

Introduction

The Federal Republic of Germany is based on a federal system, i.e. public functions are distributed between the Federal Government and the Federal *Länder*. Under the Basic Law, the constitution of the Federal Republic of Germany, the communities (towns, districts and municipalities) are parts of the respective Federal *Land*. However, in dealing with local matters the communities have a certain degree of discretion (right of self-government) under constitutional law. The Basic Law also regulates the distribution of legislative powers, of state administration and of financial responsibility between the Federal Government and the Federal *Länder*. Expenditure incurred in the discharge of their functions is borne separately by the Federal Government and the Federal *Länder*.

During the course of 2006, within the context of a reform of Germany's federal structure, the Federal Government's legislative powers in the area of water have been changed. On the one hand, the Federal Government was given full legislative powers in the area of water. On the other hand the Federal *Länder* got the right to deviate from the Federal legislation and create a separate legal framework within their own jurisdiction. In the case of a collision of Federal law and the law of the Federal *Länder*, the latter prevails. The implementation of European Law must also be fitted into this system of competences. Accordingly, the provisions of the EC Water Framework Directive have been transposed into both national law (Federal Water Act) and into *Länder* law (regional water acts and ordinances).

Which obligations do States bear in the context of private sector participation in the provision of water and sanitation services?

General

The Act on the Regulation of Matters Relating to Water (Federal Water Act WHG) as a framework law of the Federal Government, lays down basic provisions relating to water resources management (management of water quantity and quality). It states that waterbodies, as a component of the ecosystem and as a habitat for fauna and flora, must be protected and managed in such a way as to serve the general public interest. Additionally, they must benefit the individual, in a manner which refrains from any avoidable impairments to its ecological function (precautionary principle). A high level of protection for the environment as a whole has to be ensured (integrated environmental protection).

As a general principle, waterbodies (overground inland waterbodies, coastal waters and groundwater) are subject to Government control. All uses of water (e.g. discharge of substances or abstraction of water) are, in principle, subject to official authorisation, apart from a few significant exceptions. This is intended to prevent impairments to the water regime and enforce a precautionary approach to water protection. More stringent requirements, including bans on discharges, may be imposed by water authorities in individual cases in the light of emission considerations in order to achieve the aspired water quality or facilitate specific water uses, for example.

The scope of general competition law is limited when it comes to the public supply of water and the sanitation systems. While other network-bound areas, namely the electricity, gas and telecommunication sector, have been fully liberalized and are subject to antitrust and other competition rules, the water sector is exempted. In return, the competition authorities of the *Länder* and the Federal Competition Authority can enact a strengthened price abuse control (see in detail below).

While the supply of water is an economic activity, wastewater management in Germany is a state duty. This is reflected in the different tax treatment. So far, the privatization is largely confined to the water supply.

In the existing legal framework, the EU rules on public procurement have to be observed. They have been implemented into domestic law in particular by the Public Procurement Law Amendment Act and govern public biddings. The principles of equality and transparency apply. As a consequence of EU rules, activity of companies from other European countries in the German market of water supply and sanitation increases.

In order to ensure a reliable water supply, an adequate drinking water hygiene and a functioning wastewater management, local statutes prescribe a system of compulsory connection and use. This means that each individual citizen and commercial company is obliged to connect to the public drinking water supply and wastewater system. In selected cases of exceptional hardship, exceptions are permitted.

Drinking Water

The organisation of drinking water supply in Germany has essentially been in place for more than 100 years, but is continually updated in line with technical and hygiene requirements. The aim of public water supply is to ensure that the population has access to an adequate

volume of drinking water at all times. This water has to satisfy the high quality requirements stipulated by law. In order to protect the drinking water supply, water protection areas are designated. In 2004, there were around 13,428 water protection areas covering a total area of some 43,100 km², which is equivalent to 12 % of the total territory of the Federal Republic of Germany.

The qualitative requirements for drinking water are laid down in the Drinking Water Ordinance, which serves to implement the EC Drinking Water Directive and was enacted on the basis of the Infection Protection Act and the Food and Utility Articles Act. It also regulates the monitoring of drinking water quality by government bodies. Monitoring is the responsibility of the Federal *Länder* and at a local level, the public health departments. They supervise the internal control and quality assurance measures taken by the water utilities, including the prescribed documentation and also carry out their own examinations. Additionally, they monitor trends in water quality, as the water utilities are required to notify the competent public health department immediately of any cases of non-compliance with the prescribed parameter values (limits). The Drinking Water Ordinance also contains new requirements with regard to organisation. In particular, organisational measures must be taken to implement the regulations for cases of temporary non-compliance with the requirements and limits and the associated duty to draw up precautionary plans of measures. Water supply enterprises have a duty to guarantee adequate water supplies. In the rare event of a failure in the drinking water supply system (for technical or hygienic reasons), drinking water has to be made available in adequate quantity and quality by other means. This can be done, for example, by importing water from a different water works or by means of mobile water supply facilities, such as water trucks. The standards that have to be met by central water supply systems must also apply to small facilities as far as possible. As such, the definition of small facilities in the Drinking Water Ordinance deliberately refrains from distinguishing between installations for personal requirements and installations for supplying third parties, e.g. guests in an isolated woodland restaurant or holiday home tenants. The Drinking Water Ordinance also provides for the inclusion of small installations and – under certain circumstances – in-house installations and installations for the use of rainwater in the monitoring provisions. The Ordinance also specifies limits for substances harmful to human health (such as heavy metals, nitrate, organic compounds) and pathogens, as well as the scope and frequency of analysis. The prescriptive limits for these substances correspond to those in the EC Drinking Water Directive. They are set at a level assuring no harmful effects on human health expected to result from lifelong consumption. For organo-

