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Emscher-Genossenschaft ▪ Ertfverband ▪ Linksniederrheinische
Entwässerungs-Genossenschaft ▪ Lippeverband ▪ Niersverband
Ruhrverband ▪ Wahnbachtalsperrenverband ▪ Wasserverband Eifel-Rur
Wupperverband



Arbeitsgemeinschaft der
Wasserwirtschaftsverbände
in Nordrhein-Westfalen

**agw-Position Paper on the Consultation regarding
the Draft proposal for a European Directive
on the Award of Concession Contracts (COM(2011)
879 final), and its Relevance for the Water Boards
in North Rhine-Westphalia**

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The Water Board Association (**agw**) in the German State of North Rhine-Westphalia comprises the regional water boards: Aggerverband, Bergisch-Rheinischer-Wasserverband, Emschergenossenschaft, Erftverband, Linksniederrheinische-Entwässerungsgenossenschaft, Lippeverband, Niersverband, Ruhrverband, Wahnbachtalsperrenverband, Wasserverband Eifel-Rur and Wupperverband. We operate under 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 310 water treatment plants to serve approximately 19 million inhabitants. We also manage 30 dams and a river network of 17,700 kilometres.

Preliminary Note:

The water boards of North Rhine-Westphalia are public sector bodies providing public services within the scope of their statutory obligations. They do not operate in the market and are not actively engaged in concession contracts. However, the water boards continue to follow the discussions surrounding the Commission's Draft proposal on Concession Contracts and are concerned with the current content of the debate.

In the scope of its Directive on Concession Contracts, the EU Commission also plans to newly regulate the **cooperation between public authorities**. In our view, this cooperation comprises a considerable proportion of the rational division of labour between public institutions regarding the provision of public services. The most recent Decisions of the European Court of Justice on the subject made clear that no legal uncertainties exist. The need for a Directive on Concession Contracts is therefore questionable.

The **agw** also objects to the plan to force the privatisation of managing the provision of drinking water by means of a compulsory tendering procedure. This not only contravenes the nationwide and Europe-wide established principle of municipal self-governance and local autonomy, but also contradicts the decisions repeatedly adopted by the European Parliament on the subject.

In our view, the compulsory tendering procedure proposed in the draft Directive threatens a collapse of the existing regional economic structures throughout Germany. This causes us to doubt the basic goal and purpose of the Directive.

We therefore request that the following suggestions are taken into consideration during the course of the debate:

1. Regarding Article 15: Relations between public authorities

The EU Commission's initiative to introduce a Directive on Concession Contracts aims to diminish the uncertainty regarding awarding concessions and is to this effect, intended to be in the interests of both the contracting authority and the economic operator. The Commission sees a loophole in this aim, which in its opinion would result in a serious distortion of the internal market.

Article 15 aims to primarily regulate the “relations between public authorities”. Article 15, paragraph 4 assumes that agreements between public authority contractors are basically also concessions.

According to the Commission, an exception from this regulation depends on the fulfillment of five criteria, of which the following two (Article 15, paragraph 4a and c) are of significance for the water boards :

- a. *the agreement establishes a genuine co-operation between the participating contracting authorities or entities aimed at carrying out jointly their public service tasks and involving mutual rights and obligations of the parties*
- b.
- c. *the participating contracting authorities or entities shall do not perform on the open market more than 10% in terms of turnover of the activities which are relevant in the context of the agreement;*

Article 8 defines the functions and duties assigned by law which are excluded from the scope of the Directive, for e.g. obligatory waste water disposal in Germany. However, there are fields of cooperation between public authority partners from which market relevance can be derived and thus impacted by the Directive. The cooperation between public sector entities would be considerably restricted under Article 15 of the Commission’s Draft proposal. This impacts both the extensive division of labour between the partners and the ‘market share limitations’.

The Internal Market Committee has introduced several changes to the Commission’s proposal, which, in the view of the **agw**, constitute an improvement:

- There should be measures introduced at the relevant stages of the Draft to prevent compulsory membership of private entities in associations from constituting exclusion criteria for public-public-contracts.
- The proportion of relevant ‘open market’ activities should not exceed 20%, instead of the 10% proposed by the Commission.
- In cases where all the criteria stipulated in Article 15, paragraphs a-e, has been fulfilled, all existing and future agreements should no longer be subject to the Directive on Concession Contracts.

The limitations regarding the division of labour under Article 15, paragraphs 4a and c should also continue to be valid even after the European Parliament’s Internal Market Committee vote.

agw-Position: Deletion of Article 15, paragraphs 4a and c

Explanatory Statements:

The **agw** considers it appropriate to eliminate Article 15 entirely from the Draft proposal, as the subject of concessions should remain separate from the subject of public-public cooperation. However, as the leading Committee of the European Parliament has expressed support for the inclusion of Article 15 in the course of the debate, the **agw** proposes, as a very minimum, the deletion of paragraphs 4a and 4c from Article 15. This would serve to ensure that public authorities remain free to arrange their cooperation.

2. Regarding Annex III / Article 8: "Tendering Procedure in the field of drinking water supply"

The provision of drinking water is governed by Annex III of the Draft proposal. Article 8 (via Annex III) envisages an obligation to tender concession contracts for all supply and disposal networks for electricity, gas, heating, water supply and waste water management. This is with the exception of obligations governed by law regarding the operation of these networks and the supply and disposal of utilities. In Germany, this would exclude wastewater management. Conversely, as water supply would be managed primarily via concession contracts this would mean an obligation to put public contracts out to tender and practically result in forced privatisation.

It is furthermore unclear why Annex III, paragraph 4d, includes guidelines for wastewater disposal and sewage treatment in the scope of managing drinking water supplies.

agw-Position: Deletion of paragraphs 4a and b and d in Annex III

Explanatory Statement:

The **agw** considers it appropriate to **remove the regulation regarding drinking water by deleting paragraphs 4a and 4b of Annex III** from the proposed Directive. This ensures that the management of drinking water supplies will not be subject to forced privatisation. It is factually not comprehensible that guidelines in paragraph 4d refer to wastewater and sewage treatment when paragraph 4 is otherwise concerned with drinking water supply. Water supply and wastewater disposal are in fact independent processes using separate treatment plants and separate networks which are entirely unrelated to each other. **Paragraph 4d should therefore also be deleted.**

3. agw-Comment regarding the effect of the Directive on Concession Contracts on the local economy

One issue is of undisputed relevance to the water boards in the context of cooperation with local businesses in the utilities industry.

Even after the most recent proposals from Internal Market Commissioner Barnier, there is in our view, the risk of a **collapse of the existing local utilities and established public services structure**, linked to a privatisation of the drinking water supply.

A separate report of activities for utilities in the drinking water sector would, in addition to the existing unbundling of gas and electricity networks, result in the need for an additional, divisional unbundling in the drinking water sector. This would serve only to further accelerate the breakdown of existing local economic structures.