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FEAD position paper on the evaluation of the public procurement directives

FEAD, the European Waste Management Association, representing the private waste and resource management industry across Europe, **welcomes the evaluation of the public procurement directives in the EU. With the aim of improving competition and the circular economy, we present a number of critical remarks on the functioning of public procurement in the waste management market.** Most notably, FEAD highlights the need to:

- ✓ Limit the exceptions to public procurement rules under in-house contracts or public-public cooperations by introducing **a mandatory 'competition test'**. This shall ensure that such exemptions are only used to award public service contracts without a procurement procedure, where a publicly available assessment evidences that there is no private operator capable of executing the contract in the relevant market.
- ✓ When using in-house procurement rules, the consolidated turnover of a group or corporate is taken into account, i.e. the turnover of the group or undertaking to which the controlled legal person belongs in the sense of an economic unit, which may consist of several natural or legal persons. In addition, 100% of the activities of the in-house company should be carried out in the performance of the tasks assigned by the controlling contracting authorities, so to avoid forms of unfair competition. Finally, the scope of application of joint similar control is revised, for example, by introducing minimum participation thresholds by each participating administration.
- ✓ Introduce **mandatory green public procurement** with a strong focus on circularity and a 'buy European' requirement for recyclates.
- ✓ Improve and ensure **verification** of proper procurement practices.
- ✓ Regulate **risk division** between the parties to the contract adequate to their role.

Public procurement is of outstanding importance for the European economy, especially for small and medium-sized enterprises (SME). In addition, public procurement law, based on free and fair competition, and the free movement of services and goods, makes a significant contribution to the achievement of the single market and the objectives of the Green Deal and the Clean Industrial Deal. In this context, fair and transparent markets for waste are essential to encourage private sector investment. Therefore, **any forms of preferential treatment of public entities** (also State-owned enterprises) **over private companies must be eliminated, including in procurement legislation.**

Remunicipalisation trend and its impact on the circular economy

As noted by the European Court of Auditors¹ (ECA), competition for public contracts has diminished over the last decade. In particular, the municipal waste market has been steadily remunicipalised in recent years and as a result, more and more medium-sized companies are being squeezed out of the market.

- In Latvia, for example, the market share of the municipal waste collection market open for competition is only 32%, while in the remaining 68% contracts are being allocated in-house.
- In Italy, direct award of public contracts without procurement reached 91,7% in 2021 for local service contracts.²
- In Germany, it is estimated that the market share of State-owned enterprises has increased by about 31% since 2003, reaching approx. 57,5% in 2023 for the collection of residual municipal waste.³
- In Poland, the number of in-house procurements increases every year, including in big cities such as Warsaw.
- In Hungary, since 2013 only entities in which the State has at least 51% ownership can carry out household waste collection activities.

Achieving circular policy goals is hindered by the public monopolisation of the waste management market. The lack of public tendering closes the market to private operators and, although the public sector's involvement is mainly limited to **municipal waste collection markets**, this **gives control over the direction of the waste flows**. It now coincides with increased public companies also active in recycling.

To increase the quantity and quality of recycling, innovation and investments are needed, for which market access and competition are key. Therefore, **procurement rules should be revised to ensure that waste management services are always allocated on the basis of quality and efficiency to drive the transition to a circular economy through innovation**. The protection of public health and the achievement of waste management targets by Member States can be best carried out by tendering and seeking the best services in the market.

Competition test prior to in-house procurement or public-public cooperation

The primary issue that emerges is the decreasing integrity of the public procurement system, given the exclusion of competition through in-house contracts or public-public cooperation. The current in-house procurement provisions do not offer sufficient guarantees to ensure competition and, in the case of less concentrated markets, contracting authorities from consortia of municipal companies eliminate competition from neighbouring markets via public-public cooperation. Effective oversight of the delegation of public tasks between contracting authorities is practically non-existent.

¹ <https://www.eca.europa.eu/en/publications/sr-2023-28>

² https://assoambiente.org/entry_p/Comunicati%20Stampa/comunicati_stampa/15498/

³ Alone from 2021 to 2023, the State-owned enterprises increased their market share from close to 50% market share in 2021 to approx. 57,5% in 2023

FEAD therefore firmly advocates for a legislation that fully and comprehensively subjects public utility services to public procurement. Articles 11 and 12 of Directive 2014/24/EU (and their equivalents in Directives 2014/23/EU and 2014/25/EU)⁴ must not serve as a shield for the creation (or re-establishment) of public companies that, in the presence of a well-developed private sector, take over markets from private operators without a competitive tendering process. **In-house procurement and public-public cooperation as an exception to public procurement must be revised and limited to strictly necessary and duly justified cases.**

It is crucial to establish a '**competition test**', according to which, **if private actors, capable of executing the contract, operate in the relevant market, the contracting authority must organise a competitive procurement procedure.** If the competition test yields a negative result, the contracting authority could exceptionally entrust a municipal company with the execution of the contract without applying a competitive procedure.

