FEAD additional answers – Public Consultation on the Functioning of Waste Markets

September 2015

Due to the lack of space in the online Questionnaire – Functioning of Waste Markets – and under the agreement with the Commission services, additional information is provided in this separate document and can be found online on the FEAD website (www.fead.be).

Part 2 - Questions
A. Identification of the main perceived regulatory failures

3. Could you provide an example of such a regulatory failure/obstacle? Please describe it briefly.

A. separately collected fractions from households being considered as a SGEI;
B. cross-subsidisation and abuse of dominant position by municipalities operating in the waste market;
C. abuse of in-house and public-public cooperation exclusions (Public Procurement rules);
D. unequal VAT treatment between public and private companies;
E. misuse of EU funds (not in line with the waste hierarchy).

A. separately collected fractions from households being considered as a SGEI;
Germany
In some EU Member States – in Germany, for instance – even waste volumes for which functioning processing and recycling structures have long been in existence will be kept out of the market and allocated to municipal monopoly interests. In Germany, for example, this happens through the instrument of a handover obligation (§§ 17, 18 KrWG – German Law on Life-Cycle Management) which requires residents to submit to municipalities also separated waste flows from households such as scrap, old textiles and paper. It is meanwhile even possible for territorial authorities which operate, say, a recycling centre in a district to prohibit private small-scale waste collectors from collecting scrap and metal or other separated waste flows by way of commercial collections, which has led in numerous cases to the collection businesses closing down. It can be demonstrated that volumes of e.g. scrap and metal collected have reduced significantly in recent years. Many residents are not in a position to transport larger items or amounts to a recycling centre and would need the help of collection businesses to do so.
B. cross-subsidisation and abuse of dominant position by municipalities operating in the waste market;
General remarks
Many municipalities in European countries set up waste management companies or inter-municipality cooperation, to collect and treat not only household waste, but also to offer services on the commercial, industrial and even the EPR market. These companies or organisations have often directly awarded contracts, thereby mixing non-commercial (household waste treatment) and commercial (commercial/industrial/EPR waste treatment) activities within the

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same company. This causes unfair competition between the private and public sector and places additional costs on local tax and waste fee payers. The use of tax payers' money is not transparent. Mixing of non-commercial and commercial activities within the same company also risks violating EU state aid regulations.
A level playing field is crucial to develop a circular economy and promote innovation, new services and investments, growth and jobs in the private sector.
Furthermore, municipal waste management plans are in quite many cases a waste management plan for the municipal company, since the company often gets the task to develop it. This means that the private waste management companies' activities and investments are not included and taken into consideration when developing the plan. The Commission itself recognised that poor governance is a key obstacle. *"Decisions on waste management are often taken by local public authorities, with no or little coordination with private actors (e.g. recyclers) or other authorities in charge of the actual waste treatment. This can lead to sub-optimal practices and even wastage of public resources (e.g. separately collected waste being incinerated/landfilled because of lack of local capacity for recycling)."* (Commission "Circular economy – Scoping note", April 2015).
Some municipal companies have progressive business ambitions with the goal to be the supplier that can offer the best waste management solutions to both households and the commercial sector.
Another example of mixing of roles by the municipalities is that the municipality authority when doing a supervision recommends to use the municipality company for the waste management services.

Norway

Distribution of roles and responsibilities for municipal authorities and private companies in waste management creates marked distortions and unfair competition, as municipal companies mix monopoly tasks with commercial activities. This is also very much related to local overcapacities (e.g. incineration) and inefficient use of capacity in neighbouring countries. Because municipalities build incineration plants of which only 30-50 % of the capacity is used for household waste/municipal waste. They claim that they have to build overcapacity to "plan for the future", but in reality they engage in commercial activities and use their monopoly rights as basis for the investments. Local waste monopolies is the basis for local over-capacity building within incineration, at least in Scandinavia. Local overcapacities also makes recycling less interesting from an economic viewpoint.

Finland

The single most important aspect is the lack of free markets. On the national level this is a problem not only for the functioning of the market, but also for pursuing higher steps on the waste hierarchy. Municipalities have invested in incineration which means that household and similar waste is bound to waste-to-energy through exclusive rights. Long-term contracts (up to 25 years) with energy companies lock waste flows and prevent the private sector from investing into environmentally sounder waste management practices. Additionally, in case of over-capacity, also commercial waste flows to incineration through active market expansion of the municipal companies and cross-subsidization of prices (lower prices for treating commercial waste based on revenues from household waste activities).

