State provision of basic services – an obsolete model?

Public services between the European internal market and the goal of public welfare

In Germany, as elsewhere, more and more people are coming to doubt the political direction the European Union is taking. They are asking themselves whether the European vision amounts to anything more than a common internal market. And they are concerned that the European Union is threatening their regional and local independence. One of the root causes of these fears is the increasing pressure which the EU is exerting on public services in the form of ever tighter restrictions on their nature and scope. The (failed) attempt by the EU Commission, through the so-called Services Directive, to liberalise all services throughout Europe and deregulate them by introducing the country of origin principle, has added to these fears - many see the EU as the extended arm of globalisation, not as a means of shaping and regulating it.

Since the 19th century, European nation states have provided their citizens with services designed to foster the welfare of society as a whole. These include, or included, services to safeguard public order, healthcare, social amenities, such as old people's and care homes, social housing, water supply and sewage disposal, refuse disposal, fire protection, public transport, postal services, electricity, sports and cultural facilities, nursery schools and schools. The services encompass economic, social and cultural activities. They are characterised by the guarantee of equal, universal access, security and continuity of provision and - where the State is the provider - by democratic scrutiny and public accountability. Although from a historical and social point of view there have been constant changes in the scope of these services and the way in which they are provided, the services themselves are fundamental to the quality of life in modern societies and central to the principle of the welfare state enshrined in many constitutions. Their purpose is to create equal living conditions, guarantee the availability of essential facilities and make for acceptance of the State on the part of its citizens.

By virtue of their differing legal traditions, in the EU Member States these services take a variety of different forms. The terms employed make this immediately clear: German administrative law refers to 'Daseinsvorsorge', in France the more general term 'service public' is used and in the United Kingdom the preferred expression is 'services of general interest'. This problem of definition stems partly from the fact that the concept is not just a legal, but also a political one, not least because what we are dealing with here is the issue of the State's core tasks.

The development of **municipal environmental protection** makes this clear:
'*In 19th century towns and cities, which were growing quickly as a result of industrialisation, unhygienic living conditions repeatedly led to epidemics breaking out. Faced with this pressing problem, towns and cities began to develop services in the form of municipal refuse collection, centralised water supply and centralised sewage disposal. With a view to providing ordinary people with basic services, specialist municipal departments (...) were established to perform environmental protection tasks in a professional manner and guarantee minimum standards of hygiene at low cost.*'
From: Hucke, J.: Municipal Environmental Policy, in: Roth, R./ Wollmann, H.: Municipal Policy. Political Action in Local Communities, Bonn 1998.

In other words, these services did not solely benefit individuals, but rather society as a whole. The definition of these core tasks is not fixed. It cannot be set in stone, but changes as society's needs develop. For example, the significance of public support for housing construction is diminishing, above all in areas where the population is falling. In contrast, as a result of demographic ageing the ready local availability of foodstuffs and other services will take on ever greater importance.

In many Member States these services are provided by a large public sector.

However, as a result of the European Union's liberalisation policies tasks which were traditionally the responsibility of the public authorities are now increasingly being opened up to competition. In that connection, the EU's main goals are the elimination of barriers to international trade, the completion of the European internal market and the expansion of trade among the Member States. The results are expected to be lower prices and more jobs. The moves to open up markets in general stem from an overwhelmingly economic approach to political issues and adherence to the criteria of economic efficiency. What is almost completely ignored, however, are the requirements of **sustainable development**, which gives equal weight to ecological and social criteria alongside economic objectives, and the implications of the role of municipalities as places where ordinary members of the public **take part in democratic and political life**.

