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Fédération Européenne des Activités de la Dépollution et de l'Environnement
European Federation of Waste Management and Environmental Services
Europäische Föderation der Entsorgungswirtschaft

Freeing business to build Europe's recycling society - FEAD position paper on fair and open procurement

Recycling and waste management is a lead market as defined by the European Commission and FEAD wants to play a leading role in creating a European recycling society. The private sector should be encouraged, in a well-defined and competitive market environment, to develop its expertise, resources and competitive skills to deliver waste management services that represent value for money for its public sector partners.

Fair access for the private sector to waste management contracts is essential to European competitiveness. Waste management is a particular industry sector which provides services of general economic interest. In order to have a strong internal market for waste management services, fair competition should be ensured.

The Treaty on the functioning of the European Union guarantees the free movement of services and goods, including waste recovery. The principle of free trade has also been recognised by the European Court of Justice. According to the Treaty on the functioning of the European Union, a monopoly or dominant position can only be accepted for services which cannot be handled effectively by the market (article 106, 2; ex. art.86, 2): this clearly does not apply to the waste management sector in which private operators have demonstrated the ability to deliver waste services efficiently.

A number of improvements are needed in order to achieve a satisfactory level of fair competition in the waste market, which is key to Europe's success in building a recycling society:

In-House

Procurement law is applicable where a public body enters into a contract with another person (private person or public body). In order to determine whether a service qualifies as "in-house", criteria defined in a number of ECJ rulings need to be taken into consideration.

In that regard, FEAD considers that the Teckal judgment generally offers a sound basis for defining "in-house". It sets out a test by which it is possible to determine whether an entity – a "person" – is or is not in-house. The ruling in the Teckal case provided that a local authority and a person legally distinct from that local authority could be treated as the same entity for the purposes of the public procurement rules only if:

- the local authority exercises over the entity concerned a control which is similar to that which it exercises over its own department; and
- at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities.

Those criteria as stipulated in the Teckal ruling were further elaborated in subsequent ECJ cases ("Stadt Halle", "Parking Brixen", "Commission vs. Austria", "Carbotermo", "SEA" etc.), providing further, welcomed clarity on the in-house issue. For example, these cases are among those providing that as soon as a private company is involved, procurement law applies.

The ECJ's jurisprudence generally gives the taxpayer good access to the most efficient services.

APOH, Slovakia
ARS, Romania
ASEGRE, Spain
BDE, Germany
CAOH, Czech Republic

DWMA, Netherlands
ESA, UK
EWMA, Estonia
FEBEM-FEGE, Belgium
FISE, Italy

FLEA, Luxembourg
FNADE, France
IWMA, Ireland
KSZGYSZ, Hungary
LASUA, Latvia

PASEPPE, Greece
PIGO, Poland
VÖEB, Austria
YYL, Finland

Inter-municipal cooperation

As a result of recent rulings (e.g. "Commission vs. Germany (C-480/06)" "Coditel-Brabant (C-324/07)"), FEAD fears, through an increase of inter-municipal cooperation in the whole waste, management sector, infringements against procurement law at the cost of the internal market, innovation in waste treatment techniques and low waste treatment fees.

FEAD believes that the judgment in case C-480/06 is not merely a judgment applying to the specific facts of that case. Following the judgment in this case, FEAD members therefore seek the establishment of clear and binding criteria for inter-municipal cooperation between local authorities.

It should be clear that to develop free and fair competition, with all subsequent benefits on prices and quality, that inter-municipal cooperation – as in house procurement – should be permitted only when justified by specified economic and qualitative objectives.

Restrictions to a free market based on "local" and/or "political" reasons which may only lead to an increase of prices and less transparency in administrative action, should not be permitted.

- A public local authority should not be allowed to deliver services to another local public authority outside its geographical territory.
- When a corporate body that is in charge of waste treatment for one or several territories (e.g a group of neighbouring cities creates a common public entity responsible for building and running an incineration plant), is solely operated or owned by public authorities, that body must perform services only for wastes coming from municipalities that are members of the common organisation. When municipalities decide to undertake waste management services themselves – either on their own or through public-public cooperation - rather than to tender the services out to private entities, they should be required to ensure at the earliest stage possible that no excess capacities are built and that the size of their installations reflects the actual needs. Concerning the selection of private partners, transparent and competitive award procedures are required whenever public contracts or concessions are awarded to public-private partnerships (C-26/03 "Stadt Halle").
- The cooperation of municipalities in performing household waste management services by way of a common organisational structure, i.e. by creating a common public entity, should be restricted in terms of geographical and economical dimensions.

As far as inter-municipal cooperation for the performance of household waste management services is to be carried out on a purely contractual basis, i.e. without a common organisational structure, FEAD members seek even stricter criteria.