Sweden

Municipalities have invested in over capacities on waste incineration which leads to that waste management services focussing on the material recycling has difficulties to compete due to the price setting from the municipalities waste incineration plants.
Investments in over capacities have also been made for biogas production. Many of these biogas plants owned by the municipalities are not economical, which has led municipalities to depreciate these plants with tax payers' money. This causes unfair competition for the same type of plants built by private investors that gain no such benefits.
Many municipality companies handle also district heating services and cross subsidisation is also taking places between district heating and waste management on the commercial market.

In offerings to the commercial customers the municipality company can offer a better price for waste management if commercial customers buy district heating from the municipality company.
Managers of strong municipal companies make proposals to the political and authority levels of the municipality on what actions and investments should be made to develop the waste management in the municipalities. The problem arise when municipalities mix up these different roles (advise on and execute the plan), often without the politicians being aware of it. By favouring the municipal companies and actively participating in the expanding plans on the commercial market of these, politicians cause major distortions of the market, especially for those SMEs that try to grow on the local market. SMEs face significant unfair competition from the municipality companies.

Germany

The situation for plastics recycling is unsatisfactory across the EU. The economic cost of high quality plastics recycling, which would be especially important in terms of energy efficiency and CO2 emissions, is estimated to be around at least € 60 a tonne.
In recent years, the price situation for spot quantities in the area of incineration of commercial waste has, however, been clearly more favourable than that. Despite an overall improved capacity utilization rate of existing installations, prices are still today often and in many parts of Germany below the amount of € 60, which represents the minimum cost to be estimated for recycling. The price situation in incineration is so favourable because it is not rare that territorial authorities are in a position to obtain significantly higher payments (around € 150 a tonne in Berlin) thanks to the statutorily fixed charges they collect from private households. This price distortion coupled with unduly low legally binding recycling targets has led to significant job losses, business closures and a massive decline in plastics recycling.

C. abuse of in-house and public-public cooperation exclusions (Public Procurement rules)

Sweden

Municipalities having direct awarded contracts are mixing monopoly waste management services (household waste) with commercial waste management services, cross-subsidising between these without holding a separate accounting and fulfilling the Teckal criteria as foreseen in the Public Procurement Directive. In some cases, the company carrying out monopoly services for the municipality creates a separate entity specifically for commercial services and interpret that the Teckal criteria do not apply for this company cf. EU Formal notice 2014/4183 to Sweden. This leads to a situation in which the municipality waste management company is often the dominating actor on the regional market and SMEs have difficulties in entering and growing on the market with their solutions.

France

Contracting authorities can use in-house companies to collect and treat waste without tendering. Some public entities entering in the commercial and industrial waste market qualify their services as service of general economic interest and take advantage of the associated no-VAT regime in order to propose a more competitive offer. This way, they compete with private companies in waste markets segments which do not constitute a service of general economic interest (commercial and industrial waste) by cross-subsidising their activities in these markets with local taxes paid by citizens.
The new Public Procurement and Concessions Directives (currently in transposition phase) might amplify this situation by allowing extensive recourse to exceptional situations s such as in-house and other public-public agreements thereby escaping from the transparency and competition procedure as set down by those directives. In order to prevent unfair competition, stricter controls of efficient public expenditure should be made, state aid rules should apply equally to private and public entities, especially in the framework of services qualified as services of general economic interest.

Germany

A very striking example for the misuse of the public-public cooperation exemption in Article 12 para. 4 of Directive 2014/24/EU went before the German courts in December 2014.
In the German region Rhineland-Palatinate, two districts, each being the local waste management authority, had concluded an agreement, according to which one district delegated its tasks and responsibilities as a waste management authority for collection and treatment of organic waste in its territory to the other district. As reward the other district was to receive an annual payment covering its costs.
Prior to the agreement, a private waste management company had been collecting and recovering this organic waste for 20 years. The private company, however, now should be pushed out of the market. As a means to achieve this goal, the districts relied on the exemption on public-public cooperation as foreseen in public procurement law.
The court ruled that the approach taken by the two districts had been unlawful as their agreement covered a regular procurement process rather than constituting a "cooperation". So, the court declared the agreement between the two districts void and asked them to launch a Europe-wide tender procedure instead.
However, the two districts worked out another solution by joining an already existing public-public cooperation in the German region North Rhine-Westphalia, again invoking the exemption for public-public cooperation in Article 12 para. 4 Directive 2014/24/EU. The case is currently again before the courts.
This example is particularly striking as it bluntly reveals the intention to misuse the exemption from public procurement law for public-public cooperation.