*EU and **liberalisation** - when they hear that word, most people probably think of energy, telecommunications, television, postal services and railways. It is indeed the case that in these areas the EU has, by means of so-called sectoral directives, opened up markets and cleared the way for privatisations. The aim of the sectoral directives was the opening-up of markets, not **privatisation** or deregulation, since liberalisation by means of EU directives must be neutral in terms of the form of ownership, in keeping with Article 295 of the EC Treaty.*
*Likewise, liberalisation by means of EU directives does not automatically lead to **deregulation**. Quite the reverse: as a recent study by the Friedrich Ebert Foundation shows, following the liberalisation of the telecommunications market the number of laws enacted in that area in Germany alone increased from three (incorporating 79 clauses) to eight (incorporating 297 clauses) (Ortlieb Fliedner and Sabine Hadamik: 'Fewer Laws through the Privatisation of Public Sector Tasks').*
*In other words, liberalisation does not primarily lead to a reduction in the number of tasks performed by the State (often dismissed as 'bureaucracy'), but instead results in the public sector performing different tasks: rather than being a service provider, it becomes the **service guarantor** - the public authorities monitor and guarantee the provision of services and are accountable to the public in that provision.*

European law on public procurement and State aid

Taken together with European competition law, European law on public procurement and State aid is instrumental in the process of opening up municipal provision of basic services to competition. In principle, the aim is to place private-sector and public-sector firms on an equal footing in the European internal market. In reality, however, the Europe-wide requirement to employ public procurement procedures and EU rules on the monitoring of State aid, combined with the pressure to privatise a profitable and growing market, are doing much to open up the State provision of basic services to competition.

State aid and State provision of public services

Turning first to the question of State aid, i.e. the funding or partial funding of public services provided by external service providers: Article 87(1) of the EC Treaty prohibits State aid payments which might serve to distort competition and hamper trade between Member States. That provision prompts the following question: what payments are not regarded as State aid under European law and are not therefore subject to scrutiny by the EU

Commission, but are instead permissible as compensatory payments for the provision of basic services? In more practical terms, are public authorities allowed, for example, to provide financial support for the transport of children by local public transport firms or for old people's homes, nursery schools and clinics? The Court of Justice of the European Communities (CJEC) has handed down an important judgment on this matter:

CJEC's Altmark-Trans judgment of 24 July 2003 (C-280/00)
*In a dispute between the transport companies Altmark and Altmark-Trans and the municipality of Stendal in Saxony-Anhalt concerning the award of public subsidies, the CJEC found that public subsidies do not necessarily constitute State aid and are not therefore necessarily covered by the ban on State aid imposed by EU law or the EU's procedures for monitoring breaches of that law. However, the Luxembourg judges laid down very stringent conditions which must be satisfied if subsides are not to be deemed State aid. The following **four criteria** must all be met:*

1. *The recipient undertaking must actually be required to discharge public service obligations and those obligations must have been clearly defined beforehand.*
2. *The parameters on the basis of which the compensation is calculated must have been established beforehand in an **objective** and **transparent** manner.*
3. *The compensation may cover **only the additional costs incurred** in discharging the public service obligations, taking into account a reasonable profit for the undertaking concerned.*
4. *Where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed must have been determined on the basis of an analysis of the costs which a typical, well-run undertaking would have incurred in discharging those obligations.*

*A measure taken by the public authorities which fails to satisfy **all these conditions** is therefore covered by the definition of State aid. On the basis of this judgment, arbitrary subsidies represent a form of State aid and are prohibited.*

The judgment is ambiguous: although the CJEC in principle finds that public subsidies do not necessarily constitute a form of State aid, i.e. are not covered by the provisions of the EC Treaty on State aid and must therefore be allowed by the competition authorities, it also lays down stringent conditions which must be met if public subsidies are not to be deemed State aid, and unfortunately does so without giving a precise definition of 'public service obligations' (criterion 1). In addition, the judgment rules out a blanket requirement to employ public procurement procedures and, in the fourth criterion, explicitly makes provision for alternative methods of calculating the level of compensation required, methods which in practice are extremely complex and do not provide the requisite degree of legal certainty.

In July 2005, on the basis of the CJEC judgment, and after consulting the European Parliament and the Member States, the EU Commission adopted a package of measures dealing with compensatory payments for the provision of services of general economic interest. In that package it defines the cases in which compensatory payments by the public authorities do not constitute State aid pursuant to Article 86 of the EC Treaty.

(NB: In its role as supreme competition authority the EU Commission is solely competent to take decisions. In such cases, the Member States are only consulted through so-called 'advisory committees' and the EC Treaties make no provision for the formal consultation of Parliament.)

