

Cities and Towns in the European Constitutional System

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(ed.)



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Preface

Stephan Articus and Klaus J. Beckmann

European law and European policy are increasingly affecting cities and towns. Statutory regulations reach deeply into the municipal sphere of responsibility; furthermore, as a constituent of the European multi-level system, municipalities are more or less subtly affected by shifts in the structure of this system, which are an inevitable consequence of European integration. This observation might surprise the impartial observer, and even some legal experts – the EU is, after all, an association of Member States. While “traditional” inter- and supranational organisations like the United Nations or the OSCE have no or almost no effect on national structures, the EU has obtained an influential power that far exceeds the formal structure of an association of states and penetrates deeply into the internal functional contexts of its Member States. This realisation means that Europe’s municipalities find themselves confronted with the challenge of having to develop a European policy strategy. Municipalities, in turn, can only achieve this by determining where they stand and recognising relevant cause-and-effect relationships.

A chief concern here is protecting the principle of local self-government as is constitutionally guaranteed in the German political system; it grants central significance to local governments as a level of democratic decision-making for all areas of competence relevant to local affairs. This is particularly relevant in the debate on administering services of general interest, which is traditionally a responsibility attributed to local self-government; however, European competition and public procurement law continually calls this allocation of competence into question. Local government assuming responsibility for services of general interest as an expression of the democratic principle is confronted with a justified interest in promoting free, transparent and fair competition. An equitable balance of these contradictory interests, which are both justified in themselves, is an aim that has yet to be met.

The joint symposium of the German Association of Cities and the German Institute for Urban Affairs should, therefore, contribute to determining the current situation and, beyond this, highlight future opportunities. The documentation at hand contains multifaceted reports illustrating how this was achieved. The broad array of speakers ranging from scholars to municipal representatives from Brussels and a member of European Parliament in itself ensures a comprehensive assessment of the current situation from a variety of specialist perspectives. We would like to take this opportunity to once again thank all those who participated in this event, including the discussants and other participants who enriched the meeting with their contributions.

The symposium underscored one aspect in particular: A prerequisite for municipalities to act successfully within the European political system is that imminent issues are recognised and analysed at the earliest possible stage so that solution strategies can be arranged in a timely manner. Advancing this aim will continue to be a common concern of the German Association of Cities and the German Institute of Urban Affairs in the years to come.

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I. Introduction

For many years now, European law has rightly been criticised for failing to establish in its framework the right of municipalities to independently carry out local community affairs. Private member's bills submitted by the Federal Republic of Germany and Austria aimed at anchoring the principle of local self-government in European law did not receive backing from other Member States.¹ In fact, there is no mention of the institution of local self-government as a structural principle worthy of protection in the 1958 Treaties of Rome, the 1991 Maastricht Treaty, the 2000 Treaty of Lisbon and the Treaty of Nice. The EU Reform Treaty signed in Lisbon on 13 December 2007 brought the first prospect of change. If the Reform Treaty comes into force – after ratification by all EU Member States – the following provisions shall provide for the right of local self-government:

Article 4, Paragraph 2: The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, **inclusive of regional and local self-government.**

Article 5, Paragraph 3: Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, **either at central or at regional and local level**, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The Protocol on the application of the principles of subsidiarity and proportionality stipulates that “before proposing European legislative acts, the Commission shall consult widely.” Article 2 of the Protocol specifies that, where appropriate, consultations shall take into account the regional and local dimension of the action envisaged. Article 5 of the Protocol states that any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should also contain some assessment of the proposal's financial impact. This firmly establishes the **instrument of regulatory impact assessment** at European level.

Finally, Article 8 of the Protocol stipulates that the European Court of Justice (ECJ) shall have jurisdiction in “**actions on grounds of infringement of the principle of subsidiarity by a European legislative act**”. In addition to the national governments, the Committee of the Regions may also bring such actions against European legislative acts for the adoption of which the Constitution provides that it be consulted. Furthermore, each Member State has the right to bring action.

These provisions eliminate any doubts voiced to date on whether municipalities may invoke the principle of subsidiarity introduced by the Maastricht Treaty in their dealings with the Community. Some had maintained that the Maastricht Treaty only dealt with division of competences between the Community and Member States, and was not concerned with division of competences at domestic level. If nothing else, this argument is no longer valid since the **right to bring actions against the Commission before the ECJ** on grounds of infringement of the subsidiarity principle, granted to the Committee of the Regions (CoR), among other bodies, is only of use if it can also be employed to safeguard competences at domestic level.

In general, however, even in view of these foreseeable new regulations, the fact remains that municipal interests have been insufficiently represented at EU level to date. This situation has given rise a series of problems which create major difficulties for municipalities. These include:

- The requirements of European public procurement law, which are in part excessive, ill-suited and a burden on municipal structures (e.g. with regard to joint task management between municipalities by means of joint bodies or with regard to urban development agreements concerning the sale of municipal property);
- Unsuitable procurement regulations: In spite of the European initiative Better Regulation, the Commission has set out detailed regulations governing the awarding of contracts that fall below the threshold – as defined in procurement guidelines – and that do not, therefore, ultimately apply to internal markets;

¹ Federal government response to a major interpellation submitted by the CDU/CSU parliamentary group in 2001 on “Sicherung des Bestands und der Fortentwicklung der kommunalen Selbstverwaltung in Deutschland im Rahmen der EU” (interpellation: parliamentary paper 14/ 4171; response: parliamentary paper 14/5636).

- Inadequate distinction of economic and non-economic services, which the Reform Treaty leaves within the competence of Member States. This area lacks clear criteria to distinguish between types of service. Developing relevant criteria is one of the Commission's key tasks in the area of services of general interest;
- The introduction of complex new procedures which municipalities are required to follow (environmental assessment, monitoring, tendering obligations, implementation of the Services Directive etc.);
- The introduction of high levels of protection, combined with procedural requirements and physical frontiers (e.g. the Habitats Directive and the Birds Directive);
- The introduction of substantive guidelines to assess environmental impact (Air Quality Framework Directive and subsidiary directives);
- The introduction of new systematic standards (Environmental Noise Directive).

In view of these issues, municipalities must focus their efforts on strengthening their position in Europe at least in the future. This will be particularly relevant with regard to the debate concerning the tasks of services of general interest. These services typically fell within the remit of local self-government. However, European competition and public procurement law continually calls into question this allocation of competence. Local government assuming responsibility for services of general interest – as an expression of the democratic principle – stands in opposition to the Community's legitimate interest in free, transparent and equal competition. To date, European Commission policy has been unable to adequately balance these equally valid yet competing interests. The European concept of "Services of general economic interest" does not adequately encompass this principle.

The institutional involvement of municipalities via the CoR presents an opportunity for effective municipal involvement in the development of European policy and legislation that has yet to be explored. At present, Germany has 24 full members on this board; the municipalities occupy only three of these seats, while the Länder occupy 21. In view of this ratio alone, it would seem wise to question the effectiveness of this board with regard to the municipal interests outlined. The role of the European Parliament and parliamentarians' connection to their regional and municipal bases must also be examined.

All told, this prompts the following questions: What are the consequences of municipalities' hitherto weak position in Europe? Which task areas has the (hitherto) unbridled influence of Europe affected in particular? What can be done to improve the status of municipalities at European level? The German Institute of Urban Affairs conducted a pre-symposium survey to collect initial responses to these key questions. The findings of the survey were as follows.

II. Findings of the survey

1. Response rate

Of the 36 experts contacted, 18 responded by May 2008 (i.e. exactly 50% of those contacted).

2. Content-specific trends

In response to question 1: *To what extent does the EU currently influence local self-government? (Please estimate the degree of influence in percent)*

The majority (> 50% of respondents) stated that the EU had a significant influence (more than 25%) on the following task areas:

- municipal constitutional system
- finance
- health care, hospitals
- building planning
- housing
- development
- local road traffic
- municipal land policy
- green spaces, nature preservation
- municipal business development
- owner-operated municipal enterprises, independent companies.

The only task areas the majority considered to be virtually unaffected by the EU were:

- local taxes
- local charges and contributions
- education
- surveying and land register management.

The majority of respondents stated that all other task areas showed at least “some evidence of influence”. This confirmed the assessment often articulated in publications that EU regulations influence up to two thirds of tasks performed by municipalities.²

In response to question 2: *To what extent does current European legislation guarantee the principle of local self-government?*

More than two respondents felt that this principle was “very well” represented in the European Parliament via a cross-party municipal parliamentary group and individual MEPS; respondents also maintained that municipal interests were well-represented in Brussels.

However, many respondents classified the following matter as thoroughly unsatisfactory:

- Provision for local self-government in the Treaties of Rome, the Maastricht Treaty, the Treaty of Nice and in the 2000 Treaty of Lisbon.

Opinions differed widely on how well the federal government and Länder represented municipal interests in Brussels. On average, respondents rated it as “satisfactory”.

In response to question 3: *In your opinion, which areas are most in need of action?*

This question provoked the following responses:

- It is important to act as a united force within Germany in order to prevent political processes at EU level challenging local self-government.
- Coordination / benchmarking / cooperation of municipalities across Europe in traditional areas of responsibility.
- Implementing the subsidiarity principle, reforming the regional development system.
- Exercising restraint in areas which naturally fall within the remit of the EC and federal or Länder government (e.g. promotion of foreign trade, representation abroad etc.).

2 Uwe Zimmermann: Die Europäische Verfassung – Eine Bilanz aus kommunaler Perspektive, Wiesbaden 2006.

- Environmental and nature preservation
- Public procurement
- Owner-operated enterprises
- Representing municipal interests at all levels – federal and Länder interests currently dominate.
- Municipalities across Europe must illustrate more clearly where their role fits into a unified Europe and what this role entails. Blanket approaches and levelling are not good; they lead to a loss of identity. Create solid funding measures; to sustainably strengthen regions' diversity and individuality – in all areas, e.g. environmental protection and economic activities.
- EU funding policy
- Cooperation between experts in different fields
- Development of federalist structures
- Domestic decision-making processes.
- Ensuring municipalities are given precedence over private businesses in performing municipal tasks (insofar as national law allocates this right).
- The EU should not intervene in matters concerning municipal services of general interest and municipal planning authority.
- Harmonising national legal systems to facilitate willingness and opportunities for cooperation between municipalities.
- Precise definition of the role of municipalities in the Europeanisation process.
- Institutional integration in the European multilevel system at all levels;
- Improvement of pan-European interest intermediation and interest organisation
- Enhanced coordination in regional and structural policy.
- At national level: boost awareness in national administrations, ministries, the EU Commission and the Council Working Parties; better equip federal representatives responsible for conducting negotiations in Brussels and EU Commission members with information concerning municipal matters.
- At municipal level: deal more intensively with EU topics. Build networks to further intensify collaboration and thereby increase opportunities to “learn from one another” and exploit synergies.

In response to question 4: *Which measure(s) do you consider most pressing in the endeavour to promote local self-government in the EU?*

Respondents made the following comments:

- Strengthening municipal services of general interest / exemption of market-related services of general interest from Article 86 of the EC Treaty.
- Shifting local perceptions to a mindset that accounts for regional strategic contexts (in their research projects they also appear to place too great a focus – in my opinion – on purely local fields of competences and take almost no account of spatial and expert contexts).
- Involving leading municipal associations as soon as the federal government is involved.
- Improving financial resources.
- Significantly boosting direct representation in the CoR; Länder interests can take less priority;
- Strengthening federal interests (superordinate) with regard to uniform legislation.
- It does not make sense to oppose everything; Germany's trademark in Europe. Thus: intervene in a constructive manner in those areas that offer potential for the development of municipalities. This allows municipalities to preserve their identity while engaging in cultural exchange. Focus more strongly on specific topics that place a burden on municipalities such as: abolishing Sparkassen (municipally sponsored savings banks), combatting municipal economic activity (this makes no sense at all and will not help matters!).
- Municipal right to bring action;
- Committee of the Regions.

- Unlimited protection of the freedom to award contracts for cooperative ventures between municipalities.
- Enhanced consolidation of the “municipal family” = leading municipal associations in Brussels;
- Stop EU competition regulations interfering in municipal matters; e.g. no forced privatisation of water supply.
- Subsidiarity;
- Strengthening local decision-making powers, or at least preserving existing powers.
- Political action to combat the overbearing influence of free-market changes to municipal services of general interest. Developing individual concepts to improve so-called “positive integration”, insofar as municipal services of general interest are affected.
- Active participation in the drafting of policy and legislation (at an early stage).
- At national level and in Brussels: meetings of experts to examine specific themes.
- Developing clear guidelines defining the boundaries between public and private economic activity. Unambiguous definition of competition rules in the area of services of general interest; creating clear organisational structures to safeguard the municipal economy.

3. Summary review of survey findings

The survey and the specialist conference primarily aimed to find ways of strengthening local self-government in Europe. The proposals put forward in the survey can be grouped into five categories:

Firstly: Introducing a **provision expressly guaranteeing the institution of local self-government** in European agreements, and granting municipalities the means to defend themselves by means of officially recognised rights of audience and action.

The Reform Treaty goes some way towards fulfilling this goal.

Secondly: Boosting **municipal presence via lobbies** in Brussels, resulting in increased factual consultation prior to setting standards.

This goal has also been achieved to some extent, particularly as a result of the Protocol on the application of the principles of subsidiarity and proportionality.

Thirdly: Strengthening domestic **vertical cooperation between federal government, Länder and municipalities**, including their leading municipal associations to defend and strengthen self-government at municipal level.

The principle of local self-government can only be externally defended vis-à-vis the Community insofar as it is recognised and exercised within Germany's own constitutional structure. This throws major doubt upon the (widely) accepted theory whereby the institution of local self-government – with its representative bodies enshrined in Article 28, Paragraph 1 of the Basic Constitutional Law – does not belong to the constitutional features protected by Article 79, Paragraph 3 in conjunction with Article 20, Paragraph 2 of the Basic Constitutional Law. Article 28, Paragraph 1 of the Basic Constitutional Law stipulates that, in each of the **Länder, administrative districts and municipalities**, the people shall democratically elect a representative body; the latter represent the main institution of local self-government as enshrined in Article 28, Paragraph 2 of the Basic Constitutional Law. The “eternity guarantee” in Article 79, Paragraph 3 of the Basic Constitutional Law protects, *inter alia*, “the principles laid down in Article 20 of the Basic Constitutional Law”. Article 20, Paragraph 2 stipulates that all state authority is derived from the people and that this authority shall be exercised by the people through elections and other votes. Has the time not come to recognise the fact that municipal representative bodies and the local self-government they control are also indispensable components of the constitutional order of the Federal Republic of Germany? Article 23 Paragraph 1(3) of the Basic Constitutional Law states that this order is “safe in European hands”. EU legislation contrary to this order cannot prevail.

Fourthly: Increasing **horizontal cooperation between municipalities** within nation states and beyond national borders to strengthen their position in Brussels.

