

Aggerverband ▪ Bergisch-Rheinischer Wasserverband ▪ Erftverband
Emschergenossenschaft ▪ Linksniederrheinische Entwässerungs-
Genossenschaft ▪ Lippeverband ▪ Niersverband ▪ Ruhrverband
Wahnbachtalsperrenverband ▪ Wasserverband Eifel-Rur ▪ Wupperverband



Arbeitsgemeinschaft der
Wasserwirtschaftsverbände
in Nordrhein-Westfalen

**agw-Position Paper
on the EU Consultation Paper:
"Review of existing VAT legislation
on public bodies and tax exemptions
in the public interest"
(14.10.2013)**

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The Water Board Association (agw) in the German State of Northrhine Westfalia (NRW) comprises the regional water boards: Aggerverband, Bergisch-Rheinischer-Wasserverband, Emschergenossenschaft, Erftverband, LINEG, Lippeverband, Niersverband, Ruhrverband, Wasserverband Eifel-Rur and Wupperverband. We operate on the principle of 'open responsibility for public water management'. As members of the agw, we are responsible for water management in an area covering almost two thirds of the NRW region, in which we operate 304 water treatment plants to serve approximately 19 million inhabitants. We also manage 35 dams and a river network of 17,700 kilometers.

Preliminary Note:

As public authority organisations the water boards in North Rhine-Westphalia are responsible for the supply of public utilities and this duty includes the management of waste water and sewage treatment. Tax exemptions apply to waste water management as the function is defined as a duty of public administration. The most recent report issued by the European Commission in Autumn 2013, regarding the status of implementation of the Urban Waste Water Treatment Directive in EU Member States, certified only three EU Members States for achieving successful implementation. The fact that Germany was the only large Member State to have been acknowledged, reaffirms that the existing framework regulations provide a sound basis for ensuring the timely and comprehensive execution of the complex changes introduced by the EU. On this basis, we consider the existing economic and tax related regulatory framework to be appropriate and therefore see no necessity to introduce any further amendments thereof.

The **agw** adopts the following position with regards to the individual questions:

Question 1

General evaluation of the current rules (see point 3):

- *What is your evaluation of the current VAT regime as regards the public sector (including special rules for public bodies, Article 13, and tax exemptions in the public interest, Article 132-134 of the VAT Directive)?*
- *What are in your opinion the main problems of the current rules?*
- *Are there any distortions of competition (output and input side)? If so, how and in which sector do they occur?*
- *Is the complexity of the current rules and the lack of harmonisation causing problems? Please give specific examples.*
- *What is their impact on compliance costs?*

- Are the problems identified only of a national nature or do they constitute an obstacle to the smooth functioning of the Internal Market?- If you are an entrepreneur how do the current rules affect your business?

As regards the current VAT regime: the Directive should not serve to create any new, hitherto non-existing competition. It should seek to prevent a distortion of any existing competition. However, where there is a conformity of non-competition between certain services both at an EU regulatory level and a Member State regulatory level respectively, the need for such a Directive is called into question.

In Germany, local public authorities (municipalities, public-sector authority associations, water and soil associations, associations afforded special legal status) are the only entities assigned the duty of waste water management and sewage disposal. Competition between public sector authorities and private and legal entities or individuals for the performance of this function is therefore not possible in Germany.

In its response to the Public Initiative 'right2Water' (19.03.2014, COM 2014, 177 final), the European Commission emphasised the intent of the European Union to remain neutral regarding the decision of how Member States ensure national water services: local water resource and waste water management is to remain a matter for national governance. In the opinion of the **agw**, this also concerns the decision as to whether or not such water related public service should be subject to a VAT duty.

It is the opinion of the **agw**, that Article 13 of the Directive - in particular Article 13, paragraph 1, subparagraph 2 - has proven itself effective with regards to the management of waste water disposal.

The **agw** is also of the opinion, that duties acquired by means of a inter-municipal cooperation, as governed by Article 12 (4) Directive 2014/24/EU and not subject to a tendering procedure, should also be exempt from tax.

We request that the European Commission refrains from proposing a regulation, in which a duty to pay VAT is applied without exception throughout the Member States. Waste water treatment is currently not listed as a relevant activity in Annex 1 of the Directive making Article 13 paragraph 1, subparagraph 3 of the Directive inapplicable. Waste water disposal should therefore not be included in the catalogue listed in Annex 1 of the Directive. The consequence would be an off-loading of the tax-related costs onto the citizen without delivering an improvement in service quality or performance. Given the financial-political situation in the EU, it is feasible to expect that creating savings elsewhere to compensate for the cost of tax on the citizen would result

in an overall diminishing of the current high standards of service in the water disposal sector .