On that basis, services must meet the following criteria if the derogations from the rules governing State aid are to apply:

- there must be an actual requirement to discharge public service obligations
- the public service in question must be clearly defined
- compensatory payments must be necessary and appropriate (no excessive compensation),

- The measure concerned must be consistent with the public interest and the development of trade.

Compensatory payments which are made outside the specified areas or which fall below clearly defined ceilings may be compatible with the law on State aid. However, they must then be individually notified and authorised. In the case of hospitals and social housing, and in parts of the maritime and air transport sectors where passenger volumes are low, compensatory payments of whatever level are consistent with the rules governing the internal market.

However, an amendment to the European Transparency Directive has introduced a provision stipulating that undertakings are required to keep separate accounts even if the compensatory payments made by the public authorities do not constitute State aid.

This also serves to undermine legal certainty for municipalities, and in doubtful cases the Commission determines the legal position by means of so-called **Treaty infringement proceedings**. Here is an example of how Treaty infringement proceedings increaseslegal uncertainty - this case relates to the requirement to employ competitive tendering procedures:

*Brussels/Berlin, 13 December 2006: In connection with the award of public contracts for **rescue services** the EU Commission has opened the second stage of the Treaty infringement proceedings against Germany. It is claiming that German local authorities have failed to employ transparent procedures when awarding contracts and concessions for the provision of rescue services. Although the Commission has since withdrawn the requirement to issue invitations to tender for such services on a Europe-wide basis, competitive tendering must still be employed. The argument put forward by the German Government that in some German Bundesländer the provision of rescue services is a sovereign task and cannot therefore be treated in the same way as a service contract, has been rejected by the Commission. In its view, these services are not related to sovereign tasks and only if they were would derogation from the relevant provisions of EU law (transparency requirement) be possible.*

The next dispute is just around the corner: the **VAT** exemption and the **partial exemption from turnover tax** enjoyed by basic services such as refuse disposal and water supply is currently being challenged in Treaty infringement proceedings and cases before the CJEC, the argument being that the discrimination suffered by private operators is distorting competition. As so often before, the cases have been brought by private operators in Germany.

European law on public procurement and State provision of basic services

The law on public procurement requires public contracting authorities, whether local authorities or publicly owned undertakings, to issue Europe-wide invitations to tender for service contracts whose value exceeds certain set thresholds. The starting point for any legal appraisal by the EU Commission as to whether a transaction constitutes 'entrustment' is always the question of whether a contract has been awarded against remuneration to a body legally separate from the local authority. If that is the case, the provisions of EU law on public procurement always apply as a matter of principle and it is irrelevant whether the 'contractor' is a public institution, a public-private joint venture or a private undertaking. EU law lays down only two derogations: in-house procurement and administrative measures. However, both these derogations are constantly the subject of legal proceedings and have given rise to a high degree of legal uncertainty.

- ***In-house procurement:*** On this issue, the CJEC has concluded (in the Teckal case) that a local authority may conclude a contract with another entity directly, i.e. without

competitive tendering, if the local authority exercises over that entity a control which is similar to that which it exercises over its own departments (criterion of control) and, at the same time, if that entity carries out the essential part of its activities for that local authority (criterion of essentialness). Since then, a further judgment, handed down in the Halle case, has laid down an even more restrictive definition of in-house procurement, stipulating that private capital should have no stake in the entity awarded the contract, i.e. that entity must be at least 99.99% publicly owned.

- Only measures relating to administrative organisation in the narrow sense of that term are accepted as ***administrative measures.*** However, even that definition is now being challenged.

