eigenbetrieb* (semi-autonomous municipal agency) with 4.8 per cent, and the *Zweckverband* (special purpose joint authority) with 1.9 per cent. "Others" include the *AG&Co. KG* (combination of stock corporation and limited partnership), the *GmbH&Co. OHG* (combination of limited liability company and general partnership), the *AG&Co. OHG* (combination of public limited company and general partnership), the *KG auf Aktien* (general partnership limited by shares), and the *OHG* (general partnership), all of which are represented less than four times.

Table 1: Legal Form of Domestic Companies*

Legal form	Number	Frequency in %
GmbH	2 297	75,7
GmbH&Co. KG	205	6,8
AG	187	6,1
Eigenbetrieb	146	4,8
Zweckverband	58	1,9
Öffentlich-rechtliche Anstalt	41	1,4
Genossenschaft (registered)	40	1,3
GbR	40	1,3
KG	6	0,2
Others	14	0,5
Total	3 034	100
		Deutsches Institut für Urbanistik

*Source: Trapp/Bolay (2003: 26).

There is a strikingly high proportion of limited liability companies (*GmbH*) among municipal enterprises. No other type of company is anything like as frequent. No other type of private company seems to as suitable for local authority purposes. The reason why the *GmbH* is so popular is probably because it is relatively easy to set up, because local authority influence is easy to ensure in drawing up and amending the articles of association, because it offers all the advantages of a private company as regards management flexibility, and because there are no restrictions on local authorities forming this type of company. In contrast, certain states (e.g., North Rhine-Westphalia) do impose restrictions on the setting up of *Aktiengesellschaften*. It is much more complicated to found a *GmbH&Co. KG* than a "simple" *GmbH*, since two companies (*GmbH* and *KG*) have to be established.

59 The non-profit GmbH (*gGmbH*) as a subform of the GmbH was included under "*GmbH*." A nonprofit *GmbH* differs from a "normal" *GmbH* primarily from a fiscal point of view and in the object of the enterprise, not in relation to local authority control.

A project group at the University of Potsdam (Universität Potsdam/KGSt 2003) in a survey of municipal undertakings in category 1-4 cities reached similar results regarding the distribution of legal forms. They found that the GmbH occurred with a frequency of 73.4 per cent, followed by *Eigenbetriebe* and *Eigenbetrieb*-like facilities at 9.2 per cent. The *Aktiengesellschaft* ranked third (4.9 per cent), followed closely in place four by the special purpose joint authority, the *Zweckverband* (4.2 per cent) (Universität Potsdam/KGSt 2003: 19). These differences, however slight, between corporate forms nevertheless point to a greater preponderance of public companies in the Potsdam University survey. Own calculations put public enterprises at 15 per cent, private companies at 81.5 per cent (with the remaining 3.5 per cent classified as "others" where the legal form is not clear). Combining the findings on legal forms in the Difu analysis of holdings reports on "public companies" and "private companies," the preponderance of private forms is still greater (cf. table 2).

Table 2: Ratio of Private to Public Domestic Companies with Municipal Participation*

Private companies	2 789	92 %
Public companies	245	8 %
Total	3 034	100 %
		Deutsches Institut für Urbanistik

*Source: Trapp/Bolay (2003: 26).

The relatively small number of enterprises governed by public law compared to private companies may be attributable to the fact that not all public companies were included in the reports. For example, Nuremberg, Hanover, and Kiel provide no information on public enterprises. A Difu Internet search showed that these municipalities have failed to mention six *Eigenbetriebe* or *Eigenbetrieb*-like enterprises which, given the large number of domestic companies with local authority participation (n = 3034), have little overall weight and no impact on basic trends. They have therefore not been included in the evaluation. The somewhat smaller proportion of private enterprises recorded by Potsdam (Universität Potsdam/KGSt 2003), although at 81.5 per cent still considerable, is likely to support Difu figures rather than refute them.

Local Authority Control Resources

In order to determine theoretical control resources, evaluations in terms of majority and minority interests and of direct and indirect participation have to be considered together. This produces an informative overall picture (cf. table 3):

Table 3: Ratio of Direct and Indirect Participations to Municipal Share*

	Direct interest		Indirect interest		Total
Majority (50 % - 100 %	687	23 %	874	29 %	51 %
Minority (< 50 %)	371	12 %	1 102	36 %	49 %
Total	1058	35 %	1 976	65 %	100 %
Deutsches Institut für Urbanistik					

*Source: Trapp/Bolay (2003: 26).

In fewer than a quarter of companies (23 %) is the formal influence of the local authority indisputable, since it has a majority, direct interest. It is at least questionable in the remaining 77 per cent. If holdings abroad are included, the share of companies in which the local authority can exercise control neither through majority nor direct ownership increases to almost 79 per cent. Moreover, companies in which the local authority has a precisely 50 per cent share have been classified as majority interests for the purpose of our analysis. Direct majority interests include 55 companies (8 %) in which municipalities hold a 50 per cent share. 89 companies (10 %) are indirect majority holdings. If we subtract these companies, because local authorities cannot make independent decisions in their regard, the proportion of companies that are subject to direct formal municipal control is even smaller. The figure for this survey is then around 20 per cent.

Some local government acts lay down that the articles or bye-laws of private companies must require "that the public purpose of the company … be fulfilled and the municipality … be given reasonable influence, especially in the supervisory board or a corresponding supervisory organ of the company" (GO Baden-Württemberg, Paragraph 103 (1) Sentences 2 and 3).[60] Otherwise forming or participating in a company is not permitted. However, the public purpose of the enterprise is examined by the supervisory authorities solely in the course of approval proceedings. No later checks are made, so that approval once granted cannot be withdrawn. In the many private companies in which the municipality has a (direct or indirect) interest of less than 50 per cent, it is doubtful whether the conditions of "fulfilling a public purpose" and "reasonable municipal influence" are met throughout – all the less so when private parties hold shares in the (municipal) enterprise. For the performance of a (costly) public purpose can easily conflict with the chiefly monetary goals (profit making) of private companies and fall victim to competitive pressure in markets.

Unlimited control is possible only in the case of a majority, direct interest where private shareholders do not have a blocking minority of 25 + per cent.

Nor was it possible to find out how many of these 3034 German municipal enterprises had private shareholders. In this regard, too, the information supplied was too incomplete. Although the reports record the level of municipal participation, they often fail to mention who owns the remaining shares. Are the holders private companies or other municipal

60 The North Rhine-Westphalian local government act has a similar provision.

enterprises,[61] or other municipalities? Considering only the 31 companies listed as *Stadtwerke* (organizational grouping of municipal utilities) in the reports, it transpires that 51 per cent (n = 16) are fully owned by municipalities and 49 per cent (n = 15) are partly owned by third parties. In one of these cases, only other municipalities hold shares in the *Stadtwerke*, so that 45 per cent of *Stadtwerke* in large cities have a private shareholder.

For comparative purposes we cite the figures provided by the Association of Municipal Enterprises and the Potsdam University survey (Universität Potsdam/KGSt 2003): of the 977 (status 4 Aug. 2003) members of the Association of Municipal Enterprises (*Verband kommunaler Unternehmen – VKU*) in Cologne, 5 per cent have less than 25 per cent private participation, 22 per cent have private participation between 25 and 50 per cent, and 2 per cent have private shareholders with a stake of more than 50 per cent in the undertaking. 68 per cent of VKU members are fully owned municipal undertakings (3 per cent others) (VKU 2003a: 12). According to the project group at the University of Potsdam (Universität Potsdam/KGSt 2003: 23 f.) 45 per cent of the undertakings under study are fully owned by a single municipality, 16 per cent operate as mixed public companies, and 28 per cent have private sector participation, with the municipality holding a less than 50 per cent share in one third of these latter undertakings. In some 9 per cent of the enterprises recorded by Potsdam (Unversität Potsdam/KGSt 2003), the municipality had only a minority stake.

Leaving aside all quantitative differences and interpretations of the figures named, they nevertheless give impressive evidence of “structural change in utilities” (VKU 2003a: 12) such that more and more municipalities are looking for partners for their utility conglomerates (*Stadtwerke*) and other municipal undertakings.

2.3.5 Separate Assessment of the Water, Energy, and Public Transport Sectors

Since the water, energy, and public transport sectors are network infrastructure systems and accordingly a subject of study for netWORKS research, they are to be dealt with in greater detail. Private municipal companies have been operating for decades in these sectors; organisational privatisation is thus nothing new (Scheider 2001, 3).

For the purposes of the Difu analysis, the only municipal enterprises included were those within the administrative territory of the 36 municipalities under study that were operating in one of the three sectors at the point in time when the report was drawn up in 2000/2001. Not included are the many subsidiaries of *Stadtwerke* outside the home local authority territory in other municipalities, like those of the Munich *Stadtwerke*, which has interests in the utilities of other Bavarian municipalities.

In the case of Nuremberg, Kiel, and Hanover, whose reports provide no information on *Eigenbetriebe*, an Internet search was conducted to ascertain whether they had such agencies operating in the water, energy, and public transport sectors. Hanover has a sewerage agency which is included in the sectoral analysis.

61 For example, the MW Energie AG, wholly owned by the Mannheim municipality, has interests in utilities of other local authorities (including Offenbach and Solingen).

Water

The analysis of holdings in the water sector covers 58 companies in the 36 municipalities under study. They included both water supply and sewage disposal enterprises. 21 of the 36 cities own two separate companies for water supply and sewage disposal. From a statistical point of view, each of the local authorities under study had 1.61 enterprises dealing with water in the municipal territory.

Table 4 shows the count by legal form of enterprise.

Table 4: Legal Forms in the Water Sector*

Legal form	Number	Percentage
GmbH	27	47
Aktiengesellschaft	14	24
Eigenbetrieb	13	22
Anstalt öffentlichen Rechts	3	5
Zweckverband	1	2
Total	58	100
		Deutsches Institut für Urbanistik

*Source: Trapp/Bolay (2003: 30).

Relative to the overall analysis (cf. chapter 2.3.4), the *Eigenbetrieb* and *AG* are frequent and the *GmbH* correspondingly rare. The high proportion of *Eigenbetriebe* can probably be explained by lower tax rates for public enterprises in the sewerage sector. All 13 *Eigenbetriebe* operate in this field. These lower tax rates are also available to the three institutions under public law (*Anstalten des öffentlich Rechts*) and the joint authority (*Zweckverband*).[62]

Organisational privatisation in the water sector is less advanced than in local authority economic activities as a whole. In 2000/2001, just under 30 per cent of water-sector companies in the cities under study were public enterprises (*Eigenbetrieb*, *Anstalt öffentlichen Rechts*, *Zweckverband*) compared with a good 8 per cent of public companies in all task areas (cf. chapter 2.3.4).

Table 5: Ratio of Private to Public Companies in the Water Sector*

Private companies	41	71 %
Public companies	17	29 %
Total	58	100 %
		Deutsches Institut für Urbanistik

*Source: Trapp/Bolay (2003: 30).

62 The same arrangements apply for waste disposal.

Ownership of companies operating in the water sector needs to be examined to ascertain the type or form of privatisation.

Table 6: Ownership and Legal Form of Enterprise in the Water Sector*

	Eigenbe-trieb	Anstalt öf-fentlichen Rechts/ Zweckverband	GmbH	AG	Total	
100 % municipal share (di-rect interest/"daughter company")	13	2	9	1	25	43 %
100 % municipal share (in-direct interest/"grandchild company")		0	5	2	7	12 %
Majority company (municipal share 50 to under100%)		1	12	9	22	38 %
Minority company (municipal share < 50 %)		1[1]	1	2	4	7 %
Total	13	4	27	14	58	100 %
Deutsches Institut für Urbanistik						

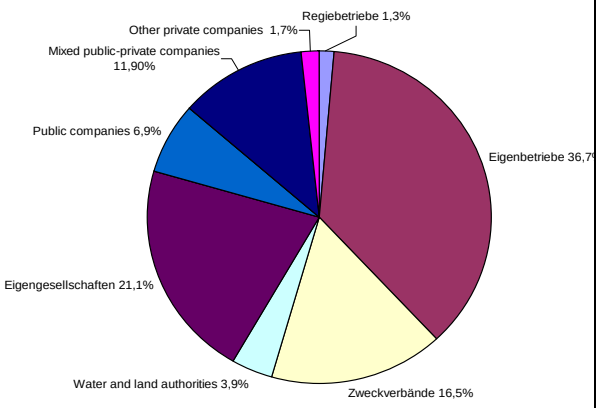
*Source: Trapp/Bolay (2003: 31).

Third parties hold shares in 45 per cent of municipal enterprises in the water sector. In 7 per cent of cases the municipality share is under 50 per cent. This figure is, however, comparatively low when one considers the overall analysis. Municipalities have only a minority interest in 49 per cent of the companies recorded. The transfer of property rights to third parties (partial privatisation) has not progressed very far in the water sector in comparison with the overall analysis (and, as we will see, with the energy sector). 38 per cent (n = 22) of municipal companies recorded in the water sector have private shareholders. In three of these enterprises the private party even has a share in excess of 50 per cent. By comparison, 55 per cent (n = 32) of companies are fully owned directly or indirectly by the given municipality. In four cases other municipalities also hold an interest.

"According to the statistics of members of the Federal Association of the German Gas and Water Industry (*Bundesverband der deutschen Gas- und Wasserwirtschaft – BGW*), it appears that public companies, especially *Eigenbetriebe*, still predominate in public water supply. However, this situation cannot be confirmed for East German states: in East Germany the *Zweckverband* predominates (49.4 per cent), following by the private-law *AG* and *GmbH* partly or fully owned by the municipality (32.3 per cent), of which private municipal companies (*Eigengesellschaft*) represent 18.3 per cent, mixed public-private companies 14 per cent)." (Kluge et al. 2003: 15).

Figure 2: Company Forms in Water Supply (Status 31 December 2000)*

Company Forms in Water Supply	Number of water utilities	in %
Regiebetriebe	14	1,3
Eigenbetriebe	403	36,7
Zweckverbände	181	16,5
Water and land authorities	42	3,9
Eigengesellschaften (AG or GmbH)	232	21,1
Public companies (AG or GmbH)	76	6,9
Mixed public-private companies (AG or GmbH)	131	11,9
Other private companies	19	1,7



*Source: BGW 2001; cited from Kluge et al. (2003: 15).

If the percentages are calculated for the Difu figures to permit comparison with the BGW statistics, it transpires that, for example, 22.4 percent of water sector enterprises in the 36 municipalities under study operated as *Eigenbetrieb* and 29.3 per cent and municipal *GmbH* or *AG* (*Eigengesellschaft*). Water companies recorded in the Difu survey are thus formally privatised to a much higher degree that BGW member enterprises in 2000.

Energy[63]

The 36 municipalities included in the Difu study reported participation in 42 enterprises in the energy sector. In contrast to the water sector, most local authorities have only one company in the energy sector supplying residents and industry with energy. The average figure is 1.17 companies per municipality. However, the companies included in this list are not to be equated with the *Stadtwerke*, since in some cities the function of the latter has changed in recent years: Some *Stadtwerke* now operate as holding companies,[64] with operative business being completely or partly outsourced to subsidiaries. In other cities, however, the *Stadtwerke* still supply customers directly with energy.

The distribution of legal forms in the energy sector of the 36 cities under study is shown in Table 7.

63 Companies that supply customers directly with energy in the municipality have been included in the Difu analysis.

64 A *Konzern* is a group of several legally independent enterprises under common management, regardless of whether they are natural or legal persons (Schruff 1993, quoted in Schefzyk 2000). Two types of *Konzern* can be distinguished: The *Stammhauskonzern* (parent company group) and the *Holdingkonzern* (holding group), both of which are to be found at the municipal level. In the parent company group the holding company itself is operative, whereas in the holding group it is responsible only for the administration and management of subsidiaries. This type of private-law combination utility permitted by a holding structure can offer municipalities the advantage that taxable gains in one unit (subsidiary) can be offset against losses in another (Schefzyk 2000:37).

Table 7: Legal Forms in the Energy Sector*

Legal form	Number	Percentage
GmbH	24	57
AG	18	43
Total	42	100
		Deutsches Institut für Urbanistik

*Source: Trapp/Bolay (2003: 32).

In the energy sector, organisational privatisation is thus much more advanced than overall or in the water sector. In the 36 municipalities under study there is not a single public enterprise remaining. Here, too, the most frequent type of company (43 per cent) is the *Aktiengesellschaft*, a type that represents only 6 per cent of all companies included in the overall analysis.

Taking a closer look at ownership in the energy sector (table 8), it is apparent that not only organisational privatisation but also the sale of shares to third parties (partial privatisation) is more advanced than in the water sector. Only 29 per cent (n = 12) of energy enterprises are still wholly owned, whether directly or indirectly, by the given municipality. In 54 per cent (n = 23) of cases the municipality is the controlling shareholder, and in one sixth (17 per cent; n = 7) it has only a minority interest. Hence, the “death” of the *Stadtwerke* that many had believed would ensue from the liberalisation of the energy sector has not occurred (Leciejewski 2003). Apparently *Stadtwerke* have developed strategies for holding their own in the market.

Table 8: Ownership and Legal Form of Enterprises in the Energy Sector*

	GmbH	AG	Total	
100 % municipal share (direct interest/”daughter company”)	3	2	5	12 %
100 % municipal share (indirect interest/”grandchild company”)	3	4	7	17 %
Majority company (municipal share 50 – < 100 %)	15	8	23	54 %
Minority company (municipal share < 50 %)	3	4	7	17 %
Total	24	18	42	100 %
				Deutsches Institut für Urbanistik

*Source: Trapp/Bolay (2003: 32).

Public Transport[65]

Most municipalities own a public transport enterprise that operates passenger services ranging from bus to underground. The average is 1.3 companies per city. It is striking that, as in the energy sector, public enterprises play almost no role, organisational privatisation being well advanced (table 9). 40 per cent of public transport companies are *Aktiengesellschaften*, a much higher proportion than in the overall analysis (6 per cent).

Table 9: Legal Forms of Enterprise in Public Transport*

	GmbH	AG	Total	
100 % municipal share (direct interest/"daughter company")	3	2	5	12 %
100 % municipal share (indirect interest/"grandchild company")	3	4	7	17 %
Majority company (municipal share 50 – < 100 %)	15	8	23	54 %
Minority company (municipal share < 50 %)	3	4	7	17 %
Total	24	18	42	100 %
Deutsches Institut für Urbanistik				

*Source: Trapp/Bolay (2003: 26).

The structure of organisational forms of member companies of the Association of German Transport Operators (*Verband deutscher Verkehrsunternehmen – VDV*)[66]diverge considerably from those described in the reports on municipal holdings. 73 per cent of VDV members are limited liability companies (*GmbH*), 15 per cent stock corporations (*AG*), 9 per cent semi-autonomous municipal agencies (*Eigenbetrieb*), and 3 per cent "others" (VDV quoted by Bracher/Trapp 2003: 19 f.) This difference between the frequency of company forms could be explained by the different structures of the local authorities behind the statistics. This analysis has been almost exclusively concerned with large cities, whereas VDV statistics include public transport enterprises from smaller communities and rural districts.

Many enterprises in the public transport sector are integrated in holding companies. This explains the high figure of 55 per cent of companies fully but indirectly owned by local authorities. The participation of private parties in municipal public transport enterprises have so far tended to be the exception. The given municipality is directly or indirectly the sole shareholder in 32 companies (68 per cent). Minority interests are the exception. Full privatisation has not yet occurred in this sector. A local authority public transport enterprise still exists in every municipality.

65 All enterprises providing public transport services in one of the cities under study were included in the evaluation of this sector. Supralocal transport associations and companies providing suburban passenger rail transport services were not taken into account.

66 Over 90 per cent of all companies operating in the public transport market is represented in the VDV.

Table 10: Ownership and Legal Form of Enterprises in the Public Transport Sector*

	Eigen-betrieb	GmbH	AG	Total	
100 % municipal share (direct interest/"daughter company")	1	5	0	6	13 %
100 % municipal share (indirect interest/"grandchild company")		14	12	26	55 %
Majority company (municipal share 50 – < 100 %)		6	7	13	28 %
Minority company (municipal share < 50 %)		2	0	2	4 %
Total	1	27	19	47	100 %
Deutsches Institut für Urbanistik					

*Source: Trapp/Bolay (2003: 26).

Comparison of Sectors

A comparison of the water, energy, and public transport sectors on the basis of the Difu figures (Trapp/Bolay 2003) for major German cities shows that organisational privatisation in the water sector is below average for the overall analysis and in comparison with other sectors. Over 25 per cent of companies in the water sector are public (*Eigenbetrieb* [semi-autonomous municipal agency], *Anstalt öffentlichen Rechts* [institution under public law], *Zweckverband* [special purpose joint authority]) compared with a good 8 per cent of companies in all task areas, 0 per cent in the energy sector, and 2 per cent in public transport. This is likely to be because of the tax advantages available to public organisational forms in the sewage disposal sector.

In the energy sector, not only is organisational privatisation most advanced (in the cities under study it has been fully implemented, cf. table 11), but also asset privatisation is relatively widespread. Only 29 per cent of enterprises are still fully owned, directly or indirectly, by the given local authority. In the water sector 55 per cent are still fully in municipal ownership, and in the public transport sector 68 per cent.

Table 11: Legal Forms of Municipal Companies: Comparison between Sectors*

Legal form	Water	Energy	Public Transport
GmbH	47 %	57 %	58 %
Aktiengesellschaft	24 %	43 %	40 %
Eigenbetrieb	22 %		2 %
Anstalt öffentlichen Rechts	5 %		
Zweckverband	2 %		
Total	100 %	100 %	100 %
Deutsches Institut für Urbanistik			

*Source: Trapp/Bolay (2003: 44).

Table 12: Ownership of Municipal Companies: Comparison between Sectors*

	Water	Energy	Public Transport
100 % municipal share (direct interest/"daughter company")	43 %	12 %	13 %
100 % municipal share (indirect interest/"grandchild company")	12 %	17 %	55 %
Majority company (municipal share 50 – < 100 %)	38 %	54 %	28 %
Minority company (municipal share < 50 %)	7 %	17 %	4 %
Total	100 %	100 %	100 %
Deutsches Institut für Urbanistik difu			

*Source: Trapp/Bolay (2003: 45).

2.3.6 Extent of Outsourcing and Privatisation in Network Infrastructure Areas Underlines the Trend towards a "Municipality Group" and Deficient Control

Eight of the 36 municipalities looked at by the Difu now regard themselves consciously as a "Konzern Stadt," as a municipal group of companies, explicitly stating so in their reports.[67] In addition to the linguistic label, there is a trend in the local authorities under study towards group formation (cf. also Killian/Schneider 1999: 19 ff.). The outsourcing of further municipal public services and core administrative functions to separate companies has led increasingly to the creation of group structures, with municipal "daughter" companies in turn hiving-off entities to new enterprises. The founding of new companies, which take on comparatively new tasks such as city marketing, also leads to group formation. This development is evident even at first glance from the organisation charts or participation structures in the municipalities, which often cover several pages. Without the respective "parent company" imposing requirements in economic and substantive planning, "grandchild" companies risk developing too great a dynamic of their own. This means decreasing control over municipal companies. This could cause problems for local authorities from a democracy theory perspective, because control of these companies by the city council is no longer fully ensured.[68]

Perusal of the holdings reports raises doubts whether such reports can compensate the loss of information relevant for local authority control caused by the hiving off of entities from municipal administration and their consequent exclusion from the municipal budget (Beuß 2001: 164). This is also because the information and figures contained in the reports is often out-of-date by the date of publication.

The report on participation interests alone cannot be a tool for the local authority to control enterprises in which it has a stake. Other tools for the management of participations must

67 The eight cities are Augsburg, Brunswick, Duisburg, Essen, Gelsenkirchen, Mannheim, Nuremberg, und Wiesbaden.

68 On the problem of group control by the council cf. Wohlfahrt/Zülke (1999).

be employed, such as economic plans, annual financial statements and quarterly reports, shareholder and supervisory board meetings, or council committees on participatory interests for the purpose of controlling and guiding enterprises. In addition, the articles of association of entities being hived off establish an important basis for local authority control from the very outset. Reports on municipal holdings offer a general overview of the "*Konzern Stadt*," the "municipality group," which grows in importance in proportion to the number of enterprises involved.

2.4 Civic Community – Strengthening Local Democracy Beyond Representative Democratic Paths

The civic community model has attracted a great deal of attention in recent years. But many ask themselves whether this is more than a passing fad (Plamper 1998: 11), not really generating a substantial, empirically significant change in relations between citizens, local council, and administration. In the 1970s, in the wake of the 1960s student movement and other developments, numerous civic action groups emerged, triggering a first, intensive "participation debate" (Kodolitsch 2002a: 7; Wollmann 1998a: 39). Even though the debate continued into the 1980s, albeit less substantively focused on "participation" in the narrower sense of the term, public participation – this time in a much more comprehensive sense – gained new impetus in the 1990s.[69] This was reflected in the greater attention paid to "civic community" by academics and practitioners, generating regular "participation euphoria" in the late 1990s without systematically addressing the limits, potential, and content of the "civic community" concept (Bogumil/Holtkamp/Schwarz 2003: 7).

Depending on the form of political participation and the degree of individual engagement, involvement in the independent handling of local affairs can concern a range of roles to be played by citizens in relation to local authorities. The simplest form of participation in the affairs of the local community is voting in local elections as an expression of representative democracy. In addition, civic involvement takes place in cooperative and direct-democratic procedures. An important factor driving the introduction of civic community elements, apart from the increasing urgency of consolidating the budget, is the shift in the thrust of local government administrative reform (cf. chapter 2.1) away from internal modernisation (distributed task and resource responsibility in optimised administrative procedures) towards the "external contact" of local administrative authorities with their "customers," primarily the citizens. In a broad and fundamental sense, "the special quality of civic community … becomes evident in the reconfiguration of the triangle of forces between citizens, municipal council, and administration. At issue is the supplementation of representative decision-making forms by direct democratic and cooperative forms of democracy" (Bogumil/Holtkamp 2002b: 5). Just how comprehensive this "supplementation of representative decision-making forms" is, at least in spatial terms, is indicated by the

69 Wollmann even speaks of a "direct-democracy 'jolt' in the local government constitutional and political world" (1998a: 39).

widespread[70] introduction of direct-democratic, plebiscitary elements (cf. chapter 2.2.1) and the integration of citizens into a "cooperating" or "activating" municipality through civic engagement (cf. chapter 2.2.2). The literature on the subject now fills entire shelves.

