

Statement on the Legislative package of the EU Commission on the *Modernisation of public pro- curement, of 22 December 2011*

Berlin, 30 January 2012

The German Association of Energy and Water Industries (Bundesverband der Energie- und Wasserwirtschaft - BDEW), Berlin, represents the interests of approximately 1,800 companies. The spectrum of its members ranges from local and municipal to regional and interregional companies. They represent about 90 percent of electricity sales, more than 60 percent of local and district heat supply, 90 percent of natural gas sales as well as 80 percent of drinking water abstraction and about one third of wastewater disposal in Germany. As public contracting entities, the great majority of BDEW members are subject to public procurement provisions.

A. On the proposal for a Directive of the European Parliament and of the Council on the award of concession contracts

I. Preliminary remark

The EU Commission has submitted the proposal for a Directive on the award of concession contracts and explains this step by the results of public consultation which showed that there existed a considerable lack of legal certainty in terms of the award of concession contracts. However, the Commission did not mention that in May 2010 the EU Parliament in the framework of the „Rühle Report“ (New Developments in Public Procurement ((2009/2175(INI))) spoke out very clearly by a vast majority against an EU-wide legal act dealing with service concessions. Moreover, on 26 October 2011, the EU Parliament adopted by a vast majority a report of the Internal Market Committee which also rejected detailed provisions on service concessions (2011/2048 (INI)).

The German Bundesrat, too, has clearly objected several times against an EU initiative (cf. Bundesrat Document 846/09 (Resolution)) and supported the “Rühle Report” of the European Parliament. Finally, on 11 February 2011, the Bundesrat clearly rejected an EU initiative for an obligation to issue invitations to tender for service concessions (Bundesrat Document 698/10 (Resolution)).

The German Bundesrat justified its Resolution by pointing out that established case-law of the European Court of Justice (ECJ) guaranteed sufficient legal certainty. The Chamber of the German Federal States stated that the principles deduced from the EU fundamental freedoms were completely sufficient and that the Internal Market was not an end in itself but an instrument in the service of other politics. In addition, the Bundesrat fears additional bureaucratic requirements which would reduce the flexible use of service concessions.

II. Appraisal

BDEW goes on considering that a Directive on the award of concession contracts is not necessary, and advocates that such a regulation be foregone.

With regard to the proposal for a Directive now available, the BDEW advocates that the water industry, at least analogously to the Services Directive, be exempted from the scope of this Directive (Article 17, paragraph 1 (d) of the EU Services Directive 2006/123/EC). The energy industry should likewise be exempted from the Directive's scope.

- 1) Throughout Europe, there are complaints about the phenomenon of overregulation. For years, efforts have been undertaken to reduce administrative burdens. Against this background, it is all the more inconceivable why the EU Commission decided to submit a Directive on the award of concession contracts against the express wishes of the EU Parliament. In this context, it is also regrettable that in spite of the very comprehensive proposal, the EU Commission did not deal with the wishes and arguments of the EU Parliament.
- 2) Water supply is a public services duty of general interest. Water supply and wastewater disposal are subject to a great variety of requirements in terms of water law, municipal law and competition law. In the legal systems of all German Federal States, they are implemented as tasks of municipal self-government and thus protected by Article 4 (2) of the EU Treaty and Article 28 of German Basic Law and the constitutions of the German Federal States. Focus is on security of supply, continuity, social pricing, quality and sustainability. Therefore, it must be left to the discretion of the local and regional authorities to choose the form in which services are provided.
- 3) Concerning the usual agreements on the use of rights-of-way in Germany, it should be made clear that the Directive is not applicable. Recital 6) of the Directive according to which „... *certain agreements having as their object the right of an economic operator to exploit certain public domains or resources, such as land lease contracts whereby the State or contracting authority or entity establishes only general conditions for their use without acquiring specific works or services...*“ should not qualify as concessions leads to the conclusion that mere agreements on the use of rights-of-way usually concluded within the energy sector (within the meaning of Article 46 of the German Energy Industry Act regarding power and gas lines and, within the meaning of transport legislation for district heating pipelines) and to some extent within the water sector do

not fall within the scope of the Directive. This also follows from Article 8, paragraph 5 (a) of the Proposal according to which the acquisition or rental of land shall not be considered as service concession within the meaning of the Directive. Moreover, the use of rights-of-way does not at all represent a service as defined in Article 2, paragraph 1 (7) of the Proposal.