If the value of a 'contract' exceeds the relevant threshold, an invitation to tender must be issued on a Europe-wide basis. However, if its value falls below the thresholds, or if on other grounds it is not (yet) covered by the European directives on public procurement, for example because the contract involves concessions, in the Commission's view the general principles laid down in the EC Treaty, in particular the principle of transparency and the ban on discrimination, still apply. In other words, depending on the circumstances a Europe-wide tender procedure may still then be required. The EU Commission has arbitrarily introduced this rule in a communication interpreting the relevant provisions of EU law. In so doing, it is endeavouring, behind the backs of the two co-legislators, Parliament and the Council, to broaden the scope of the directives on public procurement. It is basing those efforts on individual CJEC judgments and interpreting them in such a way that they appear to give it the 'right' to scrutinise procurement procedures even if their value falls below the thresholds clearly defined by the legislators.

(Interestingly, in January this year, in Treaty infringement proceedings brought by the EU Commission against Finland, the CJEC Advocate-General, Eleanor Sharpstone, contradicted the Commission on this point and found that the definition of transparency requirements for contracts whose value falls below the EU thresholds was a matter for national legislators and that a definition as far-reaching as that put forward by the Commission in its interpretive communication represented 'the opposite of legal certainty' and would impose a 'disproportionate and unrealistic burden' on smaller local authorities in particular).

What are the origins of this policy?

In order to gain a better understanding of the background to this problem, it is essential to consider the legal basis for the State provision of basic services at EU level.

The EU must respect forms of ownership prevalent in the Member States ...
Anyone who studies the issue of public services in the EU quickly encounters the problem of the differing traditions prevalent in the Member States. Even in the years immediately following the establishment of the Community, differences quickly emerged between countries with a traditionally well-established system for the State provision of basic services and countries with a less developed system based more on the private sector. Agreement was reached on a compromise designed to satisfy everyone: the Community does not influence the organisational methods and forms of ownership which the Member States employ with a view to fulfilling their tasks (Article 295 of the EC Treaty). However, public undertakings are treated in exactly the same way as private-sector firms and are subject to European rules on competition and State aid (Article 86(2) of the EC Treaty). This applies to the whole area of public services. **Derogations** are possible only if application of the rules on competition would create an unacceptable obstacle to the performance of tasks fundamental to the public interest (Article 86(2) of the EC Treaty). However, this 'dispensing clause' for undertakings whose task it is to provide services of general economic interest merely serves to illustrate the ambiguous nature of European primary law. It establishes a

rule-exception relationship in which untrammelled competition is the rule and derogations are the exception.

Until the 1980s, however, this had virtually no impact on the provision of public services by local authorities, since the rules on competition and State aid are applicable only in relation to activities on competitive markets. In the past, public services were essentially provided by monopoly-holders under State control, even if the monopolies in question were sometimes held by private firms.

It was only the gradual opening-up of markets in the late 1980s, through the programme of internal market legislation enacted by the European Community (sectoral directives governing the major network-based services, such as electricity, gas, railways, telecommunications, television and postal services), which ultimately led to an opening-up of the markets for services of general interest and left national public undertakings facing increasing competitive pressure.

At the same time, in countries such as Germany the legal arrangements for the provision of services by local authorities changed, for example of public utilities under private law, through cooperation with other local authorities beyond municipal boundaries, or through the establishment of public-private partnerships, mixed enterprises or the partial selling-off of public utilities. In this way, this area of basic service provision also ultimately became a focus of European competition policy.

A market in basic services had emerged involving various kinds of service providers.

The 'orange revolution' - Re-establishment of local authority control over services as illustrated by the example of refuse collection

Whilst many local authorities are continuing to place the emphasis on the privatisation of public tasks, a countertrend is now emerging involving the re-establishment of local authority control over the provision of basic services. Some local authorities are reversing earlier decisions and handing responsibility for, say refuse collection back to municipal undertakings. There are good reasons for this 'orange revolution', as illustrated by the example of the town of Bergkamen in North Rhine-Westphalia: refuse disposal - a service previously provided by a private operator - is now being carried out by a municipal undertaking at 30% lower cost.
When the issue of privatisation is debated, its proponents not only often overlook the fact that the profit margins enjoyed by private service providers and the salaries of their board members are high and that the possibility of exercising democratic influence - following privatisation, undertakings are no longer subject to public scrutiny - is lost, they also frequently fail to consider the possible knock-on costs of over hasty privatisation: there are redundancies, the remaining employees often no longer receive collectively agreed wages, but wages which amount to social dumping, and the local authority is left with the bill for the additional welfare benefits required.