2.4.1 Development of Direct-Democratic Forms of Democracy in Municipalities

"Direct democracy is a part of local self-government" (Keller 2000) and finds expression in direct influence exerted by citizens on a political decision as opposed to cooperative and participatory forms in which citizens "take part in decision-making procedures in an advisory, informing, requisitioning capacity" (Wollmann 1998a: 39). Whereas the role of the citizen, as far as the level of citizen focus in administrative modernisation is concerned, can be described as that of "customer," in the development of direct-democratic forms in the civic community, the citizen assumes the role of (political) "contract giver" or "employer."[71] The development of forms of direct democracy finds expression in two ways: in issue plebiscites (citizen initiative and citizen referendum) and in personal plebiscites (direct election of the mayor).[72]

Citizen Initiative and Citizen Referendum

The "nation-wide" inclusion of the citizen initiative and citizen referendum in the local government constitutions/local government acts of the states does not mean that the contents and the obstacles to an issue plebiscite are the same everywhere. The detailed arrangements for the two-stage procedure of citizen initiative and citizen referendum differ from state to state, for example as regards the number of signatures required (signature quorums) and the issues that may be put to plebiscite.[73] Participation quorums for citizen initiatives and referendums, negative catalogues of issues, and applicants' cost recovery proposals assume a defensive function against representative forms of democracy and are intended to prevent the blockade of municipal policy and the domination of sectional interests through direct-democratic elements. And it does indeed seem to be the case that "(high) quorums for petition, initiative, and referendum, limitation to 'important matters,'

70 "Whereas until the late 1980s, the direct election of the mayor was restricted to Baden-Württemberg and Bavaria, and the possibility of influencing local council decision directly by means of citizen initiatives and citizen referendums was limited to Baden-Württemberg alone, mayors are meanwhile elected directly by the people in all states of the federation, and citizens everywhere can with the aid of citizen initiatives and citizen referendums oblige the municipal council to address certain issues they would not have put on the agenda themselves, and possibly to decide such issues as they desire" (Spiegel 1999: 12). For a chronicle of the introduction of these elements in state local government statutes, see Bogumil (2001: 195).

71 Bogumil/Holtkamp/Schwarz (2003) identify not only the participatory role of the "customer" and the "contract giver/employer" in the civic community but also a third role, that of "active participant," which finds expression particularly in civic engagement (cf. chapter 2.2.2).

72 It should not be forgotten that under Article 28 (1) sentence 4 of the Basic Law, a "local assembly" can replace the elected body/municipal council. Since this "primeval form" of direct-democratic assembly of citizens is conceivable only in small or tiny communities, which, moreover, have since largely "disappeared" in the course of the territorial reorganisation of local government, this form of direct democracy is more or less anecdotal in nature (cf. Wollmann 2002b: 31, with reference to Franke 1994 and 1996).

73 Detailed account of the different arrangements in, e.g., Wollmann (1998a)

long negative catalogues of issues which are excluded from citizen referendums" makes these "exceptional procedures" (Roth 1998: 431). Citizens have so far make "remarkably little use" of such referendums (Wollmann 2002b: 32). Such plebiscitary procedures are accordingly not powerful alternatives to respresentative forms of democracy but a functional complementation (Bogumil 2001: 207).

In principle, direct-democratic procedures generate "political socialisation and learning effects, improved transparency, enhanced responsiveness and citizen focus" (Bogumil 2001: 205). The often intensive debate caused by citizen initiatives and citizen referendums can lead to thorough discussion of the issues, which thus become more accessible to the public. Similarly, for the duration of the procedure, the local public expands "beyond the local elite" (Holtmann 1999: 210).[74] The other side of the coin is that the often extremely complicated matters and argumentation chains are often presented in a foreshortened and overdrawn manner for the purposes of influencing public opinion. Arguments often advanced against the use of issue plebiscites include their "undercomplexity, the lack of scope for compromise, the excessive demands they make on citizens, and fluctuating public sentiment" (Bogumil 2001: 205).

As far as empirical data are concerned, there are a number of surveys available,[75] but on the whole Bogumil considers the data on citizen initiatives and citizen referendums to be "sketchy because there is no mandatory municipal reporting in most states" (2001: 200). In autumn 2003 the association "Mehr Demokratie e. V." presented a comprehensive comparison of direct-democratic procedures in states and municipalities including the "First Popular Referendum Ranking" (Mehr Demokratie 2003a). The organisation counted a total of 2750 citizen initiatives and 1400 citizen referendums to date,[76] almost half of which were staged in Bavarian municipalities (Mehr Democratie 2002a: 8). The most comprehensive material available to Mehr Demokratie is on Bavaria and Bavarian local authorities, since these procedures have been systematically recorded and assessed since the introduction of the right to conduct citizen initiatives and citizen referendums by

74 However, this does not mean that direct-democratic procedures result in a real extension of political engagement beyond the circles that are politically active in any case. Disadvantaged Groups can be further excluded through participatory processes, and articulate groups gain scope for bringing their interests to bear in municipal decision-making processes. Roth argues in similar vein: he sees modernisation trends like marketization, administrative modernisation under the New Public Management model, and local networking under the motto of "governance" as developments that provide "primarily privileged 'activists' with more participation opportunities and consumer sovereignty" (2001: 147). See also the reference by Roth to findings from the USA presented by Kitschelt (1996) to the effect "that direct-democratic procedures at the local level tend to contribute to further privileging already privileged interests and can thus tend to bring about political and social inequity" (Roth 1997: 412).

75 For examples see Bogumil (2001: 200).

76 It should, however, be pointed out that the reliability of these figures is not certain. The assumption is that, Mehr Demokratie e.V. being an organisation that propagates the introduction of direct democratic procedures, an "upward trend" could possibly be built into the figures. Moreover, these figures do not fundamentally contradict the conclusion that these instruments have been sparingly used in municipalities. A comparison of the statistical frequency of the citizen initiatives instigated in selected states shows that, according to available figures, a citizen initiative is instigated every 11 years in a North Rhine-Westphalian municipality, every 13 years in a Bavarian municipality, and every 21 years in a Hess municipality, Mehr Demokratie (2003a: 8). For the individual municipality a citizen initiative is thus an extremely rare "event."

referendum on 1 October 1995.[77] A total of 1091 cases are listed addressing various issues as shown in table 13.

Table 13 shows that plebiscites that are concerned with network infrastructure issues in municipalities (public infrastructure and service facilities, waste management projects) take place relatively frequently in Bavaria, so that these plebiscitary elements of democracy have indeed become important for representative decision-making structures in the classical public services sectors. For example, the citizen initiatives and citizen referendums held in Bavaria between 1995 and 2001 in connection with the (partial) privatisation of municipal water supply undertakings all ended favourably for the initiatives, which opposed privatisation (Mehr Demokratie 2002).[78] Local issue plebiscites are thus becoming an important instrument for citizens, and also for the opposition in local councils (council initiatives) in revising important municipal network infrastructure decisions such as the privatisation of municipal enterprises.

In his cross analysis of the empirical data, Bogumil comes to the conclusion that "the content of the permissible issue catalogue relates clearly to the frequency [of issue plebiscites]" (2001: 202), and the size of the signature quorum (which generally varies in proportion to the size of the community) correlates negatively with the number of citizen initiatives and referendums instigated. "Experience in Bavaria demonstrates that when institutional hurdles are low frequency of use increases considerably" (Bogumil 2001: 2002). The "low institutional hurdles" in Bavaria include the signature quorums of 3 per cent to 10 per cent for citizen initiatives, which can be collected freely without a time limit, and a small negative catalogue of excluded issues (Mehr Demokratie 2003a: 28).[79]

77 Mehr Demokratie e.V. publishes an annual report on the effects and application of citizen initiatives and citizen referendums in Bavaria (2003b).

78 An important example from North Rhine-Westphalia is the citizen initiative against privatisation of the Münster *Stadtwerke*. In November 2001, the Münster city council decided to partially privatise the Stadtwerke Münster GmbH, the vote being carried by the Christian Democrat and Free Democrat majority. 49 per cent of shares were to be sold to a private investor and 51 per cent were to be retained by the municipality. When the privatisation plans become public, an alliance formed between the citizen's office "Pro Stadtwerke," the trade union ver-di, environmental protection organisations, the Münster attac group, and political parties to thwart the plans of the council majority (in the 1999 municipal elections in Münster the distribution of the vote was as follows: CDU: 54%, SPD: 26.2%, Greens: 11.2%, FDP: 5.0%). Signatures for a citizen initiative were collected to reverse the council decision. In a citizen referendum the question was put whether the Münster municipality should remain sole owner of the Stadtwerke Münster GmbH. 65.4 % of the votes cast were in favour of rescinding partial privatisation. Voter turnout was 31.6 %. The referendum just managed to attain the 20 % approval quorum, obtaining 20.67 %, and was therefore carried. Comparable citizen initiatives on similar issues have been held in other North Rhine-Westphalian municipalities (Düsseldorf, Hamm, and Steinheim) (Deppe 2002: 40).

79 Although signature quorums in many other states are similar in size, extremely brief time limits for collection are often set (Mehr Demokratie 2003a).

Table 13: Citizen Initiative Issues: the Example of Bavaria*

Issues	**Cases**
Transport projects e.g., construction of a bypass, establishment of a pedestrian precinct	23 % (246)
Public infrastructure and public facilities e.g., construction of swimming pools or kindergartens, drinking water supply	22 % (241)
Preparatory and binding land-use plans (urban land use plans)	21 % (233)
Waste disposal projects e.g., construction of sewers, privatisation of waste disposal plants	9 % (97)
Single, private projects e.g., construction of hotels, golf courses, shopping centres	9 % (93)
Mobile telephony facilities e.g., installation of transmitter masts	4 % (49)
Rates, charges e.g., refuse collection rates, parking fees, surtaxes for sewerage systems	3 % (31)
Others e.g., street names, salaried or non-salaried mayor	9 % (101)
Total	**100 % (1091)**

*Source: Slightly modified list, taken from: Mehr Demokratie (2003a: 9).

In contrast to the figures Wollmann cites as evidence that citizens tend to use the citizen initiative and citizen referendum in reaction to local council decisions, often rejecting them, rather than "making pro-active and innovative use" of these instruments (Wollmann 2002b: 32), the figures presented by "Mehr Demokratie" show that citizen initiatives can be both "accelerators" and "brakes" (Mehr Demokratie 2003a: 9). In 28.5 per cent of the cases in Bavaria, a citizen initiative put forward a planning proposal, in 24.7 per cent of cases it rejected other planning but recommended an alternative plan, and in 41.1 per cent of cases, citizen initiatives served only to "fend off" a project (Mehr Demokratie 2003b: 13). Unfortunately, no detailed analysis is available of how the objectives and issues of plebiscites interrelate, so that nothing can be said about whether issue plebiscites addressing public infrastructure, utilities, and waste management projects tend to be reactive and rejective or pro-active and constructive.

An important consequence of this direct-democratic intervention may not be reflected directly in the statistical "success rate" of issue plebiscites, which, measured against the mere number of referendums held, is not particularly high (see above: Bogumil 2001, Roth 1998, Wollmann 2002b). It is likely to be much more important that citizens and corporate actors in municipalities (opposition parties, associations, interest groups, civic action groups) gain a potential veto position which they can use as a threat in the run-up to council decisions,[80] since majority political groups in the council are also likely to try to

80 See, for example, the recent example of the privatising of the local savings bank planned by the Stralsund municipal council, where, on the initiative of the PDS, the number of signatures formally required for

avoid what would from their point of view be a defeat through a citizen initiative/ referendum. In the run-up to actual decisions, forms of direct democracy can thus "be considered an institutional incentive for negotiated settlements and for responsive politics" (Bogumil 2001: 209).

Direct Election of the Mayor

At least for the sake of completeness, the direct election of the mayor as a personal plebiscite should also be briefly mentioned, although this direct-democratic procedure is not so relevant for the context under study.

"Until the late 1980s, mayors, as the key figures in the 'South German council-mayoral constitution', were directly elected only in Bavaria and Baden-Württemberg. (Wollmann 2002b: 33). The advocates of direct mayoral elections name three arguments: "Direct election of the head of the municipality gives citizens' greater scope for democratic participation, a strong mayor safeguards general local public interests in the face of the sectional interests of associations and parties, and, by bundling all leading functions, it ensures a high measure of administrative efficiency" (Bogumil 2001: 192). It was expected that the introduction of direct elections would improve the "'governability' of cities" (Wollmann 2002b: 33). The opponents of direct elections reverse the arguments, pointing to the danger of a strong mayor exploiting his power, denying that centralised decision-making enhances efficiency (tendency towards executive leadership), and generally fearing a reduction in opportunities for public participation (Bogumil 2001: 192).

In contrast to the citizen initiative/referendum, nothing can be said about the impact of direct mayoral elections on decision-making in network infrastructure sectors. However, an empirical study on North Rhine-Westphalian and Baden-Württemberg municipalities indicates that the directly elected mayors play a leading role in initiating civic community (Bogumiö/Holtkamp/Schwarz 2003: 14). The increased attention paid to voluntary civic participation generated in the civic community (often promoted by the mayor), in dialogistic procedures up to and including forms of cooperation (cf. chapter 2.4.2 below) can lead to greater citizen focus and satisfaction with local authority services and projects. The probability of polarising issue plebiscites being held in the community can hence be reduced from the outset. This means that "more important than citizen referendums instead of council decisions are cooperative forms of civic participation *before* council decisions" (DST 2003e: 3; highlighting by the author).

a citizen referendum were collected in a brief space of time, forcing the SPD group in the council to reconsider their support for the privatisation plans ("The clear expression of public opinion made it necessary to rethink the position" – after all, local elections were due in June 2004. Without the votes of the SPD privatisation of the savings bank would not have been possible (Süddeutsche Zeitung, 2 March 2004).

2.4.2 Civic Engagement in the "Cooperating" and "Activating" Community

The term civic engagement can cover all forms of "classical" volunteer work, self-help activities, and the assumption of public-interest and community-oriented tasks and activities by civic associations/groups. These activities are outside the sphere of gainful employment (KGSt 1999). Citizens take on the role of "active participants" if their participation becomes practical civic engagement, for example in running sporting and recreation facilities on their own responsibility or in self-organisation and self-help initiatives in the social, cultural and neighbourhood help fields.[81] This means that participation and engagement need not extend to the municipality as a whole, but, especially in larger cities and towns, also operates in spatial "stratification" within districts, quarters, or neighbourhoods. Where participation concentrates on small territorial units, especially "Districts with Special Development Needs" (Difu 2003), there is less reliance on classical procedures[82] and more on forms and methods deriving from community work, which depend explicitly on activation of the disadvantaged population (Franke 2003: 192 ff.; Hinte s.a.).

Civic engagement at the local level as an expression of activated, personal willingness to become involved in the community does not grow and flourish of its own accord. It has to be encouraged.[83] Enabling and cultivating civic engagement are central tasks in the civic community. For example, public recognition and honours (rather than pecuniary reward) can motivate voluntary engagement. But it is also important to develop and provide "infrastructures" for civic engagement (Heinze/Olk 1999: 93 ff.). This could take the form of volunteer agencies, or, for example, the neighbourhood management offices under the Socially Integrative City programme.

If civic community is hoped to generate greater citizen focus on the part of the administration and more efficient local government action, which the present authors are not alone in anticipating (see, for example Bogumil/Holtkamp/Schwarz 2003), it is obvious that promoting an active participant role for citizens also aims to cut costs. "Since greater promotion of civic engagement as a budget consolidation strategy was apparent even in the first phase of consolidation in the early 1990s, it seems likely that the new wave of local government consolidation will lead to more extensive transfers of municipal tasks [to citizens]" (Bogumil/Holtkamp/Schwarz 2003: 17). However, civic engagement should not be a mere "stopgap" to compensate public service and supply deficiencies, thus probably demanding too much of the citizen as an active participant in local government.[84] What is

81 For further examples cf. Bogumil/Vogel (1999).

82 For a systematic overview of participatory procedures see, for example, Roth (1997), Bogumil/Holtkamp (1999), or, with practical orientation, Bischoff/Selle/Sinning (1995), as well as Franke (2003) for the emphasis on activating, out-reach forms.

83 Some speak of "promoting and demanding." We will not go into detail but merely point to the problematic ethical and normative implications involved when voluntary engagement theoretically becomes an "imposition" on certain sections of the population.

84 The function would not only be questionable from a legal point of view (especially if public functions are delegated) but especially from a social-policy perspective if civic engagement is to assist in delivering social services. The necessary continuity and security of delivery is at risk if civic engagement is relied on, if only because the motivation and forms of engagement have evolved from long-term, regular

more, it will not be possible to exploit the undoubted potential for collaboration to the full if other participative roles [customer and contract-giver] are not fostered. Citizens will not collaborate in performing public services if they realise they have no say in what services are to be delivered, and if they are to do no more than stop gaps when public authorities withdraw owing to financial difficulties." (Holtkamp 2000 quoted by Winkel 2003: 100 f.).

2.4.3 Participation in Public Utility Services

Local authorities are beginning (at least verbally in the civic community) to offer citizens a greater say and more opportunity for active participation. They are thus exploiting societal stocks of knowledge and experience with whose help municipal services and functions can become more accessible to the public. What generally proves difficult is linking up and integrating the different forms of democracy. For example, the forms of direct democracy we have mentioned cannot (and should not) replace representative democracy at the local level. They should complement it by a "public-interest" dimension (DST 2003e: 3). For "voluntary, dialogistic and cooperative participation … offers opportunities to integrate committed citizens without necessarily shifting decisional responsibility from the elected representative body to the citizens" (DST 2003e: 3). This is particularly relevant where the legitimation crisis[85] makes it increasingly important for local representative democracy to institutionalise other forms of democracy in addition to party democrcy, which involve the citizens directly in *democratic policy-making*" (Bogumil/ Holtkamp/Schwarz 2003: 21; highlighting in the original).

Civic community – as Bogumil/Holtkamp/Schwarz fully agree – needs coordinated "participation management" (2003: 25 ff.), allowing the competent municipal authorities to consider who is to be involved in the decision-making process on particular issues, how this is to proceed and at what stage. However, the promotion of civic engagement should not be reduced to more or less "technical" aspects like participation procedures, incentive structures, material infrastructure, etc. The debate on civic community would risk being removed from the overarching context of normative "promotion and 'cultivation' of social and political willingness to participate (Evers 1999: 62) to revitalise the local public (civil society). Finally, the civic community model is also concerned with a comprehensive "cultural change … which, as a collective learning process, aims to incite local government decision-makers to make advances to the citizens on their own initiative and to understand public participation as an enrichment rather than a curb on their competencies and a threat to established routines" (Bogumil/Holtkamp/Schwarz 2003: 29).

From the local authority point of view, the "amenability" of network infrastructure system issues and concerns to participation appears to vary strongly from sector to sector. Whereas participation opportunities and procedures tend to be rare in the water and

volunteer work, e.g., in associations towards limited-period, project-related engagement (Heinze/Olk 1999: 90 ff.), in which the "fun" factor is also expected to have its place.

85 In two recent rounds of local government elections, voter turnout (excluding the city states) ranged from a peak of over 60 per cent in Bavaria and Rhineland-Palatinate to a low of under 50 per cent in Brandenburg and Thuringia. Source: own calculations on the basis of Internet data from state statistical offices and state returning officers

energy sectors,[86] at least as far as "contract-giver/employer" and "active participant" roles for citizens are concerned, public participation in the classical sense is not unusual in public transport. One reason for the relatively frequent use of public participation procedures is likely to be the easily comprehensible content of participation in the public transport sector. Public participation – in whatever form and by whatever means – in preparing local transport plans, where, for instance, negotiations can be held on service frequencies, journey times, or line routing – is more amenable to participation and, purely from the point of view of the subject matter, is more inviting for participation that the highly complex technical questions to be dealt with in the water sector, whose infrastructure, because of the large-scale technology it involves, is also very difficult to modify. Finally, it is easier to establish a (short-term) link between public participation procedures and specific decisions in the public transport sector than in the water sector, where depreciation periods of several decades are calculated for technical infrastructure.

As the Mehr Demokratie figures for citizen initiatives and referendums on network infrastructure sectors show, they offer the public (and interest groups) an instrument (however seldom used) for challenging politically controversial council decisions. One regular occasion for its application is a council decision to (partially) privatise a municipal undertaking.

3. Local Self-Government in Germany in the Light of Liberalisation and Privatisation Trends in Network-Related Infrastructure Systems

The traditional image of local self-government, in which the municipality is, by virtue of Article 28 (2) of the Basic Law, an all-embracing guardian managing the "affairs of the local community," has long been a thing of the past as more and more municipal tasks and services have been outsourced to privatised entities or to completely private companies acting as "municipal agents." In the operative business of municipal environmental protection – particularly in utility services – the shift to the private sector is very apparent to both the municipality and local residents. The management of the affairs of the local community by municipalities "in their own responsibility" under Article 28 (2) of the Basic Law is therefore to be interpreted in the light of the redistribution of municipal and private tasks and decision-making.

3.1 Constitutional Requirements for Privatising Municipal Services in the Light of the Local Self-Government Guarantee under Article 28 (2) of the Basic Law

The rapid shift of responsibility for the performance of municipal tasks to privatised entities presents the traditional model of constitutionally guaranteed local self-government under

86 Following liberalisation of the energy industry, municipal influence in this sector has markedly declined. In this field citizens can at best participate in the role of customer. Nevertheless, little use is made of this possibility, if one considers the number of household customers who have switched electricity suppliers. Between 1998 amd 2001, only between 5 and 10 per cent of customers did so (Monstadt 2003: 45).

Article 28 (2) of the Basic Law with a challenge. It should be noted that the environment-related elements of public services, where they are not performed mandatorily as directed by higher levels of government, are to be counted among the "affairs of the local community" and therefore enjoy the protection of Article 28 (2) (cf. Papier 2001: 13 ff,).

It is, however, clear that the traditional concept of municipal "public services" cannot claim independent constitutional relevance per se. It does no more than describe the traditional public sector task of providing the public in appropriate quality with services and goods essential for a functioning community. The fact that in recent decades these services have, at least in Germany and Austria, normally been provided by local authorities does in fact closely associate public services with the constitutional guarantee of self-government under Article 28 (2), and with the discretionary and statutory functions performed by local authorities in the field of utility infrastructures. Hence, local public services are to be counted among the "affairs of the local community" referred to in Article 28 (2) and can therefore be regarded as coming under the constitutional protection of this provision (see also Papier 2003: 687 f.).

The following should be said to avoid any misunderstanding about the relationship between privatisation and local self-government. The prevailing view is probably still that Article 28 (2) protects only relations between local authorities and the State but not between local authorities and private enterprise (cf. for example, Ossenbühl 1998: 13 ff; further references in Rennert 2002: 326). If this view is accepted, it means no more than that municipalities and/or their undertakings can assert no defensive claim against the private sector on the basis of Article 28 (2). The issue under study, namely whether the type and extent of privatisation in municipal service delivery *by local authorities themselves* is compatible with the constitutional model of distributed and civic-democratic self-government, is not affected. Article 28 (2) remains the reference provision on this question. The constitutional relevance in relations between Community law, privatisation, and municipal public services becomes manifest in the provisions of Article 28 (2) of the Basic Law, i.e., the "affairs of the local community," and, as far as the delegation of functions to third parties is concerned, performance of these functions by municipalities "in their own responsibility" (similarly, Schmidt 2003: 229 f. with further references).

If constitutional interpretation is to reflect constitutional reality (cf. chapter 3.1.1), management by municipalities of the "affairs of the local community" in "their own responsibility" needs to be reviewed to take account of the increasing cooperation between the public and private sectors in delivering services and the factual sharing of decisional responsibility. Taking into consideration the political and democratic function of local self-government as decentralised, accessible decision-making, it must be asked whether there are limits to the transfer of tasks, decision-making, and hence responsibilities by municipalities themselves, and what corner stones and instruments of municipal decision-making need to be maintained for constitutional purposes (cf. chapter 3.1.2). With regard to ultimate decisional authority, however, a distinction must be made between types of privatisation and forms of – discretionary or mandatory – municipal functions (cf. chapter 3.1.3). The question is whether, in view of the increasing transfer of functions by the municipality itself, as well as statutory – material – privatisation options which can lead to local authorities ceas-

ing to perform certain tasks, Article 28 (2) of the Basic Law does not commit municipalities to retaining a minimum of authority to be exercised "in their own responsibility" (cf. chapter 3.1.5).

3.1.1 Constitutional Reality and Constitutional Law – Changes in the Performance of Functions in Municipalities and the Constitutional Interpretation of Article 28 (2) (2) of the Basic Law

Given the increasing division of functions and decision-making between municipalities and the private sector in delivering local public services, it is high time to adapt interpretation of the self-government guarantee under Article 28 (2) of the Basic Law to take account of modern conditions. Traditionally, municipal functions have been seen as requiring protection against interference by superior authorities, usually superior levels of government. The defensive right of local self-government was mobilised against the statutory "centralisation" of municipal functions.[87] In the meanwhile, however, the situation as regards municipal tasks has in actual fact fundamentally changed. Under pressure from the ever increasing number of expensive mandatory tasks and the dramatic and intensifying, nationwide local government financial crisis (cf. chapter 1.1) brought about by falling tax revenues and demographic decline (cf. chapter 1.3), municipalities are not so much being deprived of functions by the State; *local authorities are taking action themselves* to transfer tasks to private partners. This process, which can go as far as the complete sale of municipal service facilities, is often motivated primarily by the desire to cut costs. In a certain sense, however, this trend throws light on the constitutional guarantee of local self-government "from the other side." The legitimate decision-makers in local authorities give a particular slant to the constitutionally guaranteed management of "affairs of the local community."[88] The performance of local government tasks within the meaning of Article 28 (2) of the Basic Law must therefore be interpreted with the new distribution of functions and decision-making between municipalities and the private sector in mind. Commentators on the Basic Law have so far taken little notice of the changed constitutional reality (Tomerius/Breitkreuz 2003: 426). Given the increasing outsourcing and hiving-off of municipal tasks to private actors, the constitutionally guaranteed municipal "management of the affairs of the local community on their own responsibility" is meanwhile to be seen in a broader perspective. The stronger the trend towards integrating private actors vested with powers to perform municipal functions and make pertinent decisions into the legitimation chain between municipality and citizens, the more important questions of personnel and substantive legitimation and decisional responsibility become (Tomerius/Breitkreuz 2003: 428 f.).