chemical pesticides and insecticides, for example, the maximum concentration is 0.1 µg/l. The sum total of such active ingredients is limited to 0.5 µg/l. The limit for nitrate in drinking water is 50 mg/l.

With regard to quality assurance in the construction, operation and maintenance of water supply systems, an important role is played by the technical regulations of private-law associations or federations such as the “German Association of Gas and Water Experts – DVGW” or the “German Institute for Standardisation – DIN”. Those regulations outline the technical specifications and document the best available technology. They also stipulate minimum qualifications required for employees in water works, specifications for pipelines, conditions for pipe-laying, qualifications required for pipe installation enterprises and are the basis for voluntary product certifications.

In accordance with the guiding principles of DIN 2000, the requirements placed on drinking water quality must be keyed to the properties of groundwater of perfect quality that is obtained from sufficient depth after passage through adequately filtering strata, extracted from the natural hydrological cycle, and has not been impaired in any way. Drinking water should be appetising and inviting to drink. It must be colourless, clear, cool, and perfect in taste and smell. Drinking water must be low in bacteria. Untreated water that does not meet the requirements for drinking water must be purified. It may also be necessary to treat the drinking water in such a way that it will not suffer any adverse changes during transport from the water works to the consumer. Such changes relate not only to the quality of the drinking water itself, but also to possible changes as a result of the materials with which it comes into contact in the supply company's distribution network and the consumer's home installation.

Since on the national level the most important laws in water management (the Federal Water Act and the Wastewater Charges Act) are merely outline acts, the water legislation of the *Länder* (Liquid water acts, *Land* wastewater acts and various legal ordinances) contain important provisions concretising or supplementing national law. For example the Federal *Länder* regulate ownership of waters, supervision of waters, maintenance of waters, licensing procedures for uses of waters, and indirect discharges (i.e. discharges via wastewater treatment plants) into waters. Finally, the local authorities, within the context of their statutory authority, may also adopt binding regulations, particularly in order to regulate connection to local authority water supply and sewage disposal plants, discharges into their sewage plants (indirect discharges) and the levying of cost-covering fees.

Under the law of most Federal *Länder* a charge is made for the extraction of water. The charge is payable by the party that extracts the water (groundwater, and in some cases surface water as well); in the case of water supplies the supply utility passes on the costs to the consumer. The purpose of the water extraction charge is to minimise water extraction and thereby conserve the water resources used for this purpose. The water extraction charges collected are often used for water conservation measures. In some states, the legislation explicitly states that the water extraction charges must be earmarked for such purposes.

Building regulations ensure that no residential buildings may be constructed without a proper drinking water supply. In-house installations are also considered water supply installations for the purposes of the Drinking Water Ordinance. As such, home owners are subject to the same regulations as all other companies and other owners of a water supply installation.

Drinking water supplies are essentially the responsibility of the local government, within the context of its public service mandate pursuant to Article 28, paragraph 2 of Germany's Basic Law and in accordance with the constitutions and water legislation of the Federal *Länder*. The communities and local authorities may exercise this duty in a sovereign capacity or else appoint private companies to do so on their behalf. Between 6,200 and 6,800 drinking water suppliers exist in Germany, about 5 % are privately owned and operated (the exact figures vary according to the data source).

Present knowledge indicates that a central public drinking water supply system offers the greatest safety and reliability for the supply of perfect drinking water in adequate quantities and with the pressure required for technical purposes.

Wastewater

Public wastewater management in Germany is a state duty that is performed by communities and cities as a local authority responsibility. The Wastewater Charges Act (AbwAG) regulates the levying of charges for the direct discharge of wastewater into a waterbody. The charge is the first eco-tax to be levied at Federal level as a steering instrument. It ensures that the “polluter-pays principle” is applied in practice, since it requires direct dischargers to bear at least some of the costs associated with their use of water. The charge is determined on the basis of the quantity and harmfulness of specific constituents discharged into the water.

With about 7,000 local authority wastewater management enterprises, the German wastewater sector is divided into extremely small units. For some years, however, there have been signs

of a trend towards greater independence of wastewater management operations away from “traditional” municipal departments in favour of municipal utilities and private-law organisations.