Definition of basic services by the EU: SGIs and SGEIs

EU law does not define basic services in the way they are understood in Germany. The EU Commission's definition reads as follows: '**market-related and non-market-**related activities performed in the general interest and which are therefore linked to specific public service obligations'. Europe refers to 'services of general interest' and draws a distinction between **services of general interest (SGIs)**, which are exempt from the European rules on competition and State aid, provided that they relate to tasks performed purely in the public interest and are not market-related, and **services of general economic interest (SGEIs)**, which are regarded as a normal form of economic activity and are subject to the rules governing the internal market (e.g. competition law, arrangements for scrutinising State aid, the transparency requirement, freedom of movement and freedom of establishment).

The distinction between SGIs and SGEIs is by no means clear and allows the Commission substantial leeway to interpret the rules. For the EU Commission and the CJEC, the mere fact that private service providers are competing on the market and/or that the service is not provided free of charge, but rather, for example, in return for a fee, is enough to define a service as a non-sovereign task and as an SGEI. Not even the so-called subsidiarity principle offers protection against such an approach.

Subsidiarity

The subsidiarity principle is likewise defined only extremely vaguely in the Treaties. It does not represent a genuinely practical counterweight to the internal market rules. Although the European Constitution would bring about improvements in this area, its ratification is still stalled following the failed referendums in France and the Netherlands.
However, in view of the degree of interpenetration between national economies, no great store should be set by the subsidiarity principle. The EU Commission is very clever at using WTO rules to circumvent objections, for example when setting thresholds in connection with contract award procedures; and even though GATS[1] agreements do not need to be transposed word for word into national law, they nevertheless hollow out national powers.

Regional and/or internal market relevance

The EU Commission and the CJEC also interpret the criterion of internal market relevance extremely narrowly. For example, once it has reached a certain scale intercommunal cooperation, in the form of special purpose associations in the area of, say, water management, are regarded as a hidden form of economic activity and are thus subject to internal market rules.

Example of Hinte:
In 1999, Hinte, a rural community in Lower Saxony with a sewerage network serving eight separate localities, transferred responsibility for the provision of sewage disposal services to the 'oldenburgish-ostfriesischer Wasserverband' (Oldenburg-East Friesian Water Association). On the basis of a contractual agreement with the special purpose association, the local authority retained information and scrutiny rights vis-à-vis the association. This decision, taken on the basis of Land and federal legislation, was challenged by the EU Commission, which threatened to open a complaint procedure against the Federal Republic of Germany and was prevented from doing so only by the termination of the additional agreement in April 2005.

The Commission's interpretation of the law leaves local authorities on the horns of a legal dilemma. If a special purpose association is entrusted with a clearly defined municipal task, under the law it takes over sole responsibility for that task. However, there is nothing in the law to prevent local authorities which confer such tasks on special purpose associations from retaining the right to monitor and scrutinise their performance in individual cases. Indeed, under other legal circumstances such a requirement may be binding, for example in connection with water supply on the basis of the relevant legal provisions (such as the EU's water framework directive) and the role of the municipality as the water authority. Nevertheless, the Commission insists on the transfer of all responsibilities without exception. This betrays a strange understanding of democracy, since it grants municipalities, and thus also the directly elected representatives of local people, no monitoring and information rights vis-à-vis special purpose associations.

National laws which sought to exempt such forms of intercommunal cooperation (ICC) from the provisions of European public procurement law have already been declared null and void by the CJEC *(judgment in the case EU/Spain).*

[1] The general agreement on trade in services is an international multilateral agreement drawn up the World Trade Organisation (WTO) which governs cross-border trade in services and whose objective is the increasing liberalisation of that trade (opening up of international markets).

Right to self-government

However, **intercommunal cooperation,** in particular, is becoming ever more important for local authorities: against the background of meagre public funding, an ageing society, population decline, primarily in rural areas, growing consumer demands and pressure to modernise in many areas, local authorities are facing new tasks which they can generally fulfil only by working together.