87 See BVerfGE 79, 127, 148 – Rastede; 34, 216, 233 ff. on the transfer of waste collection to counties and county boroughs with the focus on the institutional guarantee of local self-government; for critical comment and argument in favour of a more strongly subjective protective function of Article 28 (2) of the Basic Law see Kenntner 1998: 701 ff.

88 On the question of binding performance under Article 28 (2) of the Basic Law see 3.5; see also Tomerius/Breitkreuz 2003.

3.1.2 Position of Municipalities in the Structure of the State and the Democratic and Political Function of Self-Government Pursuant to Article 28 (2) of the Basic Law

Self-government, whether municipal or functional in nature,[89] is characterised by a three-way relationship between self-governing entities and the State in the narrower sense of the term and third parties (especially the group of self-governing individual entities). For instance, the municipality has rights vis-à-vis the State (i.e., other governmental authorities). At the same time, however, it not only represents residents' interests vis-à-vis the State but also and often primarily acts in its relations with these residents as a governmental agency itself, and thus as part of the overall State. This very integration of the municipality in the structure of government, the State, makes it clear that the governmental powers by virtue of which the municipality is an agent of public administration are not vested in it for "private use" (Gröpl, in: Hoffmann/Kromberg/Roth/Wiegand 1996: 104 f.).[90] Municipal competencies exist not for the sake of the municipality itself.[91] The municipality is hence required to act because it may not at will neglect to manage the affairs of the local community (cf. Stern, in: Bonner Kommentar 1999, Article 28, Rz. 92). If Article 28 (2) 1 of the Basic Law speaks of municipalities acting "*on their own responsibility*," this means that, although municipalities are not under the tutelage of the State, it does not imply that they may ignore the concerns of central government and the interests of society as a whole (Faber, in: Alternativkommentar 2002, Article 28 1 II, Abs. 2, Rz. 43, with reference to the similar situation in Article 65 of the Basic Law).

The Democratic-Political Function of Municipal Self-Government and the Privatisation of Municipal Functions

Neither the authority vested in municipalities nor their rights vis-à-vis the State are granted for "private use," owing not to the relationship between the municipality and other governmental agencies but to the politico-democratic function of all self-government, ultimately to the relationship between the municipality and its citizens (Mutius 1996: Rz. 43 ff.). Self-government of whatever sort is not an intrinsic right of the organisation concerned but serves the self-determination of the individuals standing, as it were, "behind the collectivity" (Haverkate 1992: 346; similarly von Unruh 1972: 16 ff.). The local self-government model finds constitutional justification in the modus operandi of democratic mechanisms at the local level, especially in the effective participation by local citizens in political decision-making within the community (Arnim 1988: 15 f. with further references). In electing members of a municipal representative body (and still more in directly electing the mayor, as is now practiced in several states, cf. chapter 2.4.1) the citizens of a municipality mandate

89 On the distinction see, for example, Kluth 1997: 12 f.; Ehlers, in : Erichsen 2002, para 4, point 9; for general treatment also Stern 1984, para 12 I 1.

90 On the integration of the municipality in the structure of the State see BVerfGE 73, 118 (191); 79, 127 (143); Becker, in: Bettermann/Nipperdey 1962: 687 und 700; Dreier in: Dreier, GG, Bd. II, 1998, Art. 28, Rz. 79.

91 Cf. Ehlers 1997: 141, according to whom the administration can be granted no freedom but only "duty-bound scope for action" and the self-government guarantee is to be understood as a competence provision.

the people concerned to deal with the affairs of the local community in the public interest (Mutius 1996: point 45). Such election therefore vests municipal institutions not only with the necessary personal and substantive legitimation[92] but also imposes responsibility on these institutions – and hence on the municipality – vis-à-vis the citizens. In asserting its rights and competencies, the municipality is thus not free but, as we have seen, accountable to the State and to its own legitimation base (Faber, in: Alternativekommentar 2002, Article 1 II, Abs. 2, Rz. 43[93]).[94]

Finally, it can be said that the democratic-participatory function of the self-government guarantee makes demands on the control of municipal task performance by municipal and private undertakings. Adequate control and influence over strategic (municipal) entrepreneurial decisions therefore become the legitimation basis for the performance of functions by the private sector (cf. also Rennert 2002: 331 f.; on intervention (*Ingerenz*) cf. chapter 3.1.2).

"Own responsibility" in the performance of municipal functions under Article 28 (2) of the Basic Law – minimum requirements for the privatisation of municipal tasks?

According to the constitutional model of municipal self-government, democratically legitimated decision-makers at the decentralised, municipal level are required to make decisions responsive to public and local concerns in conformity with the subsidiarity principle, and be accountable to the citizens for these decisions. But if decision-making is increasingly being transferred to private institutions and fundamental, indeed crucial decisions concerning municipal public services are affected, it must be asked whether the "own responsibility" model for the management of local community affairs is still intact. Let us review the constitutional position from the perspective of Article 28 (2) of the Basic Law, considering firstly the concept of "responsibility," then taking a look at the exercise of municipal control over decisions through intervention (*Ingerenz*) in the private performance of

92 For a comprehensive treatment both of the requirement for democratic legitimation of the municipality and its derivation from the community see Arnim op. cit., 8 ff.: see also BVerfGE 38, 258 (271), according to which the municipal representative body, being the institution representing the citizens of the municipality, lends the municipal government as local authority the necessary legitimation; that municipal representative bodies are generally not regarded as parliaments but (like municipalities as a whole) as belonging to the executive (BVerfGE 65, 283 (289); Schmidt-Aßmann, in: idem 1999: Rz. 56) does not contradict this conclusion because the executive also requires democratic legitimation.

93 Interesting in this context is the circumstance that the Parliamentary Council opposed the alternative proposal by deputy Dr. Schmidt that the municipality should act "in free responsibility," cf. Enstehungsgesschichte der Artikel des Grundgesetzes, Art. 28, JöR 1 (1951), 244, 254).

94 It remains to be seen whether this outcome derives from Article 28 (1) sentence 1 of the Basic Law, from Article 28 (2) sentence 1, or – for which there are good arguments – from a combination of the two constitutional provisions. Article 28 (2) sentence 1 is at any rate likely to be assigned the more important role in the dogmatic derivation of the content of municipal duties to fulfil functions because, unlike Article 28 (1), it is not a normative provision requiring implementation by legislation, but an enforcement provision, which is directly binding on legislature, administration, and judiciary (on the normative provision cf. BVerfGE 47, 253, 272; Stern 1984, para 19 III 5 a, p. 705 f.; on classification as enforcement provision BVerfGE 1, 167, 174 f.; Dreier 1998, Article 28, point 86, with documentation of opposing view). Also in relation to Article 20 of the Basic Law, the "general" constitutional formulation of the democracy principle, Article 28 (2) has a special significance, since it specifies the role of the municipality in the structure of the State.

functions in the municipality, and, finally, sounding out the constitutionally required municipal scope for intervention.

The concept of responsibility

If own responsibility in the meaning of Article 28 (2) sentence 1 of the Basic Law is also interpreted as the duty of municipalities to handle their affairs on their own responsibility in the public interest (Becker, in: Bettermann/Nipperdey 1962: 710), this seems at first glance not to mean very much. Although the term "responsibility" turns up often in the legal system,[95] there has generally been no detailed explication of the concept. More recently, however, certain authors have again addressed the concept of responsibility in view of the progressive sharing of functions between the public and private sectors.[96] We agree with Wilke that different regulatory matters involve different concepts of responsibility (and accountability) and go on to draw a distinction as regard administrative responsibility (i.e., responsibility for the exercise of public administration) between a competence vesting element and a sanctions element. The former refers to the independent performance of public administrative activities with not inconsiderable autonomy or discretion, and the latter refers to having to bear the consequences for inadequate performance of the tasks concerned. The two are not opposed in an either-or sense. As a rule they occur together and are even closely dovetailed (Wilke 1975: 511 f.).

Vitally important for the question of the extent to which a municipality is entitled to transfer the management of local affairs to others is the *limit* to responsibility deriving from the democracy principle addressed by the *Federal Constitutional Court* in a recent ruling on the granting of co-determination rights. In exercising State authority, the right of final decision of an administrative agent accountable to Parliament must be established for all decisions important in performing an official mandate (BVerfGE 93, 3, 70). Even if this formula is not directly subject to sanctions in the narrower sense of the term,[97] the sanctional element is prominent in that it lays down the limits to what an administrative agent is entitled or obliged to do without violating the Basic Law.

Assumption of responsibility through governmental intervention (*Ingerenz*)

In order to determine what lies within the responsibility of local authorities, it is necessary always to recall the origin of municipal responsibility, the position of the municipality in the structure of the State, and the politico-democratic function of municipal self-government. If the latter requires local government institutions (and their officials) to be democratically legitimated (see comprehensive treatment in Arnim 1988, 1 ff.), this is naturally also true for

95 Overview in Wilke 1975: 510 f.; on similarities between Article 28 (2) sentence 1 and Article 65 of the Basic Law see Faber 2002, Art. 28 Abs. 1 II, Abs. 2, Rz. 43.

96 In connection with the cooperation principle in environmental policy as a "normative guiding principle for the co-responsibly administrative State" Schuppert 1998b: 440 f.; Hoffmann-Riem 2001b: 47; a critical examination of the concept of responsibility distribution see Koch 2001:545, who complains about a blurring of government and private obligations in environmental policy and environmental law.

97 In many cases, constitutional law and constitutional procedural law do not provide for concrete sanctions. Instead, trusting in the law-abidingness of government, it is content to determine the unconstitutionality of the action concerned.

their activities. The act of privatisation and the modalities of function performance following privatising must therefore be under full democratic control. This is also to be concluded from the position of the municipality in the structure of the State. Accountability to the State as a whole means nothing more than accountability to the will of the people as the legitimation basis of this State.

As far as the legal possibilities of and limits to the privatisation of municipal functions are concerned, this means that the municipality cannot shrug off its responsibility through privatisation. The prevailing opinion is that public administrative agents cannot "take flight into private law" (Gromoll 1982: 227).[98] By reason alone of their subordination to the municipality, municipally owned undertakings and so-called quasi-public companies,[99] independently of their specific activities, are addressees of fundamental rights and thus an element of State authority, hence requiring legitimation by definition.[100]

Mixed companies are hence not to be regarded as subjects of fundamental rights (and thus as elements of State authority) if their founding and activities are not the expression of the free development of participating private persons (Article 19 (3) of the Basic Law), i.e., wherever the public sector has a controlling influence over the enterprise (Badura 1998: 822).[101] As far as the formation of mixed-economy companies over which the public sector has no controlling influence is concerned, as well as so-called material or task privatisation (i.e., the complete withdrawal of the public sector from the performance of functions) (Tomerius 1999: 156 f.), these quasi-public enterprises, like companies entirely in private ownership, being subjects of fundamental rights in accordance with Article 19 (3) of the Basic Law, have no need for legitimation. But what does require legitimation is the legal act of privatisation itself (and the collaboration of the administrative agency therein). As we shall see, this invites the conclusion that the municipality is denied any form of organisation governed by private law in which the necessary municipal right of intervention cannot be asserted as required.

The (constitutionally) required scope for intervention

If the exact extent of the influence the municipality must retain over the performance of its functions is to be determined, the democracy principle must once again be consulted. It requires not only that the municipality subject the performance of its functions to substantive control but also that all officials and officers must be integrated into an uninterrupted

98 On "flight into private law" in the present context see detailed account in Spannowsky 1996: 411.

99 They are companies governed by private law in which, in contrast to the *Eigengesellschaft* (private municipal enterprise) *several* legal persons governed by public law have a stake, whereas, in contrast to quasi-public undertakings there are no private stakeholders: Mutius 1996, point 506 ff.

100 Comprehensive account in Emde 1991: 35 ff.; Dreier 1998, Art. 20 (Demokratie), Rz. 125; Spannowsky 1996: 409 ff.; comprehensive Gersdorf 2000: 44, 47, 63, 134 f., 225 with further documentation.

101 Detailed treatment in Gersdorf 2000: 157 ff., 161 ff.; Stern 1988, para 74 IV 5: 1420 f. The assumption that, "because there is State influence, there must be State intervention (*Ingerenz*)" is only at first glance a circular argument. Existing controlling influence by the public authorities in an organisation governed by private law and the required right of intervention go hand in hand, and, as von Danwitz (1995: 606) puts it, can be compared to a system of intercommunicating pipes: the former qualifies a subject of private law as an element of public authority and thus as needing legitimation, the latter states whether the constitutional legitimation requirements have been concretely satisfied.

legitimation chain reaching down to the citizens of the municipality (Gersdorf 2000: 226 and 239).[102] However, it is still not absolutely clear how these two elements are to be weighed against each other and against private interests. Whereas the *Federal Constitutional Court* and certain experts apparently rely essentially on the effectiveness of legitimation (and thus on a right of final decision deriving from Parliament) and therefore consider (albeit not complete) compensation possible between the individual forms of legitimation,[103] others stress the irreplaceability of the single elements and demand full legitimation not only with respect to final decisions but throughout the decision-making process (comprehensive account in Ossengbul 1996: 509 and 515, and on the different forms of legitimation : 508 f.; similarly VerfGH NRW, NVwZ 1987, 211, 212 f.).

It is at any rate clear that the required municipal right of intervention, i.e., municipal control of the companies concerned – unlike supervision of the municipality by the State – is not restricted to compliance with the legal framework but also covers the steering and control of companies (Gersdorf 2000: 225). In particular, policy decisions made by the municipality – where the pertinent local government law allows decisional scope – must be reflected in the performance of functions by private parties (Gersdorf 2000: 226). The relationship between the municipality and the subject of private law can therefore not be restricted to a municipal right to be informed (and the corresponding obligation to report imposed on the private law subject). It must include municipal rights of instruction and removal (von Danwitz 1995: 608). Requirements with respect to the relationship between the municipality and private undertakings in which the municipally has a stake are laid down in the local government acts adopted by the states.[104] In individual cases, these provisions are to be measured against the constitutional requirements that have been discussed. If they do not go far enough, the state must legislate to correct this.

Finally, an extremely important element of municipal responsibility as far as the practical drafting of contracts is concerned is the “guarantee obligation” (*Sicherstellungspflicht* – term with reference to Himmelmann, in: Eichhorn 1994: 134). If, as we have seen, the act of privatisation does not discharge the municipality from its responsibility, it remains responsible for the orderly performance of functions, i.e., it has to ensure performance if, for whatever reason, the private partner defaults. The municipality is likely to have the choice between re-assuming performance itself or immediately transferring it to another private entity. Ultimately, however, the specific circumstances of the case will decide.

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102 Von Danwitz 1995: 607 f.; critical comments of the controllability of the municipal GmbH in Rennert 2002: 332.

103 BVerfGE 93, 37, 66 f; 70 f., from the literature Emde 1991: 329 ff.; Böckenförde, in: Isensee/Kirchhof 1987, § 22, Rz. 23; Pieroth, in: Jarass/Pieroth 2002, Art. 20, Rz. 9 f.; on the status of the dispute see Ehlers 1,997a: 184; on the whole question also Schmidt-Aßmann 1991: 368; however, the position of the Federal Constitutional Court is not entirely clear. The responsibility limit mentioned above is only one of many elements in the very complicated argument of the court, which in effect posits a three-stage sufficiency model (E 93, 37, 70f.); Ehlers 1,997a: 185 states that the court *appears* to prefer the position presented here.

104 Cf., for example, Article 92 (1) sentence 1 no. 2, Article 93 and Article 94 BayGO; paras. 122 (1) sentence 1 no. 3, 123, 125 HessGO; paras. 108 (1) no. 6, 112, 113 GO NRW; paras. 117 (1) no. 3, 118 (2), 119, 121 GO Sachsen-Anhalt; paras. 74 f. GO Thüringen.

3.1.3 Forms of Privatisation and Typology of Municipal Tasks.

Our point of departure is the classification in chapter 2.3. Prevailing opinion makes varyingly strict demands on the different forms of privatisation, also depending on whether municipal tasks are discretionary or mandatory.[105] While some authors claim that the difficult to define core area of municipal self-government is not available for privatisation (e.g., Knemeyer, WiVerw 1978: 65, 73), it appears to be generally agreed that the material privatisation of mandatory municipal functions is basically inadmissible – which is not the same thing.[106] Legislation can allow exceptions, which, in keeping with the nature of a formal law, has universal application, i.e., applies for all local authorities (Mayen 2001: 211; similarly Stöber 1997: 348). The organisational and functional privatisation of mandatory functions, in contrast, is possible as long as intervention options are available to ensure municipal responsibility (usually not derived from Article 28 (2) sentence 1 of the Basic Law) (cf. Stober 1997: 347; Mayen 2001: 112 f.). According to prevailing opinion, the privatisation of discretionary functions is possible on a much greater scale. Nevertheless, limits are seen here, too. Municipalities have a certain supervisory and inceptive responsibility (Schmidt-Aßmann, in: idem 1999, Rz. 122; von Danwitz 1995: 605).

Criteria for appraising and differentiating the privatising of municipal functions

It is now generally agreed that every form of privatisation means a certain loss of control by the municipality (Püttner, in: Brede 1988: 29, 37). The municipality is no longer the sole administrative agency (Ehlers 1986: 903), and in the case of task privatisation it has even ceased to be an administrative authority. It is also generally agreed that there can be no general answers to the question of how serious this loss of control is, whether and how measures are to be taken to ensure effective municipal intervention, or under what circumstances a threatening loss of control could lead to privatisation in the planned form being forbidden. But it is questionable whether a privatisation typology and the categorisation of municipal functions provide adequate criteria and, above all, whether they permit the construction of a “dogmatic matrix” assigning a specific place to every concrete phenomenon.

In the first place, the view that the core area of municipal function performance is “impervious to privatisation” is to be rejected. This conviction derives from the theory of the core area of municipal self-government being a range of self-government functions not at the disposition of lawmakers,[107] hence directing the defensive function of Article 28 (2) sentence 1 of the Basic Law not against the State but against the municipality itself. Neither the scope of any municipal self-government obligation (see 3.5 on the constitutional derivation of municipal obligations in the municipal performance of functions) nor the conse-

105 On the classification of municipal tasks following monastic and dualistic models, cf. Dreier 1998, Art. 28, Rz. 84; see also Schumacher 1995: 137.

106 Cf., for example, OVG Koblenz, DVBl. 1985: 176, 177; Hofmann 1994: 125; Schumacher, op. cit..; Stober 1997: 347 f.; Mayen 2001: 111 f.; Burgi 2001: 603; similarly Kämmerer 1996: 1047; Brüning 1997: 287 f.; Himmelmann, in: Eichhorn 1994: 134.

107 On the core area see, for example, BVerfGE 1, 167, 174 f.; 38, 258, 278 f.; 76, 107, 118; Mutius 1996, Rz. 181; Dreier 1998, Art. 28, Rz. 116 f.).

quent legal bounds of municipal privatisation activities can, however, be derived from the much more circumscribed[108] *right* to self-government. The core area does not set the municipality limits, it protects it.

But there are certain general reservations. For example, given the complicated relationship between federal and state lawmakers, municipalities, and private enterprise, "comprehensive" (Mayen 2001: 112) material task privatisation through legislation[109] cannot be offhandedly dismissed as an exception regulated by law. From a constitutional point of view it can indeed be relevant from whom privatisation "emanates." This applies, for example, with regard to the prevailing opinion that a mandatory self-government function – such as refuse and sewage disposal as provided for in some state statutes – is simply excluded from material privatisation on constitutional grounds. In state legislative practice, mixed forms exist with public-interest and municipal "safeguards" which challenge the stringency of this argument. For instance, para. 46 of the Rhineland-Palatinate state water act permits the transfer of water supply to third parties although this function is expressly stated to be a mandatory task of self-government by the Rhineland-Palatinate local government statute and water act (cf. also Fischer/Zwetkow 2003b: 283 f.). The state water act cannot simply be judged unconstitutional. This example shows that legal arrangements need to be examined in each case to determine whether sufficient municipal influence in accordance with the municipal right of self-government under Article 28 (2) of the Basic Law is guaranteed upon transfer of the mandatory function of water supply, and that the municipality's ultimate decisional authority in this field is safeguarded.

Furthermore, organisational privatisation can represent more of a risk for the constitutional right of municipal intervention than might be assumed. This is also true for "pseudo" functional and task privatisation, and in certain configurations, asset privatisation, usually considered unproblematic (for example by Burgi 2001: 603), can also constitute a certain risk for the final decisional authority of the municipality.[110]

Finally, recent literature tends to see functional privatisation as a practicable solution to the dilemma between the economic necessity of privatisation and the narrow legal limits to task privatisation.[111] But such "partial transfer" to private parties should not obscure the importance in practice of transferred elements such as planning and financing, nor how much influence on the performance of functions can be exercised in this way.

Accordingly, the question of the admissibility of municipal privatisation has to be answered in terms of the concomitant loss in scope for municipal intervention. The municipality is under obligation carefully to weigh up and comprehensibly document far-reaching organisational decisions affecting the performance of functions, taking account of citizen interests and in accordance with the criteria of municipal policy – which include the legal and

108 For instance, it cannot be said that the core area is to be equated with the sum of all mandatory functions.

109 As now expressed in para 16 (2) KrW-/AbfG and para 18 a (2) WHG.

110 Cf. Mayen (2001: 117 ff.) on privatisation by means of the interchange of dotation capital of institutions under public law.

111 Ehlers (1998: 506) appears to argue in this sense, although with the reservation that the legal limits of administrative assistance are often unclear.

actual possibilities of the municipality to influence important decisions. In practice, organisational, procedural, and contractual aspects play an important role.[112]

A first important criterion in determining the admissible scope of municipal privatisation is, however, the distinction between discretionary and mandatory municipal functions. This fundamental distinction can integrate the variants of formal and material privatisation.[113]

Another differentiation is in terms of privatisation initiators. This criterion is concerned with the privatisation of municipal functions by legislation. At this level, fundamental constitutional questions arise at the interface between the constitutional legislative powers of the federation and the protective functions of the municipal right of self-government under Article 28 (2) of the Basic Law.

Mandatory functions of the municipality

It is quite plausible to take the type of municipal function as the principal (but not only) criterion for determining the admissible reach of privatisation, and for this purpose to distinguish between mandatory and discretionary functions.[114]

Material and functional privatisation

In principle, the municipality is not permitted to disengage through privatisation from a task imposed on it by law.[115] Whether such renunciation has taken place can be judged on the basis of what has been said about municipal responsibility.

If the municipality can no longer exert influence on key strategic decisions that, going beyond the mere modalities of function performance, concern the organisational and procedural basics of performance, it is in breach of its duty to discharge those functions. In such a constellation, the municipality overstretches the chain of decisions relating to mandatory task performance that require legitimation. This chain will break at the latest when the municipality can no longer exercise its ultimate decisional authority on important, determining matters, so that it can no longer assert any controlling influence (similarly Rennert 2002: 332). The litmus test is whether the municipality is still able to revise decisions and correct aberrations in specific cases.

112 On the legal framework, criteria, advantages, and disadvantages of organisational forms in municipal waste management see Tomerius 1999: 162 ff.

113 This distinction is also relevant for the differentiated levels of responsibility in the gurantor model at the local government level (cf. 4.1.2).

114 In effect, what matters is not the sphere of activity to which a function belongs in keeping with the dualistic model nor – in accordance with the monistic model (on the two classification models and their implementation in state local government law see, for instance, Schmidt-Aßmann, in: ibid. 1999, Rz. 33 ff.) – whether it is a mandatory self-government function, a mandatory function subject to instruction, or a delegated function (on the typology of municipal functions see Dreier 1998, Art. 28, Rz. 84 with further documentation). The important dogmatic distinction is that the obligation to perform a delegated function, which, despite its performance by the municipality is legally still a function of the State, cannot be derived from the guarantee of municipal self-government.

115 Cf., for example, OVG Koblenz, DVBl. 1985: 176; Hofmann 1994: 125; Schumacher, 1995: 137; Stober 1997: 347 f.; Mayen 2001: 111 f.; Burgi 2001: 603; similarly Kämmerer 1996: 1047; Brüning 1997: 287 f.; Himmelmann, in: Eichhorn 1994: 134.

Whereas the privatisation of functions in the sense of complete transfer to private parties by the municipality must in any case be regarded as inadmissible, caution is called for even with regard to functional privatisation, which is basically permissible. The borderline between the two forms is likely to be extremely blurred. If one insists on the effectiveness of democratic legitimation as a prerequisite, the municipal right of intervention, especially the right of final decision is decisive. It is obvious that such possibilities are simply not available if the municipality has relinquished the function as such. But the discussion on admissible organisational forms for implementing privatisation cannot hide the fact that the right of last decision can suffer "creeping" degradation even where no administrative functions are entrusted to entities under private law. A look at all the aspects that could be outsourced in the context of functional privatisation shows the latent danger of losing control. If, for example, the planning and financing of functions are in the responsibility of private parties (cf. Schoch 1994: 974), these parties may be in a position to guide the entire project in a given direction through pivotal and perhaps irreversible decisions ("who pays the piper calls the tune"). This shows how necessary it is to consider each case on its merits.

Organisational privatisation

The establishment of quasi-public companies most obviously demonstrates the need for careful consideration of organisational privatisation. In this case company law, which cannot be amended to benefit the municipality, protects the private shareholder, hence restricting municipal scope for intervention (cf. Spannowsky 1996: 424 f.).[116] However, the situation is not essentially different with regard to the *Eigengesellschaft* (municipally owned undertaking) and the quasi-public company (*gemischt-öffentliches Unternehmen*), although it is in principle correct that there can be no conflict of interests between public and private shareholders in this case (von Danwitz 1995: 614 f.).[117] Nevertheless, company law commits company officers to company interests (Schwintowski 2001: 609).[118] But these company interests are not necessarily and in practice not often identical with the public interests that motivate authorities to set up companies.[119] Apart from the interest of the company in safeguarding its continuance, which can operate even if the public shareholder considers dissolution absolutely necessary, divergences of interest can arise, for example, with respect to the territorial extension of activity (legally controversial supra-local activities or even activity abroad as allowed subject to approval by para. 107 (4) of the North Rhine-Westphalia local government statute) or in subject matter (venturing into legally and perhaps economically risky new business fields, activity in a range of business segments, etc.).

