



MUNICIPAL WASTE EUROPE

– promoting public responsibility for waste

Brussels, 20/03/2012

Municipal Waste Europe Position Paper on the proposal for a directive of the European Parliament and of the Council on the award of concession contracts, COM (2011) 897

Municipal Waste Europe is a non-profit association which represents European municipalities and their waste management companies, in their responsibility to manage municipal waste. The members of Municipal Waste Europe represent 14 Member States of the European Union, through national public waste associations, which serve over 60% and up to 95% of their national population.

One of the key issues for the European municipalities is the promotion of the responsibility of local and regional authorities for waste management as a service of general interest. Throughout Europe, municipalities are responsible for the recovery of material resources from European households. The members of Municipal Waste Europe therefore play a pivotal role in driving Europe to becoming more resource-efficient. In effect, the members of Municipal Waste Europe are the bridge between the actors in resource efficiency, the citizens and thus the public.

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Municipal Waste Europe believes that:

1. Due attention must be paid to the former decisions of the European Parliament

The European Parliament in two decisions about public procurement (so called Ruehle-reports) insisted “*that any proposal for a legal act dealing with service concessions would be justified only with a view to remedying distortions in the functioning of the internal market; points out that such distortions have not hitherto been identified, and that a legal act on service concessions is therefore unnecessary as long as it is not geared to an identifiable improvement in the functioning of the internal market*” (2009/2175(INI)).

From the point of view of Municipal Waste Europe, the impact assessment of the European Commission does not reveal any profound arguments for the necessity for such a legal act. The impact assessment is a pure accumulation of data – and lacks a real analysis of the current situation and the potential impacts of such a directive. Municipal Waste Europe believes it is important to pay due attention to the earlier decisions taken by the European Parliament: the necessity for in-depth analysis of whether the Commission’s impact assessment adequately

replies to the request of the European Parliament in its initiative reports on public procurement *before* beginning negotiations on the concrete contents of a proposal.

2. The Commission does not propose a procurement “light”

In addition to a more concrete definition of service concessions, the Commission submits service concessions to a detailed tendering process: ‘In general the same thresholds shall apply as for the works concessions. In case a concession contract reaches this threshold there must be an official tender published in the Official Journal of the EU.’ Also, the bidders should be granted comprehensive legal protection by the application of the EU Remedies Directive. Exceptions for small and medium-sized authorities are currently not foreseen. Furthermore, practically all sectors fall within the scope of the proposal depending on the application of the definition of service concessions. The European Commission does not foresee a specific tendering and award procedure. However, procurement procedures and selection criteria must be objectively justified and in accordance with the principles of primary law (non-discrimination / equality). In this context, the European Commission does clarify for example in the accompanying impact assessment, that the French Loi Sapin gives too much freedom to local authorities and the awarding body in this sense. Summarizing these facts **this proposal is in no way a “light” Public Procurement Law** which the European Commission did so often promote in all meetings it had with the stakeholders and the European Parliament. The proposed rules go far beyond the judgments of the European Court of Justice and European Primary law.

3. The Commission’s proposal does not lead to more competition and the creation of PPPs

The European Commission and the proponents of the European Parliament and the Council of Ministers repeatedly emphasize that the supreme political objective of a legislative proposal on service concessions is to promote **public-private partnerships** and to increase competition in infrastructure services. Municipal Waste Europe very much doubts a realization of this goal in terms of public services: the goal to integrate small and medium-sized enterprises in the creation of municipal services by means of this proposal on service concessions is **highly questionable**. To date, the Commission and its efforts to liberalise other sectors, such as the energy sector, the postal sector or the telecommunications sector have only produced oligopolies. In this situation only a few world leaders would benefit from the proposals of the EU.

In its impact assessment the European Commission very briefly takes up this argument but rejects it. However, the European Commission commits a serious error of logic. In its impact assessment, it refers only to France, arguing French small and medium-sized businesses hold an excellent competitive position in relation to world market leaders (see footnote 130 of the impact assessment). If this is really the case, the reason for this certainly lies in France’s flexible procurement procedure (Loi Sapin), which currently applies to procurement entities in France, and which this draft concessions act proposes to stop. Precisely this award procedure, which enables the competitive position, is declared as being too flexible by the European Commission in this very same impact assessment. This reasoning is contradictory and will not result in further clarity or the competitiveness of public services.

4. Conclusions

Regarding the above mentioned issues, Municipal Waste Europe continues to consider European legal requirements on service concessions as unnecessary. In several of its

decisions the ECJ laid down the central principles of EU primary law (transparency, non discrimination, proportionality). Hence, for the public sector the main principles for service concessions are given. Further EU legal requirements would not lead to greater legal certainty, but would at most further complicate the award of service concessions in legal terms. This would result in unreasonable constraints on local flexibility and the principle of self-government. The local authorities' freedom as laid down in the Treaty of Lisbon must be preserved.

The application of detailed rules on public procurement in the field of service concessions should therefore be rejected.

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