Municipal special purpose associations have been set up in areas as varied as administrative cooperation, water, sewage, waste and energy management, local public transport, tourism, culture, hospitals and swimming pools, not to mention schools, old people's homes and nursery schools. They are particularly important for smaller municipalities, since only in this way can they provide their inhabitants with high-quality services. For that reason, district, Land or national borders should pose no obstacle to intercommunal cooperation, as illustrated by successful projects which are being implemented in areas on Germany's borders with France or Poland. One particularly interesting example is a cross-border project in the area of pre-school education involving French and German municipalities in the Rhine Valley.

Intercommunal cooperation can also hardly be described as a new phenomenon, developed, say, in an effort to circumvent European law. Quite the reverse: the first legal basis for ICC was drawn up as long ago as 1863 in what was then the Grand Duchy of Baden. Although intercommunal cooperation represents a purely internal solution to administrative problems at municipal level, and although it falls within the sphere of responsibility of the municipalities and has no direct bearing on the internal market, this form of local self-government may now come under attack from the EU.

It should be noted, however, that unlike the Basic Law in Germany, the Treaties lay down no **right to local self-government.** The Treaties make no mention whatsoever of the issue of local government. The first reference to a right to local self-government came only in the draft European Constitution[2]. Unfortunately, following the well-publicised problems which halted ratification of the Constitution this provision has thus far remained a dead letter.

What the State can do better: in an appreciation of the American financial economist Richard A. Musgrave, who recently died, Nikolaus Piper wrote the following in the 19 January 2007 edition of the Süddeutsche Zeitung:
*'Economists no longer see the State as nothing more than a well-meaning father figure. Instead they systematically analyse the forms of self-interest displayed by politicians and the impact of interest groups (...). The more the State concentrates on its core task of protecting citizens' rights, the less chance there is of it abusing its power. That said, however, the public sector still plays an economically fundamental role in society, not only in Germany, but also in countries with a longer-standing liberal tradition, such as the United Kingdom or the United States (...). One example: younger economists are understandably reluctant to follow Musgrave in talking about "meritocratic goods", such as **education**, which the State must offer because citizens, if left to their own devices, generate too little demand for such services. For them, the concept of meritocratic goods is far too redolent of the nanny state. But the example of schools in fact shows that meritocratic goods do indeed exist: many parents are unwilling or unable to take seriously their children's educational ambitions. The results of this lack of demand can be seen in the immigrant ghettos in Moabit and elsewhere. For that reason, a properly functioning **State educational system** is essential to society.'*

[2] *'The Union shall respect the national identities of the Member States, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'.* (Part I, Article 5). From the point of view of local government, the draft Constitution represents a step forward in other areas as well: the Protocol on subsidiarity would introduce a system to monitor compliance with the principles of proportionality and subsidiarity. On that basis, the Commission would have to hold a wide range of hearings at regional and local level before proposing legislation. In addition, the Constitution confers on the Committee of the Regions (CotR) the right to bring actions before the CJEC, thereby granting local political representatives the power to exercise scrutiny in matters relating to them, at least on an *ex post* basis.

Implications for sustainability

One obvious question which now arises - in keeping with the philosophy of sustainable development and in view of the economic importance of public contracts - is whether European monitoring of public procurement policy on the basis of ecological, social and ethical criteria should not be regarded as more important than breaches of the subsidiarity rule and fundamental democratic principles. After all, the European Parliament fought hard to secure agreement that procurement must take account of ecological, social and ethical, and not just economic, principles.

In that connection, however, it should not be forgotten that the award of a public contract, whether to build a road or supply pencils, involves issues which go beyond the immediate scope of local government procurement. The key issue is the highly complex one of the municipal provision of basic services. It covers all areas in which a European market is developing. Such markets already exist in the electricity and gas supply, local public transport and waste management sectors, and they are emerging in the water supply sector. However, markets are also developing for services which, in Germany at least, are not yet the focus of attention: markets for care services, for old people's homes, for schools, and for social and cultural services of all kinds. Here, the fundamental problem becomes clear: EU policy is leading to fundamental changes in the definition of basic services - they are now seen as an economic good, a significant new development.