The 'competition test' must ensure that in-house procurement and public-public cooperation are exceptionally used to award public service contracts without a public procurement procedure, in cases where a publicly available assessment evidences that there is no private operator capable of executing the contract in the relevant market. In the case of public-public cooperation, the assessment must, additionally, evidence that the underlying exclusive right is compatible with the TFEU, documenting market failures that provide grounds for the exclusive right.

Subjecting in-house procurement and public-public cooperation to competition and public procurement legislation would ensure the effective competitiveness of such awards in terms of the quality/price of the goods and services provided and the capacity to carry out the investments necessary to achieve the EU's climate and energy objectives.

The introduction of a competition test is particularly justified by the very content of Directive 2014/24/EU, which states in Recital 1 that *'the award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency'*.

Stricter in-house procurement

In addition to the proposed 'competition test', in-house procurement must be adjusted in the following terms:

- When using in-house procurement rules, **the consolidated turnover of a group or corporate must be taken into account, i.e. the turnover of the group or undertaking to which the controlled legal person belongs in the sense of an economic unit, which may consist of several natural or legal persons** (Art.

⁴ For the sake of simplification, we refer in this paper to the Article numbers from Directive 2014/24/EU, which is to be understood as general comments for EU procurement legislation in its corresponding directives

12(5) in Directive 2014/24/EU). Taking into account only the turnover of the controlled legal person itself may lead to an unduly large number of exceptions to the applicability of Directive 2014/24/EU and, therefore, to less competition. In addition, a controlled legal person could circumvent the 80/20 ratio by operating in a group context and, in that context, itself performing more than 80% of its activities for the benefit of the controlling contracting authorities and allowing one or more group companies to operate on the free market.

- **The 80% activity threshold for the ‘internal entity’** (Art. 12 Directive 2014/24/EU), in the context of municipal public utility companies serving large urban areas with turnovers reaching tens of millions of euros, **is inadequate to protect the market.** Such an entity, leveraging its scale of operations, can absorb additional contracts worth millions of euros (with cross-subsidization prohibitions proving ineffective). The percentage of ‘ancillary’ activities conducted by the public sector should not exceed a few percent or should be narrowly defined in terms of scope and financial limits. **We propose that 100% of the activities of the in-house company be carried out in the performance of the tasks assigned by the controlling contracting authorities, so to avoid forms of unfair competition.**
- The scope of application of joint similar control (Art. 12(3)) should also be revised, for example, by introducing **minimum participation thresholds by each participating administration.**

Quality and ESG elements in public procurement procedures

The ECA report notes that **procurement contracts awarded on the basis of the lowest price criterion alone still represent the vast majority of contracts awarded in the EU.** Environmental, social and innovation criteria are still given too little consideration in award decisions. This reduces the incentive to improve the quality of the service and the possibility of obtaining the best value. It is therefore desirable to make the provisions relating to bid evaluation criteria more specific, focusing on the need to better integrate ‘non-price’ criteria into public procurement decisions, as highlighted by the Draghi Report. In addition, increasing the scope for negotiation during the procurement process would better tailor tenders to the real needs of public authorities and encourage the introduction of innovative solutions, both technical and contractual.

FEAD proposes mandatory green public procurement with a strong focus on circularity and a ‘buy European’ requirement for recyclates:

→ Mandatory green public procurement with common implementation strategy that ensures operationalisation at all levels

The EU has taken, so far, a voluntary approach to green public procurement (GPP). To this end, important changes introduced in the 2014 Directive⁵ have been accompanied by specific [voluntary GPP criteria](#) developed for certain product groups as well as a series of sector specific Life-cycle costing ([LCC](#)) [calculation tools](#). **10 years after the adoption of**

⁵ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC

its public procurement Directive, the EU must take a step further to ensure that environmental aspects are the norm in public procurement. Therefore, **FEAD calls for a revision of the EU Directives on public procurement to enshrine mandatory GPP.**

Around 14% of the EU's GDP (around EUR 2 trillion per year) is spent on average on the purchase of services and goods through public procurement.⁶ This shows that **green public procurement (GPP) can play a decisive role in fostering circular economy, climate change mitigation and green technology innovation.**

The EU's voluntary approach to GPP has given room to Member States to come up with various objectives and tools that are currently used at national level. However, it is estimated that EU countries make very limited use of GPP. Based on data from the EU Tenders Electronic Daily (TED) database, most EU MS seem to use GPP in only less than 5% of their procurement contracts while, looking at the application of the most economically advantageous tender (MEAT) principle, which allows the incorporation of green criteria in public procurement, the EU average lies at about 40%.⁷

Complexity and sinking numbers of bidders seem primarily caused by the **fragmentation of rules on public procurement at national, regional and local level as well as by 'gold plating' of the EU rules** at national and/or regional level, i.e. calling for further obligations not required by EU law. A practical example for such unnecessary and detrimental fragmentation of procurement law can be found, for instance, in the divergent German regional legal acts on public procurement ('Landesvergabegesetze') besides the German national procurement law. Effective legal remedies need to be ensured (see also specific point on this at the end of this paper).