Leading municipal associations represent cities, municipalities and administrative districts at Land,

federal and – via its European offices, *inter alia* – Community level. Whenever possible, the organisations work together at pan-European level. The Union has grown to include 27 Member States and this presents a great deal of scope for increased collaboration in the future.

Fifthly: Defending, on a case-by-case basis, the core competences of local self-government against unjustifiable intervention and legislative acts from Brussels

The following core competences particularly warrant defence:

- Performing services of general interest, including the necessary municipal economic activity by means of private and public legal entities.
- Safeguarding municipal financial autonomy, including the freedom to award contracts within the scope of inter-municipal cooperation.
- Safeguarding municipal planning authority in land use management.

To summarise, it must be noted that municipalities are the most important hinge between the European Community and its citizens. One could consider granting municipalities a status in the European constitutional structure akin to that of citizens of nation states, who enjoy direct, democratic rights of participation. In a similar manner to citizens' initiatives and public petitions for referendums – as guaranteed in the municipal and district code of the Federal Republic of Germany – municipalities in Europe would then be able to table their own proposals at least in the European Parliament, resulting in EU-wide agreement on questions of substance.

III. Keynote Speech

On the content and enforceability of the subsidiarity principle for municipalities in the European Union

Introduction

Mention of the topic provokes surprised reactions, at least among European legal practitioners working at federal level in Germany. Municipalities are not one of their primary concerns – either with regard to the subsidiarity principle or the EU as a whole. There is a simple reason for the abstemious approach of European law with regard to municipalities: the European Union is an alliance of Member States and not an alliance of their regional and local subdivisions. Thus the Union institution of the Council only consists of representatives of Member State central governments and not representatives from regional and local level. Likewise, the European Community's legal acts exclusively address Member States and not the regional and local level.

I will tackle this topic in **three sections**. Firstly, I will highlight the role of **municipalities** in the **European Union**, and secondly, address the **subsidiarity principle**. Thirdly, I will examine to what extent the **subsidiarity principle** can actually **benefit municipalities**.

Section One: Municipalities in the EU

This is an interesting phenomenon: in practical terms, the EU plays a major role in municipalities. Municipalities, however, barely feature in EU law.

- In theoretical terms, the **EU's importance** for **German municipalities** results from their obligation – as part of the German administrative framework – to enforce Community law.

Three common examples:

EC competition law³ (Art. 107 TFEU) obliges municipalities to substantially limit their subsidies for municipal enterprises in the areas of public transport, energy, water, and savings banks.

Numerous EC regulations create legal uncertainty with regard to public procurement law.⁴ For example, the Commission took the view that municipalities should not be able to simply transfer the responsibility for sewage disposal to a municipal water board - they should first have to make a call for tenders.

The third example concerns EC environmental law⁵ which comprises numerous provisions affecting municipalities, e.g. regarding the treatment of municipal waste water or air pollution prevention.

- However, European primary legislation and contract law barely take municipalities into consideration at all. There is certainly some truth in the term "**EU municipal-blindness**"! The Treaty of Lisbon also only gives municipalities a cursory mention.

3 e.g. Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to state aid to small and medium-sized enterprises; Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC; Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC; Article 18 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty.

4 e.g. Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

5 e.g. Directive 2006/118/EC of the European Parliament and of the Council of 12 December 2006 on the protection of groundwater against pollution and deterioration; Council Directive 91/271/EEC of 21 May 1991 concerning urban waste water treatment.

Article 4, Paragraph 2, Sentence 1 of the Treaty on European Union (as amended by the Treaty of Lisbon) decrees that the Union shall respect the national identity of Member States “inherent in their fundamental structures, political and constitutional, inclusive of **regional and local self-government**”. It goes without saying that constitutional structure and national identity encompass self-government. The reference to self-government neither harms nor benefits municipalities. However, Article 4 of the Treaty on European Union (as amended by the Treaty of Lisbon) does not grant self-government a legal position vis-à-vis the European Union. Should a Member State decide to dispense with local self-government in the future, the Union will continue to respect the new identity of this Member State minus self-government.

Article 196, Paragraph 1 (a) of the TFEU states that the Union’s action shall aim to “support and complement Member States’ action at national, **regional and local level**” with regard to risk prevention, *inter alia*. One can only guess what this opaque formulation means in concrete terms. In any case, this passage only specifies the goal of supporting and complementing and not the form this supporting and complementing will take. In spite of this, the Union does not restrict the scope of its goal to Member State level, but explicitly includes the regional and municipal level.

Furthermore, the **Treaty of Lisbon** makes no mention of **municipalities** either **directly** or in conjunction with the **Committee of the Regions**. According to Article 300, Paragraph 3 of the TFEU, the Committee consists of representatives of **regional and local authorities**.

The **Protocol on services of general interest** contains a rather curious statement. It reads: “The shared values of the Union in respect of services of general economic interest... include in particular: – the essential role and the wide discretion of national, **regional and local authorities** in... organising services...”.

Even if one applies very generous standards when assessing this formulation, the verdict on such a statement can only be negative. The protocol maintains that the Union holds shared values in respect of services of general economic interest, and these are said to include the wide discretion of regional and local authorities! The fact that the EU makes a specific demand on the finer workings of national state institutions is surprising enough in itself; neither the European Charter of Local Self Government, nor the majority of Member State constitutions accord the municipalities a core area of responsibilities removed from the legislature. Defining “administrative discretion as a value” is misplaced when compared with the values mentioned at the outset (Article 2 of the Treaty on European Union, as amended by the Treaty of Lisbon) such as human dignity, freedom, democracy et al. What exactly does this administrative discretion relate to? The value of its scope remains unclear. Do Member States contravene European law if they limit this discretion?

Article 22, Paragraph 1 of the TFEU and Article 40 of the Charter of Fundamental Rights guarantees **the right to municipal elections**. Article 19, Paragraph 1 of the EC Treaty already made a similar guarantee, meaning the Treaty of Lisbon contains nothing new in this respect.

In addition, the **article on subsidiarity**, Article 4 of the Treaty on European Union (as amended by the Treaty of Lisbon) and the accompanying **protocol** make reference to municipalities.

Section Two: Subsidiarity principle

I shall firstly provide some **background information** on the principle before we address it in terms of **content** and **enforceability**.

The subsidiarity principle was first incorporated into primary European legislation in the 1992 Maastricht Treaty. Since then, German policymakers and academics have vested high hopes in the subsidiarity principle; some view it as Europe’s “architectural principle”⁶ or even the “Magna Carta for Europe”⁷. Others consider it to be “empty rhetoric” or “just words”. In any case, the subsidiarity principle is a **German hobbyhorse**. Germany is said to have exerted a decisive influence on the Commission’s decision to adopt the subsidiarity principle.⁸ A glance at the vast amounts of German literature provides further evidence of the national preoccupation with this topic: some 150 German publications have appeared on the European subsidiarity principle. The first monography on the subsidiarity principle in a national context was published in 1956; more than 100 other publications followed in its wake. At the turn of the

6 Cf. Hermann-Josef Blanke: Das Subsidiaritätsprinzip als Schranke des europäischen Gemeinschaftsrechts?, in: ZG 1991, 133 (144), with reference to the resolution of the conference “Europa der Regionen” on 18/19 October 1989 in Munich, printed in: Knemeyer, ZRP 1990, p. 173 (174).

7 Alfred Sauter: Subsidiaritätsprinzip als Magna Charta für Europa, in: Bayerischer Gemeindetag 1989, p. 211 f.

8 Stefan Ulrich Pieper: Das Subsidiaritätsprinzip und die Politische Union, p. 222 f.

millennium, the issue became the subject of an entire congress, which traced the development of the subsidiarity principle from the globalised society of the present day back to the early modern period.⁹

To date, however, this theoretical fervour has had little correlation to the principle's **practical relevance**. The federal government presented its first annual report on the European Community's application of the subsidiarity principle in 1995. In 2004 it ceased publishing the report altogether. The data from the individual annual reports are not easy to analyse. However, they do show that over the course of the review's ten-year publication period, the federal government raised 67 objections – a rough annual average of just seven.¹⁰ Thus, each subsidiarity objection accounts for more than two academic publications.

Looking beyond our national boundaries, it quickly becomes clear that Member States are not, per se, on the same page when it comes to subsidiarity. One Member State may view a directive as an attack on national authority, whereas another may see the same directive as welcome relief prescribed by Brussels.

The Commission¹¹ and national politicians¹² and academics¹³ have developed their own subsidiarity check mechanisms. However, the very wording of the subsidiarity principle in the EC Treaty provides us with a two-tier screening system: can “the objectives of the proposed action... be... sufficiently achieved by the Member States?” This is the so-called **negative criterion**. It is designed to impartially assess whether Member States would be unable to cope with achieving the objective. The negative criterion is complemented by a **positive criterion**: can the objectives of the proposed action “by reason of its scale or effects be better achieved by the Community”? This criterion compares the efficiency of the European Community with that of the Member States.

There exists very little judicature concerning Article 5, Paragraph 2 of the EC Treaty and **subsidiarity** checks. The **ECJ** has issued no substantive statements on this principle. While the ECJ has addressed the subsidiarity principle in more detail in its judgements, it has done more to **undermine** than strengthen it. In its 1995 judgement on the Working Time Directive, the ECJ addresses the subsidiarity principle for the first time, making the following succinct observation: “Once the Council has found that it is necessary to improve the existing level of protection as regards the health and safety of workers and to harmonise the conditions in this area while maintaining the improvements made, achievement of that objective through the imposition of minimum requirements necessarily presupposes Community-wide action”.¹⁴ This judgement's bottom line: if the Council determines that legislation requires harmonisation by the EC, this “necessarily presupposes” that the EC should assume the primary role in this task. There is no assessment of whether the Council has rightfully determined the necessity to harmonise legislation. The ECJ's insubstantial remarks concerning the Tobacco Products Directive are just as unconvincing: “As regards the question whether the Directive was adopted in keeping with the principle of subsidiarity, it must first be considered whether the objective of the proposed action could be better achieved at Community level. [...] [The] objective cannot be sufficiently achieved by the Member States individually and calls for action at Community level, as demonstrated by the multifarious development of national laws in this case [...]. It follows that, in the case of the Directive, the objective of the proposed action could be better achieved at Community level.”¹⁵ This judgement maintains that “multifarious” national laws are sufficient grounds for the EC to assume primary responsibility for a matter. However, multifarious national laws exist in every area the EC has yet to harmonise.

The **Treaty of Lisbon** has no major impact on this judicature. The material requirements of the subsidiarity principle will remain more or less the same. The **procedure** used to check subsidiarity,

9 Blickle/Hüglin/Wyduckel (ed.): *Subsidiarität als rechtliches und politisches Ordnungsprinzip in Kirche, Staat und Gesellschaft*, Berlin 2002; eponymous international congress from 1-4 November 2000, Johannes-Althusius-Gesellschaft.

10 See Overview 1 in appendix.

11 Sample explanatory statement for legal acts, COM C (2003) 4555.

12 “Procedural principles for review of compliance with the principles of subsidiarity and proportionality by Federal Ministries”; “Review questionnaire for review of compliance with the principles of subsidiarity and proportionality by Federal Ministries”: Joint Rules of Procedure of the Federal Ministries (GGO), Annexes 9 and 10.

13 Cf. Formulation proposal for Article 5, Paragraph 2 of the EC Treaty by Christian Calliess: *Kontrolle zentraler Kompetenzausübung in Deutschland und Europa: Ein Lehrstück für die Europäische Verfassung*, EuGRZ 2003, 181 (197).

14 Case C-84/94, ECR 1996, I-5755, paragraph 47.

15 Case C-491/01, ECR 2002, I-11, 606, paragraph 180 f.

however, **will change**.¹⁶ The new subsidiarity protocol stipulates that the Commission must forward draft legislative acts, accompanied by an explanatory statement, to the European Parliament and the Council and, for the first time, to national parliaments – in the case of Germany, the Bundestag and Bundesrat. Both chambers have eight weeks from the transmission of the draft to issue a reasoned opinion as to why they consider the EU draft incompatible with the subsidiarity principle. What are the **legal consequences** of a critical opinion issued by a national parliament? This depends on the number of votes. Every national parliament has two votes. The EU currently comprises 27 Member States, giving a total of 54 votes. The Bundestag and the Bundesrat each have one vote and are not required to cast a block vote. Where the critical opinion represents less than one third of the total number of votes, the EU legislative institutions give this opinion “due consideration”. If the critical opinion represents more than one third of the total number of votes, the Commission reviews its proposal. In either case, the Commission may decide to maintain, amend or withdraw its proposal. It must give reasons for its decision.

Should a subsidiarity objection fail, Member States may resort to an **action of nullity**. The Treaty of Lisbon broke new ground by according **national parliaments** the right to **bring actions** before the ECJ should legislative acts infringe the subsidiarity principle. Actions are “notified [...] by Member States [...] on behalf of their national Parliament or a chamber thereof.” The special act of parliament supplementing the Treaty of Lisbon stipulates that the Bundestag or Bundesrat assume responsibility for bringing the case before the ECJ once they have resolved to bring an action.

One would be justified in doubting whether subsidiarity objections will have any practical relevance beyond their theoretical symbolic value. To date the European Court of Justice has not declared any directive or regulation invalid for infringing the subsidiarity principle. This situation is unlikely to change much in the future. The Court of Justice will doubtless examine statements on subsidiarity very carefully. With regard to the subsidiarity principle itself, the Court’s two aforementioned decisions show that it only intends to conduct a perfunctory review. As long as the Commission provides a detailed explanatory statement proving its proposals are fair with regard to subsidiarity, it is highly improbable that the Court of Justice will allow a subsidiarity objection in the future.

Section Three: Municipalities and the subsidiarity principle

Municipal demands for the introduction of the subsidiarity principle can be traced as far back as the end of the 1980s. However, 20 years on, in spite of the Treaty of Lisbon, relatively poor results have been achieved with regard to “municipalities and the subsidiarity principle”: Municipalities play only a minor role in the Protocol on the application of the principles of subsidiarity and proportionality. The Commission is obliged to conduct **consultations** before proposing legislative acts. “Such consultations shall, where appropriate, take into account the **regional and local dimension** of the action envisaged”. Any draft legislative act should contain a statement demonstrating its compliance with the principles of subsidiarity and proportionality. The statement should also contain some assessment of the proposal’s implications for the rules to be put in place by Member States, “including, where necessary, the **regional legislation...**”.