The entity responsible for wastewater management may itself guarantee the performance of wastewater management operations, or it may entrust them to third parties. Subdividing actual performance of wastewater management operations into “wastewater collection” and “wastewater treatment” shows differences in the proportions of the organisational forms.

The wastewater collection sector is mainly dominated by municipal utilities, who account for 43 %. For 20 % of the people served, wastewater collection is handled by municipal departments, while single-purpose inter-municipal associations and water management associations account for 10 % and public-law institutions for 17 %. Private-law organizations, mainly municipal companies and operator or joint venture companies in the form of an AG (stock corporation) or GmbH (private limited company), handle 10 % of the wastewater collection. Wastewater treatment in sewage treatment plants is carried out predominantly by municipal utilities (33 %) and by single-purpose inter-municipal and water management associations (26 %). Municipal departments account for 12 % of the consumers served and public-law corporations for 17 %. Private-law enterprises handle wastewater treatment for 12 % of the residents served. Plants that do not yet comply with the requirements of the Wastewater Ordinance must be updated. The trend for making constant improvements in local wastewater treatment technology from an ecological point of view especially with a view to optimum nutrient reduction and a holistic approach to wastewater systems (reduction in drinking water consumption, treatment of substreams for further use, recovery of usable wastewater constituents) will continue in future.

What should the regulatory framework put into place by States provide for?

A lot of different aspects have to be taken account, e.g.:

- A high standard of quality of the drinking water has to be ensured.
- The prices have to be kept moderate, the principle of solidarity cannot be given up.
- Contracts have to be public so that the role of the public as watch-dog is

ensured.

- Environmental protection and sustainability has to be ensured. One of the problems in this field is that a fall in water consumption over the short term has no cost reduction potential. The reason is the high fixed costs. Taken by itself, a private company will hardly promote water conservation measures. Also, water protection areas need to be designated.
- The State has to oversee investments into the utilities since the Companies might rather tend to gain short-term profits. It is estimated that in Germany until 2020, between 150 and 250 billion € need to be invested.
- Privatization as one possibility for more competition but it shouldn't be changing a public monopoly into a private one.

Problems arising are:

- water has a much higher share of network costs in comparison to the transported good than e.g. electricity
- networks are mostly closed circuit
- problem of miscibility of different qualities of drinking water
- possible loss of quality of drinking water with long residence
- Compulsory connection and obligation to contract has to be held up.
- An escheat law, in case the company does not fulfill its duties, is necessary. Yet, a problem might be the loss of know-how of the local community.
- Principle of regionality needs to be considered.
- "Polluter pays principle" needs to be considered.
- Precautionary principle needs to be considered.
- Reliability of the private companies needs to be ascertained.
- Liability needs to be assured.

Apart from Regulation, what additional measures, structures and institutions are necessary?

Without the rule of law and strong institutions that can safeguard public interest, privatization is bound to fail. In this regard a judgment handed down by Germany's highest civil law court, the Bundesgerichtshof, is instructive. Its Cartel Senate confirmed a price cut decision of the Hessian State antitrust authority in a decision announced on 2 February 2010. The case went as follows: The private water utility of the town of Wetzlar (*enwag Energie und Wassergesellschaft mbH*) supplies households with drinking water. Since January 2003 it has charged a price of 2.35 €/m³. The Hessian State antitrust authority has compared this price with the water prices by 18 other water companies from all over Germany and came to the conclusion that it is overstated by about 30%. Therefore, in 2007, the Hessian State antitrust authority forced the *enwag* to reduce water prices by about 30%. The Higher Regional Court of Frankfurt am Main has confirmed this order. The *enwag's* appeal had no success.

Following the Federal Court's – in its own words – “key-decision” in the area of antitrust control of water prices, public water supply is governed by the strengthened anti-trust abuse control pursuant to § 103 paragraph 5, § 22 paragraph 5 GWB (Anti-Trust Law). These rules allow the antitrust authority to establish a price abuse through a comparison with the prices of similar companies. The companies concerned have to justify their higher prices. These rules were repealed for electricity and gas suppliers in 1999, but they still apply for the water companies. Circumstances that might justify their higher water prices could not be demonstrated by *enwag*.

A similar situation may occur in Berlin, where water prices have gone up 30 % since privatization.

What are the responsibilities of the private sector when participating in the provision of water and sanitation services?

The responsibilities of the private sector correspond with the responsibilities of the public sector. If public services are privatized the goal is to render the service more efficient and therefore – in the best case – better **and** cheaper for the consumer. Detriments to the consumer

are certainly not the aim of privatization. Therefore, the responsibilities cannot change just because private actors take over. This corresponds with the basic German principle of “interdiction of flight into private law”. By this principle, the State is allowed to behave as a market actor but cannot shed itself of the public law rules. The duty to ensure human rights is independent of the form of acting. This is why Germany commits itself to access to drinking water and sanitation free of discrimination.

Most welcome: specific instances of private sector participation analyzing these from a human rights perspective and showing how the participation of the private sector has contributed to or undermined the realization of human rights

See the example of the BGH.