Neither do the reasons stated for the necessity of a corresponding Directive to create the conditions needed to promote competition for concessions apply to the agreements on the use of rights-of-way usually concluded in Germany. On the one hand, Article 46 of the German Energy Industry Act, for instance, includes a legal provision regarding gas and power lines and, on the other hand, there already exists intensive competition for these contracts.¹

After all, the impact assessment on page 80 in Annex II explicitly describes agreements on the use of rights-of-way in Germany. It is established there that these agreements though being referred to as „concession contracts” actually only relate to public authorisations and do not represent public procurement rules but other administrative law.

However, the fact that agreements on the use of rights-of-way are to be excluded from the scope of the Directive on the award of concession contracts should not only be mentioned in the Annex. For the avoidance of any doubt and to gain legal certainty, also with regard to a later national implementation, the wording of the Directive should make explicitly clear that easement agreements are excluded from the scope of the Directive.

- 4) The award of concession contracts is frequently as complex and burdensome that only the preparation of a formal call for tenders is very time-consuming and gives rise to considerable advisory costs. A strict award procedure would therefore represent a substantial and unreasonable burden especially for small and medium-sized contracting authorities/utilities and be out of proportion to the revenue earned. The Directive would therefore particularly affect the German supply sector which in large parts, as generally known, is of a municipal structure due to municipal public services of general interest; besides, there exists a large number of small and medium-sized utilities in Germany.
- 5) The notification of an award of concession contracts in the EU Official Journal would alone constitute a considerable administrative obstacle to small contracting authorities/utilities which they could only overcome with external sup-

¹ Cf. Common guidelines of the Federal Cartel Office and the Federal Network Agency of 15/12/2010, page 2

port of a lawyer. This would lead to a substantial increase in transaction costs and thus give rise to essential additional charges to the general public.

- 6) Due to identical terms in accounting law (IFRIC 12 Service Concession Arrangements) it should be made clear in the recitals that the classification as service concession within the meaning of the Directive does not have any impact on the assessment in terms of accounting law.
- 7) The rules provided for in the Proposal for a Directive are not suited either to remove the legal uncertainty put forward by the EU Commission.
- 8) The BDEW advocates a clarification in the reasoning concerning the Concession Directive to the effect that environment and resource-related criteria of contract awarding, as explicitly allowed in the Drafts of the Utilities Directive and the Directive on the coordination of procedures for the award of public contracts, can also be taken into consideration in the context of concession contract awarding.

III. In detail

- 1) The ruling concerning the duration of the concession in Article 16 of the Proposal is not comprehensible. It is astonishing that the Proposal does not mention any reason for this limitation of the concession duration. In any case, such a limitation is factually not necessary and not expedient in terms of results. Furthermore, it is inconsistent with the system because the award of public contracts has never been subject to a limitation of duration according to the previous EU provisions. The BDEW considers this limitation to be a major intervention in contractual freedom. Also contracting authorities must still be at liberty to choose the contract duration they consider to be appropriate and economically efficient. A limitation of the duration may analogously be reasonable for building concessions. As far as services are however concerned, there is in most cases no capital expenditure that could pay off within a certain period. If for instance cleaning work is to be procured in the form of a service concession arrangement, it will be impossible to determine an appropriate duration of the concession contract for an investment.

- 2) The Proposal declares the „Remedies Directive“ to be applicable. It is thus certain that irrespective of what the Directive says, the national public procurement bodies will in any case rule on possible legal disputes about the award of concession contracts. They will necessarily apply public procurement law. Even if the Concession Directive should remain vague about how the rules are to be implemented, it is already quite certain that due to the applicability of the „Remedies Directive“ disputes in connection with the award of concession contracts are handled in the same way as other differences in terms of public procurement law.

- 3) The Proposal for a Directive does not solve the problem regarding the award criteria which could be applied to the award of concession contracts. Though BDEW underlined this problem in several talks with the EU Commission, the Proposal does not mention any criteria to be applied to the award of concession contracts. This is particularly astonishing in view of the fact that the EU Commission claims that it wants to improve legal certainty by means of its Proposal for a Directive. But it achieves exactly the opposite by intending to integrate the award of concession contracts into a system that is not suited for that purpose due to its structure and philosophy. At any rate, usual award criteria like “price” and “most economical bid” are logically not suited as criteria for the award of concession contracts.

- 4) The Proposal contains extended possibilities with regard to inter-municipal cooperation and in-house services. The scheduled rulings are based on the comprehensive case law of the European Court of Justice. In particular, the regulations stipulate that the privilege of in-house business only takes effect if there is no private participation at all. It is regrettable that the EU Commission adheres to the „coagulated“ case law of the European Court of Justice in terms of its Proposal and lacks any consideration of the reasonability of the different decisions. It would be desirable that the EU Commission recognised with its Proposal the overall system of case law of the European Court of Justice. To this end, it would be necessary to take account of the fact that the European Court of Justice does not only presuppose the private participation issue but also the materiality and control criteria for the assumption of an in-house business. It is not understandable why a minimum private participation shall superpose the aforementioned other criteria and make the entire award process subject to public procurement law. What matters instead are the real controlling relationships. The same applies for instance to the participation of a private entity in a contracting entity where it is also important whether the contracting authority can exert a dominant influence. This should for instance be the case at any rate when it comes to control agreements usually concluded by multi-utility companies. The Proposal should at least provide for a de mini-

mis limit and, in the light of the overall system of the ECJ's case law, go over and beyond the regulations in force.