Draft **legislative acts** must ensure that the financial and administrative burdens, *inter alia*, placed on **regional and local authorities** are kept to a minimum and are commensurate with the objective to be achieved. Prior to raising a subsidiarity objection, it is the duty of each national parliament to consult **regional parliaments** with legislative powers. This is an unfortunate statement to say the least, which certainly does not affect German municipalities. The EU is obliged to respect the national identity of Member States. It does not have the right to determine the obligations of national parliaments with regard to their laws governing internal institutional affairs. There are no legal consequences should the parliaments fail to conduct these consultations. This applies at European level and in Germany without exception. The provisions concerning the subsidiarity principle themselves do, at least, make reference to municipalities. Article 5, Paragraph 3 of the Treaty on European Union (as amended by the Treaty of Lisbon) defines the subsidiarity principle as follows: the Union “shall act only in areas which do not fall within its exclusive competence, if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central or at **regional and local level**, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”

16 See Overview 2.

Even at first glance, the purpose of making reference to Member States' specific administrative levels appears unclear. Member States alone hold the right to decide whether to enforce actions at central, regional or local level. Municipalities may oppose Member States' internal decisions insofar as this is provided for by national constitutional law. Several Member States grant municipalities this option; German municipalities have the right to file a **constitutional complaint** (Article 93 Paragraph 1 (4b) of the Basic Constitutional Law). However, municipalities may not bring constitutional complaints against European legal acts. Since acts of **European legislation** take **precedence** over national law, constitutional complaints filed by municipalities will rarely have much chance of success. In 2003, in response to a motion submitted by the coalition parties in power at the time – the SPD and Alliance 90/The Greens – the Bundestag decided to grant **the municipalities** a direct **right to bring action** of this kind:¹⁷ "Regional and local authorities should be granted a right to bring action before the European Court of Justice insofar as European Union measures directly affect their rights and responsibilities." However, this proposal was not incorporated into the Treaty of Lisbon. Municipalities must rely on the federal government and the Länder to raise objections at European level. Member States are responsible for deciding whether municipalities exist at all and what rights they should have. As a result, it would be rather odd to grant municipalities their own right to bring action in primary law. It is, therefore, more logical to implement the solution proposed by the Lisbon Treaty, namely, to equip the Committee of the Regions with a right to bring action.

Conclusion

To summarise, we can conclude that the numerous references to municipalities in the Treaty of Lisbon lack any form of practicable legal status. This also applies with regard to the subsidiarity principle. Municipalities can only console themselves with the fact that, far from being practically relevant, the subsidiarity principle ultimately plays little more than an academic-theoretical role at federal government and Länder level.

Overview 1:

Subsidiarity check conducted by the federal government and the Bundesrat

Year	a			b					
	Fedgov	BRat	•	c					
	Proposal under review			Objection					
	Fedgov	BRat	•	Fedgov	% of a	BRat	% of b	•	% of c
1995	232	190	422	24	10	13	7	37	9
1996	168	190	358	9	5	45	24	54	15
1997	117	190	307	4	3	34	18	38	12
1998	89	190	279	1	1	23	12	24	9
1999	60	150	210	2	3	18	12	20	10
2000	84	150	234	5	6	26	17	31	13
2001	109	150	259	5	5	23	15	28	11
2002	93	150	243	4	4	25	17	29	12
2003	106	170	276	10	9	28	16	38	14
2004	73	170	243	1	1	23	14	24	10
•	1,131	1,700	2,831	5	–	82	–	323	–
Ø p. a	113	170	283	7	6	8	15	32	11

The federal government and the Bundesrat used different criteria to collect the data, and these did not remain consistent over the years. Furthermore, in some cases only the statistical mean is available. Analysis can therefore only give an indication of general tendencies.

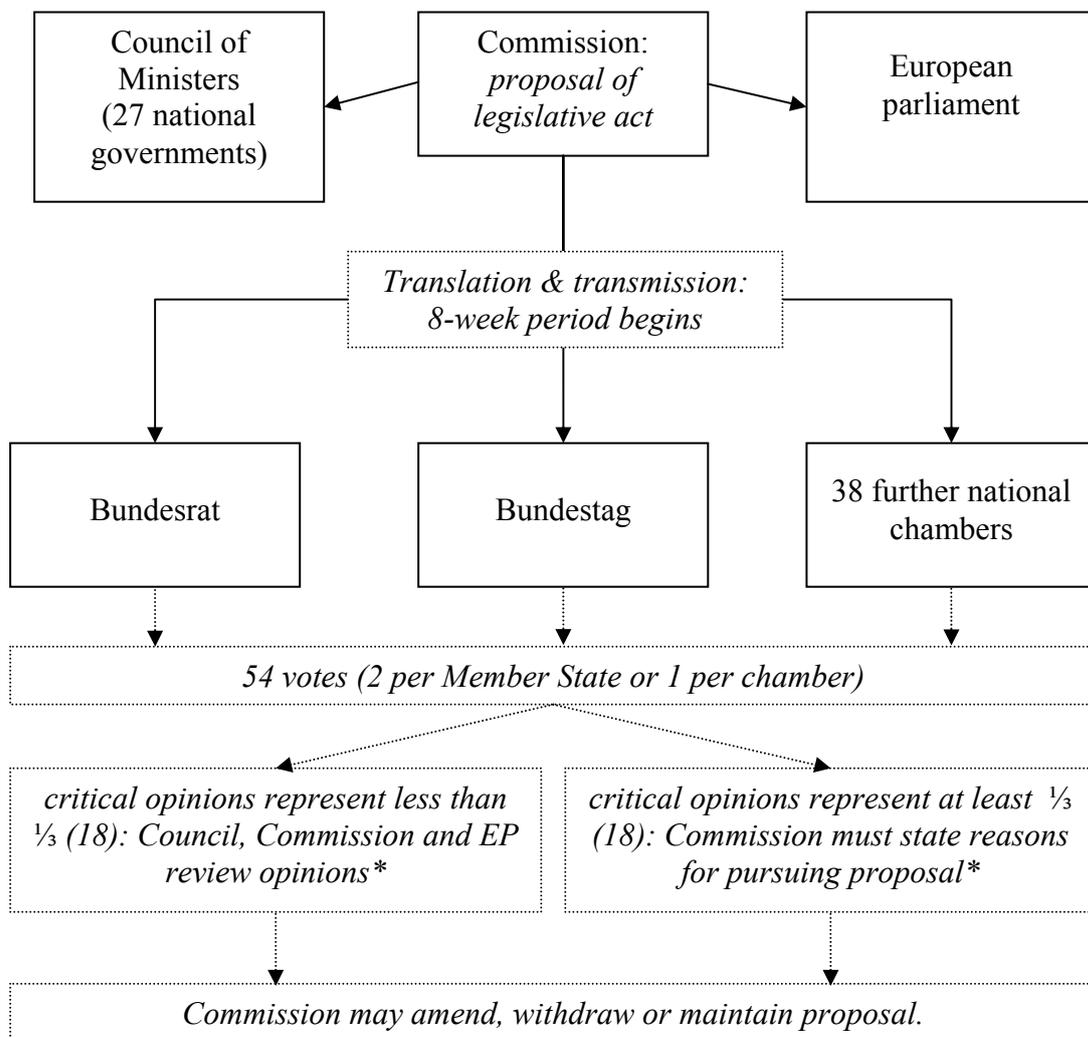
17 Minutes of plenary proceedings 15/43, recorded on 08 May 2003, p. 3569(A); parliamentary paper 15/548 of 12 March 2003, motion submitted by the SPD and ALLIANCE 90/THE GREENS parliamentary groups, "Der Europäischen Verfassung Gestalt geben – Demokratie stärken, Handlungsfähigkeit erhöhen, Verfahren vereinfachen", p. 11.

The summary is the result of our own calculations. We analysed federal government subsidiarity reports from 1995 to 2004.¹⁸ The federal government ceased to publish subsidiarity reports in 2005.

Overview 2:

Subsidiarity objections raised by national parliaments

in accordance with the Protocol on the application of the principles of subsidiarity and proportionality



*For proposals regarding the area of freedom, security and justice, the threshold is $\frac{1}{4}$ (14 votes).

18 Bundestag papers 13/5180 (1995); 13/8174 (1996); 13/11074 (1997); 14/1512 (1998); 14/4017 (1999); 14/7130 (2000); 15/111 (2001); Bundesrat papers 922/03 (2002); 54/05 (2003); 52/06 (2004).

Discussion

Schmidt-Eichstaedt notes that German and European courts differ greatly in their understanding of the scope and goal of legal checks. He believes this has a decisive influence on the robustness of the subsidiarity principle at European level:

- In Germany, the outcome is the primary concern: A decision is considered legitimate if it produces the right outcome. The procedure that led to this outcome is ultimately of little relevance.
- Courts in other European states (including the ECJ) conduct checks to establish whether a decision has been reached following the correct procedure and if it is thus rooted in sound argument. There is no “right outcome”, only substantiated outcomes achieved following correct procedure.
- This checking procedure is also of great significance for ECJ checks on compliance with the subsidiarity principle. The ECJ examines first and foremost whether correct procedure has been observed. If explanatory statements concerning directives and regulations take account of the subsidiarity principle and present balanced and convincing arguments, it sees no cause to take judicial action against the outcome.

Pechstein points out that standardising legal systems in the EU is not an end in itself; rather, the subsidiarity principle will limit its scope. Thus, he does not consider the goal of legal system harmonisation alone sufficient justification for creating European legislation. He noted that, while the constitutional treaties have not granted municipalities an explicit role or specific rights, Article 230, Paragraph 4 Lisbon Treaty may be of assistance in this respect as it accords the right to bring action to legal persons adversely affected by EU regulations. Municipalities may also exercise this right to bring action, as they are bodies established under public law and thus also legal persons.

Leitermann states that the reference to local self-government in Article 4, Paragraph 2 of the Reform Treaty is primarily of political significance. Leading municipal associations do not expect this to allow them to pursue actions at the European Court of Justice. He acknowledges that the subsidiarity principle is a German hobbyhorse. He also notes, however, that other countries are increasingly recognising the importance of the subsidiarity principle and that interest in this principle is growing in these countries. He maintains that, in case of doubt, the ECJ backs the European Commission as it is an institution of the EU and thus obliged to pursue European Union goals. He poses two questions:

- Are national governments obliged to forward objections submitted on grounds of infringement of the subsidiarity principle? What happens if they fail to do so?
- What decision-making powers does the German Federal Constitutional Court have with regard to European legal matters and what conclusions can be drawn from its judgement on the so-called “ausbrechende Rechtsakte” (ultra vires acts) with regard to infringements of the subsidiarity principle?

Hölscheidt firstly acknowledges that municipalities’ political status in the European constitutional treaties has grown to a certain extent. He proceeds to point out, however, that from a legal perspective the position of municipalities remains the same, as their right to pursue actions before courts has not changed. There have been no advances in this respect.

In reference to question one, he says that it depends on the Member State’s constitutional system. In Germany, a violation of duty could give rise to disputes between institutions. If the federal government violates its duty to transmit objections, bringing an action before the Constitutional Court in Karlsruhe would be the recommended course of action. It is possible that the ECJ will also accept a direct complaint. Thus the national executive has no means to impede the will of the legislature.

In reference to question 2: The “Maastricht Urteil” of the German Federal Constitutional Court states that “ausbrechende Rechtsakte” must not be observed. This implies that legal acts are invalid if they pertain to areas that fall outside the EU’s competence. However, the question remains as to who is ultimately responsible for determining this. In Germany the decision would lie with the Federal Constitutional Court. At European level the ECJ would be responsible. In the end, the task of determining the matter would doubtless fall to the European Court of Justice.

Stahl states the need for a European culture of subsidiarity. He claims it is wrong to limit discussion on the issue of subsidiarity to the context of rights to bring actions. In his opinion, the period leading up to drafting legislation and the corresponding consultation procedures are of far greater importance. He asserts that the reality of developing policy in the EU has changed and that the introduction of the Impact Assessment has influenced the work of the Commission with regard to drafting Green and White Papers. The alleged “municipal-blindness” is a thing of the past. Stahl also reports developments concerning the ECJ’s court rulings on subsidiarity issues. To illustrate this, he refers to a case where the ECJ had to rule on whether tax concessions for a small extraterritorial part of a Member State (the Azores, part of Portugal) contravened EU law. The ECJ decided they did not, on the grounds that it was a matter of domestic structure. Domestic structure plays a decisive role in ECJ decisions concerning the subsidiarity principle. The Federal Republic of Germany is at liberty to issue its own regulations in order to safeguard the subsidiarity principle. He cites the example of the right to bring action granted to the regions of Belgium.

Stahl concludes by pointing out that the importance of municipalities and regions is also illustrated by the fact that Member State seats in the Council of Ministers are no longer solely occupied by representatives of national governments, but increasingly by representatives from individual regions. He cites Belgium and the case of northern Italy as examples. How national governments choose their representation in the Council of Ministers is, he claims, a matter of domestic organisation.

Ruge also notes that reference to municipalities at various points in the Reform Treaty is primarily of importance in political terms. Against the backdrop of this changed constitutional situation, he claims awareness is growing of the significance of municipalities and regions in Europe. He raises the question of how national parliaments can involve municipalities in preliminary checks on compliance with the subsidiarity principle – given that the period for submitting reasoned opinions is limited to eight weeks – and what the procedure will entail for parliaments raising subsidiarity objections.

Krautzberger points out that the right to self-government set out Article 28, Paragraph 2 of the Basic Constitutional Law goes further than, and expresses something different to, the subsidiarity principle. He believes that Article 28, Paragraph 2 of the Basic Constitutional Law comprises a principle on governmental structure. He too is of the opinion that the responsibility for ensuring effective integration of municipalities in the political decision-making processes of the European Union lies primarily with the national government and national legislature.

Kiepe thoroughly explores the meaning of the subsidiarity principle. He draws a distinction between the right to pursue legal actions and substantive law. Firstly, he explains that municipalities only have recourse to a right to pursue legal actions on the basis of objections concerning infringement of the subsidiarity principle. He goes on to explain that the substantive obligation to comply with the subsidiarity principle will, however, influence the procedure of drafting legislation at an earlier stage and prevent ultra vires acts. Kiepe maintains that, in accordance with Article 4, Paragraph 2 and Article 5 of the Reform Treaty, the subsidiarity principle will play a more important role in political decision-making processes in the future.

Magiera claims it is unfair to accuse the ECJ of partiality. The ECJ must make rulings based on the legal framework of the EU Treaties while bearing in mind the goal of creating ever greater cohesion of Member States. In so doing, the ECJ does not back the Commission as a matter of principle. He cites an example of a judgement concerning cartel law, where the ECJ complicated the Commission’s position by demanding more compelling reasons to justify its decision. In addition, Magiera insists that the subsidiarity principle has its limits. He gives the examples of tobacco advertising and smoking ban initiatives, where he believes municipalities are too closely connected to the interests of the relevant lobbies. Furthermore, he too is of the opinion that there have been advances concerning the ECJ rulings with regard to the subsidiarity principle. Given the amendments introduced by the Reform Treaty, Magiera believes the ECJ’s interpretation of the Treaty must in future also account for the right to local self-government as a structural principle of the Member State.

Schmidt-Eichstaedt also questions the feasibility of organising municipal participation within the eight-week period the Bundestag has at its disposal to submit opinion on draft legislation from Brussels.