If the law relating to industrial groups is now called upon to establish possibilities for intervention under company law (cf Mayen 2001: 114), it is local government law that sets lim-

116 Cf also chapter 2.3.3.
117 Also Mayen 2001: 114; Wahl in: Schmidt-Aßmann/Hoffmann-Riem 1997: 330.
118 Significant in this context is also the correct statement by Gundlach/Frenzel/Schmidt 2001: 251 that, from the perspective of the company, the exercise of influence by the municipality comes from "outside" even if the municipality the sole partner or shareholder.
119 Comprehensive account in Gundlach/Frenzel/Schmidt, loc. cit.: 247 ff.; opposing view von Danwitz: 612 f.

its. Although stock corporation law recognises the inter-company agreement (para 291 of the Stock Corporation Act), under which a stock corporation could be subject to a municipal right to issue instructions, this runs counter to municipal economic law, which prohibits agreements which impose unrestricted liability and call-in obligations (as in this case the obligation to offset losses under para 302 (1) of the Stock Corporation Act).[120] The position is similar for so-called de facto groups with respect to liability (cf. Mayen, op. cit.; Gundlach/Frenzel/Schmidt, op. cit., footnote 25). But evading the issue by setting up a limited liability company (*GmbH*) in the sole ownership of the municipality meets with the same reservations as regards local government law if, owing to so-called material undercapitalization of the GmbH, the limitation of liability under para 13 (2) of the Limited Liability Company Act has no effect (comprehensive treatment in Schwintowski 2001: 611 with further references).

Discretionary functions

The situation is different for discretionary municipal functions, i.e., for non-statutory tasks where the municipality has discretion to decide not only how but also whether functions are to be performed. The position of the municipality in the structure of the State means that the legal system does not vest powers in the municipality for "private use," but there is nothing to prevent the legal system from leaving it up to the municipality whether to perform certain tasks. Since the position of municipalities in the structure of government is abstractly laid down by the constitution ("on their own responsibility"), it is the lawmaker's job to give concrete substance to this position by regulating municipal functions in compliance with the constitution – i.e., pursuant to Article 28 (2) sentence 1 of the Basic Law, which defends local government against interference by the State.

If the function at issue is a discretionary one, the prevailing opinion is that, in principle, formal as well as material privatisation is admissible, in other words, the municipality may transfer the task completely and irreversibly to a private party.[121] If objections are raised to the material privatisation of discretionary functions on grounds of the politico-democratic function of local self-government,[122] they are valid in so far as the responsibility of the municipality and municipal institutions cannot be reduced to the performance of mandatory functions. That the municipality is nevertheless free to decide whether and how it will perform a discretionary function follows from the difference in the content of responsibility in comparison with that for municipal mandatory functions. If the law leaves the decision to take on a task, to settle the modalities of performance, and to "relinquish" it to the municipality, the municipality is accountable to the public "only" for a democratic deci-

120 Cf., for example, Article 92 (1) sentence 1 no. 3 BayGO (albeit with reservations in respect of immunity) or para 122 (1) sentence 1 no. 2 HessGO; overview in Mutius 1996, Rz. 505; on the problem of offsetting losses under stock corporation law see Gundlach/Frenzel/Schmidt 2001: 249, who are opposed to any municipal control duties vis-à-vis municipally owned companies (*Eigengesellschaften*); also sceptical about safeguarding control rights under the law relating to industrial groups are Stober 1997: 455; Leisner 1983: 219.

121 Dreher, in: Oldiges 2001: 35; Schmidt-Jorzig 1993: 975; for water supply Fischer/ Zwetkow 2003: 284.

122 Mutius 1996, Rz. 43 ff.; also Stern, in: Bonner Kommentar 1999, Art. 28, Rz. 92.

sion.[123] The question of the material privatisation of discretionary functions is subject to a municipal assessment prerogative, specific decisions being determined by parameters like the economic situation of the municipality and resident needs, ultimately being a matter of appropriate municipal *policy* (cf. Salzwedel 1965: 237). It remains to be seen what medium and long-term effect the current drastic cuts in discretionary services could have on municipalities as decentralised and accessible "schools of democracy."

Differentiation in terms of "initiators": legislative privatisation options for municipal functions

Two particular pieces of federal legislation have ensured controversy in the discussion on the privatisation of municipal functions, but which have so far not really fitted into our account. The provisions in question are para 16 (2) of the Closed Substance Cycle Waste Management Act (KrW-/AbfG) (especially sentence 2) and para 18 a (2) sentence 3 of the Federal Water Act (WHG). For example, in that para 16 (2) of the Closed Substance Cycle Waste Management Act permits not only the performance of a duty vested in a public waste disposal authority to be transferred to a private party but also the duty itself,[124] it opens the door to the material privatisation of a municipal mandatory function – in contradiction to everything that has been said (see also Burgi 2001: 603). With regard to para. 18 a (2) sentence 3 of the Federal Water Act, too, it is claimed that the possibility under state legislation of transferring sewage disposal duties to third parties goes beyond functional privatisation (Burgi 2001: 603).[125] The present study is not the place to present and discuss all the legal problems arising from the construction of para. 16 of the Closed Substance Cycle Waste Management Act. From the perspective of mandatory municipal decisional responsibility under the guarantee of municipal self-government, however, it must be asked whether federal or state legislation is entitled to undertake the sweeping privatisation of mandatory municipal functions (for an apparently affirmative view see Mayen 2001: 111 f.). It is the job of the competent lawmaker to respect the division of municipal functions into mandatory and discretionary tasks and to ensure that the municipality has adequate scope for influencing specific privatisation decisions.

123 Municipal institutions can hardly be denied the choice of mandating the performance of discretionary municipal functions in a certain way. This is also true in – purely political – cases where an official has based an electoral campaign essentially on a certain attitude towards certain discretionary functions.

124 A brief overview of the provision: under para 16 (2) KrW-/AbfG the competent authority may on application transfer the (public) duties of waste disposal authorities with their consent entirely or in part to third parties, who – according to sentence 2 – may also be private entities. In contrast to subsection 1 of the provision, according to which persons obliged to provide for reuse and disposal may employ third parties to fulfil their obligations without their responsibility for the fulfilment of these obligations being affected (explicitly subsection 1 sentence 2), para. 16 (2) sentence 2 Krw-/AbfG addresses a transfer of the obligation as such, i.e., the material privatisation of a task which is without exception formulated as a mandatory function; comprehensive treatment of this provision in Pippke 1999: 123 ff.; Tomerius 1999: 189 ff., with further references.

125 The legal classification is controversial, hesitating between material privatisation and "Beleihung" (charging an independent private enterprise with specific functions in the public interest); see Gruneberg 1999: 179 ff.; Schulz 1998: 279; Kummer/Giesberts 1996: 1166 ff., 1170.

Issues of competence

The constitutional admissibility of privatisation cannot be affirmed on the grounds that it is up to federal legislation to decide which municipal functions are mandatory and which discretionary, for neither of the provisions cited undertakes any reassignment. It cannot be claimed that the law enabling privatisation supersedes the classification of the municipal function concerned as laid down by state law. This applies with regard to state legislation because – if only to maintain the uniformity of the legal system – such reclassification is possible only by an explicit amendment to the applicable local government statute, which also falls within the competence of state legislation.

Although the prevailing view is that Article 74 (11) of the Basic Law ("economic affairs") gives the federal government the power to regulate the economic activities of municipalities (BVerfG JZ 1982, 288, 289)[126] and hence to steer the interpretation of local government law (BVerwG NVwZ 1988, 1126, 1127), the assignment of a provision to the different types of municipal function goes beyond municipal economic affairs and municipal economic law, affecting the foundations of local government law. Federal legislation may therefore not regulate the matter. Article 31 of the Basic Law – precedence of federal law – does not apply in this instance, for federal law that intervenes in the essentials of local government law would be unconstitutional on grounds of lacking legislative competence, and hence unable to take precedence over contrary state law. Article 31 of the Basic Law may supplement Articles 70 ff. of the Basic Law only if contradictory provisions have the same subject matter and regulate the same legal issue (Schmidt-Bleibtreu 1999, Art. 31 Rn. 2 and 7 a). In order to save contrary federal legal provisions from being declared unconstitutional (which in this case would follow from Articles 30 and 70 of the Basic Law), an interpretation would be required that invokes the principles of federal loyalty and jurisdictional consideration. Caution is to be recommended in accepting the admissibility of "comprehensive" privatisation against the wishes of state parliaments. Here, too, the acceptability of such provisions cannot be justified merely on the grounds that it is up to the municipality concerned to decide whether and to what extent (cf. para. 16 (2) sentence 1 KrW-/AbfG: "wholly or partly") it makes use of the statutory privatisation option. For whenever statutory provisions on privatisation constitute a subjective public right of the private partner for the purpose of transferring the function, they grant the latter the legal option of withdrawing the function and its performance from the municipality by way of administrative court proceedings.[127]

Municipal task responsibility as constitutional requirement

In establishing statutory privatisation options for municipal functions, it should not be overlooked that the position of municipalities in the structure of the State and the democratic and political function of self-government under Article 28 (2) of the Basic Law (cf 3.2)

126 Kunig, in: Münch/Kunig 1995, Art. 74, Rz. 45; Strettner, in: Dreier 1998, Art. 74, Rz. 53; opposing view Knemeyer/Emmert 1982: 284 ff.

127 For instance, in the case of the transfer of obligations pursuant to para. 16 (2) KrW-/AfbG discretionary powers can be reduced to zero, which amounts to a de facto right to transfer, cf. Pippke 1999: 127 ff; Tomerius 1999: 193 ff., with further references in both cases.

lends a constitutional obligation aspect to the guarantee of local self-government.[128] The constitutional yardstick for all legal provisions that could affect the fulfilment of municipal functions is therefore Article 28 (2) sentence 1 of the Basic Law (cf. BVerfG JZ 1982, 288, 289; BVerwG NVwZ 1986, 754, 755). The decentralised responsibility of municipalities under the constitution and in the structure of the State cannot be undermined by federal or state law if only because neither the democracy principle nor the structure of the State as laid down by the Basic Law are at the disposal of federal or state lawmakers (Meyer 2001: 767). That it is the task of the legal system (and thus the law) to implement this State structure and to determine whether a municipal function is discretionary or mandatory changes nothing. For any such implementation, which must also respect constitutional requirements (Meyer, op. cit.), quantitatively concretises the scope of municipal self-government obligations, whereas the privatisation provisions described above threaten to diminish the quality of municipal options for fulfilling its responsibilities. If legislation assigns a function to the municipality as mandatory, this decision can under certain circumstances be reversed. But the critical point is reached if federal law releases the municipality from its responsibility to perform functions with which it is still mandated by state law.[129]

If the limit to municipal responsibility we have been discussing is to be respected by legislation, lawmakers must take sufficient account of municipal influence, especially in the sense of procedural responsibility, in adopting any future provisions on privatisation, One important instrument is the obligatory consent of the municipality for individual cases, which safeguards the municipal planning concept and which can be integrated in the privatisation process. Also important is limiting the term of task privatisation and the possibility of imposing conditions or the inclusion of a proviso of cancellation to prevent irreversible developments.

In cases of doubt, statutory privatisation provisions are to be interpreted in conformity with the constitution (cf. Meyer, op.cit.) to the effect that privatisation is permitted only with due regard for the municipal obligation of intervention (and thus especially with due regard to options for intervention under private law).

3.1.4 Limits to Function Privatisation Arising from a Municipal "Self-Government Obligation" under Article 28 (2) of the Basic Law?

The external and internal municipal factors which have lead to the outsourcing and to the formal, and sometimes material privatisation of municipal functions, now render it necessary to interpret Article 28 (2) of the Basic Law in a different light to reflect a new constitutional reality.

In privatising municipal functions, it has to be remembered that, under Article 28 (2), the municipality is *entitled* to perform functions on its own responsibility, but the question is

128 Details cf 2.5; on the unproductivity of the defence dimension of Article 28 (2) sentence 1 of the Basic Law in this regard see Peine (1997: 356), similarly Krölls (1995: 142).

129 A situation difficult to reconcile with the principle formulated by the Federal Constitutional Court (E 98, 83 and E 83, 106) of the "consistency of the legal system," which, however, we will not deal with at length in view of its vagueness. For a critical treatment of this principle see Schrader 1998: 152 ff.; Sendeler 1998: 2875.

whether and to what extent it also has an *obligation* to its citizens and towards the State to perform certain tasks itself. Whereas in earlier cases, for example the statutory "centralisation" of municipal functions at superordinate levels,[130] it was mainly a matter of the defensive nature of Article 28 (2) of the Basic Law, i.e., function retention, the current trend is towards the *municipalities themselves* transferring municipal functions to others – also pursuant to statutory privatisation arrangements – thus highlighting the other side of the coin, the "self-government obligation" under Article 28 (2) of the Basic Law. While fundamental rights, the principle of the rule of law, and the social state principle play a prominent role in the discussion on whether the constitution or simple laws are opposed to privatisation by the State or local government, the constitutional guaranty of local self-government (Article 28 (2) sentence 1 of the Basic Law), if mentioned at all, is usually dealt with offhandedly (cf. von Burgi 2001: 602;Krölls 1995: 142; Knewmeyer, WiVerw 1978, 65, 73), if for no other reason than this provision continues to be interpreted largely as a defensive right directed against the State. But this interpretation does not do justice to the content of Article 28 (2) sentence 1 nor to legitimate municipal decision-makers in the light of local authorities' growing loss of functions and decision-making competence.[131]

Constitutional derivation of a municipal self-government obligation

The traditional view: Article 28 (2) sentence 1 of the Basic Law as a freedom and defensive right

Article 28 (2) sentence 1 of the Basic Law, under which municipalities are granted the right to manage all the affairs of the local community according to the laws on their own responsibility, provides the constitutional guarantee of local self-government as the basis and nucleus of a broad and accessible democracy (BVerfGE 79, 127, 149; Vogelsang, in: Friaul/Höfling 2001, Art. 28. Rz. 84). Self-government, a phenomenon that occurs at many places in the legal system, is in general understood to mean that an organisational entity governed by public law, although integrated in the fabric of the State, is institutionally independent of the public authority system directly answerable to the State, and that certain public affairs are administered by particularly affected persons on their own responsibility (details especially Hendler 1984: 284, with numerous references). In view of the numerous and wide-ranging State measures which affect municipalities in one way or another, it is not surprising that the defensive dimension of Article 28 (2) sentence 1 of the Basic Law has been so stressed by the courts[132] and the literature,[133] and that the key concept of

130 Cf. BVerfGE 79, 127, 148. – Rastede; 34, 216, 233 ff.; Stober 1997, § 7 II 1 c bb.

131 For a constitutional law approach to a self-government obligation under Article 28 II of the Basic Law see Tomerius/Breitkreuz, Selbstverwaltungsrecht und „Selbstverwaltungspflicht", DVBl. 2003, Nr. 7: 426 ff.

132 Apart from the Rastede decision of the *Federal Constitutional Court* E 79, 127 ff., especially BVerfGE 1, 167, 174 f.; 7, 358, 364; 22, 180, 204 f.; 26, 172, 180 und 50, 50, 55; see also the overview in Vogelgesang, in: Friauf/Höfling 2001, Art. 28, Rz. 205.

133 E.g., Pieroth, in: Jarass/Pieroth 2002, Art. 28, Rz. 10 ff.; Brockmeyer, in: Schmidt-Bleibtreu/Klein 1999, Art. 28, Rz. 9 and 11; Löwer, in: Münch/Kunig 2001, Art. 28, Rz 41. ff.; Stein/Frank 2002, § 15 IV: 125 f.; Münch 2000, Rz. 868 ff.

own responsibility is understood primarily as freedom from the tutelage of the State, i.e., especially from State supervision.[134]

The municipal obligation of self-government in the literature and in case law

The literature and the *Federal Constitutional Court* have paid almost no attention to Article 28 (2) sentence 1 of the Basic Law as anything more than a defensive right. Where the literature nevertheless addresses the question of municipal obligation under Article 28 (2) sentence 1, there appear to be two main trends – where a "self-government obligation" is not merely hinted at.[135] For instance it is sometimes maintained that the normative politico-democratic function of municipal self-government can be derived from Article 28 (2) sentence 1 in conjunction with subsection 1 sentence 2 – municipal self-government being understood not only as a defensive right directed against direct State administration but also as an objective obligation of the elected representative bodies towards the citizens (as Mutius deduces, 1996, Rz. 43 ff.).[136] Authors who stress the role of the municipality in the structure of the State consider municipal self-government less as a duty towards the citizens as an obligation towards the State as a whole. The Basic Law is seen as demanding that the municipality, being a governmental agency integrated in the State which is not permitted to perform its functions at will, ensure "concordance between municipal legitimation and overall State coordination" (Stern, in: Bonner Kommentar 1999, Art. 28, Rz. 92).[137]

Case law has neither affirmed nor rejected the obligating elements of the self-government guarantee in the sense of a municipal duty of self-government. With regard to the present issue, only three established case-law standpoints are interesting. First, that municipal self-government must not be internally undermined or the "opportunity for forceful action" lost.[138] Second, the politico-democratic function of municipal self-government is to be recognised as public participation in local administration (BVerfGE 11, 266, 274, 79, 127, 149: the municipality as the "nucleus of democracy;" HessStGH, DÖV 1995, 596 ff.). And, third, the courts also see municipalities as governmental agencies that are integrated in the structure of the body politic with their own functions, and which the constitutional order assigns a specific function (especially BVerfGE 79, 127, 143). The fact that the premises of both arguments advanced by the literature can be underpinned by case law is not to

134 Brockmeyer, op. cit.., Rz. 11; Löwer, op. cit.; Hendler, op. cit..: 196 with further references.; from this point of view it is only logical to interpret Article 28 (2) sentence 1 of the Basic Law as a fundamental right, cf. e.g., Hesse 1995, Rz. 464 ff.; unlike prevailing opinion, see only Ehlers 1997b: 141.

135 E.g,. in Vogelgesang, in: Friauf/Höfling 2001, Art. 28, Rz. 116; Meyer 2001: 766 f.; Schmidt-Aßmann, in: idem 1999, Rz. 122; Becker, in: Bettermann/Nipperdey 1962: 687 and 710.

136 Thiele 1980: 106, and Graf Vitzthum 1979: 626; Knemeyer, WiVerw 1978, 65, 73, also argue on the basis of general municipal powers and the resulting duty of the municipality to undertake comprehensive development planning. Privatisation is at least inappropriate in this context.

137 Similarly Gröpl, in: Hoffmann/Kromberg/Roth/Wiegand 1996: 99, 104 f.; Faber, in: Alternativkommentar 2002, Art. 28 Abs. 1 II, Abs. 2, Rz. 43; Gromoll 1982: 223 f. differs, deriving a corresponding obligation from the right under simple law of residents to use municipal facilities which concretises the constitutional concept of self-government. Schumacker 1995: 136 argues against such "enrichment of the constitutional guarantee through simple law arrangements."

138 This is the repeated formulation in BVerfGE 1, 167, 174 f., which goes back to the Staatsgerichtshof für das Deutsche Reich; also BVerfGE 22, 180, 204 f.; 23, 353, 367; 38, 258, 279; 79, 127, 155.

deny that the Federal Constitutional Court has yet to draw corresponding conclusions from Article 28 (2) sentence 1 (possibly in conjunction with other provisions of the Basic Law).

Own responsibility within the meaning of Article 28 (2) sentence 1 of the Basic Law as a key element in a municipal "obligation of self-government"

It is precisely the concept of "own responsibility" that not only gives the municipality a defensive right against the action of other governmental authorities, but also provides a link to another element of Article 28 (2) sentence 1 of the Basic Law. Depending on where you put the stress, this provision of the Basic Law can be read as stating that municipalities are obliged to manage all affairs of the local community on their *own* responsibility or on the own *responsibility*. Where one puts the accent is increasingly important in the light of the growing division of function performance and responsibility in "public private partnership."

Without calling in question the interpretation of Article 28 (2) sentence 1 as a defensive right of the municipality against State intervention,[139] the following must be said: in view of the progressive transfer and outsourcing of municipal functions to private actors, the constitutionally guaranteed "management of the affairs of the local community on their own responsibility" by municipalities must be seen in a broader context. This requires a broader interpretation of Article 28 (2) sentence 1 of the Basic Law which not only juxtaposes the rights and obligations of the municipality but also dovetails them. The defensive function of this constitutional norm does not assign a discretionary right to the municipality but protects public interests of the municipal legitimation basis. The stronger the trend towards integrating private actors vested with powers to perform municipal functions and make pertinent decisions into the legitimation chain between municipality and citizens, the more important questions of personnel and substantive legitimation and decisional responsibility become. The discussion in 3.1.2 – "The Democratic-Political Function of Municipal Self-Government and the Privatisation of Municipal Functions" on the performance of municipal functions pursuant to Article 28 (2) of the Basic Law – mentions key aspects which, in view of the privatisation of municipal public services, are also elements of a "self-government obligation" as defined. They include the safeguarding of ultimate decisional authority and the maintenance of the "responsibility limit" of the municipality for important decisions with a major impact on citizens, and – if only as the practical precondition for ensuring ultimate decisional responsibility – the safeguarding of municipal options for intervention in the privatisation of public service functions.

139 What consequences would arise from recognition of a municipal duty of self-government with regard to the question whether Article 28 (2) sentence 1, in opposition to prevailing opinion, is perhaps to be understood as a fundamental right of guarantee vis-à-vis the State remains unanswered; in contrast to the "classical" fundamental freedoms, Article 28 (2) sentence 1 is, however, unlikely to have a "negative side" to it (cf Hellermann 1993, passim), leaving it up to the municipality to decide whether or not to manage the affairs of the local community.

Consequences of municipal self-government obligations for the admissibility of privatising municipal functions

The current trend towards privatising public functions, proceeding both in response to supranational and national policy and legislation, and through continuing privatisation by the public sector itself, throws new light at the municipal level on the constitutional interpretation of the self-government guarantee under Article 28 (2) of the Basic Law. The focus is increasingly shifting from the defensive aspect of a right to self-government to the obligation aspect, the duty of municipalities to perform functions. This lends the concept of "own responsibility" under Article 28 (2) particular relevance, but offers little indication of, let alone criteria for the detailed definition of public and private task sharing: the way one stresses the constitutional text – "on their *own* responsibility or on their own *responsibility*" – suggests a more restrictive or more extensive interpretation of municipal scope for outsourcing and privatising functions. It is clear that the constitutional model of municipal self-government does not demand or favour the exclusive performance of functions by the municipality itself or by its enterprises/undertakings (similarly, Burgi 2001: 117 ff.). As functions are redistributed between the public and private sectors, which, from the municipal point of view can make public services more "forceful" because more effective when municipal performance is deficient, the ensuring local authority (ELA) model can indeed be classified as "management of the affairs of the local community on their own responsibility" without generating constitutional friction. The emphasis is on the concept of "responsibility." What is vital is that the municipality, through its legitimate decision-making bodies, makes key decisions on public services on its own responsibility and with final decisional authority. In this interpretation, the performance of a function by a private party is not detrimental as long as the municipality lays down binding quality standards, and can monitor their respect and prevent abortive developments as well as reversing wrong decisions.

In this view, municipalities (cf. Tomerius/Breitkreuz 2003: 426 ff.) have an "obligation of self-government" under Article 28 (2) to decide (on their own responsibility) the further development of their community, entailing minimum standards for safeguarding the independent and legitimated final decisional authority of the municipality with regard to the affairs of the local community. The constitutional significance of this obligation derives primarily from the performance of public tasks deliberately devolved on municipalities by the constitution, the democratic-political function of local self-government in the structure of the State, and the final decisional authority of the legitimated decision-makers with respect to affairs of the local community. In order to establish practical concordance between the practicability and advantages of privatising municipal functions and constitutional requirements, the individual powers and obligations of private and municipal actors need to be equitably distributed. In this respect, local authorities are primarily responsible for planning and prevention. On the one hand they can withdraw from certain tasks by means of privatisation, assuming an ensurance role. On the other hand, in conformity with its constitutional "responsibility limit," the municipality must take measures to ensure that it can influence important decisions about the performance of functions and that they can be reversed, and avoid being left to deal with any follow-up costs of privatisation, which ulti-

mately have to be borne by the citizens. Legal practice which takes both into account must not only provide sufficient safeguards for municipal intervention but also include contingency plans for the possible resumption of the function, especially if the private partner becomes insolvent.[140]

3.2 The Importance of Local Self-Government in Democracy Theory

The constitutional requirements discussed in chapter 3.1 for privatising municipal functions in the light of the guarantee of local self-government under Article 28 (2) of the Basic Law need to be supplemented by a number of democracy theory considerations concerning the democratic-political function of municipal self-government repeatedly mentioned in 3.1.

3.2.1 Three Points of View on German Local Self-Government

A range of functions, tasks, and rights is associated with "local self-government." To assess the importance of local self-government from a democracy theory/social science point of view, the many-facetted and often imprecise[141] concept of local self-government needs to be differentiated. Three distinctions can clarify and structure the argument.

(1) The first concerns the essence or "reading of 'local self-government'" (Roth 1997: 413) and whether municipal representative bodies are to be regarded as "municipal parliaments" or as "administrative organs" (Wollmann 2002a: 30). In the academic debate on the politico-democratic position of municipalities in the German constitutional system, there are two basic positions. The one view – mainly espoused by constitutional and administrative lawyers – is that municipalities are constitutionally part of the executive of the federal states, so that the municipal council is to be regarded as a municipal administrative entity (Wollmann 2002a: 30, and 1998b: 59 f.). This traditional view declares "local self-government to be a purely administrative activity" (Wollmann 1998b: 60; highlighting in the original), while recognising that the elected municipal representative bodies do in practice make laws and that in everyday speech concepts like "municipal parliament" and "city government" are current. Critics of this traditional and still prevailing position argue that, on the basis of Article 28 (1) sentence 2 of the Basic Law ("In each state, county, and municipality the people shall be represented by a body chosen in general, direct, free, equal, and secret elections") the elected representative bodies in municipalities are of a kind with state parliaments (Wollmann 1998b: 61). The advocates of this position conclude that "in the exercise of their 'local

140 Suitable instruments are, for example, contractual insurance obligations, as recommended in some standard contracts for operator or management contracts, and which are usually provided for in practice; and, at the legal level, obligatory reserves can be considered, for example to reclaim profitably used land and maintain the technical infrastructure.