B. On the Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors

- 1) The scope of the Directive defined in Article 1, paragraph 2 of the Proposal is not clearly worded. It should be made clear that procurement which, though being initiated by sector utilities is **not connected with utility activities** and thus not subject to public procurement provisions. This should also be made clear in Article 16 which also contains unclear wording in this respect.
- 2) BDEW considers that the beginning of the period (30 June 2014) determined in Article 14 , paragraph 1 for the verification of thresholds should be 30 June **2013** as thresholds will already be defined as per 01/01/2014 and then again only per 01/01/2016.
- 3) The definition of a "dominant influence" on the part of contracting authorities exercised on "public undertakings" (Article 2, paragraph 2; Article 4 of the Proposal for a Directive) should be adjusted. The ruling corresponds to the previous presumption rule (majority of capital; majority of votes; etc.). Concerning private undertakings in which several public (and possibly private) entities are holding an interest, it would be desirable to put the fact of a dominant influence in more concrete (and restrictive) terms already at EU level. Particularly in the case of mere indirect and/or joint participation it is essential to determine more clear-cut definitions of when a „dominant influence“ can still (exceptionally) be assumed. Where public authorities are involved at a lower shareholder level, it is questionable whether the presumption is also generally applicable or under what conditions it can be rebutted. In order to put the presumption rule in more concrete terms, it might be possible to use the special ruling in Article 21, paragraph 2 (a) of the Proposal which requires (as a precondition for contract awarding without call for tenders) for the exercise of "joint control" by contracting authorities that the decision-making bodies of the controlled legal person be composed of representatives of all participating contracting authorities.
- 4) Article 21, paragraphs 1 and 2 of the Proposal provide for the privilege of inter-municipal cooperation and in-house procurement only to contracting authorities. In Article 4 , paragraph 9, a distinction is made between „contracting entities“ and „contracting authorities“; consequently,

it should be made clear that this privilege applies to all contracting entities, thus also to public undertakings.

Should the ruling in Article 21 be maintained, the Proposal fails to recognise that the privilege of in-house contracting could also be applied to contracts awarded by sector utilities to undertakings controlled by them, even if there is private (minority) participation in the contracting sector utility. However, contracting sector utilities must not be deprived by the Proposal of this in-house privilege developed by the European Court of Justice. The privilege of in-house award of contracts therefore has to be extended to private undertakings.

- 5) It is not understandable why Article 21, paragraph 2 (a) of the Proposal requires with regard to the control exercised over a legal person that the decision-making bodies of the controlled legal person be composed of representatives of **all** participating contracting authorities. Participation relationships may also be different and nevertheless ensure (e.g. by appropriate contractual arrangements) a control within the meaning of this provision of the Directive and of the case law of the European Court of Justice. BDEW therefore rejects a ruling according to which the decision-making bodies must be composed of representatives of all contracting authorities.
- 6) The ruling provided for in Article 21, last paragraph (and identically in Article 15, paragraph 2 of the Directive on the award of concession contracts, and Article 11, paragraph 2 of the Directive on the coordination of procedures for the award of public contracts) according to which the privilege of inter-municipal cooperation shall cease to apply from the moment any private participation takes place with the effect that all contracts awarded need to be repealed, is disproportionate and inappropriate. It would prevent any privatisation of a municipal utility. Besides, it is not comprehensible why minor private participation should affect any interests. Moreover, the intended ruling would lead to considerable legal uncertainty. It is hard to imagine that a contractor is willing for instance to enter into a service contract over a longer period of time, for which he must make future-oriented dispositions, e.g. in terms of staff or material, and which he may suddenly forfeit due to private participation in its contracting entity (Article 21, paragraph 5). BDEW therefore requires that this rule be deleted or a de minimis limit be introduced which recognises e.g. a 20 % private participation as innocuous.

Alternatively, it would also be conceivable to use a ruling pursuant to the case law of the European Court of Justice on the „Mödling case“, according to which contracts awarded in the context of inter-municipal

cooperation would have to be cancelled only if the acceptance of private participation is aimed at reaching the award of contracts at favourable terms and without having to compete (prohibition of the circumvention of public procurement law). In practice, this case law has turned out to be a sufficient assessment criterion. Automatic cancellation of contracts, however, would infringe the principle of proportionality.