Hölscheidt notes that the eight-week period only begins once the draft has been translated into all the EU's official languages. Given that translating drafts into languages such as Gaelic is often a lengthy process, the period is actually much longer than eight weeks. Moreover, he points out the need to account for the coordination problems prevalent at EU level. Europe comprises 40 legislative chambers, 23 languages, 9,500 parliamentarians in its Member States and they all want to have their say. From the Commission's perspective, therefore, the individual national parliaments per se do not hold particularly strong positions. Hölscheidt points out the "problem of being heard" among an ever-increasing number of Member States.

He maintains that, as each of the EU's 27 states already possess powers of co-decision, it would be difficult to also allocate bodies at decentralised level a greater say in matters. At most, this would be possible during an action's preliminary stages. Small states already expressed major concerns about being "pushed around" during the EU Convention.

Hölscheidt feels that the actions on the grounds of infringement of the subsidiarity principle should be organised at domestic level. Example:

Municipality → Land: Mecklenburg-Vorpommern → federal government → EU

Conclusion: This method would enable a single municipality to bring an action, but it would only have an impact if several municipalities backed the action (e.g. via the German Association of Towns and Municipalities and the German Association of Towns and Cities).

With regard to the problem of EU ultra vires acts:

1. At present, it is probable that Member States will simply disregard a directive if they feel it has been issued without due legal foundation.
2. The ECJ will probably react by pronouncing a declaratory judgement against the national government concerned;
3. The national government's failure to accept this will incur a fine;
4. Failure to pay this fine will result in enforcement by means of reduction in EU payments to the state in question. Its role as net contributor would put Germany in a good position, since it could then cut its payments to the EU.

This situation would ultimately lead to a political, not a legal, solution.

Thus Hölscheidt considers the preparation of acts of law to be of far greater importance than pursuing a legal action at a later stage. For this very reason, he says, the Bundestag set up an office in Brussels several years ago. He advocates establishing allies in other Member States during preliminary phases to give opinions more weight in the Commission's assessment. He does not believe the focus here should be on institutional and organised forms of collaboration. Options in this area were explored extensively a long time ago. Instead, he advocates concentrating on informal means of cooperation, disseminating information and reaching agreements.

III. Introductory Presentations

Karsten Hoppenstedt

1. Introductory Presentation

The role of the European Parliament in safeguarding and strengthening local self-government in Europe: Who can exert an influence and by what means?

Let me begin my presentation on “The role of the European Parliament in safeguarding and strengthening local self-government in Europe. Who can exert an influence and by what means?” *in media res* by citing an example from the past:

In 1993 the small municipality of Goldenstedt in the administrative district of Vechta in Lower Saxony lodged an appeal with the Federal Constitutional Court against the law ratifying the Maastricht Treaty, claiming that the Treaty jeopardised its right to self-government. Goldenstedt was concerned that the jurisdiction of European institutions would have a detrimental impact on municipal tasks. Its reasons included standard EC practice up until that point and the Maastricht Treaty’s vague formulation concerning the allocation of tasks.

The Constitutional Court rejected the appeal but seized the opportunity to add an important clause to the federal legislator’s general ledger:

The responsibility for preserving the municipal right to self-government as we move towards the European Union lies with the Bundestag, which, in its role as legislator, must observe Article 28 of the Basic Constitutional Law.

A representative of Lower Saxony’s government later made the following comments concerning the action tirelessly supported by Lower Saxony’s Association of Towns and Municipalities:

If we had been consulted, we would have advised against the action. After all, Lower Saxony approved the Treaty. But it was good that the municipality brought this action. The successful outcome proves that it was right to do so and that self-government is a worthwhile cause. Federalism also benefited in the process.

Goldenstedt is relevant for the topic at hand in three respects:

1. In most EU states it would be unthinkable for a small municipality to raise an objection against an international treaty the national government intends to sign. The strong position of German municipalities, which has a long tradition and is safeguarded under constitutional law, is by no means the norm in the EU. From a purely statistical perspective, as members of the European Parliament from a country with a thriving culture of local self-government, we are in the minority. However, this certainly does not mean we cannot be successful in our endeavour to safeguard municipal rights.
2. Secondly, the representatives of local self-government, who do an excellent job in their offices in Brussels, would be well-advised to seize every opportunity to draw attention to Goldenstedt, thereby reminding federal government of the conclusion reached by the Federal Constitutional Court that responsibility for safeguarding local self-government lies with federal government and the Bundestag.
3. And thirdly, Goldenstedt’s concerns that the jurisdiction of European institutions could have a detrimental impact on municipal tasks are, as practical experience shows, far from unfounded. Even if the Parliament has managed to take the sting out of numerous anti-municipal elements in Commission documents, staving off the latent danger of a disproportionate concentration of responsibilities to the detriment of local self-government remains a standard feature of everyday life in Brussels.

Lisbon has paved the way for a shift in direction, an opportunity that must be seized and one that presents us – the Parliament and our federal institutions, the federal government and the Bundestag – with the chance to champion the cause of strong local self-government.

Lisbon has strengthened the rights of local self-government. This is the first time an explicit provision establishes the right to local self-government as a component of Member States' national identity (Art. 4, Paragraph 2). "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government."

In addition, the Reform Treaty contains the following provisions, which are of particular importance to municipalities:

- Involving municipalities in subsidiarity checks and strengthening the subsidiarity principle in conjunction with an improved system of allocating powers,
- Extending municipalities' right to consultation in Europe,
- Equipping the Committee of the Regions (CoR) with its own right to bring actions before the European Court of Justice on the grounds of infringement of the subsidiarity and proportionality principles and its right to be heard.
- Introducing impact assessment procedures, particularly with the administrative and financial impact of EU legislation in mind.

Subsidiarity and subsidiarity checks in particular are of paramount importance to municipalities, as in the future it will be mandatory – and actionable – to firstly assess whether a matter can be better achieved at European or municipal level. If the Reform Treaty is ratified, this will apply in all of the EU's 27 Member States, representing a particularly useful tool for the Parliament as regards examining Commission documents.

The example of services of general interest:

In future, the Commission will continue to espouse the view – and anything else would be a miracle – that all public tasks should be subject to market conditions. Thus municipal services of general interest in the German sense, for example, should not be performed by municipalities themselves, but should instead be put out to tender on the free market. To date, the Parliament has managed to keep damage to a minimum in this respect. And the Reform Treaty gives grounds for hope: Protocol 26, which has achieved fame in its own right, has laid thoroughly new foundations. The governments of all Member States have jointly declared that, from this point on, national, regional and local authorities shall be able to exercise wide administrative discretion in defining and organising tasks pertaining to services of general interest:

(Cf. Protocol No. 26: "... The shared values of the Union in respect of services of general economic interest ... include in particular: – the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users.")

This hardly transforms municipal provision of services of general interest into an impenetrable fortress for Commission policy, nor does it make it a given in the conflict-ridden domain of EU competition law. But we now possess an officially recognised right which must be asserted and defended in the everyday business of Brussels – without doubt a task for the Parliament and the national governments.

Protocol No.26 can be found on page 395 of the recently published consolidated version of the Lisbon Treaty. I would assume that the 479-page agreement contains plenty more "nuggets" for our local self-government. For example, the Brussels representative of the German Association of Towns and Municipalities, Uwe Zimmermann, recently highlighted an important change in Europe's primary law – namely, Article 3, Paragraph 3 of the Reform Treaty – and introduced a new facet to the debate on services of general interest. Article 3 of the Reform Treaty explicitly states the aim of establishing "a highly competitive social market economy". The Reform Treaty's new socio-political target is extremely significant, as it obliges the entire Single European Market to function as a social market economy. Germany also traditionally views municipal services of general interest as a component of a social market economy – a market model in which public authorities assume the role of provider and guarantor in the interests of its citizens and the economy. Article 3 strengthens the status of municipalities and should be incorporated into the debate on municipal services of general interest ("Article 3, Paragraph 3: The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy,

aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.)”

The issue of services of general interest also encompasses respect for the organisational sovereignty of municipalities, which should not be restricted by additional legislation concerning the awarding of below-threshold contracts. To clarify this point further, I make reference to Article 2 of the Regulation on the Award of Public Contracts (VGV) which specifies these thresholds. In 2008 and 2009 – exclusive of VAT – they comprise:

- for works contracts: 5,150,000 euro
- for supply and service contracts awarded by selected supreme federal authorities: 133,000 euro; in the areas of drinking water and energy supply or in the transport sector: 412,000 euro; in all other cases: 206,000 euro.

We must exploit all available possibilities to develop and intensify intermunicipal cooperative ventures. We cannot, therefore, sit back and allow European public procurement law to encroach upon the micro domain of performing standard municipal responsibilities. The Commission’s proposal in its paper on awarding so-called below-threshold contracts would mean that, in future, 90% of all municipal procurement and 80% of the volume of contracts would be subject to EU public procurement law. This would result in an incredibly large bureaucratic burden, poor economic results and an unacceptable state of affairs for local self-government. The same applies to so-called “in-house relations”. This, too, is a sustainable organisational form of municipal task management that we cannot afford to lose, and which, along with joint local authority ventures, is an integral part of local self-government as we know it today.

At this juncture, I would like to make a passing comment concerning the revised and modified regulations that still lie dormant in obscurity when compared with legislation still in force (I also consider this to be a “nugget”):

A revised version of a provision concerning rural areas and structural policy should have a significant impact on the affected areas. Article 174 (revised version of Article 154 EC Treaty) stipulates that the European Union should pay particular attention to rural regions.

“In particular, the Union shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions. ... Among the regions concerned, particular attention shall be paid to rural areas, areas affected by industrial transition, and regions which suffer from severe and permanent natural or demographic handicaps such as the northernmost regions with very low population density and island, cross-border and mountain regions”.

One cannot read one’s way to an understanding of Europe, and very few people will read the 479-page consolidated version in its entirety. On no account should this be misunderstood as a criticism of the scope of the Reform Treaty. After all, creating a new state entity from numerous nation states is a highly complex endeavour. A glance at the 16-page table of contents is enough to illustrate this level of complexity. However, one can only speculate on the extent to which the Treaty will influence everyday life in the EU’s Member States.

The opportunities that lie in the strengthening of the CoR’s powers could be extremely important for municipalities (consolidated version, the Treaty on the Functioning of the European Union, Article 305, page 234).

I emphasise the “could” here, as it is still unclear how the Treaty will be implemented and it is this that will decide if municipalities are actually able to exploit these opportunities or whether the Länder will callously leave them out in the cold, as was the case when the CoR was founded.

As is generally known, the Council intends to take a unanimous decision on the composition of the Committee of the Regions, which will comprise up to 350 members in the future. The aim is to reflect the social, demographic and economic developments of the EU in the composition of the CoR plenum. Thus the question will soon arise – and I would be very surprised if scenarios of this kind were not already under discussion behind the scenes – as to whether large EU Member States such as Germany should not be entitled to a larger national delegation in the CoR. If one applied, for example, the European Parliament distribution formula to the CoR, this would mean that the German CoR delegation (24 delegates at present) would double in size. This would bring an end to the imbalance in the CoR, since municipalities would be able to provide far more than three delegates.

The fact that they occupy three seats at all was only thanks to Chancellor Kohl's insistence. But for that municipalities would have been left empty-handed, as the Länder had claimed all the seats for themselves. This should not be overlooked in upcoming talks.

In my opinion, leading municipal associations would be well-advised to make increasing their representation in a more powerful CoR a top priority. Time is of the essence here to ensure vital issues are not superseded by less important matters. Everything that helps to safeguard our rights to self-government is an urgent matter. Securing influence in the CoR, however, is not only urgent; it is of utmost importance, as it will assume a key role. With the right amount of seats in the plenum, municipalities will then gradually be able to assume a key role in the CoR. This is of utmost importance, as the CoR:

- is to be granted its own right to bring actions before the European Court of Justice – in the name and interests of municipalities and regions, so to speak – on grounds of infringement against the principles of subsidiarity and proportionality,
- will be granted its own right to be consulted and submit opinions whenever it deems this expedient.

Of course, no one expects to see the Commission in Brussels perform an about-face once the Reform Treaty has entered into force, and that the Commission, now purged of all its failings, will suddenly view local self-government as the solution to the EU's estrangement from its citizens – a solution that utilises municipalities' authority and close community ties to help citizens reap the advantages of the EU.

Unfortunately, it will take a lot more for the Commission to acknowledge that an unweakened form of local self-government with local ties and real powers represents a great opportunity for Europe. A major concern is rather that the Commission's overzealous compulsion to draft regulation concerning small-scale tasks, its tendency to assume the role of guardian, will continue to keep the Parliament and the leading municipal associations on their toes in the future.

Today one can only speculate as to whether the Reform Treaty will serve as a launch pad for stronger local self-government across the EU. However, one can rest assured that self-government in Germany in the form and tradition it has developed over the years has a fighting chance of counteracting the legislative juggernaut that is the Commission in Brussels. And there is absolutely no doubt that local self-government can bank on support from the European Parliament in this endeavour. Just as a reminder: as far back as 16 May 2002, the European Parliament passed a resolution (directed at the EU Convention) concerning the debate on division of powers within the EU and appealed for a strengthening of regional and local authorities in the EU.

We have reaped the first rewards of a journey along an obstacle-ridden path – we must now unite and tackle the obstacles ahead.

Discussion

Magiera highlights the fact that services of general interest in Germany have traditionally fallen with the remit of municipalities and that these include numerous economic services on which fees are levied. The Maastricht Treaty stipulates that "services of economic interest" are admissible, which leads Magiera to conclude that municipal enterprises with regard to services of general interest are also admissible. He points out that Article 295 clearly states that organisations governed by private law must be subject to uniform commercial law and notes that the provisions of the fundamental freedoms do not stipulate a minimum limit for the size of enterprises.

Stahl supports Hoppenstedt's line of argument and points out that the Commission is often unaware of the consequences of its intervention. Municipalities must, therefore, adopt a strategy aimed at making the Commission realise that new rules infringe upon other, more important rules. This requires better cooperation between municipal representatives in the Parliament. A federalist intergroup could form a point of contact in this endeavour.

2. Introductory Presentation

Regulatory impact assessment in European Commission policy – an instrument to safeguard local self-government?

Quote from Otto von Bismarck, the first chancellor of the German Empire, from 1898 (i.e. after he had left office):

“... it is a dubious error to assume that, in this day and age, our laws receive the scrutiny and preparation they require ...”

We in the modern world are burdened by legislation too. The legislation enacted is

- excessive,
- poor quality,
- unsuitable for implementation and
- creates additional bureaucracy.

Municipalities bear the brunt of this burden; they are the de facto level of legislative administration and enforce these laws vis-à-vis citizens and enterprise. In light of this, they should assume a primary role in deregulation and debureaucratisation, aiding in the application of the regulatory impact assessment (RIA) instrument and benefiting from it. This can bring them relief, and even make it possible for them to claim reimbursement from those liable for costs incurred.