141 The concept of local self-government is used imprecisely when it is equated partly with "city" – meaning only the "political" and not the "built" city – and partly with "local democracy" or with "local public services." Although all these concepts are closely related to local self-government, they are by no means synonymous with it.

autonomy' municipalities are to be recognized as an independent politico-administrative level (also under constitutional *law*)" and that municipal representative bodies are to be classified as parliaments (Wollmann 1998b: 61; highlighting in the original). This discussion on whether municipal councils are parliaments or administrative authorities is concerned not only with differing constitutional interpretations but also with the societal-democratic significance assigned to municipalities and their right to local self-government. From a democracy theory point of view, there is a qualitative difference whether the lowest entity in the structure of the State is assigned purely decentralised administrative functions for reasons of administrative practicality and economic efficiency or whether municipalities are recognised as the smallest and in this function independent entities of democratically legitimated decision-making.[142]

(2) The second distinction in analysing local self-government depends on the vantage point of the observer, i.e., whether local self-government is considered with regard to the municipality as an entity (internal view) or as part of the State institutional structure and in its function for the State as body politic (external perspective).[143] The internal perspective addresses not only the specifically institutionalised relationship between council and administration (their "institutional configuration," Göhler 1997) but also the participation of citizens in the management of the affairs of the community on the responsibility of the municipality. Internally, the self-government idea finds "its raison d'être in the participation of its members" (Rennert 2002: 321). This is the fundamental democratic function of local self-government, which primarily takes effect within the community, but which can also be seen from an "external perspective" to affect the State as a whole. This speaks in favour of the "municipal parliament" position with democracy theoretical complementation.

(3) The third level, important in establishing the democracy theoretical relevance of municipal self-government in the context of utility network infrastructure transformation, is the economic activity[144] of municipalities, an important aspect of municipal services for the public. Local self-government is often named in one breath with the performance of municipal functions and local public services, and the link between self-government and service delivery by the municipality itself (public services) is often regarded as necessary. There is indeed a close link between the ecological, economic,

142 The Hesse County Association stated: "Local self-government is not restricted to administrative decentralisation and is not primarily rooted in administrative rationale. Efficient local self-government complements the principle of the division of powers, counters excessive concentration of power, and ensures a graduated democratic political community." (Hessischer Landkreistag 1998)

143 A comparable distinction is made by Wollmann between "external municipal constitution" and "internal municipal constitution" (1998b: 50), by Rennert, who distinguishes "an external and an internal side to the self-government idea" (2002: 321), and Kodolitsch for whom local self-government is "basically two things: autonomy of municipalities vis-à-vis the State in the sense of management of the affairs of the local community on their own responsibility, and the participation of the citizens in this activity" (2003).

144 Municipal economic activity means the performance of (public) tasks and services. They can be performed directly within the municipal administration (e.g., by direct labour organisations) and indirectly by entities hived off from the core administration (public or private companies in which the municipality holds an interest). The latter form of economic activity is generally accompanied by diminished control at the operative level (i.e., the level of practical service delivery and production processes in the administration) and greater emphasis on the strategic, planning level (policy on generally long-term goals) for the purposeful control of municipally owned enterprises (see also chapters 2.3 and 4).

and socio-societal relevance of the tasks within the competence or responsibility of the municipality.

This “delaminated” concept of local self-government is thus subject to varying normative interpretations, and addresses different spatial-institutional levels of reference and material content (tasks) in implementation in the municipality.

In an unpublished manuscript “The Dilemma of the Urban,” Göschel argues that a third normative goal of the State can be posited in addition to “the rule of law and the social state,” namely the “cultural state” in the sense of a “reproduction of democracy” (Göschel 1999: 9). This function of safeguarding democracy in the State/community can, however, be performed by a municipality only if local self-government is more than decentralised administrative activity, and only if ethical/moral debates are conducted at the local level on decisive issues that are *political* in the best sense of the word. Local self-government is then much more than dealing with the proverbial “rattling manhole cover.”

3.2.2 The Importance of Local Self-Government for the Community

Elementary to the local self-government guaranteed by Article 28 (2) of the Basic Law is the right of municipalities to manage all the affairs of the local community on their own responsibility. This includes both the guarantee of certain governmental rights of municipalities like planning autonomy, territorial jurisdiction, and organisational powers, and a basis for financial autonomy (financial and taxing powers).[145] In practice, however, the concrete formulation and scope of these rights are often highly controversial and are at the heart of the debate on the “Future of the City” and the “City of the Future.”[146] The (normative) point of departure for further consideration is the opening of the municipality to public participation in the management of the affairs of the local community – constitutive to the internal perspective of the local self-government guarantee – (cf. Kodolitsch 2003, Rennert 2002) and the democratically legitimated control and monitoring of municipal functions

Public participation in managing the affairs of the local community

Public participation in the management by municipalities of the affairs of the local community on their own responsibility is not an end in itself. And public participation is least of all a legitimation of internal local self-government. Towns and cities constitute the lowest level of democratically legitimated decision-making. In the municipality, citizens have the opportunity to contribute actively to their community. “Decisions are most easily comprehensible at the local level. The individual is acquainted with the foreground and background and with the actors involved. How interests interrelate is comparatively clear, the consequences are easy to understand, the chances for an individual to obtain a hearing and recognition are greatest in the local sphere. At this level he can and should be given

145 Cf. Vogelgesang/Lübking/Jahn (1997: 39 ff.).

146 The project of the German Association of Cities and Towns (DST) “Future of the City?– City of the Future!” is an attempt to redefine and realign the principles and goals of local self-government in local government practice – (see www.staedtetag.de or Articus 2002).

more opportunity for active participation than at the more remote level of the State" (Knemeyer 1995: 78).

With the exception of completely uninformed participation in elections, all these roles and forms of participation in the autonomous management of local community affairs have in common that citizens deal with issues and problems arising in their immediate life-space, namely their neighbourhood, their municipality, their district, or their city. Participation in political will formation and electoral decision-making, and, still more, in active collaboration and practical civic engagement are generally regarded as offering opportunities for "strong identification of citizens with the community and far-reaching integration of citizens in the community" (Articus 2002: 10 f.).[147]

Participation, and even more so engagement and activation, are easier to achieve and more varied at the local level than at the supralocal level of the State. For its citizens, the local community, the municipality, is an elementary part of their societal lives, especially their everyday lives. In the municipality, citizens directly experience the effects of State activities, for this is where the provision of public services shapes their lives, this is where they use infrastructural facilities and have direct contact with public authorities. The relationship between the State and the municipality proves to be a mutual one. The State grants municipalities the right of local self-government, and municipalities act as "schools of democracy" where civic competencies can be acquired, thus stabilising the system. For public participation in local affairs not only legitimates municipal autonomy itself. The overall construct of municipality as a politico-administrative system plus public participation constitutes the "main source of State legitimacy" (Kodolitsch 2003). Public participation in the management of the affairs of the local community provides the municipality – institutionalised in its right to local self-government – with a basis for legitimating its existence not only as a built city but also as a political community that is more than an intermediate administrative level between the State and the individual.

Democratic control and monitoring of municipal functions

Owing to environmental, social, and urban development goals (public interests) adopted by municipalities, there are "tasks and functions that cannot obey market laws, or at least not alone, and which require political standard setting and political control at the local level" (Articus 2002: 11). Municipal public services are repeatedly mentioned in this connection. But they are not the only area central to the question of the democratically legitimated control and monitoring of tasks performed by or in the responsibility of the municipality as a "constitutive element of local self-government" (Kodolitsch 2002b: 53).[148] Two perspectives are to be distinguished: first, the control and monitoring of municipal tasks and enterprises within and by the politico-administrative system in municipalities (e.g., by means of investment controlling) and, second, control and monitoring by citizens – in their

147 Similarly Kodolitsch, for whom the citizens "announce" their identification with their community through their engagement in local affairs (2003: 1).

148 Cf. also chapter 3.1.2 and 3.1.3 for a constitutional-law discussion of the municipal intervention requirements in cases of privatisation.

various roles as political employer/contract-giver, customer, or active participant (Bogumil/Holtkamp/Schwarz 2003). The basic conditions for both levels are transparency and information on task performance and production (Articus 2002: 12).

At the first level, however, practice shows that in the course of privatisation and outsourcing, the politico-administrative system of the resulting “municipal group” can lose a degree of control and supervisory competence (Wohlfahrt/Zühlke 1999). The undertakings spun off from the core administration through organisational privatisation often develop a life of their own (Bogumil/Holtkamp 2002b: 77). These municipal enterprises, which in fact generally act autonomously, are thus considered “undercontrolled,” in stark contrast to the “overcontrolled” core administration (Kodolitsch 2002b; 51“ Röber 2001: 8). Deficient control and supervision is due not only to the growing “institutional distance” between control subject and object but also to the increasing complexity of control and supervisory tasks in a complicated web of direct and indirect holdings (cf. chapter 2.3). Municipalities are likely to find it more and more difficult in politico-administrative practice to maintain the constitutionally required option of intervention,[149] for example through investment management and controlling.

At the second level, the situation for public control and monitoring of municipal functions is also problematic, since citizens can perform a monitoring role either as “customers” of municipal undertakings and public, quasi-public, or private[150] “agents” – involving all the informational disparities and dependencies associated with this notion of customer democracy, especially if the citizen/customer has no practicable exit option available[151] – or as “political employer/contract giver” of the municipality in its capacity as owner of an undertaking or the entity with ultimate responsibility for performance. The customer of services in public responsibility is thus dependent on the council or the administrative authorities as intermediaries vis-à-vis the enterprise, which brings us back to the first level, the politico-administrative system with its deficient controls and monitoring.

3.2.3 Local Self-Government under Pressure

“Democracy is … a project that can progress only in public debate about the interpretation of its fundamental ideas and the appropriate forms of its realisation” (Klein/Schmalz-Bruns 1997: 11). Democracy also needs to be “lived.” But lived democracy, like municipal self-government as its local expression needs fields for decision-making and spheres of action with appropriate scope for action and decisions. Municipalities and their constitutional guarantee of local self-government are coming under pressure from various sides, so that towns and cities find their capacity for decisions and formative action massively restricted.

(1) An unprecedented amount of “highly detailed laws, regulations, and binding administrative rules issued by the federal and state governments, as well as the increasing

149 For a differentiated legal discussion of municipal options for and restrictions on intervention in privatisation decisions cf. chapter 3.1.2 (intervention authority and intervention options) and chapter 3.1.3

150 The relationship between customers and private companies in the energy sector has, however, no direct impact on local self-government, since it is a private contractual relationship in market competition.

151 Cf. critical comments in Bogumil/Holtkamp (2002b: 82 f.).

number of European Community legal instruments … have reduced the cities to executive agents of the State (DST 2003e: 2). The proportion of discretionary self-government tasks in municipalities has decreased steadily (Bogumil 2001: 77).

(2) The State continues to delegate tasks to local government without providing financial compensation for services provided (and paid) for by municipalities. The demand of municipalities for the introduction of the connexity principle ("who calls the piper pays the tune") is well known.

(3) Closely associated with the first two problems are the dramatic developments in local finances and investment. The crisis in local government finance described in chapter 1.1 – triggered by increasing welfare expenditures and simultaneously falling revenues – reduces financial scope to a minimum. "Own funds for spending on discretionary tasks are more or less non-existent" (DST 2003e: 2).

(4) Primarily as a result of EU competition law and law on the award of contracts, municipal enterprises are under competitive pressure in providing services. Owing to empty coffers, many municipalities have sold interests in their companies – with consequences for the municipal control and supervision of these enterprises (cf. chapter 2.3). There is even some talk of the "abandonment of power by local councils in the context of privatisation" (Bogumil/Holtkamp 2002b: 79 ff.).

This massive "loss of municipal scope for action can result in a general devaluation of local democracy. Where there is nothing to be decided, political participation becomes obsolete" (Roth 1997: 412) – not only in cooperative democracy but possibly in its representative form, municipal elections. The widespread fall in turnout for local elections puts greater legitimation pressure on municipalities and the institution of local self-government. Voter turnout reached its lowest ebb in the Brandenburg local elections in 2003: 45.83 per cent.[152] Without speculating on the reasons for the drop in turnout at local elections,[153] these figures tend to diminish the legitimation basis and increase pressure on the politico-administrative system in municipalities and local self-government to pay greater attention to the public in the political debate and the performance of functions. Practice seems to demonstrate that "there has never been such a democratic stir at the local level" (Roth 2001: 136). There is a whole range of new opportunities for participation (e.g., citizen initiatives and referendums) at the municipal level. At the same time, conventional and unconventional forms of participation have scarcely diminished. Furthermore, many new fields of civic engagement have developed (Roth 2001: 136). For "over and above legal protection, the principle of local autonomy must continuously provide evidence of its particular achievement potential if it is to enjoy political backing. Municipalities must demonstrate this through forward-looking concepts for the organisation and performance of pub-

152 In two recent rounds of local government elections, voter turnout (excluding the city states) ranged from a peak of over 60 per cent in Bavaria and Rhineland-Palatinate to a low of under 50 per cent in Brandenburg and Thuringia. Source: own calculations on the basis of Internet data from state statistical offices and state returning officers) makes it increasingly important for local representative democracy.

153 The usual factors mentioned include disaffection with politics and politicians, a lack of interest, a sense of powerlessness, anger, and carefully calculated abstention.

lic functions, which determine the quality of life, of housing, economic activities, and work in the city" (DST 2003e: 6).

The key question in this context is whether local self-government requires not only a catalogue of tasks (which is legally the case) but also the capacity to provide services itself. In other words, is the topos of the link between the local self-government guarantee and the municipality engaging itself in economic activities still valid, and is this link a necessary condition for local self-government? Is the ensurance role sufficient for the municipality to be able to exercise the right to local self-government? The conditions that an ELA that takes local self-government seriously must fulfil are discussed in the following chapter.

4. Changing Functions and Control Resources in the "Ensuring Local Authority" (ELA)

The transformation occurring in local government can be described as an institutional shift from a service to a ELA. Three levels of abstraction can be considered. Taking changes in the conception of State under the ensuring State model as the point of departure, the theoretical implications for the ELA concept are examined with respect to evolving public sector arrangements. Finally, in chapter 4.2, changing functions and socio-ecological control resources are described and discussed on a more operative, practical level, focussing on the example of transformations in network-related infrastructural sectors.

4.1 The Conception of the "Ensuring Local Authority"

Terminologically, the discussion on institutional and model change in the performance and control of public functions focuses primarily on the ensuring *State* rather than on the ensuring *local authority*. But this change is particularly visible and acute at the local government level (see chapters 1. and 2). One might not fully agree with Reichard when he asserts that the "the political science and public administration debate on the ensuring State approach … has so far been very restrained" and that there is "considerable need of analysis" (Reichard 2002: 39). But his judgment is doubtless right when it comes to the ELA concept, especially with respect to the differentiated performance and control of municipal functions. No systematic attempt appears to have been made to develop an ELA concept on the basis of the ensuring *State* approach. However valuable it would be, any such challenging, primarily constitutional law venture is beyond the scope of the present project. But we will be taking a detailed look at existing treatments of the ELA model.

In the theoretical debate on the ensurance model, the literature operates with the concept of the "ensuring State," whereas the empirical and practical examples taken to illustrate theory regularly come from the local government level.[154] This shift in perspective is often tacit, raising doubts as to the consistency of the arguments. A definition or concept of the

154 This alone indicates that municipalities have already had experience with the ensurance model. For local authorities have long had the choice between two ways of performing their functions: they can do it themselves or entrust it to third parties. What is new is the attention being paid to performance by third parties and the theoretical debate on the subject.

ensuring local authority cannot be developed simply by replacing the element "State" in definitions of the "ensuring State" to be found in the literature by "local authority." That would be far too simplistic. At least the differences that exist between the State[155] and municipalities in types of function, responsibilities, and resources have to be taken into account. Local government human resources, tangible assets, and powers are not to be compared with those available to the State – a profoundly banal statement, but one that points to the limits of the ELA model. Local authorities have very limited financial resources.[156] Depending on the size of the city, municipalities may well have a highly qualified and correspondingly well equipped administration and facilities, but they are unlikely to attain the dimensions and hence the knowledge-processing capacity of State administration and authorities such as federal government departments. Finally, the ensuring State has greater clout and "negotiating power" vis-à-vis the private actors to which it entrusts the performance of functions than does the individual municipality. Imagine the situation of a small municipality coming into conflict with a global player in the water sector.[157] And it should not be forgotten that local authorities have no legislative powers.

The "ensuring State" as new conception of the State

Conceptions of the State have succeeded one another over recent decades, from the regulatory State (*Ordnungsstaat*) and the sovereign State (*Hoheitsstaat*) to the service or producing State (*Leistungsstaat*) in combination with the welfare State (*Sozialstaat*). These models have been joined in recent years by notions of the lean, moderating, activating, cooperating or ensuring State.[158] These both shifting and imprecise concepts express a changing understanding of government, of the State (Reichard 2002, Schuppert 1998a and 2001). These labels seem imprecise because they lack well-founded and consistent, substantive definition, at least in the parlance of political debate. That these concepts and notions are politically contentious indicates that they are normatively charged and in competition with one another. There is no exclusively valid conception of the State. And there can be none in a pluralist, free, democratic country if "conception of the State" means how citizens conceive "their" State and what picture of the State governmental institutions and non-governmental corporative actors develop. For this necessarily covers a wide range of pictures and understandings. Nevertheless, there are certain dominant, paradigmatic conceptions in societal perception and acceptance which are subject to permanent (mostly unconscious, sometimes conscious[159]) scrutiny in the light of the actual conditions for State action. For the gap (the cognitive dissonance) between the claims of the State and reality cannot become too wide. To take one example, a welfare State

155 The term "State" is used in this context to mean the (German) federal and state governments. This excludes "municipalities" or "local authorities," although from the constitutional point of view they are part of the State. The terms "public authorities" or "public sector" are used to mean both federal and state government and local government/municipalities/local authorities.

156 Cf. chapter 1.1, where the dramatic financial situation of local authorities is graphically described.

157 As the dispute about the truck toll system between the Federal Transport Ministry and the firm Toll Collect very well demonstrates, the clout and negotiating skills of the State often leave much to be desired.

158 Some of the labels are also used in connection with municipalities – often associated with the concept of "*Bürgerkommune*" ("civic community").

159 Cf. public sector task review processes (see also chapter 2.3).

which claims to pursue social equity but which has little practical success or which is increasingly unable attain its objectives,[160] will no longer be perceived as such. Theoretically, there are two ways to narrow the gap. The State can either try to sustain its model, but will then have to change its instruments, or it can adapt the model to actual conditions. Both the modification of the conception of the State in the process of public discourse and the adaptation of State institutionalisation can thus be described as attempts to "reduce dissonance." In the current debate on a new conception of the State, we are experiencing precisely this search for fit in new State-societal models and modified (control) instruments.

In simple terms, the normatively charged poles can be seen as the neo-liberal "lean" State and the traditional welfare State (Reichard 2002: 27). The concept of the ensuring State is interpreted as a "middle course" between the poles (e.g., Reichard 2002: 27), which is not to say that the concept is impartial or neutral. For some, the ensuring State is perhaps the beginning of the end for the caring welfare State, for others it is steers a compromise course in the prevailing global-societal "megatrend" (E.U. von Weizsäcker) towards dedemocratization and, in the pursuit of economic Darwinism, towards neo-liberal modernisation leading to oligopolisation and monopolisation, constituting a "pragmatic synthesis" (Reichard quoted in Andersen/Reichard 2003: 17). For still others, the ensuring State is a model that does not go far enough in rolling back government to its core functions and leaving everything else up to free market forces. Probably, the concept of the ensuring State has gained a certain respect precisely because of the middle position it occupies among State modernisation models.[161] Over and above substantive differences and differing accents, all models show a blurred dividing line between State and market: "More and more, public tasks are being performed by means of institutional arrangements (increasingly through networks) that are characterised by a complex 'public-private mix'" (Reichard 2000: 22).

The local level in the ensuring State

At the local government level, the blurring of lines between the public and private sectors in a complex public-private mix is manifested in efforts to modernise public administration (cf. chapter 2.1) (introduced internationally under the heading "New Public Management" and by the Cooperative Association of Municipal Authorities (KGSt) in Germany as "New Control Model"), in the privatisation and outsourcing of municipal functions and services (cf. chapter 2.3) and in the discussion on "civic community" (cf. chapter 2.4) – a discourse area of potentially overlapping, interpenetrating, interdependent, and possible competing strategic reform approaches to reforming municipal administration. Also affected is the triangular relationship between politico-administrative system, the local (private and municipal) economy, and the public.

160 It is almost beside the point whether this assessment in based on objective fact or whether public perception is distorted.

161 Cf. similarly remarks by Voßkühle (2001) on the "career" of the key concept "regulated self-regulation," which was due, among other things, to the fact that this concept cannot be clearly assigned to any political school of thought and combines various theoretical approaches.

A range of roles, functions, and tasks for the State can be derived from these models or conceptions of the State – with complementary roles, functions, and tasks for private or non-governmental (corporate) actors. The discussion about the concept of the ensuring State requires consideration of the underlying

- changes in the conception of the State as a new understanding of State control,
- changes in State tasks, and thinking in levels of responsibility,
- changes in the institutional configuration of individual actors and their institutional arrangements (roles and interrelations),
- changes in knowledge requirements,
- the limits of the ensurance model.

With regard to the public ensurance function and the ELA model , the focus is accordingly on changes in the fundamentals of local self-government, municipal functions, the institutional configuration[162] of the municipality, and knowledge requirements in local authorities. The limits to the ensurance model are probably still narrower for the municipality than for the State.

4.1.1 Changes in the Conception of the State as a New Understanding of State and Municipal Control

The State perspective

The shift in the conception of the State from a service to a ensuring State has been provoked by the burden imposed by:

- a steadily increasing, now extremely copious inventory of State functions,
- limited State resources,
- increasingly complex and interdependent socio-ecological problems and State control functions owing to the differentiation of societal functional subsystems

(Hoffmann-Riem 2001a: 15 f.).[163] The excessive demands being made on the State are evidenced by the crisis in public finance, inefficient public service delivery, and control deficiencies and problems.

In sociological modernisation and control theories, “modern” societies are often described as highly functional. Functional subsystems develop (law, politics, the economy, science, religion) which have highly specialised responsibility for the performance of certain societal functions. These subsystems are themselves highly differentiated. This brings growing societal complexity. The enormous increase in knowledge in the modern science system provokes growing uncertainty and awareness of knowledge gaps, which have to be processed by society. Traditional State (i.e., hierarchical) control, in other words the classical exercise of influence by a control subject on a control object by means of a control instrument to achieve a control objective, is no longer possible – if it ever was. A “crisis of regu-

162 Particularly the politico-administrative system.

163 The gap between task inventory and State resources has already been addressed in chapter 2.2 (task review).

latory policy" was diagnosed as long ago as the 1970s (Mayntz 1979, quoted from Mayntz 1996: 148).

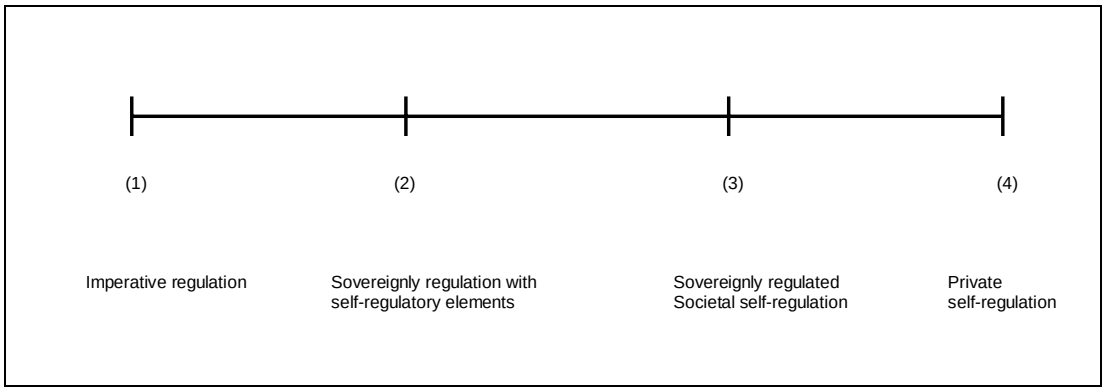
A differentiated society requires a differentiated government machinery whose functionally differentiated subsystems can "dock" on to the equally differentiated functional subsystems of society. The State and its institutions accordingly differentiate themselves, like administrative units at the practical level, in terms of subject or task areas. This produces a need for negotiation and coordination between sub-units and subsystems within the machinery of the State (Mayntz 1996: 157). But societal interdependence prevents these subject areas from ever fully coinciding with independent problem fields or decisional problems. Other departments or authorities with their know-how and their specific interests are always affected by any decision to be made. Thus, "the obligation arising from differentiation to negotiate *within* the government machinery has become the central mechanism for putting societal interdependence problems on the government agenda. Without *intra-government* negotiation, the shift of political decision-making to sectoral policy networks would only lead to fragmentation" (Mayntz 1996: 157; highlighting in the original); State and politics would no longer be capable of action. The central task of the State and politics is to deal constructively with interdependence between subsystems and the concomitant coordination problems. In this "interdependence management" function (Mayntz 1996), the State and politics insist on their right to influence societal systems and processes, however differently they may now be defined. "'Control' in the sense of purposefully influencing social processes is thus the special function claimed by the politico-administrative system. What has changed is the way in which the State tries to perform its functions" (Mayntz 1996: 157) – and hence how it seek to exercise control.

In view of the excessive burden imposed on the (sovereign regulatory) State, the neoliberal modernisation approach concludes that the State has "failed" and consequently calls for more private self-responsibility, personal initiative, and self-regulation. On the other hand, this private, market-driven self-regulation is jeopardised by potential market failure.[164] However, a range of different modes of control can be identified between the two. In this range,[165] Hoffmann-Riem cites four types of regulation: "sovereign-imperative regulation," "sovereign regulation with self-regulatory elements," "sovereignly regulated self-regulation," and "private self-regulation" (Hoffmann-Riem 2001a: 29).

164 Market failure is primarily explained by externalities and market balances or power asymmetries which endanger the functioning of the market.

165 Cf. Schuppert (1998), who refers to an earlier work by Hoffmann-Riem.

Figure 3: Range of Regulation Types*



*Source: Own presentation following Hoffmann-Riem (2001a: 29).

In the types of regulation that go beyond 'sovereignly regulated self-regulation', the State relies (at least initially) on self-regulation by legally private and often private-enterprise oriented actors, but lays down a regulatory framework for private self-regulation" (Hoffmann-Riem 2001a: 30).[166] The differing degrees of linkage between State political control and societal self-regulation shown on this scale constitute a "extensive mixed form of governance" (Mayntz 1996: 160). Thus, although State and societal regulation may occasionally conflict and compete, they cannot replace but – at best positively – only interact and complement each other.