This is justified by the fact that any form of direct delivery of services or access given to waste treatment capacity by a public local authority or group of public local authorities to other public local authorities in other territories leads to unfair competition with the private sector. This is partly due to the fact that public bodies are not bound by certain rules relating to competition, tendering, taxation, permitting, contractual rules etc. while they are undertaking services in their capacity as public authorities. Therefore, inter-municipal cooperation in the field of household waste management simply based on contracts should be restricted as follows:

- Cooperation for the performance of household waste management services must not involve remuneration; there should be no financial transfers or transfer of other pecuniary advantages.
- Cooperation for the performance of household waste management services must relate to a common and identical public task incumbent on all participants.
- There must be genuine cooperation in the performance of a task, on a mutual basis of "give and take", i.e. activities of equal value must be performed by all participants.

- Cooperation for the performance of household waste management should only serve the pursuit of objectives in the public interest; non-relevant considerations which do not relate directly to the performance of the public task in question can not justify direct cooperation; the performance of the task must be made possible or considerably facilitated for the participants by the cooperation.

Inter-municipal cooperation for the performance of household waste management services should be restricted to neighbouring public entities responsible for the public task; there should be no cooperation in performing waste management services between geographically separate entities and authorities. Circumvention, e.g. through cooperation between several neighbouring entities and authorities (“chains of cooperation”), is not permissible. In order to inhibit circumventions which could potentially arise as a result of the creation of chains of cooperation, restrictions should be made, for example, with regards to the level of services delivered reciprocally, the number and size of local authorities involved and the amount of households affected by the chain of cooperation. These restrictions would ensure that a significant negative impact on fair access to markets for waste management is avoided.

Concessions

We expect the Commission and Member States to ensure that public authorities do not misapply the distinction between concessions and public service contracts, a matter on which there is useful jurisprudence. We are not persuaded of the need to change EU law in this regard and would strongly urge the Commission not to proceed without having undertaken the most careful impact assessment: we believe that matters raised elsewhere in this paper are far more important in enabling the private sector to contribute fully to delivering Europe’s green economic recovery.

The elaboration of one single cross-sectoral directive on service concessions at European level will create enormous difficulties given the different historical background, market structures, types of activities and sector specificities in the Member States, which have been handled previously with a sector-like approach (e.g. Regulation (EC) N° 1370/ 2007 on public passenger transport services by rail and by road).

Reduced VAT for public sector companies in the waste management business

Pursuant to art. 13 of Directive 2006/112/EC on the common system of value added tax, activities or transactions of public entities are not subject to VAT as long as public entities engage in these actions or transactions as public authorities, and provided that this does not lead to “significant distortions of competition”. The main problem about this rule is the fact that it is left to the Member States to define and declare actions and transactions of a public entity as a part of a public authority.

In a number of Member States, public sector waste management companies are exempt from paying value added tax (VAT) for their services even though this creates a market distortion as private sector waste management companies are required to pay a high VAT rate. In this regard, FEAD considers that VAT should apply to all Services of General Economic Interest, regardless of the legal nature of the operator, be it public or private.

Concerning the Directive amending Directive 2006/112/EC as regards reduced rates of value added tax on labour-intensive services such as waste management services, a key criticism is that the application of reduced rates is only optional i.e. the Member States themselves decide whether reduced VAT-rates on certain services are applicable. While some Member States currently favour public bodies by exempting their activities and transactions from VAT, it is unlikely that they would apply reduced rates on services which are subject to public private competition.

FEAD and its members advocate equal treatment of private and public sector companies in the waste management business and the application of uniform VAT rules.

Fair financial treatment

The ECJ has developed detailed jurisprudence on state aids and FEAD expects Member States to respect the spirit and the substance of that jurisprudence. In addition, FEAD believes that in providing post-closure financial guarantees for landfills under the Landfill Directive, Member States should operate a level-playing field as between publicly and privately owned landfills.

Increase of threshold values in procurement procedures

As part of their economic recovery programmes, a number of countries (e.g. Germany, Konjunkturpaket II) have increased the level of their procurement threshold values for a limited time.

FEAD believes that the claim that this would reduce administrative burdens for medium-size companies is disingenuous and that the intended beneficiaries of this policy are merely public sector companies. FEAD believes this policy to be fundamentally misconceived: Europe needs green economic recovery and this can be achieved only by a vigorous private sector with fair access to all sizes of procurement contracts. Opening up small contracts is particularly important to the SME sector which will play a crucial part in green economic recovery.

Transparency

FEAD invites the Commission to promote more openness and transparency in tendering procedures to maximise value for tax payers. This is particularly important in the current challenging economic climate.

FEAD is the European Federation representing the European waste management industry. Its members are national waste management associations, with an approximate 60% share in the household waste market and handling more than 75% of industrial and commercial waste in Europe (with a collective annual turnover of approximately € 54 billion). FEAD has 19 members from 19 EU Member States. FEAD represents companies with activities in all forms of waste management. These companies employ over 295 000 people who operate around 1 800 recycling and sorting centres, 1 100 composting sites, 260 waste-to-energy plants and 1 100 controlled landfills and play an important role in the determination of the best environmental option for waste management problems.