Regulatory impact assessment (RIA) is an instrument that strives to achieve rational policymaking; it is the offspring of economics-based thought, the fruit of tight budgets, in short – when applied correctly – a savings instrument. It aims at deregulation and debureaucratisation to minimise the costs incurred by statutory regulation. It is an instrument designed to gauge the impact of laws on citizens, the economy, state institutions and administrative authorities. The evaluation criteria are efficacy (achieving the desired goals), effectiveness and efficiency. This process measures the enforcement, bureaucratic and administrative costs. Methods employed in RIA include test questions, the Delphi method and cost appraisals and projections, which can be performed either ex-ante or ex-post. This approach was first formalised in the United States in 1980 with the creation of the *Office of Management and Budget*, which is headed by the vice president. RIA is currently employed at federal and Land level. On the European level, initial steps have been taken to integrate this method into standardisation procedures. Karpen feels local governments, which have used this instrument sparingly up to now, have the greatest need for action in this regard.

The standard cost model (SCM) is one method to estimate the bureaucratic burdens state information and reporting obligations create for businesses, citizens and administrative authorities. The input parameters are the number of pieces of data that must be reported, the amount of processing time required and the hourly wages due the employees who perform the task. To estimate the bureaucracy costs a regulation will incur, the three parameters are multiplied.

This method was employed in an exemplary study of the Westphalian town of Bünde (Bünde Study) designed to calculate the expenses a municipality would have to bear to fulfil its statistical and other information and reporting obligations. The total annual expenses for Bünde were 90,000. On the basis of this study, these obligations would incur projected bureaucracy costs of 5 billion for the Federal Republic of Germany. Some obligations are sensible – e.g. the obligation to report births and deaths. Others appear less sensible – e.g. the obligation to report to the agricultural statistics office the number of fattened pigs weighing over 110 kg and the land area on which African violets are cultivated and late kohlrabi planted.

Knowing what the cost drivers are is a prerequisite for political intervention aimed at reducing bureaucracy costs. According to projections performed on the basis of the Bünde Study, federal government regulations produce roughly 20% of bureaucracy costs and *Land* regulations are responsible for roughly 80%. The rules laid down in Article 70 ff. of the Basic Law, specifically Articles 83 to 86, do not clearly separate federal government and Länder responsibilities; this has led to considerable confusion when determining which authority must bear certain costs. The Bünde Study did not explicitly include European legislation. The share of the cost of all German laws adopted that is due to European

legislation can serve as a criterion for cost estimates. Empirical studies arrive at varying results, putting this share at anywhere between 26% and 84%. A differentiation must be made between costs incurred as a result of EU law and the reporting obligations member states themselves create when implementing EU law.

The 2005 SPD-CDU/CSU coalition agreement sets out dismantling bureaucracy costs as a specific aim, one Ms Merkel is pursuing with great fervour. The government established a special department in the Federal Chancellery and formed a National Regulatory Control Council to address this issue. The Federal Statistical Office was given the task of gauging bureaucracy costs. In so doing, Germany seized upon initiatives spearheaded by Great Britain, the Netherlands and the OECD. EU action in this area is contingent upon initiatives of Member States. In the meantime, the objective of dismantling bureaucracy costs has become a standard of European legal policy. In the EU, the responsibility to address this issue is divided up between three instances:

- The Directorate-General,
- The Impact Assessment Board (akin to a meeting of state secretaries),
- The High Level Group (akin to the German National Regulatory Control Council).

The handbook Impact Assessment Guidelines, first published in 2000 and revised in 2005, vaguely describes which methods should be applied. The speaker sees a need for action at municipal level, where a thick layer of red tape exists. Efforts to reduce it, such as those practised in the innovative region Ostwestfalen-Lippe, are only in their infancy. The speaker also feels there is a need for action in the area of municipal land development planning.

At the conclusion of his talk, Mr Karpen pointed out that the issue of bureaucracy costs has lost significance of late, despite the initial successes already achieved at federal level. In the future there is a need to more concisely determine the ways in which sinking bureaucracy costs benefits citizens. RIA and the SCM method should be used more widely in the future and should be employed more extensively, e.g. to assess environmental regulations. To do this, parliaments must be involved, training and advanced training promoted, and local authorities must be encouraged to share best-practice examples. Good ways to launch this initiative include spreading the methodological principles at expert meetings, promoting empirical studies on the costs of bureaucracy and raising the profile of this issue; the *Initiative Neue Soziale Marktwirtschaft* (New Social Free Market Initiative) provides a suitable platform for this.

Discussion

In the first presentation **Schmidt-Eichstaedt** addressed the concept of RIA. He made reference to the difficulties associated with calculating the compliance costs arising from laws as a whole. Almost every law also consists of a multitude of provisions, each with vastly different impacts. This is all the more true now that it has become popular to bundle a complex array of regulations in “a single” law (cf. Social Security Code (SGB); Environmental Code (UGB)). In his opinion the term “provision impact assessment” would be more accurate. Moreover, he corroborates Karpen’s perception of the situation: Many of the legal compliance costs derive from multiple causes due to the fact that the Länder implement the laws enacted by the federal government. Incidentally, the behaviour of the addressees also influences follow-up costs.

Bunzel emphasised that RIA provides an opportunity to arrive at more rational decisions. He feels that in the EU this falls under the authority of the Directorate-General, which has already envisaged relevant indicators in its guidelines. The guidelines, however, lack details on subsidiarity and municipal self-government.

Nutzenberger stressed the importance of EU regulations addressing bureaucracy costs. The Commission, however, lacks knowledge about the consequences of its actions; it does not examine the national laws in each of the 27 states ex-ante. It is, therefore, important to involve municipalities in political decision-making processes, as they have extensive experience of implementing standards. They are, nonetheless, extremely overburdened and withdraw from political decision-making processes. This is why it is imperative to effect a shift in mentality in favour of the increased dismantling of bureaucracy. Lobbying initiatives in Brussels should not, however, be reduced. Further, he pointed out that the use of RIA does not invariably lead to a reduction in bureaucracy.

Leitermann, too, stressed that municipalities should get involved in RIA at European level. He criticised the fact that current evaluation procedures are merely performed internally and do not include consultation with experts. He also claimed the evaluation procedure only targets areas of economy, society and environment, but not administration, or rather, municipalities.

Battis parries this with the claim that expert knowledge on the consequences of legislation exists within the Commission. The problem lies elsewhere, i.e. in the low significance of RIA within political processes. In his opinion it would be desirable to implement impact assessment procedures comparable with Dutch and British standards at European level. He ascribes great importance to quantitative impact assessments of new legislation. At the same time he alludes to the limited influence the results of such evaluation procedures ultimately have on the force of prevailing political opinions. In his view, cooperation with the *Initiative Neue Soziale Marktwirtschaft* carries with it the danger of political interference/instrumentalisation. After all, dismantling bureaucracy is also in the interest of private enterprise – some “bureaucracy costs” do indeed go towards rational administrative action. Thus, in his opinion, the involvement of local authorities in political discussions and their political influence should be increased. He points to last year’s drafting procedure for the Leipzig Charta and the EU Territorial Agenda during the German EU Council Presidency as good examples of wide-ranging participation with various political players.

Magiera, too, stresses that policy-makers do not (cannot) act rationally and poses the question of the costs the RIA itself incurs.

Karpen counters that, although there are significant costs (a staff of about ten employees in the Federal Chancellery, and, at certain times, one-fifth of Federal Statistical Office staff), this is, nonetheless, money well invested.

Beckmann feels it is very important to incorporate the expertise of those who apply legal provisions into political decision-making processes. The general approach of itemising all costs is, according to him, too laborious and financially unfeasible. He proposes a two-step plan of action. The initial step would require only qualitative estimates from experts; the second step would entail quantifying estimates for specific selected areas. He also asks if any experiences with ex-post studies exist.

In response **Karpen** suggests that those applying laws and instructors should feel responsible for ensuring ex-post assessments of legislative consequences are carried out, as ex-post assessments are the prevailing method in practice. Gathering and diffusing expertise could be a potential task for leading municipal associations.

3. Introductory Presentation

Consultation of leading municipal associations in procedures to adopt EU directives and regulations

Brussels and Washington are the **global lobby capitals of the world**. There are no completely reliable statistics on the number of interest groups active in Brussels. However, the press invariably reports that there are 15,000 individuals currently lobbying in Brussels. The European Parliament has a (voluntary) register that suggests there are 5,000 lobbyists in Brussels. A list compiled by the Permanent Representation of the Federal Republic of Germany to the EU containing only German political and economic interest groups represented in Brussels comprises approximately 70 pages and includes around 400 associations and organisations.

Independent of the exact numbers we can be certain that the leading municipal associations face tough competition when it comes to the battle for influence, attention and recognition in Brussels.

In the European Union no differentiation is made between lobbyists and leading municipal associations who represent municipal interests. As such, on the European stage, municipal interest groups **do not enjoy a special status**. At the present moment this is evident in the efforts to implement the European Transparency Initiative (ETI), which aims to create a mandatory register for interest groups in Brussels. The attempt of the German Association of Towns and Cities – as well as other leading municipal associations – to call attention to the particular nature of municipal interest groups has, as yet, fallen on deaf ears in Brussels.

The particular nature of municipal interest groups is that municipalities represent the level of state government that implements EU law, and its representatives act as elected officials. This leads to heightened responsibility and an amplified public presence for municipal interest groups in terms of the state governance as a whole.

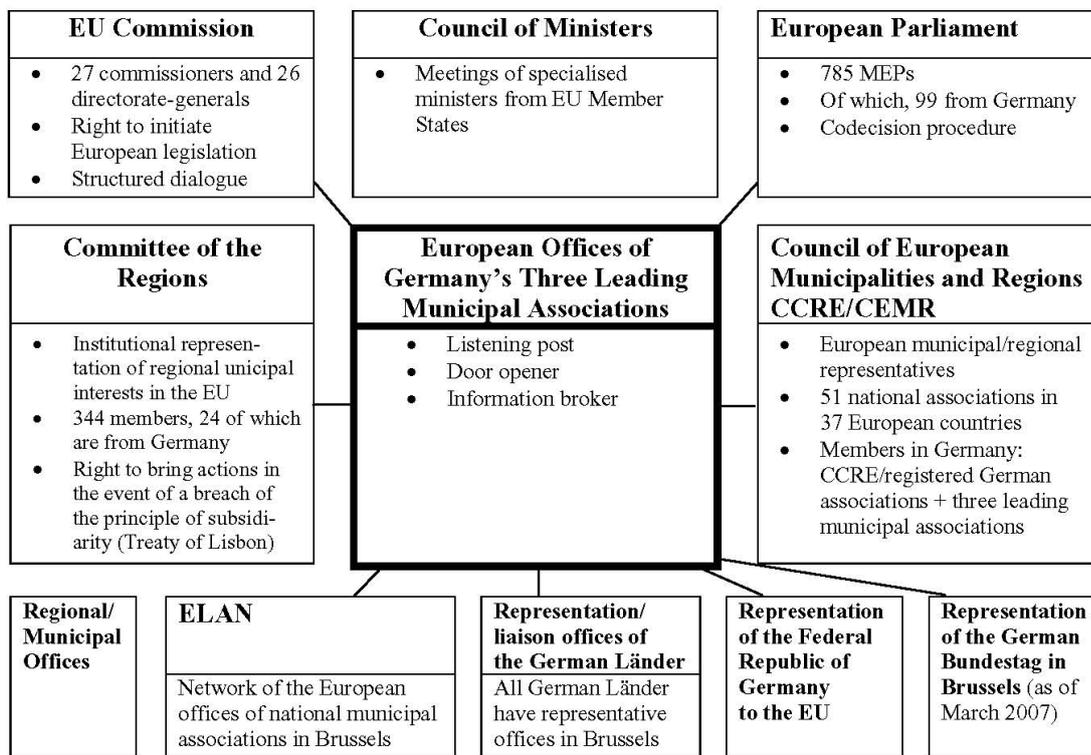
In contrast to the situation regarding national legislative procedures, European Union rules contain no arrangements granting leading municipal associations special rights to be heard. This means that leading municipal associations have **no guaranteed right to consultation** at European level.

In the Federal Republic of Germany, such special rights are guaranteed in the Collective Procedural Rules of the German Federal Ministries (Articles 47 and 74) and in the Procedural Rules of the German Parliament (Article 69).

The Treaty of Lisbon obliges EU institutions to grant the opportunity for dialogue and the right to be heard. The relevant passages can be found in Article 11 paragraphs 2 and 3 of the new EU Treaty. Article 11 addresses issues pertaining to representative associations and civil society, or, more specifically, to affected parties, i.e. to those who should be involved in dialogue and have the right to be heard.

The chart below shows the **avenues available for exerting influence**.

Network of Municipal Interest Groups in the EU



More specifically:

Due to its right to initiate legislation, the **Commission** is of particular import and municipal interest groups maintain intensive contact with it. It is the most important dialogue partner open to the arguments of municipal advocacy groups. Access to legislation drafted by the **Commission** is good; often better than access provided in Germany. In general, a high-level of transparency characterises the work of the Commission, as the documents it produces are easily accessible on the Internet. The Commission has firmly established a system of structured dialogue that allows for an informal exchange of information with municipal associations active in Brussels. The circle of stakeholders is, however, very large.

No contact exists with the **Council of Ministers**.

Aside from the Commission, the **European Parliament** is the most important dialogue partner. Its right to participation in decision-making processes has grown in recent years. But the fact remains that the European Parliament can only block guidelines and directives and cannot initiate them of its own accord.

Cooperation with the **Committee of the Regions** (CoR) is satisfactory. The leading municipal associations are well connected with the German delegation in the Committee of the Regions (CoR). The leading associations regularly participate in delegation meetings and will even be chairing them for the next two years. The composition of the CoR does, however, warrant criticism; of the 24 German members only three come from leading municipal associations. The delegations of other EU states have a more balanced ratio. This is a clear indication that the German Länder often wish to speak for municipalities.

The **Council of European Municipalities and Regions (CEMR)** is of special significance in the search for allies, as this institution helps facilitate and expedite the identification of cooperating partners. The CEMR is the European municipal association; however, while it includes leading municipal associations from EU Member States, those from other European states also enjoy membership. The problem here is that the Commission expects coordinated advisory opinions from the CEMR. However, given the wide range of interests represented in the CEMR, it often ends up expressing opinions that are reduced to the lowest common denominator. Nonetheless, CEMR remains a key element of formal access to the Commission. Leitermann claims this access is not available to leading national associations; instead, they must resort to avenues of informal contact. He says that, in effect, it is a matter of identifying as many sister

associations as possible to further specific projects and interests. The larger the number of associations advocating a certain proposal is, the more seriously the Commission will consider it.

There are structural deficits that hinder **cooperation with other leading municipal associations** due to varying national rules that ascribe differing constitutional requirements and responsibilities to municipalities. In the event that all leading European municipal associations are unable to agree on a common approach, leading municipal associations enter into agreements of limited cooperation. No contact exists with other regional representatives or representatives of towns and cities, as they are mainly interested in acquiring funding.

