



## **FEAD position paper on the modernisation of EU public procurement policy**

FEAD takes note of the initiative on the part of the European Commission to modernise EU public procurement rules, a policy area that is essential to the activities of the private waste management sector. Public procurement is one of the key policies of the EU 2020 Strategy and contributes to reaching the objectives of this strategy by improving framework conditions for businesses to innovate and making full use of demand-side policy, shifting towards a resource efficient and low-carbon economy, e.g. through Green Public Procurement and improving the business environment, especially for SMEs.

The European Commission has identified a number of obstacles that need to be overcome in the context of the modernisation of public procurement rules: Increase of SMEs' access to public-procurement contracts, reduction of unnecessary red-tape and the promotion of European cross-border procurement. In principle, FEAD members agree with these overall objectives.

However, in modernising EU public procurement legislation, we call upon the EU institutions to keep the basic principles of this policy in mind, namely to allow for best-value for money and to guarantee that procurement markets are open on an EU-wide basis. We trust that the following policy proposals from our sector will contribute to an efficient and successful modernisation of EU public procurement legislation.

### *1. Public-public cooperation*

The free movement of services is one of the cornerstones of the EU Internal Market. Alongside the opening-up of public procurement to competition in all Member States, the free movement of services is also one of the objectives of the EU rules on public procurement.<sup>1</sup> Therefore, this fundamental freedom must be guaranteed and interpreted in a broad sense. Conversely, any exemption from it has to be interpreted narrowly. As a result, the criteria for exemption of public-public cooperation from procurement rules must be interpreted narrowly, too.

FEAD members are of the opinion that there is a need to clarify the boundary between what is public procurement and what is not public procurement.

#### A. In-house

The procurement rules do not require an authority to tender for a service where the authority decides to provide the service itself, or where the local authority exercises over an entity a control which is similar to that which it exercises over its own departments.<sup>2</sup>

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<sup>1</sup> Recital 2, Directive 2004/18/EC.

<sup>2</sup> See paragraph 50 of ECJ Case C-107/98, Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia of the 18<sup>th</sup> November 1999.

As pointed out by the EC Green Paper on public procurement, *“the case law of the ECJ leaves a number of questions open, such as what is meant exactly by “similar control”*. In this regard, FEAD considers that a clearer definition of the concept of “similar control” is needed. FEAD is also of the opinion that the notion of “similar control” must be interpreted in a narrow sense – the awarding entity should de facto have an effective and decisive influence on the commissioned entity, which is not the case when a private partner is involved or when control is exercised collectively.

Another cumulative criterion, also deriving from the Teckal case law, is that the entity must conduct an essential part of its activities with the contracting authority i.e. the activity is performed within the territory of the competent authority, and the entity does not participate in tenders outside of this territory.

Existing EU public procurement legislation stipulates that public contracts must be advertised<sup>3</sup>. FEAD similarly advocates that responsible public authorities should be required to declare their intention to resort to the “in-house” exception and to name the corresponding entity when delegating a public service. This would allow for proper scrutiny by the competition authorities and for interested parties to have access to remedies.

A clear distinction must also be made regarding cooperation between public authorities in operating the service (in-house procurement), and in organising the service (horizontal cooperation).

#### B. Horizontal cooperation

In line with ECJ jurisprudence, FEAD views “horizontal cooperation” as falling outside the scope of the EU Public Procurement Directives provided the following criteria are all met:

- a. The cooperation must be characterised by a joint provision of a public task incumbent upon all participating parties and it must be qualified as a real cooperation in terms of a service exchange;
- b. The cooperation must not involve financial benefits for any of the entities involved;
- c. The cooperation has to be governed solely by considerations and requirements relating to the pursuit of objectives in the public interest and the performance of the task must be made possible or the participants must be considerably facilitated by the cooperation;
- d. There must be no market orientation of the entities in question (and not just a “limited” market orientation”).