Let us take waste management policy as an example: waste is not a simple commodity which can be freely traded and for which a genuine market exists, based on supply and demand. Waste is, and remains, a hazardous substance and responsible, environmentally friendly disposal will always be more expensive than dumping in the countryside or incineration in industrial plants. Admittedly, accompanying laws laying down suitable requirements and monitoring procedures can prevent a lot of abuses in this area. Nevertheless, the privatisation of waste incineration plants and dumps involves incalculable risks. In the long term, operator monopolies are likely to emerge which can be no longer be properly monitored by the public authorities, since operating such plants requires very substantial investment, including massive post-incineration costs, which are beyond the means of just about any small- or medium-sized firm.

The great refuse swindle: *The great refuse swindle has been running for some time on the German waste disposal market (...). Whilst private disposal firms fight tooth and nail for market shares, and whilst investors are increasingly eyeing the huge profits to be made from refuse, ordinary people are left to clear up the mess. The concentration process and increasing competition have not yet been reflected in falling prices (...). The head of a medium-sized waste disposal firm expressed his fears thus: 'The ongoing consolidation process will lead to the creation of* ***oligopolies****'. Once the big firms had divided Germany up between them, they would be able to dictate prices, he added (Welt am Sonntag, 20 August 2006). The profit margins are substantial, between 8 and 12% according to the same newspaper (2 March 2007).*

Any trend which left a much reduced number of independent firms concentrating on a small, largely unprofitable area would turn municipalities into 'poor risk managers' and would lead to market consolidation, in the form of pure privatisation, which would not foster market liberalisation, but rather the establishment of private monopolies and oligopolies.

Implications for the development of democracy

Privatisation is a process which is difficult to reverse, however, since when municipal services are disbanded the know-how they represent is also lost, know-how which subsequently has to be bought in at great expense in order to monitor the external provision

of services. By handing over to third parties responsibility for the provision of their own services, local authorities leave themselves facing a knowledge shortfall which is very difficult to rectify and, at the latest when administrative staff leave their posts, knowledge of the nuts and bolts of service provision is irretrievably lost. Even in purely legal terms, by comparison with private firms local authorities have limited scope for obtaining detailed information and making it available as part of a democratic process of shaping public opinion.
However, by delegating tasks to third parties the public authorities cannot absolve themselves of responsibility for safeguarding the welfare of the local community. As a result, the question of how the exercise of influence and scrutiny by publicly legitimated decision-makers can be protected and fostered becomes fundamental to local democracy, since otherwise the continuing trend towards the privatisation of public services will go hand in hand with increasingly inadequate supervision by local authorities, and they, owing to a lack of information and negotiating power, will no longer be able to perform the vital task of carefully weighing up the environmental, economic and social implications of privatisation. On that basis, there is every danger that local self-government will become a meaningless term.

'*Privatisation creates a new dimension (...). Some people, remembering the many bad experiences they have had with incompetent, corrupt or otherwise unsatisfactory local authorities, see this development quite simply as an improvement. However, for the vast majority of towns and cities in central Europe the experience is completely the opposite one (...). Municipalities have (...) a good relationship with their citizens, they could point to remarkably effective arrangements for the provision of public services, and they genuinely served as the* ***'school for democracy'*** *landed by De Tocqueville' (...). Through the process of privatisation, the link between citizens and local authorities is broken: the provision of public services traditionally establishes the basis for trust in local government and, by extension, its political prestige. Municipalities which hand over responsibility for the provision of public services to private undertakings risk depriving themselves of an important form of contact with local people. In addition, the role of local government may become blurred, leading the public to perceive it as superfluous and "bureaucratic".'*
From: 'The limits to privatisation - *how to avoid too much of a good thing',* report to the Club of Rome, 2006, published by Ernst Ulrich von Weizsäcker/Oran R. Young/Matthias Finger.
An objective analysis of the range of international experiences gained with privatisation, its problems and its limits, with corresponding conclusions and practical recommendations.

What can be done?