To foster the use of GPP across the EU, harmonised criteria are needed, which will also ensure accountability and comparability of data. Simple and standardised reporting on the use of GPP would ensure a better understanding of the situation. FEAD welcomes the sectoral work done in the past years. Most recently in the new Critical Raw Materials Act, which foresees concrete rules on the use of secondary raw materials via green public procurement, and the Ecodesign Regulation, which empowers the Commission to adopt Implementing Acts to develop binding GPP criteria for which ecodesign requirements have been developed. Now, **it will be decisive to implement these new rules as effectively as possible.** Furthermore, the EU legislation has to harmonise this sectoral approach and provide for generally binding rules under the Procurement Directives. Otherwise, companies as well as public authorities will be overburdened with this fragmented legislation.

Against this background, to consolidate efforts made and to contribute to its climate and environmental objectives, resource security and strategic autonomy, **the EU shall initiate a revision of the Directives on public procurement to integrate environmental matters**

⁶ Communication from the Commission, The 2025 Annual Single Market and Competitiveness Report, Brussels, 29.1.2025 COM(2025) 26 final, p. 19

⁷ Sapir, A., Schraepen, T. and Tagliapietra, S., 'Green Public Procurement: A Neglected Tool in the European Green Deal Toolbox?', *Intereconomics*, 2022, 57(3), 175-178, <https://www.intereconomics.eu/contents/year/2022/number/3/article/green-public-procurement-a-neglected-tool-in-the-european-green-deal-toolbox.html>

in the basic and mandatory procurement principles. Solid and concrete recommendations have already been made⁸ and include the following:

- ✓ **The mandatory elements must be integrated, in particular, in Article 18(2) Directive 2014/24/EU, while other relevant provisions must be revised accordingly.**
- ✓ **The 'link to the subject matter' as a basis for procurement today should not be a technical limitation for GPP and should therefore be integrated or combined with a mandatory life cycle assessment requirement.**
- ✓ **The revision of the Directives and the introduction of targets must be accompanied by an EU-harmonized monitoring and tracking mechanisms as well as effective guidance and information systems.**

The success of green public procurement will depend on its effective implementation, and we can assume that there are several factors that are impeding its broader use among public administrations so far. Member States have already developed different initiatives that should be used as basis for establishing mandatory green public procurement at EU level. Moreover, FEAD highlights the following aspects to ensure successful implementation of mandatory green public procurement:

- **Ensure that circular procurement has a prominent role according to its environmental and climate benefits. This means, focusing on mandatory criteria to procure products that are recyclable and that contain (European) recycled content.**
- Prioritise and develop strong digital solution tools.
- Provide guidance to public procurers on which environmental labels and certification schemes may be used.
- Consider the need to prioritise certain product categories, such as plastics, textiles or construction products.
- Promote the application of a Rating System for sustainable construction and for infrastructure that promotes and recognises green purchasing strategies, based on the logic of the circular economy.
- Consider ISO 20400 on Sustainable procurement and ISO 59004:2024 - Circular economy - Vocabulary, principles and guidance for implementation

⁸ K Pouikli, 'Towards Mandatory Green Public Procurement (GPP) Requirements under the EU Green Deal: Reconsidering the Role of Public Procurement as an Environmental Policy Tool' (2021) ERA Forum 715-716, <https://link.springer.com/article/10.1007/s12027-020-00635-5>

- Standardise reporting via the EU tendering platform to follow up on the use of environmental considerations in MS' procurements.
- Develop harmonized training programs, including components that support assessment of circularity elements. Educational material must also demonstrate the societal and monetary value of GPP practices to build stronger political buy-in. Training may be included under ERASMUS or other EU training module to cover the costs.
- Prioritise the development and adoption of implementing acts under Article 65(2) of the ESPR (Regulation (EU) 2024/1781) containing mandatory GPP requirements that foster circularity in this mandate.
- Prioritise the development and adoption of delegated acts to the specifying mandatory minimum environmental sustainability requirements for construction products under Art. 83(1) of the Construction Products Regulation (Regulation(EU) 2024/3110) to foster circularity in this mandate.
- Ensure that authorities at all levels give procurement officers a clear mandate and adequate financial resources to play a strategic role in implementing and monitoring GPP practices.