An important forum for exchange and networking is the network of the European offices of national municipal associations in Brussels, the **European Local Authorities Network (ELAN)**. It serves as an informal information-sharing forum. The various groups lobbying on behalf of European municipalities in Brussels meet every fortnight at the ELAN offices to exchange information.

Contact with the **Representation/Liaison Offices of the German Länder** is well-established. This is important because the Länder apparently have a much larger group of representatives than the leading associations, which only have a small team of representatives. Some of the Länder have *Spiegelreferate* ("mirror departments") which liaise with individual directorate-generals.

Contact with the **Representation of the Federal Republic of Germany** to the EU could be improved. Länder representatives are regularly briefed at the Representation of the Federal Republic of Germany. As yet, however, the leading municipal associations have had no success in being allowed to attend these briefings.

Contact with the recently formed **Representation of the German Bundestag** is satisfactory. Its establishment has given municipalities a solid ally in Brussels. All in all, it opens up a wide range of options to influence political events in Brussels.

In closing, Leitermann warns of the danger that the offices of the leading municipal associations in Brussels will be downgraded to mere information offices. This would be inappropriate because:

Municipalities are responsible for implementing the majority of EU norms. In addition, they are – in contrast to the bulk of interest groups in Brussels – democratically legitimated. The special status of the leading municipal associations manifests itself in how they perceive their role. The leading municipal associations see themselves as advocacy groups (with a commitment to serving the common good), not as lobbyists (who are more committed to partial interests). The European office of the German Association of Towns and Cities has three functions. It serves as a "listening post" in that it receives information on the latest developments. It serves as a "door opener" in that it initiates contacts for association staff in Brussels. Thirdly, and lastly, the European Office acts as an "information broker". Although the leading municipal associations do not have to be consulted as part of norm-setting procedures, there are a plethora of possibilities for them to exert political influence. They are set down in the Treaty of Lisbon, Article 11, paragraphs 2 and 3, which oblige the Commission to enter into dialogue with representative associations and civil society, i.e. to hear affected parties.

Discussion

Battis notes that the Lisbon Treaty has improved the position of municipalities. In his opinion the expertise of the leading municipal associations is important and makes them an interesting consultation partner for the Commission. He is sceptical about the democratic legitimacy of other associations and thus feels the democratic legitimisation of the leading municipal authorities is a characteristic that sets them apart.

Krautzberger highlights the German Building Ministers' Conference as a good example of the domestic integration of municipal representatives in political decision-making processes. The leading municipal authorities have long been part of the conference.

Nutzenberger points out the rivalry the leading German associations have with the Länder. He sees the cause for this in their anticipated loss of relevance. Municipalities, as the lowest level in the state governmental structure, are not threatened by the same fate. He also mentions the role of the Land offices. Their significance is waning because information gathering is increasingly becoming their main function. Mirror departments in Germany are gaining ever more European competences. He once again stresses the poor contact with the office of the Federal Republic of Germany.

Schmidt-Eichstaedt underscores the democratic legitimisation of towns and cities as independent administrative authorities with representatives elected by the people according to the Basic Constitutional Law. Here, he refers to Article 28 of the Basic Constitutional Law; its first paragraph guarantees the right to the free election of representative bodies in municipalities. Moreover, Article 28, Paragraph 2 of the Basic Constitutional Law safeguards the right of municipalities to regulate all local affairs of their own accord, within the limits prescribed by law. This truly assigns municipalities authority as the third level of government in the state (after the federal and Länder governments).

Söbbeke points out that the Commission encourages lobbying activities (it “shall consult widely”). Accordingly, interest groups are granted access to it. He states that an institutionalised right to be heard is desirable, but is not a primary aim as long as interest groups are heard in stakeholder consultations, as laid down in primary law. The positions they present in this forum are often taken into greater account than they are in Germany. As a result of this, well-organised business lobbies have it easier in Brussels than municipal interest groups. Mr Söbbeke added that, first and foremost, good arguments are the key to success in Brussels.

In this context **Leitermann** points to the Commission’s Transparency Initiative, which stipulates that only accredited lobbyists will be invited to official parliamentary and Commission sessions. The role of the European Parliament should not be underestimated. This institution is in a position to exert pressure and, thus, to push initiatives forward. The Commission puts a great deal of stock in the principle of good governance, which also weighs how practically feasible it is for municipalities to implement legislation. Here he sees a good starting point in the argument for an offensive representation of municipal interests. With regard to the hierarchical concept of the state in Germany, he cites the Anglo-Saxon approach as a model worthy of emulation. There, the various levels of state administration are referred to as “spheres of government” and are considered equal parts of a whole.

4. Introductory Presentation

The role of the CoR in safeguarding and strengthening rights to local self-government in Europe. What is the impact of the right to bring action before the European Court of Justice?

At the beginning of his talk Stahl addressed in detail the peculiarities of the framework conditions in European policy. He pointed out that, due to the size of the EU, European policy should be organised according to different rules than those of policymaking in nation states. In contrast to administrative authorities in nation states, the Commission's actions are of a more political nature, as MEPs are integrated into the process from the start. The participative forums held at an early stage in the EU proposal process - in the form of stakeholder processes, cabinet meetings and a college consisting of the various commissioners – are hallmarks of this working method. The system is open to external recommendations. Many initiatives are launched based on such suggestions. In this respect it is a political model more comparable with the American nation state than with European nation states.

The speaker went on to pinpoint the nation state as the loser in this multilevel system of governance. He explained that with the European Economic and Monetary Union, nation states have ceded authority in the core areas of economic policy to European (monetary policy) or regional (e.g. cluster-based innovation policy) policymakers. At the same time, he noted, a notable shift of competences from the national to the regional level is taking place. This is where the Committee of the Regions (CoR) comes into play, as it represents the interests of local and regional authorities.

He related that the share of elected municipal officials in the Committee of the Regions is 50%. This is, he said, in egregious disproportion to their share of representatives in the German delegation – only three of 24 elected members are municipal officials. The CoR participates in informal ministerial meetings and thus has influence on policy development in the Council of Ministers as well as in the Commission. The CoR currently has 500 employees. This is due to the complex task of providing translations into all official languages.

He went on to explain that with a contingent of six members, the CoR is also very active in the European Constitutional Convention. He pointed out that a cooperation agreement exists with the Commission that draws on the subsidiarity check. Subsidiarity is, as he said, one of the core principles guiding the work of the CoR and one that it has focused on from the start.

Assessing the consequences of newly introduced EU regulations on municipal administrations is one of the main aims of CoR activities. In 2004 a working committee that involves regional and local players was established to monitor adherence to the subsidiarity principle. In 2005 the work of the committee was reviewed. One of the conclusions reached was that a large share of the players approached did not take part in the work of the committee. The results of the test phase led to the launch of a subsidiarity network with 89 cooperating partners. Partners can incorporate knowledge relevant to their areas of expertise into the work of the committee. The decisive factor in asserting a position successfully is ensuring that it contains a close examination of Commission proposals. Invoking formal provisions alone seldom reaps positive results.

Discussion

Battis notes that Mr Stahl's remarks contradict the statements made in Mr Hölscheidt's introductory keynote speech. The latter related that emphasising the principle of subsidiarity was a purely German phenomenon; Stahl says this is not so. Stahl can only corroborate the presumed loss of relevance for nation states in the case of centralised territorial states. He points out that, for example, the position of the Ministry of Economics has always been weak in Germany, so forfeiture of authority on economic policy in Germany does not, in fact, constitute a loss at all. The regions have never been consulted on the most important issues on the European agenda – security, foreign policy, etc. This is yet another area in which only national governments have a say in Brussels. According to Stahl, nation states have therefore grown comparatively stronger. In Battis's view, a "Europe of the Regions" is a buzzword of the 1980s and 90s. He says the CoR has particularly disappointed with regard to the high expectations of the Länder, which initially cast the CoR in the role of a lower house.

Stahl disagreed. He claimed the CoR is a well-established element of the European political process; it safeguards political influence for the regions. However, the work of the CoR is impeded by the differences in the governmental structures of the participating states. Moreover, he pointed out that CoR members are apprehensive about a new mode of operation – binding municipal elections for the CoR.

Then **Battis** noted that the European constitutional courts have done much to preserve and strengthen national competences in following the “Maastricht Urteil” of the German Federal Constitutional Court. In the future the CoR will have to put more emphasis on the results of the subsidiarity network. However, he said we must also ask ourselves whether it would not be better to examine issues of subsidiarity at national level.

Stahl countered **Leitermann’s** question concerning how subsidiarity violations are ascertained by noting that there are two subsidiarity watchdogs in the CoR. If the subsidiarity principle has been violated, the individual regions have the right to pursue legal action.

Magiera remarked that the losers of the EU reform process are the ones who have seized upon the principle of subsidiarity. By continuing to insist on this principle they are impeding the European reform process. In reply, **Stahl** stated that the subsidiarity principle is part and parcel of good politics. He went on to recite the definition of the principle of subsidiarity, according to which responsibilities are assigned to the administrative level best equipped to fulfil them successfully.

In response to **Leitermann’s** question about cooperation with national parliaments, Mr Stahl reported on joint sessions with the Bundesrat, the House of Commons and an upcoming session with the French Senate planned for this year.

In closing, **Stahl** pointed out that, with respect to international competitiveness, Europe had made great strides and has forced the Member States to adapt to globalisation. Without the stringent criteria for members joining the monetary union many unpopular measures would not have been adopted. Nonetheless, he explained that much pressure must still be exerted to dissuade states from allowing services of general interest to become obsolete. He feels that the success of European policy is extremely inconsistent with opinions expressed by those affected by European policy. As a matter of principle, it would be wise to consider whether our views are compatible with EU aims that merit support.

IV. Summary Conclusions

The opinions expressed by the experts and the remarks made during the discussion sessions at this symposium have shown that the position of municipalities and municipal self-government in the European Union can only be strengthened through persistent efforts at several levels. This is not only, and probably not even primarily, a matter of legally stipulated guaranteed political participation rights; informal activities are at least equally as important. These six points must be addressed:

1. Firstly, **a provision expressly guaranteeing the institution of municipal self-government in European agreements**, secured through a right to be heard in decision-making processes, in particular in processes to formulate legal norms and the right to bring legal actions before the European Court of Justice;
2. **The position of towns and cities, municipalities, administrative districts and municipal self-government in the constitutional structure of the Federal Republic of Germany** should be strengthened within Germany by emphasising their independent position as the third level of state government, which is also an indispensable component of the constitutional order of the Federal Republic of Germany.
3. **Municipalities must have interest groups in Brussels**; they must have a permanent presence there and be represented with a sufficient workforce, bringing their interests to the table as early as possible in the European Union's decision-making and legal norm-setting processes.
4. Municipalities must also effectively present their interests on the national political stage in political **consultation processes in the Federal Republic of Germany**. Vertical and horizontal activities are needed to achieve this: Vertical in relation to the federal government and Länder, and horizontal through activities such as cooperation between cities and towns, administrative districts and municipalities.
5. **Municipal cooperation** must be established **across the borders of European nation states**.
6. To flank this constant work, **ad-hoc activities** are advisable if it becomes evident that the European Union is taking action that would not be in the interest of municipalities. The core competences of municipal self-government have to be effectively defended while there is still time. To do this, assaults must be identified early and a defence strategy must be formulated and made available in good time.

The symposium participants arrived at the following conclusions concerning the reasoning for and implementation of these six points.

1. On the introduction of a provision expressly guaranteeing the institution of municipal self-government in European agreements

For a long time the European Community was widely considered myopic when it came to municipal self-government. This was not unjustified as long as it remained an institution with primarily economic objectives – neither can fault be found with it, as the national decision-making process lay outside its sphere of influence. However, as the European Economic Community grew into the European Union and began acting politically, the more the national constitutions and administrative systems of Member States would come to the attention, and into the sphere of influence, of Europe. This development was only set down in writing for the first time in the Reform Treaty.

If the Reform Treaty is ratified by all EU Member States and enters into effect, it will include these rules on local self-government:

Article 4, Paragraph 2: The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and **local self-government**.

Article 5, Paragraph 3: Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central or at regional and **local level** but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The Protocol on the application of the principles of subsidiarity and proportionality requires that the Commission “consult widely before proposing European legislative acts”. Article 2 of the Protocol stipulates that the regional and local dimension of the envisaged measures be taken into account where appropriate. Article 5 of the Protocol states that any draft European legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should also contain some assessment of the proposal’s financial impact. This firmly establishes the instrument of regulatory impact assessment at European level.

Finally, Article 8 of the Protocol stipulates that the EU Court of Justice shall have jurisdiction in “actions on grounds of infringement of the principle of subsidiarity by a European legislative act”. In addition to the national governments, the Committee of the Regions may also bring such actions against European legislative acts for the adoption of which the Constitution provides that it be consulted.

If this proves effective, the “local level” would be sufficiently rooted in the European agreements. It would certainly not be advisable to demand that the European Union enact mandatory provisions requiring all Member States to introduce or guarantee municipal self-government at local level. Member States are structured too diversely – from mini-states like Malta to (formerly) centralised states like France. If we call upon the EU to exercise the utmost restraint in regulating national administrative structures, then we should pursue the same approach in this matter.

Municipal self-government must make efforts to continuously prove the benefits it derives from being a structural principle so every Member State strives to maintain or introduce it of its own accord. The European Charter of Local Self-Government¹⁹ is an ample instrument of voluntary commitment.

2. On strengthening the position of towns and cities, municipalities, administrative districts and local self-governments within the constitutional structure of the Federal Republic of Germany

The position of municipalities in Germany’s federalist system is weakened by a section of German constitutional law stating that municipalities are to be considered solely an element of the administrative structure of the Länder.²⁰ The Basic Law assumes the state is organised with a two-tiered governmental structure consisting of federal and Länder governments – not a three-tiered structure of federal government, Länder and municipalities.²¹ On the one hand local self-government is held to be an avenue for citizens to participate in administrative activities (self-government through holding honorary positions in local government); on the other, it is understood as an autonomous, legally regulated authority – albeit without expert guidance – on matters of public interest acting through legally independent administrative bodies (independent legal self-government by municipalities as institutions of public law).²² Neither perception – nor a combination of the two – truly expresses the autonomous position of municipalities **as the third pillar** in the governmental structure of the Federal Republic of Germany.

Constitutionally, Germany must be termed a federation with a two-tiered governmental structure consisting of the federal and Länder governments, as agreed upon in the “constitutional treaty” between the Länder that constituted the founding of the Federal Republic of Germany in 1949. At the time this treaty – which would become the constitutional charter of the Federal Republic of Germany known as

19 Published in: Schmidt-Eichstaedt: Die Gemeindeordnungen und die Kreisordnungen in der Bundesrepublik Deutschland (loose-leaf format), Stuttgart 2008 ff.