1. **European Framework Directive on the protection of basic services:** Since late 2006 the European Trade Union Confederation has been running a Europe-wide campaign which is backed by the Green Group in the European Parliament. The campaign is calling for the definition, in the form of a European framework directive, of a set of safeguards to protect services of general interest. Support for this objective has thus far been received from two Member States, France and Belgium; Germany, in contrast, has voiced its opposition. Opinion is divided in the European Parliament as well: the conservative-liberal majority is against a framework directive, whilst the Greens, Socialists and the left-wing Socialists/Communists are in favour - although they have not reached agreement on the minutiae.

   Setting this controversy aside, the argument is worthwhile in itself: there is a need to establish just what restrictions European secondary legislation can impose on internal market rules derived directly from the EC Treaties. In addition, a framework directive would enforce, but not set, standards valid throughout Europe. This would entail a further transfer of powers to European level, a step to which German local authorities in particular are strongly opposed.

   Nevertheless, if basic services are to be safeguarded, the relationship between

national regulatory policies and competition within the internal market must be clarified. National basic services in the internal market can no longer be protected by partitioning off national markets and taking unilateral political decisions, but only by shaping EU law. Primary law and the interpretation of that law have left little room for manoeuvre, but the remaining scope for actively shaping the substance of secondary law must be exploited.

2. **Guarantee the right to local self-government in the Treaties:** The principle of local government must also be enshrined in the EU's primary law. Reference has already been made to the fact that the Treaties do not lay down the right to local self-government. A compromise concerning the formal establishment of this right was found in the draft Constitutional Treaty, one which would have enshrined municipal rights in EU primary law for the first time. This advance must be safeguarded. When the draft Constitutional Treaty is revised, a broad-based lobby must be marshalled to advocate the retention of this principle.

3. **More effective lobbying at EU level:** Intercommunal cooperation must be excluded from the scope of, i.e. exempted from, European law on public procurement. Only in this way can a secure framework for the municipal provision of basic services be established under European law. Unfortunately, these issues are primarily seen as German problems. Only rarely can alliances be forged with national associations representing municipalities in other Member States. Indeed, the reverse is true: people who defend the German concept of the municipal provision of basic services in the same breath criticise the more centralised French approach to 'service public'. However, isolated German or German-Austrian initiatives are bound to fail in Brussels.

4. **At federal level:** German competition law is equally unsuited to application at European level. The exemption of public law agreements under German competition law is based on a very artificial distinction between 'mandating' and 'delegating' agreements, which may, under certain circumstances, give rise to tendering requirements. This concept cannot be translated into European law. In fact, it merely creates additional legal uncertainty and should therefore be abolished. In addition, federal and Land legislation must not fall into the (European) trap of contributing to the watering down of the **public interest principle**. Ultimately, only a clear, stringent requirement that they should serve public interest objectives can protect basic services against European competition law - there is no such thing as 'a slightly free market' (see, for example, the negotiations between the Federal German Government and the EU concerning savings banks).

5. **At Land level - do away with counterproductive laws which are inapplicable at European level:** Laws must do what it says on the tin. Unfortunately, however, German laws at Land level still allow for private involvement in ICC, a principle which cannot work in the EU. Land laws must be framed in such a way that the establishment of a special purpose association, or the act of joining such an association, can also be seen by the EU as a national organisational measure. This will only be possible, however, if the involvement of private firms or individuals is ruled out.

6. **At municipal level - weed out the black sheep:** The municipalities themselves can no longer shy away from addressing the issue of their own 'black sheep'. By way of an example, private energy supply oligopolists have no place in a special purpose association dealing with water management.
The history of the Landesbanken (regional German banks) should have provided sufficient illustration of the fact that it is generally the black sheep in one's own ranks

whose actions offer an open invitation to start a complaint procedure and provide a pretext for challenging the legal status of an entire category of organisations.

7. Last but not least: In Europe we need an **open, non-ideological debate** on the blind spots in the internal market strategy: all too often, liberalisation on the European internal market leads to the formation of structures akin to oligopolies. The EU Commission's powers to supervise competition are no defence against the European global players.