→ Introduce “Buy European” with regard to recyclates

Recyclates play an essential role in the strategic autonomy of Europe as underlined in the Clean Industrial Deal Communication. However, the comprehensive substitution of natural resources and primary raw materials can only succeed if recyclates can prevail in the market against primary raw materials and virgin materials. Furthermore, a single market can only function properly, if goods from third countries being placed on this market follow the same rules as products stemming from the EU. Considering the current alarming situation, **the revision of the Public Procurement should include a ‘buy European’-model for recyclates** to ensure the substitution of materials with materials obtained from the processing of waste (secondary raw materials):

- Low prices for virgin materials prevent the market from transitioning to locally produced recyclates.
- Plastic recyclates from outside the EU, particularly from Asia, are of uncertain origin (virgin or real recyclates), quality and benefit from the same energy and labour cost advantages as virgin products from third countries. These imported ‘plastic recyclates’ are often not recyclates at all, but rather cheap new materials that are incorrectly declared as recyclates; having therefore a higher degree of purity and preferred by the plastics processing industry. If the goods imported from third countries are actually recyclates, they generally also have a considerable cost and price advantage over recyclates produced in the EU, as they are produced at lower energy costs and under lower environmental protection standards. As a result, recyclates produced in the EU are pushed out of the market and plastics recycling in the EU is becoming uneconomical. Due to a lack of demand, Veolia, Europe's

leading waste management company (from France), has already shut down a plant for recycling PET plastic bottles in Germany and REMONDIS, Germany's largest waste management company, made losses in the double-digit million already in 2023 with plastic recycling.

Following the Draghi-report's proposal for European Defence Solutions, an incentive mechanism for EU recycles over non-EU imports should be introduced. Public procurement should specify that goods must be produced using recycles manufactured in the EU, or that recycles must originate from the EU. With regard to waste management services to be awarded, it could be required that the relevant waste be recycled in the EU (as far as technically and economically feasible). **To ensure this, a label to recognise recycling of European post-consumer waste in the EU should be introduced.**

Verification of proper procurement practices

It is of crucial importance that the Remedies Directives provide effective legal remedies. This means that an economic operator affected by a violation of EU procurement law cannot only call for damages but also for the adjustment of an incorrect procurement procedure. We see today that some Countries lack adequate tools to make their case before the courts and this must be corrected. Standardisation of tender evaluations, replacing subjective criteria with an objective, transparent numerical scoring system would also contribute to increasing fairness and legal certainty in the award of contracts.

In particular, there is a lack of sufficient rules on remedies to protect the market from monopolisation by public companies using in-house procurement. This includes a lack of adequate (prompt and professional) verification by the relevant authorities of whether a contract involves an SGEI-type service within the meaning of Article 14 of the Treaty and whether the contracting authority, in awarding an in-house contract, does not violate other systemic legal norms. On the award of in-house contracts, there should be a procedure for verifying whether the contract in question relates to an SGEI-type contract in the sense of whether the competitive market is unable to meet demand at the level of quality and availability specified by the contracting authority.

Risk division in public procurement contracts

We point out that the contracting authority, as the host of the proceedings, has the power to impose unilateral contract terms on contractors. **Risks unrelated to their performance are often shifted to contractors.** Very high contractual penalties are imposed, the calculation of which is detached from the degree of culpability of the party. This causes, on the one hand, problems with the contractor's performance of the contract. On the other hand, it can be a premise for his exclusion from subsequent tenders. **There is no provision relating to the division of risks between the parties of the contract adequate to the role of the parties.** Public companies are obviously privileged in this regard without bearing business risks.

FEAD notes the following points in a revision of the European public procurement framework:

- **Clarify risk sharing arrangements**, in particular regarding the management of penalties, legislative changes, fluctuating costs in waste management, electricity market volatility and insurance policies, with a preference for mixed remuneration.
- **Improve the management of the transfer of operational and market development risks** (in particular as regards penalties, electricity market fluctuations and insurance). On the one hand, by specifying the procedures for price revision (especially by avoiding fixed shares and cap clauses). On the other hand, by facilitating the application of the 'hardship doctrine' to increase the adaptability of contracts.
- **Establish a European legal framework for contractual penalties** to facilitate their application, while clarifying their liberating effect, which is currently only recognised in administrative doctrine (e.g., in France).

FEAD is the European Waste Management Association, representing the private waste and resource management industry across Europe, including 20 national waste management federations and 3,000 waste management companies. Private waste management companies operate in 60% of municipal waste markets in Europe and in 75% of industrial and commercial waste. This means more than 320,000 local jobs, fuelling €5 billion of investments into the economy every year. For more information, please contact:

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