20 Cf. Peter J. Tettinger in: Commentary on Basic Law, Mangoldt, Klein, Starck (ed.), 5th edition, 2005, Article 28, Paragraph 2, Comment 40; further, Eberhardt Schmidt-Aßmann and Christian Röhl in: Besonderes Verwaltungsrecht, Schmidt-Aßmann (ed.), 13th edition 2005, p. 15 (Comment 8 f.).

21 Theodor Maunz and Rupert Scholz, in: Basic Law, Article 28, Comment 79, Maunz/Dürig/Herzog/Scholz (ed.), (33rd instalment, 1997).

22 For details on the origins: Reinhard Hendl: Grundbegriffe der Selbstverwaltung, in: HKWP, vol. I, 3rd edition, 2007, Paragraph 1, Comment 6 (p. 6 f.).

Basic Constitutional Law – was agreed to, municipalities were merely constituent parts, or objects, of the Länder. According to the constitution they remain that today because they do not qualify as an instance of state.

Constitutionally, however, it is precisely this “constitutional treaty” – i.e. the Basic Law – between the Länder that guarantees local administrations the same status as the federal and Länder governments, that of **subjects** (and not just objects) of state authority. They were ascribed the status of an autonomous third pillar of state authority. This is laid down in Article 20, Paragraph 2(1) and in Article 28, Paragraph 1 of the Basic Constitutional Law. For when Article 20, Paragraph 2(1) of the Basic Constitutional Law prescribes (or declares) that all state authority derives from the people, and then goes on to organise this authority derived from the people into more than two levels in Article 28 of the Basic Constitutional Law, the state constituted is more than a two-tiered structure (it is three-tiered).

Article 28, Paragraph 1 of the Basic Constitutional Law defines the division of popular sovereignty into more than two levels thus:

- By presuming that the federal government is the highest authority, Article 28, Paragraph 1(2) postulates that there will be elected representation in the Länder and thus confirms Länder government as the second level of democratic state authority.
- By then proceeding, in Article 28 Paragraph 1(2), to demand and guarantee the establishment of popularly elected representative bodies in administrative districts and municipalities, it creates the third level of government, the local level.²³

If we considered this in terms of the Anglo-Saxon conception of the state, the federal government, Länder and municipalities would be “spheres of government”, with each equal in authority, not with one subordinate to the other.²⁴ Local self-government must view itself as a single entity, even if – apart from cities without administrative districts – it is organised into two levels, namely, into administrative districts and municipalities.²⁵ This unitary perception of local government is documented in Article 28, Paragraph 2 of the Basic Constitutional Law, where “*municipalities*” (as an overarching term for towns and cities and municipalities) are guaranteed the right to regulate **all** local affairs on their own responsibility. As for municipalities, there is an institutional provision for administrative districts in the Basic Law, but what their exact responsibilities are is not defined (cf. Article 28, Paragraph 2 of the Basic Constitutional Law). As such, they are constitutionally imperfect supplementary bodies and their exact function left to the oversight of Länder law to safeguard the institution of local self-government for municipalities which lack the administrative authority to regulate “all local affairs of their own accord”. According to the constitution, towns and cities, municipalities and administrative districts are one level – the level of local self-government.

Article 28, Paragraph 1 of the Basic Constitutional Law cannot be interpreted only as a formal “homogeneity clause” that aims to ensure that all forms of government of the constituent members of a federal state are structured uniformly. This would constitute neglect of the substantive structural function of the provision aimed at establishing a democratically organised state system with at least three levels of government.

Homogeneity is a purely formal principle that is sufficiently safeguarded in every form of government, as long as the governmental bodies within the federation are the same in nature. The principle of homogeneity could be sufficiently secured in a federation of monarchies. Article 28 does more than

23 The following article addresses the central importance of Article 28, Paragraph 1(2) of the Basic Law: Hans-Günter Henneke and Klaus Ritgen: Aktivierung bürgerschaftlicher Selbst-Verwaltung in Städten, Kreisen und Gemeinden – zur Bedeutung der Lehren des Freiherrn vom Stein für die kommunale Selbstverwaltung der Gegenwart, in: DVBl. 2007, 1253 (1257).

24 In accord with Hugo Preuß’s theory of a state structure based on a bottom-up hierarchy in which all governmental bodies are “equal in nature”. Further to this: Hugo Preuß: Gemeinde, Staat, Reich als Gebietskörperschaften, 1889 (reprint 1999), p. 223, 369. Also see Jasper Mauersberger: Ideen und Konzeption Hugo Preuß’ für die Verfassung der deutschen Republik 1919 und ihre Durchsetzung im Verfassungswerk von Weimar, Frankfurt 1991, p. 36 f.; Arndt Faatz: Hugo Preuß – Die Entwicklung eines Strukturprinzips für den modernen Staat, jr. Diss. Freiburg 1999, p. 207 ff.; Christoph Müller (ed.): Gemeinde, Stadt, Staat: Aspekte der Verfassungstheorie von Hugo Preuss, Baden-Baden 2005.

25 For an opposing opinion refer to: Klaus Stern in: Bonner Kommentar, Article 28 Comment 51. He proceeds from the premise that “the state structure in Germany is basically organised according to a four-tiered organisational principle”; as does Vogelgesang in: “Berliner Kommentar zum GG”, Article 28, Comment 13 ff. (4th instalment 2002).

pursue this formal principle. In fact, through its provisions concerning the constitution of the Länder and municipalities, Article 29 combines the formal aspect of homogeneity with a tangible decision for a system of values predicated on a specific constitutional system, namely:

- a republican, democratic, and social state governed by the rule of law
- and a multilevel parliamentary democracy with representative bodies elected by the people, including at the local level.

Article 28, Paragraph 1 of the Basic Constitutional Law guarantees and provides for this multilevel constitutional structure just as emphatically as it does homogeneity, considering both critical formal prerequisites for the proper functioning of a federal state. Thus the multilevel constitutional structure is explicit in Article 28, Paragraph 1, on its own and independent of a call for the federalist principle of homogeneity. Although the federalist system of government is conducive to a multilevel constitutional structure, it alone does not bring it to bear, as it is not capable of defining the third pillar, local self-government.

Recognition of local self-government as the third pillar in the German governmental structure is not about restricting the sovereignty, the statehood of the federal government and the Länder, rather, it is about the division of governmental authority within the state. It is the responsibility of those in the constitutional assembly to divide domestic authority among autonomous bodies integrated into state structures and not to simply ascribe it to administrative governmental bodies organised according to a hierarchical principle. It is not a question of statehood, nor one of sovereignty, but of a citizen-friendly organisation of authority-dividing structures that originates with the people.

Further, granting municipalities a subjective quality with regards to the exertion of state authority does not mean they must revert to a condition that is “antecedent to the state” or that they be qualified as extraterritorial or pseudo-state entities. A constitutional commitment to said authority suffices: Because the constitution has organised local authority as a direct expression of popular sovereignty, as far as the scope of this authority allows (i.e. encompassing at a minimum matters pertaining to the local community plus any additional legally allocated authority), municipalities and municipal associations cannot be degraded to “administrative structures subordinate to the federal or Land governments” or to “constituent parts of Länder governments”.

Within national boundaries, federal and Länder authority alike extends only as far as the limits of local self-government. Where it terminates, the constitutional autonomy of municipalities begins; the constitution protects this autonomy by virtue of Article 93, Paragraph 1(4b) in the same way it guarantees the sovereignty of the Länder in Article 93, Paragraph 1(3). A “constitutional complaint” filed by a municipality pursuant to Article 93, Paragraph 1(4b) has precisely the same procedural status as a dispute between the federal and Länder governments concerning the object and extent of federal competences vis-à-vis the Länder. In both cases it is a question of protecting constitutional allocation of rights and duties, except that a municipal “constitutional complaint” does not contest the relationship between the Länder and federal governments but the relationship between federal or Land governments and municipal authorities.

If one interprets the fundamental decision described in Article 28, Paragraph 1 of the Basic Constitutional Law as an appeal for a multilevel constitutional structure, then substantial particulars contained in Article 28, Paragraph 2 of the Basic Constitutional Law mean it can be construed as one of the constitution’s executive provisions concerning the allocation of constitutional rights and duties to the individual levels of the constitutional structure. Article 70 ff. and Article 83 ff. govern the division of rights and duties between the first two levels, i.e. between the federal and Länder governments; the former deals with legislative powers and the latter with authority to execute laws. Article 28 supplements the division of powers between the federal and Länder governments with a third level by granting municipalities the right to regulate all local affairs of their own accord, within the limits prescribed by law. Therefore, Article 28, Paragraph 2 should not only be interpreted in favour of municipalities as an institutional guarantee, not merely as a “structural principle”, but as **a constitutionally guaranteed allocation of rights and duties**.²⁶ As entities possessing public authority, municipalities constitute “a bit of state in themselves”.²⁷

26 Likewise Kay Waechter: *Einrichtungsgarantien als dogmatische Fossilien*, in: *Die Verwaltung* 1996, p. 47 ff. (63 ff. „Staatsstruktur- und Kompetenzbestimmung“).

27 According to Peter J. Tettingerl, in: von Mangoldt, Klein, Starck (ed.), *GG*, Article 28, Point 127, following *BVerfGE* 73, 118 (191).

This also has significant implications with regard to the boundaries of the authority of the European Union.

If one construes local self-government as the “third pillar” in the governmental structure of the Federal Republic of Germany as previously described, it then constitutes a core area of the constitutional order of the Federal Republic; this status is protected from constitutional amendment of any sort by the eternity clause stipulated in Article 79, Paragraph 3 of the Basic Constitutional Law and from any substantive intervention on the part of the EU by Article 23 of the Basic Constitutional Law.²⁸ The protection of local self-government from substantive EU intervention is based on the following series of regulations:

Article 23, Paragraph 1(2) of the Basic Constitutional Law grants the federal government the right to transfer sovereign powers of the Federal Republic of Germany to the European Union with the consent of the Bundesrat; it does, however, contain the stipulation that the EU cannot exercise any authorities that would, as such, constitute an infringement upon the constitutional order set down in Article 79, Paragraph 3 of the Basic Constitutional Law. Article 79, Paragraph 3 stipulates that any amendment to the Basic Constitutional Law that affects the division of the federation into Länder, their participation on principle in the legislative process or the principles laid down in Articles 1 and 20 is inadmissible. The principles laid down in Article 20 of the Basic Constitutional Law include, *inter alia*, those in Article 20, Paragraph 2 of the Basic Constitutional Law: *All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive, and judicial bodies.* The bodies guaranteed by the constitution in the sense of Article 20, Paragraph 2(2) of the Basic Constitutional Law include, pursuant to Article 28, Paragraph 1(2) of the Basic Constitutional Law, the representative houses of the Länder, administrative districts and municipalities and, pursuant to Article 28, Paragraph 2 of the Basic Constitutional Law, the institution of local self-government. Therefore, these bodies and institutions fall within the scope of protection of the eternity clause pursuant to Article 20, Paragraph 2 of the Basic Constitutional Law. Local self-government is also protected insofar as no interference is allowed with regard to its essential makeup. This protection cannot be superseded by Europe, as The Federal Republic of Germany is not allowed to transfer sovereign powers pertaining to such issues. Germany legally asserted the efficacy of this German salvo with respect to the EU by pushing through recognition of the principle of subsidiarity.

The **principle of subsidiarity** protects the three-tiered constitutional order of the Federal Republic of Germany against unwarranted hierarchical interventions. Against this backdrop it is no coincidence that Germany, of all nations, insisted that this principle be contractually guaranteed in the European agreements. Without this principle there would have been a danger that the EU would be allowed to exercise its authority in a manner that would have impinged upon Germany’s constitutional structure consisting of federal government, Länder and municipalities as well as upon the division of legislative and administrative powers that are part and parcel of this arrangement: The EU would then – by virtue of an ostensible, yet constitutionally inadmissible, transfer of norm-setting rights on the part of the German federal government – have been able to interfere in the powers of the Länder, towns and cities, municipalities and administrative districts to such an extent that the core area (constitutive element) of local self-government would be left a hollow remnant. The subsidiarity principle ensures that EU legal norms are not permitted to interfere with the constitutive authority of the Länder and municipalities.²⁹ For, at its core, this constitutive element consists in the right of Länder and municipalities to take action of their own accord, without any unnecessary restrictive EU law, on all matters that they can deal with better, more effectively and closer to citizens than an instance of centralised regulation can. Thus, the principle of subsidiarity guarantees preservation of the constraints laid down in Article 23, in connection with Article 79, Paragraph 3, of the Basic Constitutional Law, when sovereign rights are transferred to the EU.

As yet, no judicial dispute has taken place between the EU and the Federal Republic of Germany concerning the application of this principle. There could be cause for such litigation should the EU insist upon undermining municipal organisational sovereignty, e.g. by instituting rules regarding public procurement that would stipulate that municipal cooperation geared towards fulfilling administrative responsibilities be considered a purely economic activity. This would mean that public procurement law

28 This deviates from the prevailing opinion; cf. Tettinger a.a.O., Article 28, Point 145 (with further references): “The guarantees in Art. 28, Paragraph 2 GG do not safeguard against European intervention”.

29 Hans-Peter Bull: *Kommunale Selbstverwaltung heute – Idee, Ideologie und Wirklichkeit*, in: DVBl. 2008, p. 1 (4). With respect to this Bull speaks of a “subsidiarity dictate”. On the significance of the subsidiarity principle for local self-government, see also Edzard Schmidt-Jortzig, in: Schmidt-Jortzig/Schink (ed.): *Subsidiaritätsprinzip und Kommunalordnung*, Stuttgart et al. 1982, p. 1 ff.

would have to be observed when municipalities transfer responsibilities, e.g. to inter-municipal service consortia, so that private enterprises would have to be allowed to assume such responsibilities if they submit a bid to perform the same task more economically than the municipal consortium could. Municipal organisational sovereignty, however, implies that, prior to an invitation to tender, municipalities are allowed to make a politically motivated decision as to whether they desire to perform the task sovereignly through a municipal association or through a private enterprise. This decision precedes any tendering obligations.³⁰

It is paramount that towns and cities, administrative districts and municipalities no longer tolerate the fact that a portion of German constitutional law unconditionally defines them as constituent parts of the Länder who merely perform “administrative tasks” for the Land but enjoy no power to set norms and no autonomous administration based on their own sphere of responsibility separate from that of the federal and Länder governments. **Article 28, Paragraph 2 of the Basic Constitutional Law is a genuine substantive attribution of competence:** Municipalities are responsible for regulating all local affairs of their own accord – through norms established through administrative acts and through simple administrative activities. The *framework* of Länder and federal laws that municipalities are required to abide by does not restrict these competences any more than the federal *framework* laws the Länder were required to abide by until the 2006 constitutional reform restricted the actions of the Länder when they acted within the ambit of Article 75 of the Basic Law (previous version). The formulation “within the limits of prescribed law” relates to the degree of direct responsibility, not to the allocation of authority.

