Legal Argumentation

• Directive on the award of concession contracts is **not** necessary
• Primary law and case law from the European Court of Justice is sufficient
  • Service concession is a legal term of EU law
  • Term of a service concession is specified and determined under EU law
  • Unlike public service and works contracts, service concessions do not fall within the area of application of EU public procurement law. They are only subject to the less strict rules of EU primary law.
• EP voted 2010 against EU-law on the award of service concessions ((2009/2175(INI))
• Draft directive limits the choice of municipals for the perfect structure, e.g. private participation
• Art. 15 No. 5 can be qualified as private participation prevention clause
Review Water Supply

- Water supply is a public services duty of general interest
- Water supply and wastewater disposal are subject to a great variety of requirements in terms of water law, municipal law and competition law
- In the legal systems of all German Federal States, they are implemented as tasks of municipal self-government and thus protected by Article 4 (2) of the EU Treaty and Article 28 of German Basic Law and the constitutions of the German Federal States
- Focus is on security of supply, continuity, social pricing, quality and sustainability. Therefore, it must be left to the discretion of the local and regional authorities to choose the form in which services are provided
Types of enterprise in the public water supply 2008

 Shares related to water output

- 26% mixed public–private companies AG/GmbH (plc, limited liability company)
- 16% owner–operated municipal utilities
- 11% institution under public law
- 11% other private–law utilities
- 7% ancillary municipal utilities
- 3% public–law companies AG/GmbH (plc, limited liability company)
- 2% water and soil associations
- 1% special purpose associations

Source: BDEW Water Statistics 2008 (basis: 1,218 utilities)

© Profile of the German Water Sector 2011
Structural Conditions in the German Water Sector – further impact assessment necessary

- The Graphic above shows a great variety of types of enterprises and municipal institutions in the german water sector.
- It shows a grown structure that is congruent with the different conditions in the different regions in Germany and can partly be explained by the German reunification.
- The major part of the types are municipal dominated or influenced because the municipals are obliged to guarantee a safe and healthy drinking water supply by law.
- Even private entities are bound to municipal influence and legislation by contract and company law

**Conclusion:** structural differences in the member states demand further impact assessment on structural effects – for Germany can be predicted that private participation or a so called competition for supply areas will decrease.
Possible effects

- The award of concession contracts is frequently as complex and burdensome that only the preparation of a formal call for tenders is very time-consuming and gives rise to considerable advisory costs.

- A strict award procedure would therefore represent a substantial and unreasonable burden especially for small and medium-sized contracting authorities/utilities and be out of proportion to the revenue earned.

- This would therefore particularly affect the German supply sector which in large parts, as generally known, is of a municipal structure due to municipal public services of general interest; besides, there exists a large number of small and medium-sized utilities in Germany.
General Review

- Primary Law is sufficient
- Impact Assessment didn’t explain why this directive is needed
- Demand for a new Impact Assessment which explains:
  - Situation in member states – structural effects
  - Concrete situation for the awarding authorities
  - Possible development in the water sector
- The rules provided for in the Commissions proposal are not suited either to remove the legal uncertainty put forward by the EU Commission
- No autonomy of decision for local authorities
- The water industry pleads, at least analogously to the Services Directive, to be exempted from the scope of this Directive (Article 17, paragraph 1 (d) of the EU Services Directive 2006/123/EC)