Italy

The latest data provided by the Italian ANTITRUST Authority (Autorità Garante della Concorrenza e del Mercato – AGCM) in the field of waste management revealed that there are too many in-house arrangements with absence of public tenders (46.8% do not open public tender procedures), compared with 22.8% of regular service, while only 30.4% of contracts are awarded via public tender procedures; this determines closure of the market.

Norway

Several Norwegian municipalities award exclusive rights to their own waste management companies. This means that private companies are excluded from the competition of contracts, even if they can offer better and more efficient solutions. It addition, several public waste management companies owned by the municipalities, operate in commercial markets, at the same time as they are enjoying exclusive rights as part of the municipal monopoly on household waste (see A). In Norway, awarding exclusive rights on collection and treatment of waste even differ from in-house collection/treatment of waste, as the Teckal criteria do not apply. Several (inter-)municipal waste companies conduct commercial activities, which amount to well above 20 % of the total turnover in municipal companies, while they enjoy monopoly on household waste at the same time. There are also examples of non-commercial municipal waste companies, which collect household waste, before directly awarding contracts on treatment of the collected waste to commercial sister companies (organized within the same corporate/parent company). In practice, this means that exclusive rights on household waste (and commercial waste from municipal buildings), are awarded directly to municipal companies with a commercial and industrial character.

D. unequal VAT treatment between public and private companies

Differential treatment with regards to the payment of VAT in the public and the private waste management sector is a problem in a number of Member States (e.g. Germany, UK, Greece, Belgium, Luxembourg etc.). It creates distortions of competition between public and private bodies, in particular, for the collection of waste which has the following consequences:
1. In cases where public and private service providers compete in the same market, distortion of competition occurs due to the public party not charging its customers with VAT, therefore being able to offer more competitive prices.
The current legislation has attempted to resolve this issue in Article 13 of the VAT Directive by granting Member States the discretion to charge VAT to public authorities, where this would

lead to a “significant” distortion of competition. This, however, has led to legal uncertainty and a lack of clarity, which prevents a consistent application at national level. Member States, for instance, have interpreted the provisions of Article 13 paragraphs 1 and 2 in different ways and have treated certain taxable services as non-taxable, even in markets that are open to competition.

Waste management should be included in the list of taxable activities (Annex I of the VAT Directive), which has been created explicitly with the goal to avoid distortions of competition between public and private bodies. The fact that waste management is not included in the list is all the more problematic, given that waste management is an activity, in which the private sector is actively involved and which is labour-intensive, rendering the sector thus very sensitive to VAT.

2. A second issue is that a public body exempt from VAT is charged VAT by the private service provider when it outsources its services. This acts as a disincentive for public authorities to outsource services, even under circumstances where this would improve efficiency, as they cannot recover the VAT. It also affects the promotion of public-private partnerships, since these types of contracts become unfairly costly for public authorities due to the non-recoverable VAT. One of the reasons for public bodies using in-house service providers is that private providers would have to charge VAT, which for the public entity is not recoverable. However, if the VAT could be recovered, the public body may be able to save costs and increase efficiency by using a private provider. The 2011 Copenhagen Economics study on the VAT exemptions in the public sector contracted by the European Commission, for instance, clearly shows how public authorities can save costs by outsourcing if they could recover VAT. In this regard, the study provides the following example: a service which costs the public authority € 110 when provided via an in-house operator can be provided by the private operator for € 100, as a result of economies of scale. However, as the private provider is currently required to charge VAT of around 20%, the cost for the public authority becomes € 120 on account of the non-recoverable VAT. Clearly, if the authority were able to recover the 20%, it could decide to outsource the service and save costs.

The Copenhagen Economics study further explores the investment decisions of the public sector and shows that, for public authorities, the possibility of refunding VAT may lead to more investment decisions and outsourcing.

Equal VAT treatment in the public and the private sectors for the same type of services could also provide more clarity on the burden of costs for public-private partnerships (PPPs) and consequently foster the creation of more PPPs in the EU. The Copenhagen Economics study shows that there are cases where the creation of PPPs has been difficult, as a result of differential VAT treatment. In the case of Germany, for example, PPPs must pay VAT, which makes the participation of the public party more expensive because of the non-recoverable VAT.

Against this background, equal VAT taxation of public and private waste management operators across the EU needs to be guaranteed.

E. misuse of EU funds (not in line with the waste hierarchy)

The lack of economic instruments and improper application of the public procurement procedures hamper private investments, thereby creating barriers to achieving sustainable growth in a resource efficient and environmentally sound way. Indeed, in Central and Eastern Europe public companies use subsidized investments on the non-subsidized competitive market, jeopardizing the concept of fair competition. EU funds should not be used for re-municipalisation and to set up redundant waste management infrastructure. Central and Eastern Europe have to increase landfill fees and put an end to varying levels of contributions for public and private investors to give them equal treatment. There should be better controls of EU subsidized investments.