3. On the presence of municipal interest groups in Brussels

As explained earlier, leading municipal associations represent municipal interests in Brussels. The leading associations all maintain their own offices there, and because they share an office space they are well linked to exchange information. The tangible success of their arguments and petitions depends on who posits them and the network they have at their disposal; any abstract suggestions regarding this in this paper would hardly be constructive. However, some prerequisites must be met if the leading municipal associations hope to continue their successful work in Brussels:

- The Brussels offices of the leading municipal associations must be adequately staffed with qualified personnel. Staff workers should speak several official EU languages (preferably German, English, French) and possess qualifications in European law and/or economics.
- Networking between the German offices in Brussels should be strengthened. It is a travesty that the Representation of the Federal Republic of Germany in Brussels does not invite the leading municipal associations to the weekly “briefings” of the Länder representatives. This deficiency – along with the three token seats out of 24 allotted to municipalities in the Committee of the Regions – clearly attests to the fact that neither the federal government nor the Länder truly perceives municipalities as the autonomous third level in the German state structure with their own constitutionally guaranteed competences.
- Cooperation among the leading associations of Member States is a key instrument in bolstering the power of municipalities vis-à-vis the Commission and the European Parliament. Low-key initiatives on the part of German associations to intensify this cooperation would most certainly be advantageous. Brussels is an opportune place to exchange ideas; it can be assumed that the representatives of leading municipal associations here from various Member States can communicate easily in English, French or German without the need for interpreters. The language barriers in their respective home countries can be too great.

4. On vertical cooperation of municipalities with federal and Länder governments and horizontal cooperation between towns and cities, administrative districts and municipalities.

The leading municipal associations, through the Länder, arrange cooperative activities between municipalities and the federal government. A right to be heard is granted to leading municipal associations in matters of municipal legislation at federal level only by virtue of the Procedural Rules of the German Parliament and the Procedural Rules of the German Federal Government – not by virtue of a

30 See the joint declaration of leading German and French municipal associations from May 2008 “More Legal Certainty for Municipal Authorities and Local Public Companies in the European Single Market”, (www.rgre.de/pdf/erkl_daseinsvorsorge).

constitutional mandate. At the Länder level a constitutionally guaranteed right to be heard exists in Baden-Württemberg,³¹ Bavaria,³² Brandenburg,³³ Lower Saxony,³⁴ Saarland,³⁵ Saxony³⁶ and Thuringia³⁷.

In terms of the topic at hand – activating municipalities in European processes to establish legal norms relevant to local government – the right to be heard in the framework of national legislation is, however, less significant than the rules pertaining to the issue of whether, and how, municipalities should be involved when the Federal Republic of Germany participates and is heard in the context of EU legislative processes. National governments and national parliaments are, and will remain, the EU's dialogue partners. It is the responsibility of Member States to ensure that their respective "regional and local levels" are involved at an early stage in EU processes to formulate legal norms. In the federalist structure of the Federal Republic of Germany, the process of activating the lower levels of government primarily functions only between the federal and Länder governments – not between the federal government and municipalities. In this respect, the Länder act as mediating agents for municipal interests. This is most certainly unavoidable given the primary responsibility of the Länder for their municipalities intended by the Basic Law; due to reasons bound to the division of powers, the federal government does not have direct access to municipalities (provided there is no authoritative basis, which can only be granted along with the consent of the Bundesrat). However, this "ban on federal intervention" applies only to individual municipalities – not to leading municipal associations. The federal government could, and should, inform them at an early stage when the EU plans to formulate legal norms affecting municipalities. This is somewhat complicated by the fact that it is the federal ministries who address matters pertaining to their specific areas and who are responsible for presenting opinions on EU legal norms and integrating EU law into the national legal framework, but the Interior Ministry is not always responsible for matters pertaining to municipalities. It may be possible to improve the lines of communication between the ministry and municipalities. The representational share of German municipalities in the Committee of the Regions must be rectified without delay. Municipalities cannot remain underrepresented vis-à-vis the Länder at the conclusion of the impending CoR expansion. Based purely on numbers, municipalities should have more seats in the CoR than the Länder; by rights, they deserve at least half.

The lines of communication between cities and towns, administrative districts and municipalities on issues relevant to the EU could, perhaps, also be improved. Many larger cities have departments, units or, at the very least, a coordinator that handles European Community affairs. In most cases they focus on the issue of weighing their chances of receiving funding from European support programmes for their own projects. There is, however, only a very limited degree of intermunicipal strategic coordination. On a case-by-case basis the leading municipal associations host meetings of European affairs coordinators; however, these gatherings have not yet been organised as those of a permanent working group or expert committee.

Municipalities must, however, formulate well-defined plans if they hope to be successful in procuring funding from EU support programmes. To achieve success they must follow and put into practice these elements:³⁸

Strategic:

- Carefully and impartially **analyse the strengths and weaknesses** of towns, cities and regions
- Use this as a basis to formulate regional/municipal **development strategies**
- Evaluate the contribution towns and cities/regions could make towards achieving the **Lisbon objectives**

31 Article 71, Paragraph 4 of the Constitution of Baden-Württemberg.

32 Article 83, Paragraph 7 of the Constitution of the Free State of Bavaria.

33 Article 97, Paragraph 4 of the Constitution of Brandenburg. The Brandenburg League of Towns and Cities right to be heard is set down in Article 7 of the Bbg Gemeindeordnung (Brandenburg Municipal Code).

34 Article 57, Paragraph 6 of the Constitution of Lower Saxony.

35 Article 124 of the Constitution of Saarland.

36 Article 84, Paragraph 2 of the Constitution of the Free State of Saxony.

37 Article 91, Paragraph 4 of the Constitution of the Free State of Thuringia. The procedural rules of the Länder parliaments also guarantee leading municipal associations the right to be heard; cf., e.g. Article 30a GeschO des Bayerischen Landtags (Procedural Rules of the Bavarian Parliament).

38 According to a speech by Martin Hennicke of the Ministry of Economic Affairs, SMEs and Energy of North Rhine-Westphalia given at a meeting on 20 September 2006 organised by the German Association of Cities on the implementation of the programme phase of structural development aid from 2007 to 2013; as quoted from Regina Blania, European coordinator for the city of Hagen at www.europa.wfg-hagen.de.

- Formulate **project proposals** geared towards these aims
- Avoid limiting proposals to problem neighbourhoods/urban renewal/infrastructure
- Learn from **experiences with URBAN** (e.g. civic participation, integrated project development)

Instrumental:

- Develop **project proposals** that substantiate **Lisbon issues** (innovation, creating clusters, establishing SMEs, labour market, etc.)
- Derive project proposals on the basis of a plausible **array of strengths**
- Develop/improve **project development competences** in these areas
- Develop **integrated projects** – interdisciplinary thinking and action
- Avoid focusing on/limiting proposals to **classic issues** of municipal economic development (land utilisation, infrastructure)
- Respect the **additionality principle** of the EU Structural Funds: Do not “sneak in” tasks that are municipal obligations (services of general interest)

Institutional:

- **Exert influence on programme development in the Länder** (opinions, advisory committees, events)
- **Plan strategic development** in towns and cities/regions
- Organise **intermunicipal and interdisciplinary cooperation**
- Adequately equip **municipal administrations** in terms of staff and organisational structures (project teams, qualifications, etc.)
- **Organise information exchange** on best practices with other towns, cities and regions – nationally and internationally
- Leave **programme management** to Länder governments, who are well-versed in this regard
- Instead, demand involvement in **advisory committees**

Leading municipal associations and the German Institute for Urban Affairs can and should support this continuous process of analysis and influential action. German regions have at least been granted EU financing totalling 9.4 billion euro until 2013 for the new Objective 2, “Regionale Wettbewerbsfähigkeit und Beschäftigung” (Regional Competitiveness and Employment) from ERDF and ESF funds. Pursuant to Article 5 of ERDF Directive 2007-2013, the following areas are to receive funding:

1. Innovation and knowledge-based economy (including innovation-oriented small and medium-sized enterprises (SMEs):
Establishment and expansion of strategic contacts between the public and private sectors, universities and technology centres that meet local needs.
2. Environment and risk prevention.
3. Access to transport and telecommunications services of general economic interest outside large urban centres.
4. Sustainable urban development (Article 8 ERDF Directive):
Increased economic growth, decontamination of the physical environment, redevelopment of abandoned tracts of land, preservation and enhancement of natural and cultural heritage, promotion of entrepreneurial initiatives, local employment and municipal development, and the provision of services to citizens.

As a result, sustainable urban development has become a stronger focus of EU support objectives. Municipalities should seize their opportunities.

5. Municipal cooperation across the borders of European nation states

Intermunicipal cooperation is necessary not only within Germany, but also across the borders of European nation states. Local administrative authorities throughout Europe must also work to strengthen their position. The Council of European Municipalities and Regions (CEMR) is a readily available platform for cooperation.

The Council of European Municipalities and Regions is a pan-European organisation of municipal and regional administrative authorities. The CEMR is a consortium of 51 national municipal associations from 37 European countries (sections). As such, the CEMR represents roughly 100,000 municipal authorities throughout the whole of Europe. The CEMR has the task of representing municipal interests in Europe, championing the idea of local self-government, preserving the devolution of administrative structures. The member associations in the CEMR are not limited to EU Member States; they also include leading municipal associations in the EFTA states and in numerous central and eastern European states. This makes the CEMR, which originally grew out of city partnerships, the most extensive representative of municipal associations at European level.

The German section of the CEMR is a consortium of roughly 600 German towns and cities, municipalities and administrative districts, all involved in European politics. It has a seat and votes in the assemblies of the international Council of European Municipalities and Regions. The leading municipal associations in Germany (German Association of Towns and Cities, German Association of Towns and Municipalities and German Association of Administrative Districts) are also members of the German section of the CEMR. The German section of the CEMR is represented in the executive committees of the European umbrella association, i.e. the European Policy Committee and the Executive Bureau, and participates in the work of the working groups.

The office of the German section of the CEMR is located on the premises of the German Association of Towns and Cities in Cologne. Along with the Europe/Foreign unit of the German Association of Cities, it acts as a centre for European municipal work in Germany. A database of municipal partnerships (town and city partnerships) is also maintained there. These partnerships are the most conspicuous sign of European municipal cooperation. They can help imprint the European dimension of local self-government in the minds of citizens.

6. Ad-hoc Activities

In general, well-functioning cooperation is also necessary for ad-hoc activities geared at appraising and, when necessary, for protesting against specific norm-setting legislation or programmes planned by the EU. The Commission is obliged to provide a detailed statement with all draft legislation, stating whether it complies with the principles of subsidiarity and proportionality. This statement should also contain some assessment of the proposal's estimated financial impact. This provides a great opportunity for municipalities: Eighty percent of the responsibility for implementing laws lies with the municipalities. Nonetheless, as yet these costs (apart from laws purely involving the disbursement of funds) have seldom appeared in regulatory impact assessments, because municipalities are expected to implement laws with their existing staff and as they are currently materially equipped. Any resulting increases in bureaucracy, which can "only" delay and complicate the completion of an individual task, are not addressed at all.

In this area there is an acute need for informational activities. A comprehensive regulatory impact assessment must determine

- (additional) staffing costs for the administration implementing the law;
- (additional) material costs the implementing administration will incur;
- approximate cash benefits and payments in kind due;
- the temporal effects on the completion of the respective tasks (expediting or delaying);
- acceptance of the rule among those affected.

It is evident that the clarification of these questions is a very labour-intensive task; in some cases financial restrictions mean it can be done only partially or not at all. However, the Commission's *Impact Assessment Guidelines* have made apparent its interest in having more specific information on the economic consequences of its norm-setting actions apparent. Municipalities should provide the Commission with as much factual material as possible. It can hardly be expected that fundamental political judgements will be made contingent upon regulatory impact assessment. However, the nature of a regulation can be influenced by recommendations that are supported by a regulatory impact

assessment. Such recommendations must be supported with facts and evidence if they are to be successful. The key is finding the right balance between precautionary data gathering (which is tedious and costly) and ad-hoc clarification (which sometimes comes too late). The ratio of effort to return must be advantageous.

Leading municipal associations and a consulting and research institution such as Difu could also be instrumental in this area.

7. Conclusion

When all is said and done it is clear that a common and overriding prerequisite exists for municipalities to act successfully within the European political system:

- Impending problems must be recognised and analysed **at the earliest possible stage** so that rectifying strategies and, if necessary, data collection can be arranged in a timely manner.

Given the highly complex way in which problems develop and the continuous introduction of new legal norms in the European Union, it may be advisable to follow the path started by this symposium and to periodically call together a committee of high-ranking experts. The leading municipal associations must take the initiative for this to happen. The committee would be unique in that, in comparison to the assembly sessions of the CEMR or to the meetings of the representatives of the European Local Authorities Network ELAN and other networks, it could consist of a relatively small circle of independent experts (scholars) and high-ranking German-speaking decision-makers (MEPs, municipal representatives from Brussels, leading municipal associations). The annual convention could be restricted to a core agenda consisting of a single day with a keynote speech, and introductory presentations and an additional day with voluntary participation that includes an evening invitation to a cultural event in Berlin. A press conference to publicise the conference's conclusions, suggestions and demands on policy would then routinely take place the next morning. The key theme for each meeting should be a current municipal issue relevant to Europe.

The upcoming events could address issues such as:

- The migration of people to Europe /inter-European migration;
- The role of municipalities in energy provision in Europe;
- Municipalities and jobs – municipalities und unemployment.

Difu could assume the responsibility, in agreement with the leading municipal associations, of periodically calling such a conference together (once annually) to analyse and consult on current issues in municipal studies and municipal policy – and routinely those with European relevance. The calibre of the speakers, the niveau of the discussions and a commensurate setting and supervision for the meetings should intrinsically appeal to high-ranking participants. These meetings should serve as a **summit of municipal scholars in Europe**.

Summits of municipal scholars could and should also be platforms for formulating current demands. The participants of the symposium held on 28 May 2008, the first "summit" of this kind, formulated these **four current demands**:

1. The allocation of the German seats in the Committee of the Regions (CoR) must be altered in favour of municipalities. Currently, the Länder hold 21 of the 24 seats while municipalities hold only the remaining three. A 50-50 ratio of representation should be advocated for the upcoming expansion of the CoR.
2. Municipalities – in particular the leading municipal associations – should be involved in all federal and all Länder departments and in all questions pertaining to municipal issues and projects at an early stage.
3. Municipalities must adopt active and forward-thinking roles in the regulatory impact assessment process at European level. Municipalities do, after all, enforce a majority of the laws. Administrative authority and the informational competences of municipalities (existing data and access to it) must be strengthened.

4. The parliamentary legitimisation of municipalities as the autonomous third pillar in Germany's governmental structure must be strengthened. Municipalities represent an independent, constitutionally protected level of state administration. They possess sovereign competences that European law cannot infringe upon.

The presentation of this paper will make these demands public and the leading municipal associations, along with Difu, must continue to pursue them openly.

Convention Participants

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