On the scale of control modes, the concept of the ensuring State would fit in around the two middle types "sovereign regulation with self-regulatory elements" and "sovereignly regulated self-regulation." The ensuring State "leaves a public task be, and concentrates on providing a framework and structuring requirements for problem-solving by other, particularly private parties, without guaranteeing that public interest goals will be pursued and attained in a particular way" (Hoffmann-Riem 2001a: 24). Thus the State no longer "provides" its own services but "enables" their provision by third parties. The public sector "no longer exercises a public 'production monopoly,' but cooperates with private parties and possibly other public service providers in performing functions" (Reichard 2002: 30). Or as Trute puts it, the term ensuring State "denotes a State that upholds its concrete, i.e., task-related responsibility towards the public interest, but which has withdrawn from the direct performance of certain functions" (Trute 2002: 329). In the practice of governmental and administrative action, this means that a "politically legitimated public entity decides on the provision of politically desired and affordable services to the public and commissions either its own public services or external providers to deliver the service" (Reichard 2002: 30).

166 Another type of regulation is "regulated self-regulation" (Berg et al. 2001). Regulated self-regulation has long been known as a concept for "realising the public interest through the division of labour," and, like the above-mentioned modes of control or regulation, is characterised by the meshing of external and self regulation (Voßkühle 2001: 197 ff.).

Changes in the conception of "municipality"/"local authority" and local self-government

Like the model of the ensuring State, the ELA occupies the middle field between the ideological poles of local government with generalized competence providing or producing public services and a lean service municipality as an extension of sovereign government administration in the neo-liberal minimal State. The high standing of the ELA model is also due to a certain vagueness and definatory imprecision. As the following two quotes show, the "middle ground" between the poles is broad indeed:

- "The 'ensuring local authority' of the future will perform its sovereign functions and guarantee the performance of tasks that do not belong to this core area. The performance of these tasks will, wherever possible, be transferred either to specialised providers of (municipal) services or to the public" (Roland Berger Strategy Consultants s.a.: 12)
- "The public sector ensures ('guarantees') the performance of functions. It need not necessarily perform all these functions itself: it can use the services of others. It no longer exercises a public 'production monopoly,' but cooperates with private parties and possibly other public service providers in performing functions" (Reichard 2002: 30).

While the first quote can be read as a call to reduce the volume of local government tasks, for the municipality to concentrate on its core tasks[167] and delegate others wherever possible to third parties, the second is much more reserved. In Reichard's view of the ensurance model, local authorities are under no sort of pressure to transfer tasks. Apart from delivering services itself, the municipality may use the services of other actors to perform functions and implement the public interest. For "they *need not necessarily* [but may if they wish] perform all these functions themselves" (highlighting by the authors). In this case, the ensurance model broadens the range of possible institutional solutions for local authorities in a positive sense. The (self) conception of local authorities thus changes, as reflected in the claim by the managing director of the German Association Of Cities And Towns (DST) that the idea that German "cities could be something like 'allround providers of services of all sorts' has long been obsolete" (Articus 2002: 14). "The [new] model must be the ensuring city that makes certain that certain services are provided without necessarily delivering them itself" (Articus 2002: 14). In the choice available to municipalities between performing public functions themselves or having them performed by others, the weight has shifted in favour of external performance. At the control level, there has been a reorientation from internal control to external, more competitive control.

Decisive for the quality and reach of changes in the municipal self-conception is hence not reference to the ELA notion but the extent to which it puts pressure on the municipality to replace responsibility for direct performance by ensurance responsibility. The bare term "ensuring local authority" means only that every position can be taken on a continuum of possible conceptions and interpretations ranging from the normative pole of the traditional service municipality to a lean service administration. For scholarly and political assessment it is essential to fill the concept of the ELA with content and to spell it out.

167 On the difficulty of determining this core area of local authority functions cf. chapter 3.1.3 (discretionary and differentiation criteria for the privatisation of municipal tasks).

4.1.2 Changes in Public Sector Functions, and Thinking in Levels of Responsibility

Changes in State functions

With the transformation of the State from producer into ensurer, old functions like the planning, delivery, and control of public services are joined by new tasks and functions like the moderation, control, and coordination of civil society and economic processes, monitoring and controlling and, where necessary, intervention in the delivery of services (Reichard 2002: 30 f.). As a consequence, the State weights its functions differently. “Soft” control and the management of the various subsystem, sectoral resources, interests and objectives of actors pursuing their own interests in differentiated functional areas of society thus become key functions of the State, of State policy and administration. The State as guaranteeing mediator, coordinator, and controller then has the job of “managing subsystem interdependence” (Mayntz 1996: 155). “Interdependence management [as functional definition of the political system] accordingly demands intervention in the power relations between subsystems and includes the authoritative hierarchization of competing claims. In view of asymmetric interdependence, guaranteeing the operative capability of individual subsystems ultimately becomes a political task” (Mayntz 1996: 156).

The responsibility of the State in its role as ensurer is concerned not only with guaranteeing service delivery by third parties and certain policy objectives (e.g., quality criteria for public services), but also the guaranteeing of appropriate conditions for the production and distribution of services. For example, the State is to guarantee effective and non-discriminatory competition. But it also becomes the job of the State to guarantee cooperation in complex negotiatory systems, i.e., the State must ensure that cooperation can be established between governmental, non-governmental, and quasi-governmental actors, and proceed in regular – institutionalised – form. The changing State conception of its functions is thus manifested primarily in a changing conception of the role of administration in the State (and, as we shall see, in the municipality) (Schuppert 1998a: 25). As should now be clear, the shift in the conception of the State from the welfare or service State to the ensuring State is accompanied by a change in State responsibilities, specifically, a change from primary responsibility for performance to ensurance responsibility.

A gradation of State responsibilities has proved useful in analysing this complex (cf. Reichard 2002, Schuppert 2001). State responsibilities can be systematically graded in terms of the different types of function to be performed by the State and private actors. Kißler distinguishes four types (1998: 61):

1. core State functions, which have to be guaranteed and performed by the State itself;
2. State guaranteed tasks, which have to be guaranteed but not necessarily performed by the State itself; they can also be handled by private parties;
3. supplementary State functions (non-public) which the State may perform if it can do so more efficiently than the private sector;
4. private core tasks, which are to be performed by private entities.

Depending on the type of function and the duty or right of the State to perform it itself, to delegate (privatise), or even renounce performance, a range of privatisation options[168] and corresponding grades and divisions of responsibility can be identified. There is broad agreement in the literature that three basic types of responsibility should be distinguished: performance responsibility (*Erfüllungsverantwortung*), ensurance responsibility (*Gewährleistungsverantwortung*), and backup responsibility (*Auffangverantwortung*) (Schuppert 2001: 401).[169]

"One can speak of *performance responsibility* if the State itself is responsible for performing certain tasks directly by its own means and does not delegate it to third parties" (Schuppert 2001: 401; highlighting by the authors). If the State has direct responsibility for performing a task,[170] it is responsible for producing a service and delivering it to the customer. This type of responsibility differs from *ensurance responsibility* in that "in the case of ensurance responsibility, independent third parties intervene while the State determines the framework for their action" (Hoffmann-Riem 2001a: 26f.). "The public sector concentrates on guaranteeing the performance of functions that continue to be regarded as public; it sees its own role primarily in exercising control and not necessarily in actually providing public services (from 'providing' to 'enabling')" (Reinermann 1994, quoted by Schuppert 2001: 402). Through control exercised by laying down the conditions for peformance by private entities, the State tries "lastingly to secure [to guarantee] the provision of services for the public at politically defined standards and costs" (Reichard 2002: 31). This requires State control of the services guaranteed by the State and delivered by third parties. Ensuring responsibility can be differentiated into regulatory and supervisory responsibility (Schuppert 2001: 402). *Backup responsibility*, finally, means that the State has to take remedial or substitutive action if control is deficient or if other (private) actors fail to deliver a service as political defined by the State (Schuppert 2001: 402). Pursuing Schuppert's sporting metaphor, the State can be said to be on the substitutes' bench (2001: 402), taking the field if a player drops out and no other viable (private) player from outside is available. On the responsibility scale, ensurance responsibility comes between backup responsibility and performance responsibility.

Thus, in relinquishing performance responsibility and concentrating on ensurance and backup responsibility, the State does not reduce but merely restructures its responsibilities. The ensuring State model is not simply about the withdrawal of the State but about a change in the form of State control, in which the State seeks to make greater use of the self-regulatory forces of private or quasi-governmental actors to attain public goals (Hoffmann-Riem 2001a: 27). The result is the redistribution of responsibility between governmental and non-governmental actors and service entities.

168 Cf. chapter 3.1.3 on privatisation options depending on the type of municipal task involved.

169 Reichard identifies a fourth type: financing responsibility, responsibility for financing a service (2002: 31); both the State and the customer could be responsible.

170 In the literature, performance responsibility is closely associated with results responsibility (Hoffmann-Riem 2001a: 26) or implementation responsibility (Reichard 2002: 31).

Changes in municipal functions and in the municipality's conception of its functions

This distinction between function types and levels of responsibility also applies at the local level. At the municipal level, however, a distinction has to be made between mandatory and discretionary functions of self-government. Only then can a "differentiated, graduated conception of tasks" be established (Andersen/Reichard 2003: 19) for municipalities.

In chapter 3.1.3 we saw that task privatisation and thus the complete transfer of a function to the private sector (withdrawal of the public sector from task performance) is not permitted in the case of mandatory local government functions. Functional and organisational privatisation at most are possible, on condition that the municipality retains sufficient scope to intervene, sufficient powers of supervision and control to exercise its final decisional authority. The municipality must secure final decisional authority over mandatory self-government tasks; it must ensure that the "chain of decisions requiring legitimation" does not break (cf. chapter 3.1). It can either assume direct responsibility for performance or ensurance responsibility, i.e., the municipality may "produce" the service itself or entrust the performance of mandatory self-government functions to a purely private entity or a municipal undertaking governed by private law. In any case the municipality must ensure that it has sufficient control.

In addition to ensurance responsibility, the municipality has backup responsibility for mandatory autonomous functions. It is a moot point, however, whether municipal backup responsibility necessarily means that local authorities have to maintain their own production capacities in the sense of machinery and equipment or means of production. On the one hand, municipalities improve their negotiating position or clout vis-à-vis private parties if they have production capacities of their own. On the other, sustaining these capacities is likely to be expensive. It could be sufficient for local authorities to be "managerially" in a position to continue an operation (temporarily) before entrusting it to another (private) agent. When, for example, a private bus line operator in a city fails to deliver, there are other companies at the ready to take over the concession and provide the service (the operation of defined bus lines). Moreover, an agent commissioned by the municipality does not suddenly and unexpectedly fail if the enterprise has been adequately supervised. Effective monitoring can hence be regarded as an important anticipatory element in municipal backup responsibility.

Changes in municipal functions are not so much substantive in the sense that municipalities completely abandon old functions and take on completely new ones; there is more of a qualitative shift in the relevance of individual existing functions. The (internal) control of function performance is therefore likely to become less important than the (external) control, monitoring, supervisory, and planning of functions performed in a competitive context. A comparatively new task is likely to be finding suitable (private) "producers" (companies, Third Sector organisations, citizens) when the municipality wishes to outsource or delegate operative function performance (either voluntarily or semi-voluntarily for budgetary reasons, or because EU competition law and law relating to the award of contracts obliges them to do so). The new conception of municipal functions is reflected by the conviction that mandatory self-government functions for which the municipality cannot divest itself of

responsibility through privatisation should be delegated to third parties. The municipality is thus transformed "from production manager to network coordinator and '*facilitator*'" (Reichard 2002: 37; highlighting in the original).

4.1.3 Changes in the Institutional Configuration of Individual Actors and their Institutional Arrangements (Roles and Interrelations)

The State as "umpire" in changing sectoral institutional arrangements

In the traditional welfare state model, the State had greater responsibility for performance than in the ensuring State. "In the classical implementation model, the public-interest orientation of administrative action was ensured at least from a normative perspective by complex institutional arrangements of rules on functions, organisation, standards, instruments, and procedures" (Trute 2002: 330). This institutional configuration or organisation of the public sector has, however, been modified by the involvement of private parties in service delivery. The "complex institutional arrangement" of rules and procedures is teetring and needs to be adjusted. For the change in the weighting of State responsibilities owing to the shift from the service to the ensuring State, i.e., the transfer of State functions from the public sector to private actors, with strong emphasis on ensurance and backup responsibility, affects both the State's relations with private and quasi-governmental actors and, within the machinery of government, between State administrative units (see above). "The involvement of private parties in service delivery, the transformation of public service provision into a model of market-related service delivery, normatively integrated in a regulatory framework subject to State powers of intervention to safeguard public interests, the use of societal self-regulation in a regulatory framework laid down by the State, which is designed to secure certain public interests," has an impact on control and changes the "regulatory structure of function performance" (Trute 2002: 330).[171] Not least of all, the roles of actors and their relations are affected in their institutional arrangements.

The ensuring State relies (to some extent) on the self-regulatory resources of non-governmental actors, but also watches over compliance with institutional rules (laws, regulations, and procedures) and with State defined (quality) standards. Hence, the State does not become an equal partner for private actors even under the ensurance model. On the contrary: the State retains the power to determine the rules of the game and the objective of the game (even if the players (associations, lobby groups) participate in this (governance) process), to warn players when necessary, and in the event of poor performance to take them off the field (e.g., cancellation of concessions or licences). However, the State needs the know-how to set goals, define rules, and make decisions, and, in meeting its backup responsibilities and putting pressure on recalcitrant actors, it needs the competence to intervene itself as player in the game.

171 In the terminology of the netWORKS Research Association its regulation.

Changes in municipal roles and relations with local stakeholders

In the traditional model of the service municipality, control arrangements can be described both as hierarchical – involving complex administrative rules, standards, and procedures – and as informal. Informal because the intimacy between political leadership and top administration (e.g., director of a direct labour organisation) permits "short official channels" and easy consultation[172] Although this model provides for internal control and production in various administrative units, they are not as legally and institutionally separate as in the ELA model. For it is a key characteristic, indeed, an institutional prerequisite of the ensurance model that employer and contractor sides be kept apart (Anderson/Reichard 2003: 20), which transforms the performance of municipal functions into "a demanding arrangement of externally effective, market-related rules … which cannot rely on sources of economic efficiency alone but must include public interest objectives" (Trute 2002: 343). The public-interest oriented control of public service delivery must now be ensured by means of a sometimes tightly-knit sometimes looser network of municipal and private actors (stakeholders). "The role of employer or contract giver for public services tends to be … to initiate, moderate, coordinate, and monitor the process in the service network in which various public and private actors operate" (Reichard 2002: 36).

A new role for the citizen develops, who becomes a "customer" (at least in the New Public Management context), not least of all in processes and forms of cooperative democracy in municipalities, such as Local Agenda 21 and civic engagement activities (cf. chapter 2.4). The ensurance model is accompanied by greater societal self-responsibility for the individual. On the one hand citizens have more options and greater choice in public services because they can decide between various private providers (e.g., power) or to perform the service themselves[173] (e.g., parent-run kindergartens) On the other hand, the individual is more exposed to the dynamics of the market. It is obvious that well-educated, communicative, and assertive members of the middle and upper classes benefit most, because they have greater individual resources at their disposition for exploiting the new choices. Not only is establishing and ensuring market transparency and publicity – indispensable for the changing role of the public in the ELA – a key task for the municipality but also stressing and safeguarding the public interest dimension, if necessary by socially balancing private action in formally public areas of responsibility.

As far as municipal economic activities are concerned, the shift from service to ELA has meant that, owing particularly to EU law, municipal undertakings have lost their local monopoly and can no longer relay on orders from "their" local authorities. Under the ELA model, a municipal undertaking is one of many potential contractors competing for orders from the municipal administration. Although the municipality as the owner of an enterprise has an interest in its success and in seeing it make a profit, and thus to award it contracts, municipalities have the opportunity to compare offers and thus, not least of all, to promote the efficiency of its own undertaking.

172 According to several statements by interviewees and participants in an expert workshop on the subject "Municipal (Policy) Control Resources and Holdings Management.

173 Nevertheless, municipal support (e.g., advice) and financing are indispensable when civil society entities take on public tasks.

4.1.4 Changes in Knowledge Requirements

Changes in the knowledge requirements of the State

With changes in State control, in State tasks and functions, and in relations with private actors, government and politics come to need different knowledge and competence if they are to operate as "interdependence managers" of functional subsystems in society and of the actors involved. The participation of private actors in task performance and in goal and rule setting (governance structures) gives the State access to private stocks of knowledge, giving it the opportunity to enhance its competence for processing and solving problems. "Although the stronger involvement of private actors and societal regulatory mechanisms, like the use of market processes or private organisational and procedural forms, does in principle make their problem-processing capacities and stocks of knowledge available, it leaves the State with the problem of having to formulate requirements, lay down conditions, and assess outcomes without the appropriate knowledge" (Eifert 2001: 138). Through the transfer of performance responsibility in the case of functions guaranteed by the authorities, i.e., through the delegation of service delivery to third parties, know-how relating purely to service production will become less important for the public sector. Nor will the State need the same level of supervisory knowledge and competence in relation to the production process as under the traditional model of internal production. Instead, competence in controlling and assessing goal attainment becomes more important. The ensuring State is more strongly integrated into and more dependent on a network of different actors than is the traditional welfare State. In order to assert control in a complex network of actors, the State needs knowledge and competence in coordinating the action logics and interests of the actors involved in the network, and skills in cooperation management. Acquaintance with actors' action logics and interests can only be useful in gaining their cooperation to achieve certain public-interest goals of the State by offering appropriate incentives and taking account of their interests. In sum, the ensuring State needs less detailed and specialised technical knowledge and less intervention-related know-how and more control and instrument-related knowledge (Eifert 2001: 140). This abstractly formulated change in the required forms and content of knowledge also applies with regard to local authorities.

Changes in the knowledge requirements of municipalities

The ELA, too, tries to tap and integrate private stocks of knowledge through the delegation of functions and services, and, like the ensuring State, faces the challenge of developing systematic, institutionally safeguarded administrative learning (Eifert 2001: 142 f.), which no longer takes place almost automatically in the course of operative service delivery by the municipality itself. For, "in the shift from performance responsibility to ensurance responsibility, inadequate information for the State and third parties proves to be a major danger for the instrumentation of State responsibility" (Trute 2002: 340). This applies all the more at the local level, where resources are much sparser than at the State level. The municipality needs the capacity to obtain or ensure that it is provided with the information it needs for fulfilling its duties of intervention as the basis of all other knowl-

edge and know-how and competent, politically defined strategic control. The municipality must also have the competence and knowledge to judge whether the information available to it on the "agents" it has commissioned and on service delivery itself is complete and correct. Only then can it go about processing this information.

For the generation of knowledge and existing stocks of knowledge required for control and result assessment, it is, however, problematic that not all knowledge can be acquired theoretically or is theoretical in nature. Often it can be gained "only in actual operation of the given instrument design" (Eifert 2001: 140). This is a serious problem for the status of municipal competence and knowledge if Eifert's statement extends not merely to control instruments but also to the process of service delivery. If the knowledge needed to assess the control and monitoring of goal attainment can also be acquired only "on the job" in the production process, the ELA will develop an irremediable knowledge gap by relinquishing service delivery. At the latest when the administrative staff involved in operative task performance leave, such detailed operative knowledge will be irretrievably lost to the municipality.

4.1.5 Limits of the Ensuring Local Authority Model

The main dilemma, and hence the democratic, political and constitutionally required limit to the ensuring State, is that it can meet its responsibility as ensurer only if assured some scope for controlling and safeguarding results. This means giving the State sufficiently means to control and supervise task performance by third parties, to assert the public interest obligations imposed on private providers, and to retrieve outsourced functions for performance by its own entities (Schuppert 2001: 411). The resources available for this purpose at the State level are not directly comparable to those available to municipalities.

Owing particularly to the constitutional right and obligation of intervention in municipal task performance (mandatory self-government functions) there is a sharp limit set to the ELA model not only in formal, legal terms but also in terms of the competence and resources for safeguarding precisely this right of intervention.

From a constitutional point of view, the limit to the ELA model is drawn where the chain of legitimated decisions on the given mandatory task (cf. chapter 3.1.3) is no longer secured. This chain will break when the municipality can no longer exercise its ultimate decisional authority on important, determining matters, so that it is no longer able to guide a private municipal undertaking or a purely private company entrusted with the delivery of services towards policy goals, to correct aberrations or revise decisions. The basic prerequisite is sufficient knowledge and problem-processing capacity, especially on the part of municipal administrative authorities, for the politically defined strategic control of increasingly market-organised public function performance. The actual competence for safeguarding the right of intervention (control and supervision) and guaranteeing the performance of public sector tasks in the public interest by third parties (formally privatised municipal undertakings or purely private enterprises), which differs from municipality to municipality, determines where the limits to responsibility and intervention rights in ensuring local authorities are to be drawn.

4.1.6 The Crux of the Ensuring Local Authority Model – from Theory to Practice

Proceeding on the assumption that commitment to the public interest and the involvement of the public in the management of the affairs of the local community on municipal responsibility are to be regarded as constitutive to local self-government (cf. chapter 3.2) and hence apply to municipalities, and that safeguarding the public interest is to be considered a State and local government task (Trute 2002), the municipal politico-administrative system necessarily has a right of control and a need to control (cf. also chapter 3.1). If, however, Schuppert is right in saying that responsibility towards the public interest in the modern State can no longer be conceived as responsibility monopolised by the State because a wide range of governmental, non-governmental, and quasi-governmental actors participate in discussions on the public interest and themselves provide services in keeping with the public interest (Schuppert 2001: 400), the question of the control and implementation of politically formulated public-interest objectives becomes the crux not only of the effectiveness but also of the legitimacy of the ELA.

In the ensuring State, the State does not divest itself of responsibility for the performance of State functions but restricts itself to guaranteeing their performance when it delegates or privatises tasks. The withdrawal of the State to the ensurance role does not involve abandoning its final decisional authority. It remains to be seen what constitutes this final decisional authority of the State or municipality and how the public interest is actually safeguarded in local political, administrative, and financial practice, and how local authorities can fulfil this duty in "operative day-to-day business." Discussing this issue will certainly be a major task in further specifying the ELA model. For the "persuasive power of the ensuring State model [and the ELA depends] on its ability to ensure the performance of functions in keeping with the public interest by non-governmental providers" (Schuppert 2001: 412). If in practice municipalities are unable or cannot be enabled to handle the enormously increasing, new demands on their planning, control, supervisory, and communicative capacities, the ELA will remain mere theory.

4.2 Changing Functions and Socio-Ecological Control Resources: Transformation in Network-Related Infrastructure Sectors

The model of the ELA, treated theoretically in chapter 4.1, is the point of departure for describing and analysing the changing requirements and functions of local authorities in the field of network infrastructure systems.[174] Chapter 3.1 showed that municipalities are constitutionally obliged to exercise and safeguard their democratically legitimated final decisional authority over mandatory self-government tasks. We now consider what concrete form this final decisional authority can take in an ELA for the policy areas "network-related infrastructure systems" and "municipal environmental policy," and what changes occur in roles, functions, and requirements. Focusing on empirical changes in network infrastructure sectors, we are particularly interested in assessing political control resources and

174 Cf. Reichard (1998).

their limits in implementing the public interest and in defining and providing public services.[175]

But to begin with, the "scope" or functional-administrative limits of an ELA are to be explicated. This raises the question whether the ELA is a valid analytical model only with respect to functional privatisation or whether it can also apply to organisational privatisation. In other words, Do the three levels performance responsibility, ensurance responsibility, and backup responsibility cover only relations with private agents or also relations with municipal companies governed by private law which are no longer embedded in a close control context within the core administration? In our view, the scepticism about the capacity of municipalities to control and monitor subsidiaries expressed in this report (and in the literature,[176] not to mention interviews with municipal subsidiary management practitioners) indicates that even formally privatised municipal undertakings are to be regarded as subject to municipal ensurance responsibility. For the politico-administrative system comprising local council and administration bears ensurance responsibility for the performance of services by hived-off municipal enterprises. Although, from a strictly formal and legal point of view, this approach can be questioned on the grounds that municipally owned companies are part of the "municipality group" ("*Konzern Stadt*") and that the municipality can therefore still be said to be delivering services itself, from a social-science perspective (cf. Haller 1999) concerned to explain societal reality, there is much to be said for assigning function performance by hived-off entities to the ensurance model. Although municipal company and municipal owner may be formally one, an organisational and institutional boundary has in practice developed between the municipality and its enterprises[177] – not only when third parties have a stake but also when the company is fully owned. Finally, the dividing line between employer and contractor characteristic for the ensurance model needs to be maintained in an analytically more productive and stringent form. This is particularly true in relation to the award of public contracts by means of competitive tendering.[178]

The status of water, power, public transport, and telecommunications services as discretionary or mandatory self-government tasks is defined differently from state to state. Whereas energy supply[179] and telecommunications are treated as discretionary tasks in

175 The empirical basis is provided by the accounts prepared in the first phase of netWORKS research on the water (Kluge et al. 2003), electricity (Monstadt 2003), public transport (Bracher/Trapp 2003), and telecommunications sectors (Scheele 2003), as well as a series of key informant interviews in netWORKS field partner municipalities and at the workshops with other selected experts from research and practice.

176 Cf. Bogumil (2001), Bogumil/Holtkamp (2002c), Kodolitsch (2002b), Röber (2001), Trapp/Bolay (2003), Wohlfahrt/Zühlke (1999).

177 This institutional boundary could also be described as a growing cultural gap between public administrative authorities and municipal companies, which in deregulated markets are increasingly subject to the logic of competition, thus coming into line with the action and corporate strategy of private companies (cf. Edeling (2000 and 1998).

178 But even in the case of in-house awards, the division between municipal contract giver and acceptor persists.

179 As regards energy supply, it should, however, be said that the State continues to bear ensurance responsibility for certain public services goals in this sector. "The State continues to be responsible for guaranteeing an affordable, safe, and area-wide supply of energy and equal access for all citizens to energy services" (Monstadt 2003: 65):

all states of the federation, and municipalities can intervene, if at all, only marginally, water supply is explicitly designated a mandatory function in some states (East German states, Hesse, Rhineland-Palatinate) and as discretionary in the others (Fischer/Zwetkow 2003b: 142). Pursuant to para 18a of the Federal Water Act, sewage disposal is generally designated a mandatory function of local self-government (Kluge et al. 2003: A3). Public transport, explicitly mentioned as a basic public service (cf. para 1 (1) of the Regionalisation Act), is defined as a discretionary task of local self-government by most state public transport acts, but sometimes, for instance in Saxony-Anhalt, as mandatory (Bracher/Trapp 2003: 49). This very mixed categorisation of sectors as discretionary or mandatory imply different privatisation options and categories of municipal responsibility.