7. What actions are you aware of that could solve or mitigate this problem? (multiple answers possible)

If relevant, please provide additional information in relation to your above reply.

Legislative changes

General remarks

What we can see at European level is essentially an implementation, enforcement and prioritisation problem.

Inadequate application of European legislation as well as still insufficiently clear priority-setting (in line with the waste hierarchy) in the deployment of resources from the European structural and cohesion funds for the development of a waste infrastructure in the new EU Member States attract criticism in equal measure.

At national level, arrangements which discriminate against the private sector vis-à-vis the state-operated sector need to be consistently dismantled. Only in this way can we ensure the continuation and promotion of innovative and cost-efficient material recovery which is driven forward by the private waste management sector.

In addition, individual national policies must insist on the development of an efficient secondary raw materials sector even in conflict with municipal territorial authorities' monopolies. If necessary, capacities and installations which are *de facto* contrary to a secondary raw materials sector and the five-step waste hierarchy should be upgraded or closed down.

There is a need for a proper transposition and enforcement of implementation of European law at national level. In general, internal market and fair competition aspects should not be circumvented. This requires a strict interpretation (only in exceptional cases) of the in-house and public-public cooperation criteria (Public Procurement Legislative Package). Upcoming legislation should ensure the development of waste management markets in such a way that they become more market-oriented and give all actors on the market the possibilities and incentives to develop a circular economy. Revise the waste legislation and have special actions in those areas where waste is regarded as a problem. Set clear market regulations and conditions so that waste management can take place in open markets

At EU level, it is important that the revised Waste Framework Directive incorporates the relevant case law of the Court of Justice (see in particular cases C-292/12 and C-209/98), thereby clarifying that collection and treatment of separately collected waste destined for recovery (including such household waste) are activities on the open market and as such subject to competition. At national level revisions are required too. For example in Germany, a revision of Section 17 KrWG must secure that commercial collections of separately collected household waste may be prohibited only in exceptional circumstances and based on grounds exclusively related to the collection itself or the collector. It may not, as it is currently the case, be based on grounds related in any way to the public waste management authority.

Certification of recycling facilities

The establishment of a certification system for recycling facilities treating hazardous waste (e.g. WEEE) could be envisaged in order to ensure the proper application of hazardous waste legislation and to create a level playing field for all operators both within the EU and in third countries. By contrast, for green-listed waste (separately collected fractions such as paper, plastic and scrap metal) there should be no mandatory certification at global level since this would create an unjustified barrier hindering trade in secondary raw materials and is deemed to be an inadequate measure to prevent illegal shipments.

Changes in the policy or decision-making by authorities

There is a need of requirements that secure that non-commercial activity and commercial services are not organised within the same municipal company or corporate. This can be secured both through EU/national legislation as well as policy making on local/regional level. On local level, it is municipal politicians who should decide that green public procurement and

competition on waste management services shall be the norm, instead of granting monopolies and exclusive rights.

EU guidance on waste legislation or policy

In a number of EU States, Norway included, there is little observance of basic principles of competition and internal market law, resulting in unfair competition from public or private entities in the waste sector. It is crucial that a public actor, which engages in a commercial activity, is subject to the same obligations as private companies, and does not benefit from special, exclusive rights. The growing lack of competitive neutrality in a number of Member States endangers the economic viability of the recycling businesses in an internal market across Europe and must be addressed by the European Commission. As a result, DG Competition should update its paper "Concerning Issues of Competition in Waste Management Systems", published in September 2005.

Co-operation between authorities in different Member States

Waste Shipments Regulation

Stronger co-operation between authorities in the member states is crucial to secure that EU legislation is interpreted in the same way across the EU. In addition, better co-operation on control/inspection of transboundary waste shipments is necessary. We also suggest that the group of Correspondents for the Waste Shipments Regulation is transformed into a Technical Adaptation Committee, and that formal consultations with the industry are allowed.

Co-operation between authorities in the same Member State

The framework conditions for the waste management market has so far predominantly been determined by the environmental authorities who do not always have a profound knowledge of the functioning and development of waste markets, but rather look at them from an environmental perspective. Circular economy is a much broader strategic issue and the responsibility for the resources market, including the waste and recycling market, should involve other ministries responsible for defining the market conditions (e.g. fair competition aspects, introduction of economic instruments). The environmental authorities will continue to play an important role in supervising market developments from an environmental point of view.