When the German Federal Parliament investigated the effects of a VAT duty in 2002 (16% at the time compared with a current value of 19%), it calculated a consequent 12.25% increase in the fees for waste water disposal (German Federal Parliamentary publication 16/1094 p18).

Furthermore, the inclusion of waste water disposal in Annex 1 would not be in accordance with the purpose of the Directive: there is no reason for tax harmonisation where competition between public sector authorities and private legal entities is not possible. The basic question as to whether, and to what extent, the field of waste water disposal is open for competition remains an issue exclusively for the Member States to decide. As long as this does not lead to a distortion of competition within the internal market, national governance of the waste water disposal sector is acceptable from both an EU and Member State level.

Question 2:

Distortion of competition clause:

- Do you think the distortion of competition clause pursuant to the second subparagraph of Article 13 (1) of the VAT Directive and the existing case law from the Court of Justice of the European Union in this respect have been efficient enough in preventing distortions of competition between public and private providers on the output side?

- Does the national legislation of your country provide for a legal mechanism according to which a private entrepreneur who is experiencing unfair competition from a public sector body could formally raise this issue with the tax authorities or the courts?

A distortion of competition can only come into existence if competition is even theoretically possible within a field of activity. Whether this is the case depends on whether European Union legislation or national Member States' legislation allows for municipalities and local public authorities as well as private legal entities to operate as waste water disposal providers. Germany has not opened the market for waste water disposal and only public sector bodies perform this function in which case, there is no possibility for waste water disposal services to create a distortion of competition regardless of whether these services are subject to taxation.

In the opinion of the **agw**, Article 13, paragraph 1, subparagraph 2 of the Directive and the relevant corresponding case law provides a fully sufficient

legislative framework to prevent a distortion of competition between public sector and private service providers, where public and private sector players compete in the same sector or competitive market.

Due to a non-existence of competition for waste water disposal services there is no need to change this provision.

The existing national legal framework in Germany allows sufficient scope for private businesses to challenge any discrepancy should those private individuals feel that they are excluded or disadvantaged due to any unfair competition by a type of public sector institution. If there existed competition between public sector bodies and private sector companies for the provision of these services, the legal private entity could, for example, make a claim for legal action against the public body exercising public authority, for them to refrain from doing so.

Question 3:

Reform measures (see point 5):

- *What are your views on the different reform options or reform measures mentioned in this document (including a possible sectorial reform); do you have a preference for any particular option and any particular variant mentioned in relation to the different options and why?*
- *Is there any option which should be excluded and why?*
- *Do you have any additional ideas or proposals?*

and Question 4:

Sectorial reform (see point 5.4.):

In case a sectorial reform would be the way forward, Copenhagen Economics has modelled the sectors postal services, broadcasting, waste management and sewage. Other sectors such as air traffic control, access to roads and parking areas could be potential candidates as well.

- *Do you agree with this list?*
- *Which other sectors should in your view be selected for such a review? Why?*

The considerations outlined in Copenhagen Economics Study, including the proposal to subject waste water management and sewage treatment to (full) VAT duty, should only be pursued if there is competition between public authorities and private legal entities. Whether, and to what extent, this is possible depends on the national law provisions of the Member States.

Where the responsibility for waste water disposal and sewage treatment is a public sector function and hence competition with private sector companies is not possible, there is no cause for tax harmonisation. Member States who, in accordance with their national regimes, opt to impose a VAT duty on waste water treatment services provided for by public sector authorities are permitted to do so. The existing European legislation does not prevent this. There is,

however, no reason to enforce such a regulation on Member States who opt to exempt waste water disposal from taxation.

The inclusion of waste water disposal and sewage treatment is not in accordance with the purpose of the Directive. As explained above, the extent to which competition is opened for waste water disposal is the concern of the individual Member States.

Question 5:

Option to tax (see point 5.5.):

- Do you think that an option to tax as regards tax exempt activities either by taxable persons or Member States should be considered?

The issue of whether and to what extent the Member States enable affected companies to opt for VAT inclusion and thereby to benefit from deductible VAT, is an issue which the European legislator should leave to the Member States to decide. For companies with large investments, this can be of benefit for tax on input in the acquisition of investment goods: during the course of business, the asset increases in value at the rate of VAT of the Member State.

In the view of the **agw**, however, an 'option to tax' is not an issue to be governed by European law. The Directive regulates whether and according to which prerequisites a company can be subject to a full or limited rate of VAT within the national law. A further extension or broadening of this scope is not necessary.