We would also deem it necessary to include as further criteria that the horizontal cooperation ought to occur only between neighbouring entities and that the cooperation must meet the same green and social standards/requirements/criteria that would usually be set in the award procedures of a contract.

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<sup>3</sup> Chapter VI, Directive 2004/18 (“Rules on advertising and transparency”).

### C. Transfer of competence

It should be made clear that transfers of competences remain outside the scope of EU public procurement law only when responsibility for the task is transferred in its entirety. Transfer of the execution of the task clearly falls within public procurement rules.

#### *2. Award criteria*

FEAD considers that “price” should not be “the” exclusive, decisive award criterion. As far as waste services are concerned and regarding the best value for money for services expected by citizens and public authorities, there must be a wider approach than merely a price-based award criterion.

Alongside the price, the quality of the service, innovation and environmental performance are often among the criteria with which public authorities award contracts to private waste management companies for collection and/or treatment of waste. Awarding contracts on the price alone would be detrimental to these other aspects.

#### *3. Thresholds*

FEAD believes that thresholds for the application of the EU Directives 2004/17/EC and 2004/18/EC are currently adequate and should not be raised. They seem to us to be in line with EU public procurement principles which stress the importance of fair competition and transparency. Adequate thresholds are crucial to ensure that the scope of the public procurement rules should be as wide as possible in order to provide private sector companies with access to public contracts, notably SMEs and in order to ensure that citizens get the best “value for money”. It is only through a wide application of public procurement rules that the EU will be able to achieve the EU 2020 objectives of smart, sustainable and inclusive growth.

#### *4. Innovation*

FEAD believes that a first step towards further promoting and stimulating innovation through public procurement would be to widen the possibility for tenderers to submit variants. Contrary to what is currently provided for in article 24 of Directive 2004/18/EC, tenderers should always be able to submit variants.

Towards a more general approach, FEAD considers that contracting authorities should be encouraged to set objectives in terms of results rather than in terms of means. This would encourage innovation on the part of bidders, and thus contribute to achieving one of the main objectives of the EU2020 strategy: innovative growth.

#### *5. Strategic use of public procurement in response to new challenges*

FEAD generally supports the introduction of considerations going beyond technical specifications and price in public procurement, and particularly favours the use of green requirements. Furthermore, FEAD is of the opinion that all selection and award criteria should

be directly related to the subject matter of the contract so as to avoid the possibility of arbitrary decision-making by public authorities.

FEAD calls upon the EC to introduce mandatory green public procurement targets. Based on equal performance, it should be mandatory for public authorities to give preference to secondary raw materials in public procurement. Such a measure could help to achieve both sustainable growth, a key element of the EU2020 strategy, as well as the creation of a European “recycling society”, which is the key objective of the Thematic Strategy on Waste Prevention and Recycling. In addition, this would contribute to the general objective of resource efficiency, which is the subject of one of the EU’s Flagship Initiatives.

In general, FEAD would like to stress that it is imperative that relevant stakeholders such as business organisations - given their expertise in this matter - take part in the development of ecological and social criteria for public procurement. This necessary involvement of stakeholders is clearly recognized in *COM (2008) 400 on Public procurement for a better environment*.

In relation to social criteria, FEAD considers that it can be quite difficult to relate these precisely to the subject matter of the contract. Moreover, a balance needs to be struck between the opportunities that such criteria can offer and the increased complexity of public procurement that could result from the introduction of such measures.

*FEAD is the European Federation representing the European waste management industry. FEAD’s members are national waste management associations covering 20 Member States and Norway. They have an approximate 60% share in the household waste market and handle more than 75% of industrial and commercial waste in Europe. Their combined annual turnover is approximately € 75 billion.*

*FEAD represents about 3000 companies with activities in all forms of waste management. These companies employ over 320000 people who operate around 2400 recycling and sorting centres, 1100 composting sites, 260 waste-to-energy plants and 900 controlled landfills. They play an important role in the determination of the best environmental option for waste management problems.*