Characteristic for the ensurance model is the clear distinction between the roles of the municipality as employer and contractor, i.e., as company owner, too. This also has to do with the "institutional options for the performance of public sector functions" (Reichard 1998) between which the municipality must choose: external performance by private companies (agents); performance by municipally owned, hived-off enterprises; and performance by the municipality itself within the core administration (direct labour). These options are not absolutely new. What is new is the greater attention paid to the external performance of public sector functions and services and which – either voluntarily or under constraint (e.g., owing to the budgetary crisis or to satisfy EU legal requirements) – tends to be favoured as an option, as well as the considerable inventory of hived-off municipal undertakings dealt with in chapter 2.3 with reference to major cities. Implicitly, the separate roles of employer and contractor in municipalities have hence long existed, but have seldom been referred to as such or distinguished in strict logic. Competition policy requirements and the law relating to the award of contracts, as well as legal unbundling in the energy sector[180] have promoted the transparent separation of the various organisational and functional units.

Vital not only for the political legitimacy of local self-government but also for the ensurance model is the integration of public interests by the municipality. Public interests can be ecological aspects of maintaining the natural environment and social issues in the sense of offsetting social disparities, especially safeguarding the provision of public services (e.g., equal access, acceptable prices, continuity, and universality, as well as adequate quality; cf. DST 2003d: 24).[181] These public interests have to be asserted in a network of potentially self-oriented, utility maximising private actors. Owing to the greater weight given the employer function in municipalities (service delegation to third parties) as a consequence of the shift in the municipal control regime from the "classical" internal implementation model to control through a public-private mix (Reichard 2002: 22) in a complex network of municipal, private, and quasi-public or mixed economy actors, planning functions, various forms of control, supervisory, and coordination functions are becoming more important for both municipal administrative and political authorities.

180 Unbundling is the legal requirement to make a clear organisational or at least accounting distinction between power generation, network, and end customer business in power companies that used to be vertically integrated (Monstadt 2003: 19 and 22 f.)

181 A political goal would also be to avoid "premium network spaces" (Graham 2000) developing under competitive conditions in infrastructure sectors.

4.2.1 Planning Functions

At a strategic level, planning functions are becoming more important in relation to municipally owned enterprises. This is particularly the case where outsourcing has led to the relevant functions and planning competence being hived-off from the core administration, as well, so that comparable competence and task areas now have to be (re)developed within the administration. Individual tasks which had hitherto been performed by municipal companies are hence (re)transferred to the administration, sometimes under legal constraint. One example is the transfer of technical planning for public transport from the municipal transport undertaking to the municipality as regulatory authority[182] (Bracher/Trapp 2003: 36).

In awarding concessions by competitive tender, the municipality is obliged even more strongly to develop its ideas about the services to be provided by the concession holder and to draw up a specification of services. In a future "controlled," competitively organised public transport system (competitive tendering), the public transport plan could develop into a key municipal planning and controlling instrument and provide the basis for tendering procedures for concessions or service packages (lots).[183] "With the instrument of the public transport plan … the planning powers of the responsible authority would be strengthened and elements of public service provision in the sense of planning for public welfare (*Daseinsvorsorge*) and competition would be introduced into the Passenger Transport Act, originally based on industrial law" (Bracher/Trapp 2003: 12). In the public transport plan, municipalities as the competent authorities can now define their ideas on establishing and ensuring adequate transport for the population (Bracher/Trapp 2003: 12). Municipalities would gain a great deal of scope for action in comparison with the current regime if the transport authorities (mostly the municipalities) were also responsible for awarding concessions. Transport planning modernised through a public transport plan with wider powers would cover not only public transport services in the narrower sense of the term but also become a municipal regulatory instrument for safeguarding transport-related public interests. It could then function as a "transmission belt for policy" in pursuing public-interest objectives in public transport and public services (Bracher/Trapp 2003: 12).

182 Skilled, well-coordinated planning is particularly important for public transport services in a municipality because "public transport services become attractive only when individual services and means of transport are efficiently integrated" (Bracher/Trapp 2003: 7 f.)

183 If the so-called three-level model is considered, in which "an administrative and allocation organisation entrusted with management, coordination, and allocation functions would be established between transport authority and transport undertaking" (Bracher/Trapp 2003: 44), the following responsibilities would accrue to the administrative and allocation level: fare structure calculation, receipts accounting and distribution, network planning, joint timetable and its coordination, coordinated public relations and uniform passenger information, coordination and control of operational management, processing of local transport data and reporting on service operation (Bracher/Trapp 2003: 44).
As far as the division of labour between the transport authority and the licensing authority is concerned: "Planning, organisation, and financing should be brought together under the roof of the municipal public transport authorities. The control instruments of the responsible authority, the transport service contract and the public transport plan, should be upgraded" (Bracher/Trapp 2003: 46). "In concession award procedures, the licensing authority could be given the task of checking the legality of the responsible authority's allocation decision" (Bracher/Trapp 2003: 46).

Not only do public transport services have to be planned but also the infrastructure (especially local passenger rail transport). One proposal has been to set up a municipal infrastructure company ("municipal networks" company) as owner of the networks, which it would plan and operate.

Municipalities also face new planning tasks where water supply functions are delegated. With regard to water extraction, there must not only be contractual safeguards that the local water balance will not be disturbed by over or under-use of wells to the detriment of built-up or near-natural areas. The planning authority must also make long-term arrangements for dealing with such issues as abandoned water catchment areas (Kluge et al., 2003: 61).

The general limits to the planning and planability of developments should not be forgotten in municipal planning functions as modified and reweighted under the ensurance model. The technocratic "planning euphoria" of the 1970s has long since given way to scepticism. Uncertainty about its realisation sets an immanent limit in all planning. Few developments can be reliably predicted (for example, national but not subnational demographic change; cf. chapter 1.3.3). Little can be said about many variables, and the farther one looks into the future, the more difficult it becomes to forecast developments. There are thus limits to both planning and planability. However trivial this might sound, it is important because the ELA has less scope for spontaneous and direct intervention in the operative business and management of utility services than the traditional "service municipality" operating with its own undertakings under monopolistic protection. The ELA ensures the performance of public tasks through contracts with (private) agents which, depending on the sector and subject matter, can run for well over ten years. Amendment of these contracts, for example, to take account of changes in the underlying legal conditions (e.g., new EU directives), the economic situation (e.g., takeovers), or ecological requirements, generally needs the consent of both contracting parties, and is therefore not always possible or at least not without major problems and a great deal of coordination and negotiation.[184]

4.2.2 Competitive Tendering for Services and Selecting a Producer

In formulating calls for tenders, "municipalities can rely on their past experience with drafting tender specifications (e.g., for building projects)" (Andersen/Reichard 2003: 21). Hence, municipalities do not start from zero when they organise tendering and draft contracts. Indeed, existing experience and know-how needs to be used for other administrative areas, too (Andersen/Reichard 2003: 21).

One important task for the municipality is the binding integration of ecological and social goals into tender specifications, hence integrating public-interest goals in the web of the

184 On the other hand, it is in the nature of contracts to be incomplete (cf. Williamson 1985). Performance and counter-performance can never be completely specified, fulfilment of the contract cannot be determined to the last detail, and justified claims cannot be asserted with sufficient certainty or only at the price of high transation costs. Long-term contracts generate interdependence. At the same time, loopholes can be just as differently interpreted as expectations for the future. This need not call into question the rationale of concluding a contract, at least not if the parties trust each other that compliance with the contract will be pursued with the necessary fairness.

externally-oriented, competitive public service production. It is not absolutely clear for all sectors and subject matter how such “extraneous” goals and requirements are to be woven into tender specifications in full compliance with the law relating to the award of contracts. Particularly as regards technical environmental standards, however, it is now generally recognised and confirmed by national and European case law that they may be included in the specification of services without constituting inadmissible “extraneous criteria” (cf. chapter 1.2.5).[185]

It is vital to find the right balance between detail and openness in tender specifications. On the one hand, highly detailed requirements for the goals to be attained and precisely formulated performance parameters give tenderers little scope for introducing their own innovations or ideas into the competitive procedure, thus hindering the desired positive effect of tapping private innovativeness from the outset. On the other hand, relatively openly formulated specifications, although they facilitate the integration of new ideas from outside into the delivery of municipal services, have the disadvantage of giving the municipality little influence on goal attainment or the precise formulation of goal attainment. Cutting across this question of depth and detail in specifications is the current controversy[186] in the public transport sector between the options of constructive and functional tendering. Whereas in constructive tendering procedures the individual contents of the required service are defined, in functional tendering procedures the goals are specified which tenderers are to pursue and which they have to include in their tender. It is obvious – at least at first glance – that functional tendering procedures give the transport enterprise more room for manoeuvre than substantive-constructive specifications. A functional procedure is therefore seen as having the advantage that entrepreneurial potential can be better exploited. Procurement is also more economical because a range of alternatives is on offer, and the responsible authority (usually the municipality) can concentrate on its “real” job of setting strategic targets for local public transport and general transport policy.[187] However, not only the drafting of functional specifications but also assessing tenders and drafting functional contracts are factually and legally extremely demanding processes. Functional tenders therefore make great demands on the responsible authority if it wishes to attain its transport policy goals. Functional tendering procedures accordingly provide no solution to the dilemma between ensuring the attainment of policy goals and openness to private innovativeness in problem-processing.

Finally, in choosing a third party, a possibly private partner and agent, the municipality bears the responsibility for “ensuring that it ... possesses the needed expertise, capabilities, and reliability to secure the long-term performance of the function entrusted to it” (Kluge et al. 2003: 57). Also needed is appropriate knowledge of the market and the ability to judge the competence and entrepreneurial situation (competitiveness, innovativeness, accounting, etc.) of the enterprise in question.

185 Taking the example of public transport cf. EuGH Rs. C-513/99, judgement of 17 September 2002 – Concordia Bus Finland –, Rz. 53 ff., published in: NVwZ, 2002, 1356 ff. = ZUR, 2003, Heft 4, 32 ff.; cf. also Cremer (2003: 265 ff.).

186 What follows is based on presentation foils and verbal reports by our colleagues Michael Lehmbrock and Volker Eichmann at a public transport workshop at Difu in the context of the "Tellus" project (module 7.5b) on 25 Nov. 2003 under the heading "Functional Contract Awards."

187 One disadvantage for the enterprise is claimed to be that tendering demands greater input.

4.2.3 Drafting and Concluding Contracts

Seeing that local government has no legislative powers in the true sense of the term, and that, when a municipality awards contracts to private third parties rather than entrusting functions to its own undertakings, it cannot directly control supervisory bodies or the shareholders' meeting, other regulatory and control mechanisms become more important. On the basis of municipal planning decisions and objectives and tender specifications, contracts between local authorities and third parties (e.g., concession contracts and transport service contracts) develop into detailed regulatory instruments – now in contrast to the actual tendering procedure. Superordinate, city-wide planning, e.g., the public transport plan, ground water management models, or the infrastructural development of new land (and, increasingly, the "downsizing" of facilities) have to be contractually specified between municipality and enterprises to enable formal implementation. In the public transport field, this is done in the form of a transport service contract concluded between the transport authority and one or more transport companies, which describes in detail the respective rights and duties of the parties and the (quantitative and qualitative) specifications of the service.

As we have seen, municipalities then have a great deal of planning and defining to do with respect to service delivery. Over and above this, municipalities face new tasks in supervising service production and, where necessary, imposing sanctions in the event of defective performance (Monstadt 2003: 54). Contracts must regulate potentially conflictual issues and areas of cooperation as fully as possible. Effective sanctioning mechanisms in the event of defective performance (e.g., penalties) are certainly a major issue in this context. To mention only one of many other conceivable areas of conflict in the water sector: for a private agent in water supply, it may be useful from a business management point of view to shift water extraction to other wells in the service area or to concentrate on single wells without this having a negative impact on its actual task – supplying the population with drinking water. But relocating water catchment may perturb the water balance of the region. The water table might rise or fall with negative consequences for nature as well as for the city as a socio-technical system (cracks in buildings due to subsidence or wet foundations). For such constellations the contract must settle how the consequences are to be dealt with, especially who is to bear the (external) costs and in what amount. As this example suggests, the complexity of the subject matter to be regulated and the time dimension can sometimes produce almost unsolvable problems. Water supply concessions often run for ten years or more (sometimes up to 30 years). No contract can cover all eventualities over such long periods. Nevertheless, a regulatory procedure between contracting parties and substantive fundamentals would at least have to be agreed, covering, for example, infrastructure investment or how changes are to be dealt with, be they in environmental conditions or in the demand situation (e.g., demographic changes, which are, however, generally predictable, or the departure of industry from a region, which cannot be controlled by municipalities).[188]

188 Cf. the comments in footnote 150 on the problem of incomplete contracts.

Regulatory intervention by the municipality thus goes beyond the selection of private partners. Contracts concluded between municipalities and private parties must take account of performance and quality standards and include comprehensive catalogues of duties, including supervisory powers and liability rules (reversion clauses).

4.2.4 Controlling and Monitoring

In general “controlling” is understood to mean business management planning, monitoring and supervision of organisations, processes, or projects and the provision of the information required for these purposes. It should not simply be equated with “control” or “supervision.” Controlling in Municipalities – introduced both conceptually and instrumentally in the course of the administrative modernisation debate – plays a key role in the ensurance model. Controlling is practised in the form of affiliate controlling with respect to formally privatised municipal enterprises, but only as financial controlling without scrutinising or monitoring substantive goal attainment, which has attracted a great deal of criticism (Trapp/Tomerius/Libbe 2002: 245 f.; Bogumil/Holtkamp 2002b: 77; Kodolitsch 2002b: 50 ff.). In so far as the targeted control of municipal companies aims to safeguard the public interest, the controlling of substantive goal attainment must be intensified and developed (for example, by introducing elements of environmental controlling; e.g. BMU/UBA 2001). However, this can succeed in the framework of contract controlling only if substantive goals are appropriately operationalized and contractually spelled out.

Monitoring, by contrast, involves the supervision or observation of a procedure or process. It generally relies on technical aids – for example, in municipal environmental protection, where a continuous and long-term supervision of selected environmental parameters is undertaken with the help of geographical information systems.

In the ELA model, the municipal supervision and monitoring of contractually agreed private sector service delivery is a high priority controlling task.

4.2.5 Ensuring Service Production in Compliance with Defined Goals

Monitoring and controlling help ensure service production in accordance with defined goals for which the municipality bears responsibility, if no longer for direct performance, then as ensurance or in the form of backup responsibility. Ensuring and backup responsibility are closely intermeshed. For ensurance responsibility vested in the public sector (municipalities) implies that, in the case of default or defective performance by a private service provider, the municipality has to step in as the entity with ultimate responsibility. Hence, it is absolutely necessary to allow for both organisational and technical reversion should a contract being terminated, because the loss of municipal know-how through outsourcing exacerbates the problem of how the municipality is to resume delivery of public services itself if obliged to do so (Kluge et al. 2003: 51).

The question has already been raised in chapter 4.1.2 whether municipal backup responsibility necessarily implies local authorities having to maintain their own production capacities in the sense of machinery and equipment/means of production. However improbable

it is that a utility service will fail completely, the question must be considered of whether other private companies are standing by to take over service production should a private agent/concessionaire go bankrupt. Presumably the expense of maintaining “emergency means of production” is out of all reasonable proportion to the probability of any hypothetical deployment. Possessing their own production capacities would have a positive effect for municipalities at best as a threat to brandish over the heads of private operators in competitive tendering procedures. It seems quite possible that municipalities as the ultimately responsible authorities could fulfil their backup responsibility if, equipped with the appropriate management capacities, which they can procure externally, they were able to continue operations on a temporary basis before entrusting them to another (private) agent. Finally, as we saw in chapter 4.1.2, efficient monitoring and controlling are important preventative measures for assessing the risk of a private provider failing to perform and for taking suitable and timely remedial measures. Another preventative instrument for avoiding the sudden total failure of a private concessionaire could be a rescue company or reserve fund as in the insurance industry to be borne by all enterprises, which could at least financially cushion the risk of a loss of production. Such a fund could be fed in proportion to the turnover or balance sheet total of a company either by all companies in a given sector operating throughout Germany (e.g., water utilities) or by all concessionaires operating in a municipality in a sector (e.g., the various public transport companies constituting a transport association in a municipality).

With regard to mandatory self-government functions and, to some extent, competitively organised utility sectors (energy and waste), municipalities retain ensurance and backup responsibility for certain public services goals, namely to guarantee sustained socially and ecologically compatible quality and service performance – particularly in public water supply and residential sewerage disposal (Kluge et al. 2003). For one of the core functions of the public sector (the State and local government) and one that legitimates their activities – all the more so under the ensurance model – is to safeguard the public interest, which – legitimately – is not pursued by private actors.

4.2.6 (Strategic) Cooperation Management

The ELA model is based on the delegation of services and functions by the administrative authorities to third parties (be they formally privatised municipal undertakings or, as a consequence of functional privatisation, purely private enterprises). The number of actors involved in service production and goal attainment increases accordingly. Municipal arrangements for goal attainment are thus no longer conceivable as formal, hierarchical control in administrative proceedings but as public control and coordination of societal self-regulation in complex multi-actor networks and governance structures. The municipality becomes a network coordinator and manager (politics as interdependence management), seeking to optimise network operation by means of strategic cooperation management.[189]

189 Cf Bogumil/Holtkamp/Schwarz (2003) on the analogy with participation management.

Strategic cooperation management should enable the municipality to coordinate function-related stakeholder networks more successfully by deploying the interests, strengths, and weaknesses of the individual actors deliberately and determinedly in the interest of attaining the overall goal. However, cooperation management can also have a compensatory role to play – namely when municipalities have only limited scope for entrusting external (e.g., environmental or social) tasks/goals to its own power utilities now that they are competing in the deregulated power market. In order to continue pursuing public-interest municipal goals like local climate protection under competitive conditions, cooperation between many different private, quasi-public, and civil-society actors is likely to be necessary.

4.2.7 Ensuring Transparency and Publicity to Enable Participation

A key demand made of municipalities (also in the context of strategic cooperation management) is to ensure transparency and public participation in network-related infrastructure systems. Transparency in decision making and procedures is required to throw light not only on the internal workings of the politico-administrative system but also on stakeholders and civil society. This is not in itself a new demand. In the traditional "service municipality" model, the politico-administrative system in the municipality as a democratically legitimated representative and administrative body is responsible for making decisions in participation with the public participation pursuant to a transparent procedure (council resolution) and for commissioning administrative authorities and companies to perform functions and deliver services in keeping with prior goals. This is also the case in the ELA, in which, however, the municipality entrusts service production more extensively to third parties. But this fundamentally changes the conditions for ensuring transparency and participation. In addition to the greater complexity of decision-making situations and the increase in the number of actors to be coordinated (which tends to complicate and obscure decision-making), municipalities have to invest a great deal more effort in obtaining, processing, and publishing information relevant for political control from purely private companies and hived-off municipal enterprises in order to establish transparency with regard to services and goal-attainment. The development of transparency in network-related infrastructure sectors is ambivalent.

On the one hand, transparency can be assumed to have increased if the contents of public tendering procedures are communicated. Debate in municipalities on tendering procedure contents could offer new opportunities for public participation and public political debate (Libbe/Tomerius/Trapp 2002: 23; Sternberg 2002: 217 f.). Similarly, comparing tenders increases transparency for the municipality with respect to the costs involved in service delivery and to potential problems and solutions. The separate booking and financing of costs for providing "external" services certainly also increases transparency as well as the need for political justification[190] of certain services and goals. Owing to competition in

190 Cost transparency and the societal, political debate on what costs can be tolerated and accepted for certain services and functions always entail the risk that, for example, certain ecological measures can no longer be publicly imposed although they could be informally implemented in an ecologically oriented administration.

the power sector and spin-offs from the core administration, municipal *Stadtwerke* (organizational groupings of utilities) are no longer as able as they were before liberalisation of the electricity market to perform costly “special functions” for municipalities that are unprofitable from a purely economic point of view. One possible solution for the municipality to pay a company financial compensation for general interest services that go beyond the service package of comparable private market competitors. A price is then put on these general interest measures that is to be politically justified by the municipality or the local council.

Essential for transparent function performance is the unbundling of municipal functions and responsibilities. This involves drawing a line between the responsibly authority and operation, i.e., a clear distinction between employer and contractor, and, secondly, drawing a line between (technical) infrastructure and operation or delivery of the service to customer (Bracher/Trapp 2003: 45 f.; cf. also Monstadt 2003: 19 on the power sector). At least for public transport, the law requires the legally defined responsibility for performance and regulation to be kept separate from entrepreneurial operation (Bracher/Trapp 2003: 43). Like the unbundling of energy-sector functions at the municipal administrative level, legal unbundling is required at the operative organisational level: “a key element of the competition concept [in the electricity sector] is the unbundling of the generation, transmission, and distribution segments.” (Monstadt 2003: 18). The aim is to create greater transparency, especially in the allocation of resources and hidden, competition-distorting subsidies. The organisational unbundling of various functional areas is the precondition for the clear allocation of tasks, costs, and responsibilities.

On the other hand, a loss of transparency, especially internally, i.e., in the politico-administrative system, is likely if municipal enterprises are spun off from the administration, so that the flow of information between the local council/administration and municipal undertakings has to be reorganised. The question of the supervision and verifiability of operative decisions in municipal subsidiaries is closely associated with both transparency of internal workings and external transparency vis-à-vis the local public. Notorious is the dilemma of municipal representatives on the supervisory boards of private companies between their duty to inform[191] the municipality and the public and their duty to the company not to disclose trade secrets (Machura 1998). Supervisory boards generally meet behind closed doors. The pressure on municipal representatives in supervisory bodies to observe secrecy has a great deal to do with the concern that information and knowledge about the enterprise could be exploited by competitors. Many municipal enterprises are accordingly not willing without further ado to disclose sensitive internal business information even to the municipality. This can mean that municipal planning, surveys, or calculations, e.g., in the form of requirements forecasts are no longer published to prevent private competitors from obtaining important information, planning data, and detailed knowledge. Competition can thus generate secrecy. This development really becomes a problem for the municipal-

191 As the experience of a holdings management practitioner from a German municipality shows, some municipal members of supervisory boards tend to “pamper” “their” company, which can mean, for example, that unpopular news and bad business figures were held back so as not to make a bad showing before municipal bodies with "their” companies. This once again raises the fundamental question of information transparency and ultimately the control of municipally owned enterprises.

ity and its city-wide planning functions when, for technical or other reasons, the administration is not able to prepare such forecasts and plans itself and has to rely on municipal enterprises, who seek to withhold them or want them kept confidential.

Owing to competition or a wide choice of providers, rates, and service standards (and possible due to unbundling, which increases the number of actors in the system[192]) supply structures can become opaque for consumers and private customers, in particular, making choosing a complicated venture. In this case, it is incumbent on municipalities, and on local, regional, and national environmental and consumer protection organisations to ensure (or re-establish) transparency with regard to the quality of services (Libbe/ Tomerius/Trapp 2002: 21). “For interested consumers (they) are both important contacts and advisors, and they are also trusted to adequately defend interests at hearings and the like” (Kluge et al. 2003: 26).

In order to establish transparency and publicity, suitable participation and communication structures as well as strategic cooperation management have to be developed in and by municipalities, which can also be used to “fetch” and integrate stocks of knowledge from local stakeholders. However, participation processes do not release municipalities from their responsibility to define general interest goals. On the contrary, it is now all the more important for municipalities to “filter” public interests out of the abundance of sectional interests.

4.2.8 The “Learning Administration” as Model for Administrative Organisational Structures in the Ensuring Local Authority

Planning and control are based on applicable and usable knowledge. If municipalities wish to retain and strengthen their formative influence on water supply or other public services, the question of the knowledge base for municipal action must necessarily be raised, and hence the question of the competence of municipal actors (Kluge et al. 2003: 54). This question is all the more urgent because, with the hiving off of municipal undertakings from the core administration (organisational privatisation), the (partial) sale of municipal enterprises (asset privatisation), and the commissioning of private parties as agents to produce services (functional privatisation), more and more technical competence and know-how (can) be lost concerning, for example, physical networks. Knowledge and know-how about networks and technology, about operational procedures and the framework conditions for the various infrastructure systems are, however, also essential for realistic planning as the basis for competitive tendering. Moreover, as functions change so do the demands on municipalities and hence the demands on the knowledge available to municipalities. Changes affect

192 This might seem paradoxical, since we have just argued that unbundling increases transparency. But it is conceivable that the unbundling of integrated enterprises into many separate companies can lead to a new “intransparency” with respect to actors and providers. Transparency is also an issue when integrated companies are unbundled for accounting purposes and also subdivided into affiliates, and it is no longer possible to discover whether the enterprises belongs to a parent group and, if so, to which.

- types of knowledge (less system knowledge and more transformation and goal knowledge),
- knowledge stocks (technical, social, economic, ecological, legal knowledge changes and shifts in relative importance; necessary and dispensable knowledge is reshuffled; and knowledge gaps develop),
- knowledge-carrying entities (council, administration and companies change their stocks of knowledge and redistribute them among themselves),
- knowledge carriers (persons).

Basically, it is a matter of changes in knowledge content, location, and quality, and inevitable knowledge gaps, which set limits to municipal control and supervision.

In chapter 4.1.4 it was argued that the ensurance model provides for the integration of external, i.e., non-governmental, societal knowledge stocks and problem processing capacities, but that this alone does not solve the public sector's fundamental problem of having to judge goals and goal attainment itself. Established public administrative capacities, technical competence, and knowledge stocks, as well as financial resources are needed.

The control of complex governance structures and networks under the ensurance model similarly requires the integration of various stakeholders, functions, services, and planning in a "consistent whole" for the municipality. "Most public authorities have neither the skills nor the financial resources to perform these functions" (Bracher/Trapp 2003: 36), so that new competence, resources, and structures have to be developed or reorganised.