Other

Better enforcement of EU legislation and monitoring of national waste management plans.

8. Are there other important aspects of policy and legislation that distort the waste market or create obstacles to the functioning of waste markets? If yes, please describe these taking into account the previous questions.

The different interpretation and implementation of EU legislation at national/regional level as well as the fact that the level of enforcement varies greatly among Member States prevents the development of a level-playing field for waste management companies across the EU. In the section below, the main differences leading to market distortions are explained.

Lack of clear definitions

The lack of clear definitions and harmonised calculation methods and reporting under the Waste Framework Directive make it hard to compare achievements (e.g. of the recycling targets) across the EU.

- Sweden

In Sweden, municipalities can define what is regarded as "similar waste", which means that all 290 municipalities decide about their own definition. The municipalities claim ownership of this type of waste which means that commercial companies generating the waste and wanting to have it treated at a higher level of the waste hierarchy cannot ask for such a service on the market.

- Definition of "municipal waste" to be changed into "household waste"

It is important that EU waste definitions are developed with the objective to secure equal access of public entities and private companies to recyclable materials and do not undermine the level

playing field that must exist between all actors. Waste definitions should be formulated in such a way that the terms used do not place undue emphasis on who collects the waste. The term "municipal waste" should be replaced with a collector-neutral definition. This will encourage and incentivise all actors, including SMEs, to reach the recycling targets, crucial to a circular economy. To avoid market distortions, the terminology "household waste" should be preferred and its scope limited to waste produced by households.

Poor statistics

The Regulation on Waste Statistics and the different calculation methods applied for measuring what is included in the recycling rate do not provide a solid basis for harmonised statistics in Europe in order to draw comparisons between the performances of the Member States.

We notice a striking divergence in the data on waste generation across EU countries, for example on the generation of hazardous waste per capita. This reveals a diverging classification of waste and a lack of reliable data on waste generation and management.

Diverging level of enforcement

The level of enforcement in terms of waste management varies highly both within countries and between the Member States (WFD: e.g. divergence in the permitting and traceability rules for hazardous waste; Waste Shipments Regulation: weak enforcement in some countries leads to "port hopping"). This creates an uneven playing field (between countries but also between legal and illegal operators).

The following examples, which are the result of poor enforcement and insufficient control and inspection, lead to a distortion of waste markets:

- Poorly classified waste, hazardous waste classified as non-hazardous waste;
- Hazardous waste mixed with non-hazardous waste to avoid proper environmental treatment;
- Illegal landfilling on sites or facilities without the required permit;
- Sham recovery: deposit of waste in gravel pits and quarries, and uncontrolled application of industrial waste to soil.
- Waste treated in facilities not authorised to do so (e.g. hazardous waste waters in urban waste-water treatment plants);

- Tackling illegal activities

Some waste streams are subject to theft at civic amenities or in the streets before collection (WEEE and metals). Payments in cash can create a disadvantage for some companies operating in Europe (ELV and scrap metals) because they make it easy for criminals to sell stolen metals to rogue waste dealers. These payments can lead to a fiscal advantage for companies subtracting themselves from taxation compared to the others. Such payments are forbidden in some countries but remain a common practice in other countries. We therefore ask for limitations in cash payments to be applied in the same way across the EU.

Different application of procedures

For some pieces of EU legislation, in particular the Waste Shipments Regulation, the different implementation of procedures causes problems for operators, especially when they are active in more than one country and have to follow diverging rules (e.g. for the filling in of Annex VII WSR). Furthermore, in case of shipments there are frequent conflicts between the authorities of different Member States (e.g. different classification of waste, discussion on the status of the material: waste or end of waste).

It is crucial to improve the efficiency and quality of controls and inspections in order to tackle illegal waste shipments. At the same time, a clear distinction needs to be made between "real" illegal activities performed by rogue traders and shipments reported as illegal simply due to a divergent interpretation between Member States and/or a mistake when filling in paper-based forms.

Lack of EU end-of-waste criteria

In absence of EU end-of-waste criteria, several countries have established national end-of-waste criteria. Different national criteria for the same waste streams create market distortions.

Furthermore, uncertainty remains among authorities on how to interpret applications for end-of-waste criteria for specific recycled materials. It often takes very long and in some countries, the legal value of such decisions is questioned. There should be better guidance for authorities when handling applications for decisions on end-of-waste. Otherwise, the development of markets for recycled products will be hindered. E.g. it can be hard to find buyers for recycled materials because the buyer needs to have an environmental permit to handle waste, in order to be able to use the recycled materials in their production. This can be a long and costly process which can make it less interesting to use recycled materials. At European level, national end-of-waste regulations can lead to uncertainties for waste operators and reduce their ability to exchange on best practices between their entities in different EU Member States. We therefore call for the establishment of EU end-of-waste criteria for priority waste streams such as paper and plastics.