- 7) Article 22, paragraph 4 describes service contracts, supply contracts and works contracts awarded to affiliated companies provided „... that at least 80% of the average total turnover of the affiliated company with respect to services, supplies and works **in general** for the preceding three years derives from ...". It is not clear what the wording „in general“ exactly means. This wording corresponds neither with the previous formulation of the materiality criterion nor with the description in paragraph 5 which correctly stipulates: „Where more than one undertaking affiliated with the contracting entity provides **the same or similar** services, supplies or works ...“. The formulation „in general“ is thus to be replaced by the wording „the same or similar services, supplies or works“.
- 8) The limitation of the term of framework agreements to four years (Article 45, paragraph 1 of the Proposal) should be deleted again. Framework agreements are a very practicable and intensively used instrument for energy and water supply utilities as far as works but also other services are concerned. These framework agreements are frequently concluded for a certain term (e.g. one or two years) with automatic prolongation unless they are terminated. This would presumably no longer be possible if terms were limited to four years. There is no reason to generally limit the term of agreement for reasons of competition. It is sufficient to this end to rely on the general jurisdiction on long-term agreements which rather takes effect from a term of 20 years as there is no more competition in the long run.
- 9) Pursuant to Article 82, modifications of contracts during their term shall be subject to complex regulation. A substantial modification of the provisions of a works, supply or service contract during its term shall be considered as a new award for the purposes of this Directive and shall require a new procurement procedure. Public procurement provisions will thus become a permanent basis for the implementation of contracts. The necessary continuous verification of whether the preconditions for a new award are met would lead to an inappropriate administrative workload which would contravene the aim of modernizing public procurement rules. The requirements to provide for “clear, precise and

unequivocal review clauses and options“ in the procurement documents which "state the scope and nature of possible modifications or options as well as the conditions under which they may be used“ and not to “provide for modifications or options that would alter the overall nature of the contract” are too high. They would not lead to a simplification of public procurement law in this field but to a multiplication of the current operational expenditure. Moreover, the result of the obligation to carry out a new procurement procedure in the case of a „substantial modification“, is that different contractors handle the same contract object with different obligations of performance. The 5 % threshold provided for in Article 82, paragraph 4, could in turn be interpreted to the effect that all increases of the contract value going beyond 5 % would have to be considered as „substantial“ within the meaning of paragraph 1 even if it did not render the contract “essentially different” from the one initially concluded. A clarification should be made here. Moreover, the 5 % threshold seems to be too low. Increases in the contract value to this amount, particularly where different modifications add up (cf. paragraph 4, second sentence) cannot be avoided even in the case of very precise preplanning. The threshold should therefore be raised. Finally, it is not clear which legal consequence shall be applicable if the contracting entities do not make use of the possibility to terminate contracts in the case of modifications (Article 83).

- 10) According to Article 93, all contracting entities shall in future be subject to supervision by a single independent body responsible for the oversight and coordination of implementation activities (oversight body). The introduction of a further, quasi third verification body runs counter to the goals set in terms of simplification, flexibility and efficiency increase of procurement procedures. Contracting authorities are required to transmit to the planned oversight body the full text of all concluded contracts with a value equal to or greater than 1 million EUR in the case of supply or service contracts and 10 million EUR in the case of works contracts. The required transmission of contracts leads to additional bureaucratic expenditure of the procurement activities. The oversight body will, upon written request, give unrestricted and full direct access, free of charge, to the concluded contracts. The applicants filing a request for access to a contract need not show any direct or indirect interest related to that particular contract. However, “for combating corruption and favouritism” it is not necessary that everyone be granted access to the contracts. Access to contracts should be granted only if applicants have a sufficient legitimate interest in the matter.
- 11) The power to adopt delegated Acts is conferred on the Commission under Article 98. Certain power shall be (revocable) conferred on the

Commission for an indeterminate period of time. However, the essential contents of a standard should be regulated by the standard-setting body (not the Commission).

C. On the Proposal for a Directive of the European Parliament and of the Council on public procurement

- 1) The differentiation between services according to Annex II, Part A and Part B of the Directive 2004/18/EC which have well proven in practice is abandoned. This means a great change. The BDEW pleads for retention of the differentiation of services according to Annex II Part A and part B in line with the previous rules.
- 2) Article 19, paragraph 7 of the proposal provides for an obligation of the contracting entity to use electronic procurement procedures two years after entry into force of the Directive. Electronic procurement turns out to be impracticable particularly for procedures requiring the submission of large-scale plans. According to the experience gained to date, it should be left to the discretion of the contracting entity whether or not to use electronic communication means for procurement procedures.

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