



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

November 2011

FEAD Position on the Commission Staff Working Paper on public-public cooperation

FEAD welcomes the Staff Working Paper on public-public cooperation presented by the European Commission on 4 October 2011 and its clear message that, as a basic rule, the EU public procurement rules do apply to public-public cooperation. This is a further step to enforce the general principles governing the internal market, notably the principles of non-discrimination, transparency, equality of treatment, mutual recognition and proportionality. It should constitute a practical tool for contracting authorities to be able to organise and ensure the provision of services for the European citizens in compliance with the common market and without distorting competition.

We follow with great interest and actively contribute to the initiative of the European Commission to reform the EU public procurement package. One of our principle concerns being the lack of clarity on the exemption of in-house and horizontal public cooperation from EU public procurement rules, FEAD is pleased with the attempt to bring clarity on relations between public authorities. In this regard, we consider the clear delineation between the two different situations of in-house arrangements and horizontal cooperation to be very useful.

As a general rule, public-public cooperation should serve the fulfilment of a public task and should have as an objective the pursuit of a public interest. Therefore, there should be no market orientation of the entities involved as otherwise they would be in direct competition with private companies and, hence, that would mean the pursuit of commercial objectives.

In-house:

As far as in-house arrangements are concerned, FEAD is of the opinion that the two cumulative criteria deriving from the Teckal judgment should be understood strictly.

Joint control by several contracting authorities over an in-house entity should therefore not be interpreted as **similar control**. Indeed, a contracting authority cannot claim to exercise a similar control in a situation of joint control insofar as it cannot control itself the decisions of another contracting authority. Moreover, the control a public entity exercises over its own departments is never a joint control – therefore, a joint control of several contracting authorities over an entity cannot be regarded as a control similar to the control a public entity is exercising over its own departments. Conversely, we agree with the Commission that the material and geographical scope of the controlled entity's activities have to be taken into account when assessing "similar control" since it might indicate potential independence and/or market orientation of the in-house entity. In this regard, also the legal form of the in-house entity has to be taken into account: if the national law governing the legal status of the entity provides a certain level of autonomy for its management, i.e. a certain independence from the stakeholders, a similar control cannot be assumed.

For the same reason, the second Teckal criterion should be interpreted in a way that it should be a necessary condition for the controlled entity to carry out all of its **activities with the contracting authority**.

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

NORSK INDUSTRI, Norway
PASEPPE, Greece
PIGO, Poland
SRI, Sweden
VÖEB, Austria
YYL, Finland

In any case, an 'in house' entity must be subject to the same obligation to respect EU public procurement law as the contracting authority, as regards its own procurement activities. This should also apply on the relations between several in-house-entities of the same parent as well as the relation between an in-house-entity and its parent – there is no similar control of an in-house-entity over another in-house-entity of the same contracting authority as there is no control of the in-house-entity over its parent. Thus, the procurement rules should apply to contracts awarded by an in-house-entity to another in-house-entity of the same parent and to contracts awarded by the in-house-entity to its parent.

Horizontal cooperation:

As far as horizontal public cooperation is concerned, the European Commission refers specifically to the ECJ ruling in the Case C-480/06, Commission vs. Germany. According to the EC Staff Working Paper, such cooperation between contracting authorities is permissible only without the participation of private capital and only if it is based on a **real cooperation with the joint performance to ensure the organisation of a public task** which all the cooperation partners have to perform. This cooperation must be free of charge and there should be **no financial transfers** between the partners that go beyond the reimbursement of actual costs.

It must be made clear that the horizontal public cooperation only relates to the organisation of the provision of public services whereas the 'in house' arrangement concerns the provision of services itself.

We also share the views of the Commission when stating that the cooperation agreement should **not include activities to be offered on the open market** in order to ensure that the cooperation remain only governed by public interest - i.e. non-commercial – considerations.

Finally, FEAD believes that a mandatory requirement for publishing envisaged in-house arrangements and horizontal public cooperation would serve the proper application of these types of exemptions by ensuring more transparency and by providing the opportunity to seek legal remedies.

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.