- Ireland

The introduction of end-of-waste criteria has led to a problem with recycling aggregates in Ireland and possibly with other materials. The aggregates were considered a product and sold as such until the WFD introduced end-of-waste criteria, with the corollary that any material not certified as end-of-waste remains a waste and cannot be used as a product. Due to a lack of resources, the Irish EPA has not yet been able to develop end-of-waste criteria for aggregates. Irish waste management companies therefore now have no ability to recycle aggregates in Ireland. Waste companies in Northern Ireland (part of UK) can declare end-of-waste for their aggregates and bring them south as a product to be sold in the Republic of Ireland, but Irish companies cannot do this in their own country. Larger Member States have a big advantage here as they have the resources to establish national end-of-waste criteria quickly and effectively.

B. Obstacles to the functioning of waste markets connected to the application of EU waste legislation or other EU legislation

10. What are the drivers/causes of these regulatory failures or obstacles to the efficient functioning of waste markets?

a. Application of the system of notification- and consent requirements under the Waste Shipment Regulation (Articles 4-17 and 26-33 of the Waste Shipment Regulation).

The different interpretation of procedures by the authorities in EU countries are burdensome for waste management companies. The use of electronic forms instead of paper-based forms (both for Annex VII and notification documents) to fulfil procedures deriving from the WSR would reduce the administrative burden for companies and authorities. Electronic systems reduce paperwork, contribute to the simplification of procedures and allow for better protection of confidential business information. Moreover, the introduction of an EU-wide data interchange system would solve the problem of incompatibility of existing systems. We welcome the establishment of common inspection criteria (recent revision of the WSR) but note that to facilitate the cross-border movement of waste, not only the criteria for inspections but also the criteria for administrative procedures should be further harmonised. Also, increased traceability would allow authorities to more easily tackle illegal shipments of waste.

b. Application by national authorities of the provisions concerning waste shipments through transit countries (Waste Shipment Regulation).

See a.

c. Other controls imposed on waste or waste shipments by application of EU waste legislation.

Person who arranges a shipment
In many EU countries, a company which does not have a legal seat in the country of dispatch may not act as "person who arranges a shipment" (Art. 18 WSR). In a harmonised European market where waste is considered as an economic good, all legal operators, also those established in other EU or EEA countries provided they are registered in the country of dispatch, should be allowed to arrange shipments from any EU country, in order to unlock the full potential of the internal market for waste materials.
Effective presence of the contract
Countries like France, Germany and Austria require the effective presence of the contract mentioned on Art. 18.2 WSR on board of the vehicle, while the WSR only refers to the providing on request. We would like the Commission to make an overview of the situation in different countries in order to provide clarity for waste operators. Ideally, we would like the Correspondents' guidelines to explicitly mention that the contract does not have to be carried on board but needs to be provided on request from the authorities.
Different interpretation of green-listed waste
- Ireland
Some Irish companies have had some shipments of waste paper returned from the Netherlands. The Irish companies argue that these are shipments of paper with minor contamination, whereas the Dutch authorities argue that this is mixed waste. The problem arises from the fact that in Ireland domestic paper is collected co-mingled with other recyclables and is not as clean as paper collected from households in the Netherlands, so the Dutch Port authorities decide that it does not comply with the Dutch standard.

d. Different interpretations of the definition of 'waste' according to the Waste Framework Directive.

In case of waste flows for which there are no end-of-waste criteria defined at EU level or for by-products, there can be different opinions between various Member States. In absence of EU end-of-waste criteria, Member States may develop their own national criteria which are supposed to be valid only within their own borders and by mutual recognition (receiving country recognising the criteria). However, the traceability of such a national end-of-waste stream being nevertheless potentially exported cannot always be guaranteed. Whereas national end-of-waste criteria need to be notified to the EC, a notification for by-products is not required.

e. Diverging classifications of waste as 'hazardous' or 'non-hazardous' (Waste Framework Directive).