In the long term, buying ad hoc external expertise is unlikely to suffice for sustaining local self-government. The municipality must at least have the competence to assess externally prepared expert opinions or draft contracts itself. But small and medium-sized municipalities are likely to be overtaxed in drafting contracts for privatisation projects or the participation of private parties. Municipal competence in drafting and supervising contracts must therefore be developed and strengthened.

The "learning administration" becomes a model for organisational structures in the ELA, not only in the transitional phase but as a permanent aspect. This, too – the obligation to permanently expand and update one's knowledge – is not new. In the ELA, however, not only the available knowledge base but also the forms of knowledge[193] and the channels for generating knowledge change fundamentally. For the delegation of service production deprives the municipality of the possibility of automatically gathering and processing experience in live running, i.e., in the practical handling of technical, financial, or ecological problems.[194] The generation of knowledge must accordingly be institutionally ensured by other means than in the past. One tentative idea would be to finance continuing training measures or new staff with part of the revenues from the award of concessions (Kluge et

193 Less descriptive systems knowledge ("how something works") and more normative goal knowledge ("Where do we want to go? What do we want to achieve?").

194 But it seems highly doubtful whether it makes sense to maintain small municipal undertakings in the various functional areas to safeguard experience with live running operation. Any such "combine model" under which the municipality can theoretically do everything itself within certain limits presumably implies enormous inefficiency and tied-up resources.

al. 2003: 58). This would have to be contractually safeguarded so that the necessary financial resources are not regularly suspended in budget negotiations.

If municipalities wish to retain and strengthen their formative influence in, for example, water supply, urgent attention needs to be paid to municipal knowledge resources and the competence of municipal actors for their changing planning, control, and coordination functions (Kluge et al.: 54) – especially when it can be assumed that formal and functional privatisation will be accompanied by at least a fundamental change in, if not a partial loss of knowledge stocks in municipal administration. In view of the new conditions and challenges, municipalities should therefore not only develop new competence of their own but also purposefully use external knowledge[195] and integrate it by means of participatory procedures. The knowledge of experts and stakeholders could compensate the partial losses of and changes in municipal knowledge. An important element would be targeted strategic cooperation management fostering knowledge about stakeholders, systematically anticipating their interests, and providing access to necessary methodological competence.

4.3 Limits to Municipal Control in the Ensuring Local Authority Model

In chapter 4.1.5 two fundamental limits to the ensurance model for municipalities have been described: the constitutional requirement to safeguard the municipal right to intervene in public functions (*Ingerenz*), and the availability of the competence and resources to do so. The available resources (staff, money, knowledge) and thus the actual competence and capacity for ensuring control and supervision to guarantee the performance of public functions by third parties in compliance with the public interest differ depending on the size and type of municipality in question. Small and medium-sized municipalities with fewer human resources in administration are likely very soon to reach the limits of what they can handle in, for example, drafting comprehensive and highly complex contracts between municipalities and private entities in the case of functional privatisation.[196]

The practical limits have been repeatedly mentioned in preceding chapters and will not be taken up again at this point. But a crucial one has not yet been addressed: the necessary will to control. This is the sine qua non of all control. Failure by the municipality to assert a right of control[197] obviates any discussion of the ensurance model – and of local self-government – since the municipality may not relinquish or transfer this right owing to its ensurance responsibility for mandatory self-government functions.
Municipal scope for action in shaping public services and safeguarding the public interest corresponds to the scope for influencing municipal and private utilities. This influence depends strongly on the institutional arrangements for function performance, which involve

195 External knowledge is understood in this context as both expert and lay knowledge.
196 Even if the concrete job of developing and drafting a contract can be entrusted to external lawyers, this does not release the municipality from the need to understand and independently assess the consequences of contract wording (at least as far as the most precarious arrangements and subject matter are concerned).
197 And this right of control must necessarily cover not only purely fiscal goals but also so-called substantive goals.

specific regulatory requirements (Fischer/Zwetkow 2003b; Kluge et al. 2003: 10 ff; Reichard 1998). Municipal control extends to both municipal and private enterprises performing public sector functions. In the framework of water and land associations and under management and service contracts, in operator models, joint ventures, and concessions, private entities are generally involved in the arrangements for service production in the full range from direct labour organisations, semi-autonomous municipal agencies, municipal companies governed by private law, and special purpose joint authorities.[198]

If, in the "classical model" of the service municipality, municipal authorities could exert direct influence on power supply, for example, in their territory through *Regiebetriebe* (direct labour organiations) or *Eigenbetriebe* (semi-autonomous agencies) (Monstadt 2003: 10),[199] the municipality's scope for control and intervention with respect to "its" formally privatised companies now depends on a whole set of factors. They include the size of the municipality's holding in the company, the legal form of the company, and the terms of the specific (service) contracts between the municipality and municipal undertakings. Wohlfahrt/Zühlke (1999: 53) take the view that legal forms that go beyond the *Eigenbetrieb*, the semi-autonomous municipal agency, are scarcely amenable to control or influence. In chapter 2.3.3, in contrast, it was argued that the public sector can, at least theoretically, secure a controlling interest in all forms of company with the exception of the stock corporation (*Aktiengesellschaft*) and the limited partnership (*Kommanditgesellschaft*). A member of a Difu expert workshop on holdings management[200] also considered (contrary to Wohlfahrt and Zühlke) that scope for control has less to do with the legal form of the company than with its size, with the organisational structure and staffing of the management as well as its professional qualities, and the actors involved, for example the political and technical authority of a chief of section. A bundle of factors thus appears to determine municipal influence on its subsidiaries. In the experience of another practitioner at the workshop, the self-conception of the company management is also decisive for municipal control. The self-confidence of company management increases in proportion to the formal, legal distance of the company from the municipality, to how long the undertaking has been privatised, and how large it is. In contrast, managers of small companies showed a different self-conception and self-confidence vis-à-vis their owner, the municipality. For example, they consult the administration on legal matters because they do not have sufficient know-how in the company itself. Such companies can be easily and, above all, flexibly controlled. Overall experience so far with the control of municipally owned companies

198 For a description of the various models and forms of undertaking see either chapter 2.3, or, for greater detail Kluge et al. (2003: 12 ff.) and Trapp/Bolay (2003).

199 However, "…*public companies, too, have proved to be only partially effective instruments for implementing public interests* in energy supply" (Monstadt 2003: 13) where the theoretical control of the municipality over concession contracts can be used only to a limited extent and not very effectively to implement energy policy goals. "The obligations of energy supply companies under concession contracts were mostly limited to paying the highest possible royalties to municipalities and implementing supply" (Hölzer 2000, quoted in Monstadt 2003: 12). Even in the traditional, classical model of local self-government, control over service production in the energy policy field by the municipality itself can be deficient as regards environmental and public interests.

200 On 23 June 2003, an expert workshop was held in the context of the netWORKS Research Association on the subject: "Municipal (Policy) Control Resources and Holdings Management" at the German Institute of Urban Affairs (Difu), Berlin. Holdings management representatives from major German cities took part.

has, however, proved “not very encouraging” (Bogumil/Holtkamp 2004: 11) – especially when other than fiscal goals are to be pursued.

The delegation of function performance (under the ensurance model) makes not only the control of municipal companies more important but also the extent of control and responsibility for controlling private enterprises under the management and service, operator, cooperation, and concession models. In these cases control is exercised through contracts which lay down the mutual rights and duties of the parties in connection with a defined service. Direct control of service production in municipal *Regiebetriebe* or *Eigenbetriebe* is replaced by the indirect control of (partially) privatised municipal undertakings or purely private companies by means of task and service planning, network cooperation, and contractual specifications. The limited planning capacity and knowledge resources inevitably make themselves felt at this point.

In other words, the process of change can be described as transformation from “informal” inward-looking control[201] in the traditional model to “formal” control through contracts and corporate supervisory bodies in the ensurance model. Municipal practitioners at the Difu workshop reported that a different self-understanding used to prevail within the administration. There was a high degree of identification with the city. Decisions were made “from the heart” to attain a good result, without the need for formal guidelines. In other words, control used to be “informal,” with various task areas integrated or linked. This was also possible because functions and control arrangements were less complex. In a modern municipality, which increasingly delegates functions externally (ELA), “functional globalisation” is developing, with the local boundaries of municipal activity dissolving as interlocal and regional networks are initiated and functions become more complex. Under the conditions of deregulated and privatised utility sectors, the interests of many sides and many different actors also have had to be taken into account, which has rendered decision-making much more difficult.[202] The old control regime no longer fits in the new framework and is perhaps no longer admissible (cf. the discussion on inhouse contract awarding). Moreover, legal requirements like unbundling in the energy sector or separation of transport authority and transport company in public transport dismantle the evolved informal (and always opaque) structures. Under such changed underlying conditions for the performance of public functions in competition, “personal trust” which has often grown over many years, is often stabilised, supplemented, or replaced by formal “system trust” (cf. Luhmann, quoted in Edeling 2000: 57).

Another variable restricting the municipality’s scope for action is the pressure of competition in liberalised markets. Not only because municipal companies competing with private ones can no longer pursue so-called external goals to the extent possible under monopoly conditions, it must be asked whether politically motivated control in municipalities “against” the market and the “primacy of the economy” is possible at all. For example, the liberalisation of the energy industry and the competition it entails has meant that the scope for mu-

201 Cf chapter 4.1.3.

202 In a network of partly competing private, quasi-public, and public actors, "informal" control would probably not be accepted. This is not to say that it is not practised, but this form of control is then called “wheeling and dealing” or at worst corruption.

nicipalities to implement public interests in energy supply is increasingly defined by "what is feasible and profitable in the individual economic unit" (Monstadt 2003: 48). Municipalities are hence far more subject than before to the constraint of having to adapt their goals and interests to the market and profit-maximising logic of (private) companies in competition. The possibilities of financing external services through political prices are dwindling. Local authorities face the central question of the extent to which political objectives (the reduction of water consumption, the social acceptability of rates, or other public-interest goals) can be taken into account in pricing (Kluge et al. 2003: 57).

The increasingly narrow limits to the financing of external services also affect the possibilities for implementing public-interest goals in competitive tendering. For private utility companies will pass on to the customer[203] the cost, in the political responsibility of the municipality, of performing defined supplemental functions and services (environmental protection) beyond "bare" utility services, or they will seek compensation in some other form. However, this is unrealistic in view of the tight budgetary situation. Owing to the local authority budget crisis, "municipal subsidies are no longer possible at the level needed to maintain services at the existing level or as required by the public transport plan" (Bracher/Trapp 2003: 15). Moreover the municipal combination utility/multi-utility is proving more and more fragile. Although municipal transport companies often belong to a management and financing association within the multi-utility *Stadtwerke* in which public transport services are "cross-financed" by surpluses from energy supply under tax optimisation conditions, such practices are being increasingly called in question[204] Municipal public transport planning is thus subject to exacerbated financial constraints which have a massive impact on scope for environmental, social, and urban development projects.

5. Conclusion: Constitutional and Practical Requirements for the Delegation of Functions and Scope for Action in the Ensuring Local Authority

Local authorities currently face a number of problems of sometimes unprecedented dimensions. They include the dramatic crisis in local government finance, demographic developments, whose repercussions can often be forecast only in outline, and EU law relating to competition and public procurement, with its impact on the performance of municipal functions. The consequent challenges affect both the municipality as an institutional and territorial whole and specific individual, traditional areas of local government policy regarding network infrastructure systems like water and energy supply and public transport. In interplay with the reaction strategies adopted by municipalities, far-reaching changes are taking place in the foundations of local self-government. The outsourcing and privatisation of municipal functions is well advanced.

203 It is questionable whether privatisation is politically tenable if it involves higher rates and prices for the customer.

204 Including by the EU ban on State aid and the decision of the Federal Cartel Office on the common carriage rate of the Mainz *Stadtwerke* of 17 April 2003.

The origin of local government responsibility, the position of the municipality in the structure of the State, and the politico-democratic function of local self-government necessitate that, when municipal functions are outsourced and privatised, the act of privatisation itself and the key modalities for performing mandatory self-government functions be subsequently subject to the full, democratic control of the politico-administrative system. For the democratic legitimation of local government places the municipality under obligation to the public to carefully weigh up and comprehensibly document far-reaching organisational decisions affecting the performance of local government functions, taking public interests into account and in accordance with the criteria of appropriate municipal policy. In practice, not only the legal possibilities available to the municipality for influencing important decisions on function performance, but also planning, instrumental, and organisational aspects play a vital role, especially within local administrative authorities.

On the basis of the distinction between formal, functional, material, and asset privatisation, varyingly strict demands are made on the different forms of privatisation. If the task in question is a *discretionary municipal function*, the municipality may, in principle, opt for formal as well as material privatisation, thus transferring the function completely and irreversibly to a private party. In the case of discretionary municipal functions, the municipality is free to decide whether and how to perform and transfer them. However, the municipality is accountable to the public for proceeding democratically. In the case of discretionary functions, too, material privatisation is subject to a municipal assessment prerogative,[205] the municipality being under obligation to weigh up the economic, ecological, and social advantages and disadvantages of privatisation and to ensure that the decision-making process is transparent and well documented. For the privatisation of discretionary functions also affects local self-government scope for action – if not in formal, legal terms then from the point of view of political practicality and democracy theory. For, leaving aside financial constraints, municipalities are likely to have greater scope for making decisions on discretionary functions than on mandatory self-government functions, which are generally more strongly standardised and regulated. Moreover, the broad range of discretionary functions offers greater opportunities for public participation. They are a peg for local government policy debate in direct, cooperative, and representative forms of local democracy. This also affects municipal self-government, which is conceived not as a purely administrative, decentralised activity delegated by higher levels of government (the “State”) but as the bottommost unit of legitimate decision making, and the place where locally embedded societal conflicts can be fought out in a political, ethical discourse.

As far as the privatisation of municipal public services in the field of *statutory mandatory functions* is concerned, the municipality is in principle prohibited from withdrawing by means of privatisation from producing a service which it is required by law to deliver. A municipality may not escape its responsibility through privatisation or by “flight into private law.” If the municipality can no longer brings influence to bear on key strategic decisions or prevent irreversible decisions that, going beyond the mere modalities of function performance, concern the organisational and procedural basics of performance, it is in

205 Assessment prerogative means scope for interpreting indeterminate legal concepts, which the courts have accepted as not verifiable in certain areas.

breach of its duty to discharge those functions. In the case of statutory mandatory functions, material and or task privatisation are forbidden. Functional and organisational privatisation, in contrast, are permitted in principle. But from a constitutional point of view (Article 28 (2) of the Basic Law), even these far less drastic variants of privatisation require that local government decisions have effective democratic legitimation, i.e., that the municipalities right of intervention and its final decisional authority be safeguarded.

The required municipal right of intervention, i.e., municipal control of entities entrusted with performing functions – unlike supervision of the municipality by the State – is not restricted to compliance with the legal framework but also covers the steering and control of enterprises by the municipality. Municipal policy requirements must be reflected in function performance by private parties, be it in specifications for public tendering, in the subsequent contractual quality requirements, or through municipal assignments accompanying the performance of functions. However, the latter will be easier to impose on municipal companies in the full or majority ownership of municipalities than on purely private agents, who will normally invoke the contractually agreed minimum duties. In the light of municipal responsibility for control and final decision-making, constitutionally required instruments for intervention (*Ingerenz*) include not only the right of the municipality to be informed (with the corresponding duty of the subject of private law to report) but also rights of the municipality to issue instructions and terminate contracts, which, in addition to sanctions and guarantee clauses for defective performance or default on the part of the private partner, have to be contractually agreed.

In our view, Article 28 (2) of the Basic Law constitutes not only a *right* of municipalities to self-government. The public performance of functions by municipalities – deliberately decentralised by the constitution – the democratic-political function of local self-government in the structure of the State, and the associated final decisional authority of the legitimate decision-makers with respect to affairs of the local community imply minimum requirements for municipal decisional control in the sense of a "*duty* of self-government," which is to be respected when privatising municipal public services. The gradation of municipal decision-making and intervention duties depending on the level of privatisation and the type of municipal function are to be taken into account.

The local self-government model entrenched in the constitution does not provide for exclusively "internal" performance of functions by the municipality or its undertakings and companies. If, especially in municipalities with low operative capabilities, a public-private division of labour contributes – in the sense of the Federal Constitutional Court – to more "forceful" public service provision, this is not contrary to the Basic Law model of municipalities managing "the affairs of the local community on their own responsibility" under Article 28 (2). On the contrary, there are many useful and functioning privatisation models and forms of functional division of labour in the sense of public private partnership in municipalities, without which the range of municipal public services to be assured could not be optimally handled. Integrating private partners in operative business, in which quasi-public companies are often involved – for example in the utilities sector – is not only quite usual, but could help municipalities to concentrate on strategic objectives, thus strengthening planning and deliberative procedures and instruments. If the constitutional-law ac-

cent is placed on the concept “responsibility,” the performance of a service by a private party does no harm as long as the municipality sets binding quality standards and monitors their application, and is in a position to prevent unwanted developments and reverse ill-advised decisions. Such a decision-making model in the sense of a ELA respects the constitutionally required “responsibility limit” of the municipality.

The growing transfer of functions to private actors makes it increasingly urgent to consider whether and how municipalities and their legitimate decision-makers can effectively manage the affairs of the local community assigned to them by the constitution. In the interest of the effective and responsible provision of services for the public, a balanced distribution of powers and duties needs to be established between the municipality and its private partners. Task responsibility, which cannot be delegated in the case of mandatory functions, changes form on transfer to third parties. The responsibility for performance borne by the municipality that produces services itself is replaced by ensurance responsibility when functions are performed externally. At this level of responsibility, the municipality must ensure that a purely private company or a municipal enterprise governed by private law entrusted with producing a service can be adequately steered towards politically defined goals. The municipality has not only ensurance responsibility but also backup responsibility for mandatory autonomous functions. Essential for exercising ensurance responsibility is sufficient knowledge and problem-processing capacity for the politically defined strategic control of increasingly market-organised public function performance. The actual competence – differing from municipality to municipality – for safeguarding the local government right of intervention and guaranteeing the performance of public sector tasks by third parties in the public interest sets the limits to responsibility and intervention rights in ELA.

By delegating the production of municipal services to private entities, the municipality often provides a functional point of reference for the public. This raises the question whether local self-government becomes a mere “theoretical exercise” without a measure of direct function performance by the municipality. But it should also be asked whether municipal functions really have to be categorised in terms of municipal operative service production and substantive functions or whether ensurance responsibility expressed in planning, control, coordination, and supervisory functions could not also provide adequate political legitimation for local self-government in public service production.

To satisfy the requirements of the ELA model, which in constitutionally acceptable manner ensures municipal responsibility for partly privatised public services, conditions have to be established at both the legal and municipal practice level for responsible municipal decision-makers to exercise more expert influence. This must be the case in balancing interests between municipal planning requirements and the objectives of operative business, in the often deficient controlling procedures for municipal subsidiaries, and in drawing up framework requirements for public procurement and in managing the procurement process, which will be increasingly important for the quality of function performance in municipalities. Particularly in tendering procedures and the corresponding contracts, long-term and difficult-to-correct arrangements are often made. For municipal control and for an ac-

ceptable level of local government legitimation, skilled and transparent tendering procedures and contract management are needed.

Since it is objectively probable that the transfer of local authority functions to private parties generally involves relinquishing know-how and decision-making competence – in practice, the loss of control capacities is likely to vary in the transition from formal to material privatisation, from organisational to functional to task privatisation – it will be crucial to develop or foster procedures and instruments at the municipal level to safeguard and enhance the influence of legitimate public decision-makers. Otherwise, if the persisting trend towards privatised public services continues, municipal control, lacking information and negotiating power, will become increasingly deficient and unable to assess the social, environmental, economic, and societal repercussions of privatisation. There is no denying that such a development is contrary to the thrust of the constitutional model of local self-government rights and duties under Article 28 (2) of the Basic Law, and that municipalities as the smallest independent units of democratically legitimated decision-making would no longer function, and that the model of not only ecologically sustainable community and urban development would fail.

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Appendix 1

Overview of the local authorities and the number of their holdings included in the study

City	Population[1]	Number of Holdings
Aachen	244 000	57
Augsburg	255 000	43
Berlin	3 382 000	320
Bielefeld	322 000	64
Bochum	391 000	55
Bonn	302 000	39
Brunswick	246 000	53
Bremen	539 000	203
Dortmund	589 000	103
Dresden	478 000	66
Duisburg	515 000	76
Düsseldorf	569 000	78
Erfurt	201 000	52
Essen	595 000	45
Frankfurt	647 000	169
Gelsenkirchen	279 000	56
Halle	248 000	53
Hamburg	1 715 000	404
Hanover	515 000	130
Karlsruhe	279 000	29
Kiel	233 000	11
Cologne	963 000	81
Leipzig	493 000	152
Magdeburg	232 000	47
Mainz	183 000	84
Mannheim	307 000	177
Mönchengladbach	263 000	43
Munich	1 210 000	135
Münster	266 000	42
Nuremberg	488 000	115
Oldenburg	155 000	27
Potsdam	129 000	33
Rostock	201 000	52
Schwedt	40 000	15
Stuttgart	584 000	53
Wiesbaden	270 000	50

1 The figures are taken from the Statistisches Jahrbuch 2002 (Statistisches Bundesamt 2002).

Appendix 2

netWORKS-Papers

The findings of the netWORKS Research Group are published in the series netWORKS Papers, the full text of which is published in the Internet and in a small edition. Local authorities may order these publications free of charge – as long as stocks are available – from the German Institute of Urban Affairs. Academic customers and the specialist community can download the texts free of charge from the project platform www.networks-group.de. The following Papers have appeared to date:

- Kluge, Thomas/Scheele, Ulrich
  Transformationsprozesse in netzgebundenen Infrastruktursektoren. Neue Problemlagen und Regulationserfordernisse
  Berlin 2003 (netWORKS-Papers, Nr. 1)

- Kluge, Thomas/Scheele, Ulrich
  Transformation Processes in Network Industries. Regulatory Requirements
  Berlin 2003 (netWORKS-Papers, No. 1)

- Kluge, Thomas/Koziol, Matthias/Lux, Alexandra/Schramm Engelbert/Veit, Antje
  Netzgebundene Infrastrukturen unter Veränderungsdruck – Sektoranalyse Wasser
  Berlin 2003 (netWORKS-Papers, Nr. 2)

- Bracher, Tilman/Trapp, Jan Hendrik
  Netzgebundene Infrastrukturen unter Veränderungsdruck – Sektoranalyse ÖPNV
  Berlin 2003 (netWORKS-Papers, Nr. 3)

- Bracher, Tilman/Trapp, Jan Hendrik
  Network-Related Infrastructures under Pressure für Change – Sectoral Analysis Public Transport
  Berlin 2003 (netWORKS-Papers, No. 3)

- Scheele, Ulrich/Kühl, Timo
  Netzgebundene Infrastrukturen unter Veränderungsdruck – Sektoranalyse Telekommunikation
  Berlin 2003 (netWORKS-Papers, Nr. 4)

- Monstadt, Jochen/Naumann, Matthias
  Netzgebundene Infrastrukturen unter Veränderungsdruck – Sektoranalyse Stromversorgung
  Berlin 2003 (netWORKS-Papers, Nr. 5)

- Tomerius, Stephan
  Örtliche und überörtliche wirtschaftliche Betätigung kommunaler Unternehmen. Zum aktuellen Diskussionsstand über die rechtlichen Möglichkeiten und Grenzen in Literatur und Rechtsprechung
  Berlin 2004 (netWORKS-Papers, Nr. 6)

- Kluge, Thomas/Scheele, Ulrich
  Benchmarking – Konzepte in der Wasserwirtschaft: Zwischen betrieblicher Effizienzsteigerung und Regulierungsinstrument. Dokumentation des Symposiums am 28.4.2004 in Frankfurt am Main
  Berlin 2004 (netWORKS-Papers, Nr. 7)

- Libbe, Jens/Trapp, Jan Hendrik/Tomerius, Stephan
  Gemeinwohlsicherung als Herausforderung – umweltpolitisches Handeln in der Gewährleistungskommune. Theoretische Verortung der Druckpunkte und Veränderungen in Kommunen.
  Berlin 2004 (netWORKS-Papers, Nr. 8)

- Libbe, Jens/Trapp, Jan Hendrik/Tomerius, Stephan
  The Challenge of Securing the Public Interest – Environmental Policy Action in the Ensuring Local Authority in Germany
  Berlin 2005 (networks-Paper, No. 8)

- Hummel, Diana/Kluge, Thomas
  Sozial-ökologische Regulationen
  Berlin 2004 (netWORKS-Papers, Nr. 9)

- Monstadt, Jochen/Naumann. Matthias
  Neue Räume technischer Infrastruktursysteme. Forschungsstand und -perspektiven zu räumlichen Aspekten des Wandels der Strom- und Wasserversorgung in Deutschland.
  Berlin 2004 (netWORKS-Papers, Nr. 10)

- Monstadt, Jochen/Naumann. Matthias
  New Geographies of Infrastructure Systems. Spatial Science Perspectives and the Socio-Technical Change of Energy and Water Supply Systems in Germany
  Berlin 2005 (netWORKS-Papers, No. 10)

- Rehbinder, Eckard
  Privatisierung und Vergaberecht in der Wasserwirtschaft
  Berlin 2005 (netWORKS-Papers, Nr. 11)

- Döring, Patrick
  Sicherung kommunaler Gestaltungsmöglichkeiten in unterschiedlichen Privatisierungsformen – Beispiel Wasserversorgung
  Berlin 2005 (netWORKS-Papers, Nr. 12)

- Spitzner, Meike
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  Berlin 2005 (netWORKS-Papers, Nr. 13)

- Schramm, Engelbert
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  Berlin 2005 (netWORKS-Papers, Nr. 14)

- Kluge, Thomas
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  Berlin 2005 (netWORKS-Papers, Nr. 15)

Further publications of the netWORKS Research Group:

- Trapp, Jan Hendrik/Bolay, Sebastian
  Privatisierung in Kommunen – eine Auswertung kommunaler Beteiligungsberichte
  Berlin 2003, Schutzgebühr Euro 15,– (Difu-Materialien 10/2003)
- Trapp, Jan Hendrik/Bolay, Sebastian
  Privatisation in Local Authorities – An Analysis of Reports on Municipal Holdings
  Berlin 2003 (Translated from Difu-Materialien 10/2003)
- Tomerius, Stephan
  Gestaltungsoptionen öffentlicher Auftraggeber unter dem Blickwinkel des Vergaberechts
  Berlin 2005, Schutzgebühr Euro 15,– (Difu-Materialien 1/2005)