

Germany's wake-up call

Municipal utilities are hoping that benchmarking will save them from reform. They are being optimistic.

Germany's water and wastewater sector is busy collecting data, and lots of it. Back in 2002, the German parliament voted against liberalisation of the water sector and turned instead to structural modernisation to achieve greater efficiency – and in order to assess what needs modernising among about 7,000 water companies, it goes without saying that plenty of information is required.

Water and gas lobby organisation the Bundesverband der deutschen Gas- und Wasserwirtschaft (BGW) has commissioned a study on prices and efficiency for 2004/05, gathering data from Germany and comparing it with figures from the water sectors in other European countries. The BGW will also shortly begin a survey of water consumers' opinions. On top of that, a massive data collection effort is underway, bringing together water information and figures from all possible sources to provide a "Branchen-Spiegel", a complete picture of the water branch. These efforts add to the benchmarking going on at about 700 firms.

Into this hive of ongoing and undoubtedly necessary activity, the association of communal utilities Verband kommunaler Unternehmen (Vku) has trumpeted a dramatic wake-up call.

The water sector is slumbering under the impression that modernisation, rather than liberalisation and competition, is the order of the day. While the BGW is waving its new benchmarking model as a formula for more efficiency in the sector, EU officials continue to work on introducing greater competition, the Vku warns.

At a Handelsblatt/Euroforum conference on water and wastewater in Berlin in mid-November, Ulrich Cronauge, legal expert at the Vku, urgently cautioned the water sector against making light of Brussels developments which could be critical for the future of Germany's largely communally-owned water and wastewater sectors – but which could also open the door to new private activity in the water and wastewater services sector.

In particular, he points to the Green Book on public-private partnerships and community law on public contracts and concessions, which could introduce competition through the back door. The document is now under discussion after its presentation by the European Commission on 30 April 2004. The slant of the initiative is to reduce the role of parishes to mere supervisors, while operative

business in water is transferred in the form of concessions "to the greatest extent to private companies", says Cronauge.

He says that this view is held not only by the European Commission's internal market and competition directorate, but also by the European Parliament, as is evident from parliament's final statement on 14 January 2004 regarding the Green Book on "services of general interest", since progressed to the status of White Book. This expressed a recognition of local and regional entities' rights to supply services of general interest, but at the same time stressed that the activities of communal companies that do not issue tenders should be limited to within the confines of their own parish boundaries.

Policies contained in the Green Book on PPP/concessions coupled with those in the White Book on supply of services of general interest may not only lead to stringent tendering rules – to the point where tendering for all communal services is obligatory – but also place a very restrictive interpretation on what constitutes "in-house" communal activities that would not be covered by the strict tendering rules.

"Looking ahead, two types of German municipal water companies could emerge: those which adhere to competitive tendering and can extend their activities nationwide and beyond, and those which don't issue tenders, whose activities are restricted to within their parish boundaries," says Cronauge.

Substantial decisions could be due on the PPP/concessions and services of general interest issues next year, he says, but adds that it could be up to six years before new policy is implemented, "not including transition periods".

While such key issues are discussed at European Union level, Germany's communal-dominated water sector also has homemade difficulties to contend with, which will need to be resolved either at state government level or steam-rollered through when the Green and White books develop into new rules from Brussels.

Legislation on parishes' business activities, in substance dating back to 1935, "puts parishes in shackles, or rather a straitjacket", says Cronauge. He points to a federal law to partially liberalise the waste sector, passed back in 1996, which included a new option for parishes to transfer their sovereign responsibility for wastewater disposal to third parties. However, the option only takes effect once transposed into state law. Of the 16

states, only Saxony, Baden-Württemberg and Saxony-Anhalt have even begun to tackle the issue, complains Cronauge.

In the meantime, the states have parish law based largely on the same principles but differing in interpretation of those rules. The state of North Rhine Westfalia, for instance, seems in certain cases at least to take a relaxed approach to the "territory" principle – that a communal enterprise's activities should be limited to its local area of operations. No efforts have been made to hinder 100% communally-owned Gelsenwasser's activities in other parts of Germany and abroad. Yet contradicting this liberal approach, a recent amendment to North Rhine Westfalia parish law introduces a requirement for a "market analysis" of implications on local trades, industry and business before a communal enterprise can initiate a new company or area of activities. "This is counterproductive to competition," states Cronauge.

Adding to the confusion, North Rhine Westfalia court ruled in October that waste disposal, which includes wastewater, is not an economic activity (but rather a service that is the sovereign responsibility of the communes). Under NRW parish law, the territory principle does not apply to non-economic activities – so while efforts by communal water enterprises to spread their activities tend to be frowned upon, NRW wastewater enterprises can operate activities nationwide.

Other states place varying emphasis on the "subsidiarity principle" in parish law. Lower Saxony, Saarland, North Rhine Westfalia and Schleswig-Holstein are agreed that a commune is justified in supplying a certain service assuming that performance is on a par with that of a private company; a private company must merely prove it is better than the communal company to get the business. In Rheinland Palatinate or Bavaria, a communal company is forbidden from providing a service unless it is better than the private company, appearing to raise the chances for private companies.

Cronauge believes the subsidiarity principle should be done away with "since it demands the impossible: a comparison between private companies that aim to maximise profit with communal enterprises, whose primary job is to fulfil the public service".

Perhaps the initiatives from Brussels will prompt Germany to clear away a lot of other anachronisms to liberate the communes from their bonds. ■