Even though Commission Decision 2014/955/EU, which revises the list of waste entries, entered into force on 1 June 2015, there are still large differences as to the interpretation of properties of waste which render it hazardous (in particular concerning the hazardous property HP 14). Correct declaration must be ensured by way of better enforcement. It has to be avoided that hazardous waste can be declared as non-hazardous.
Examples of waste streams for which there are frequent disagreements as to whether they are to be classified as hazardous or not are: harbour sediments, contaminated soils, empty packaging of phytosanitary products.
- Finland
The Finnish authorities consider the shredder light fraction (SLF) to be hazardous waste whereas in other EU countries the exact same waste fraction is seen as non-hazardous. The list of waste contains a mirror entry for SLF. The classification applied in Finland puts Finnish companies at an economic disadvantage compared to companies in other countries.

f. The distinction between 'recovery' and 'disposal' (Waste Framework Directive).

There are differences in qualifying treatments as a Recovery or Disposal operations between the Member States. For example, in the UK and Germany hazardous waste incineration is qualified as Disposal whereas in other Member States (e.g. France) this is not always the case (it depends on the calorific value of the hazardous waste and can be classified as either Disposal or Recovery).

g. Application of the 'proximity principle' resulting in an outcome which is inconsistent with the waste hierarchy (Waste Framework Directive and Waste Shipment Regulation).

We understand that this question refers to both the self-sufficiency principle and the proximity principle as foreseen in Art. 16 of the WFD.
Whilst we are in favour and acknowledge the importance of the principle of self-sufficiency, we strongly advocate for two points to be clarified by European legislation:
Art. 16 stipulates that the principle does not mean that each Member State has to possess the full range of final recovery facilities within that member state. Hence, this principle has to be applied at EU level allowing the setting up of an integrated cross-border network of installations allowing exports. In doing so, Member States can co-operate.
The principle is applicable only to waste destined for disposal and to mixed municipal waste for recovery not to separately collected waste destined for recovery.

h. Divergent application of the so-called 'R-codes', i.e. the recovery operations listed in Annex II to the Waste Framework Directive.

This concerns, amongst others, the categorisation of waste treatment facilities. In some countries, the permits for such installations do not contain any R/D codes as required in Annex VII WSR. This issue will become more controversial as from 1 January 2016 when the provisions of Regulation (EU) No. 660/2014 of 15 May 2014 amending the Waste Shipments Regulation will enter into force. That is because Regulation (EU) No. 660/2014 introduces a shift of the burden of proof to the person who arranges the shipment. The person who arranges the shipment could henceforth be held liable for an incorrect or failing classification of the treatment facility in the country of destination.

i. Application of national end-of-waste criteria established in accordance with the Waste Framework Directive, see further Article 6(4) of the directive.

The lack of interest in some countries to establish national end-of-waste criteria (in the absence of EU end-of-waste) may lead to economic disadvantages for companies operating in these countries compared to operators in countries which have established national end-of-waste criteria.

j. Application of the grounds for reasoned objections to shipments of waste for recovery, as listed in Article 12 of the Waste Shipment Regulation, or the requirement for environmentally sound management (ESM), see further Article 49(1) of the regulation.

The requirement for environmentally sound management relates, for instance, to installations in third countries. In cases of shipments to third countries the requirement for environmentally sound management often leads at least to a time obstacle until all documentation on the installation in question has been collected to ascertain whether environmental standards are met. Depending on the country, this documentation is sometimes available at the installation, sometimes not at all. This point will also become more relevant as from 1 January 2016 (“shift of the burden of proof”).

k. Other obstacles not listed above.

Application of the REACH Regulation
Obstacles exist at the interface between the Waste Framework Directive and the REACH Regulation. As soon as a material 'ceases to be waste', REACH requirements apply in principle (except for registration, from which recovered substances may be exempted if "sameness" to an already registered substance can be proven) in the same way as to any other material. For example substance identification required by REACH and in particular the identification of impurities in the recovered substance can be very challenging because the composition of recovered substances may vary, depending on the waste input. To achieve better quality recyclates, the requirements for primary products should be higher (e.g. the use of hazardous substances should be phased out), so that the problem to comply with REACH does not arise when the product is recycled.

D. Final questions

19. What solutions would you propose in order to address the regulatory failures or obstacles you have identified above?

Private sector investment
A more circular economy can only be achieved if European policies and policy instruments support and facilitate the construction of the alternative waste and resource management facilities required to move materials up the waste hierarchy and put them to beneficial use. This requires considerable capital investment and most Member States will have to rely on the private sector to provide this investment.
Private sector investment is the key to making progress towards a more circular economy in Europe and closing the gap in performance between Member States. To get the necessary investment, and so create growth and jobs, Europe needs a long-term vision for resource policy beyond 2020, the right regulatory framework, and competitive markets. That is why FEAD is calling for the following measures to be included in the Commission's revised Circular Economy package:

- Full implementation and proper enforcement of existing waste and resource management legislation. Implementation of waste management plans at national level should be closely monitored.
- EU funds provided to Member States for investments in waste or resource management infrastructure must respect the waste hierarchy. EU Structural Funds must be used more efficiently.
- Binding recycling and landfill diversion targets are needed to provide legal certainty beyond 2020 and a firm basis for making business and investment decisions. FEAD strongly believes that these targets should remain harmonised at EU level, with longer transition periods and extra help for some Member States where necessary.
- Market-based solutions are a key driver for investment and innovation. To achieve a circular economy, free and fair competition is needed throughout the value chain to stimulate customized services and solutions.

Resilient markets for secondary raw materials
Europe's economy can only be truly circular if markets are available for the secondary raw materials (SRM) the recycling and reprocessing sectors produce. The current markets are unstable and disincentivise SRM production and uptake by Europe's industry. While secondary materials are in direct competition with lower-price virgin materials, we will not deliver a more

circular economy in Europe, even when overall demand for raw material is strong, unless the environmental cost of using primary raw materials is better reflected in their price.

FEAD is calling for credible and effective measures to help build resilient markets for SRM across Europe by boosting demand and creating the conditions for price stability:

- In order to reduce dependency on virgin raw materials and increase the circulation of SRM, the EU's reindustrialisation strategy should boost markets for SRM within the EU.
- The Eco-design Directive should go beyond energy efficiency and include measures for material resource efficiency, including recyclability requirements for selected products such as electronics.
- Eco-labelling rules on products should be amended to make it easier for consumers to choose recycled and resource efficient products.
- The Commission should encourage collaboration between all actors in the value chain, fund innovative substitution technologies and reward first-movers through market instruments such as a lower rate of VAT on second-hand goods and products with recycled content, to promote waste prevention and re-use.
- The Commission should clear the barriers impeding the wider adoption of Green Public Procurement practices, a potentially powerful market driver. Public procurement should be by open competition and should be awarded to the offer which delivers the most sustainable outcome.
- The Commission should ensure that extended producer responsibility schemes operate in a transparent way, to incentivize manufacturers to design their products in a recyclable and non-hazardous way and to ensure fair and equal access to materials and resources.

Pull measures

FEAD broadly supported the Commission's original proposals to ban recyclable waste from landfill by 2025, and to set a 70% recycling target for household and similar waste by 2030, which would vastly increase the supply of secondary raw materials. But where will the demand for these additional materials come from? Increasing the supply of SRM does not automatically create demand for it, due to competition from lower-priced primary raw materials. If the cost of collecting and sorting SRM outweighs the output value of that material, it could become uneconomic to collect and process much of Europe's recyclable waste.

If Europe truly believes in the wider economic, environmental and social advantages of a Circular Economy, it must recognise that market forces and supply side measures alone will not deliver it. Hence, FEAD is calling on the Commission to put much more emphasis on the demand side:

- Minimum recycled content requirements for selected products.
- Minimum green public procurement requirements at EU level to boost purchase of recycled products and materials.
- Eco-labelling rules to incorporate indications of recycled content and recyclability.
- Lower or zero rate of VAT on second hand goods and products with recycled content.

Open markets and fair competition

A crucial element in delivering a Circular Economy is to create open markets and fair competition for waste and resource management services. By ensuring open markets and fair competition, jobs and growth will be created. For the private sector to deliver these services and make the necessary long term investments for a circular economy, they need legal certainty and fair competition rules ensuring that the household waste market is opened up for increased competition.

Free and fair competition will deliver a circular economy much more effectively and efficiently. The benefits are clear; more choice for customers, lower costs for households, higher recycling rates, more innovative recycling solutions and the potential for higher growth and more jobs.

FEAD has observed a clear trend towards increasing public sector activity in the recycling market in several Member States. This goes against ample evidence which shows that

competition through private sector involvement delivers better outcomes for the environment and for taxpayers. Against this background, FEAD makes the following recommendations:

- Household waste management markets should be opened up to competition from private entities. Competition in waste markets should be the norm.
- The legal responsibility of municipalities should be limited to the collection arrangements for household waste only, by recourse to mandatory open tender to provide the best value-for-money service to the taxpayer and the most efficient use of taxpayer funds.
- In line with European Commission recommendations, Member States should not attach specific public service obligations to waste management services that are already provided or can be provided by undertakings operating under normal market conditions.

There should be equal market conditions and clear regulations for municipalities operating both on the household and commercial waste markets. The competitive advantages enjoyed by municipal undertakings should be removed (such as lower VAT rates and the possibility of "cross-subsidisation").