

# EU Policy Review

Analysis of recent EU legislation and policy for local and regional government

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### LEGISLATION

#### **New 'Remedies' Directive Alters EU Procurement Rules**

Local authorities will have to change the procedures by which they award public contracts, following agreement between the European Parliament and national governments on a revision of the EU Public procurement rules. The new 'Remedies' Directive, amending Council Directives 89/665/EEC and 92/13/EEC, introduces a so-called 'standstill period', which obliges awarding authorities to wait at least 10 working days between announcing an award decision and concluding a contract in order to give unsuccessful bidders an opportunity to challenge the process. Councils that fail to comply with these rules will be exposing themselves to the risk of legal action.

The new rules will apply not only to competitive tendering procedures, but also to cases where there is a direct award of a contract. In situations where competitive tendering has taken place, notification of the award decision must be sent to the failed bidders as soon as the decision is made. Where a company has been directly awarded a contract, (a practice only allowed in limited circumstances), local authorities will be obliged to publicise the award notice once the decision has been taken. In both cases, this notification phase must be followed by the standstill period, and national courts can deem the contract to have been illegally awarded and open to challenge if these conditions are not met. This means that the decisions of local

authorities awarding public contracts could be challenged even before the preferred bidder has been contracted. It represents a change from the previous legislation, whereby the only remedy for a disappointed bidder following conclusion of the contract was damages.

By exposing awarding authorities to this risk, the European Commission aims to improve transparency in the procurement process and give unsuccessful bidders sufficient opportunity to challenge the decision before the contract is signed. The idea is to encourage companies from across Europe to bid for contracts outside their home country, in the knowledge that procedures for redress are applied uniformly in all European countries. However, the implications for local authorities will be significant, as projects could be stalled for lengthy periods if the tendering process is challenged by unsuccessful bidders.

As Internal Market Commissioner Charlie McCreevy explained, "effective procedures for seeking review are essential in making sure that public contracts ultimately go to the company which has made the best offer".

At the request of national governments, the Directive does include a provision for the typical standstill period of 10 days to be reduced to 7 days in certain circumstances and even abolished in cases of "extreme urgency". However, the Commission will put pressure on national Governments to keep these exceptions to a minimum, and will monitor each country to ensure that they are not used as a means of avoiding the demands of the Directive.

Meanwhile, in a recent report on specific problems in the transposition and implementation of public procurement legislation, the European Parliament has called for the introduction of national advisory agencies on public procurement to assist contracting authorities in the correct implementation of the public procurement rules, and to assist tenderers, in particular small and medium enterprises, in bidding for public contracts. MEPs stressed that national governments must focus on detecting and sanctioning illegal practices and ensuring that all relevant national court judgments and rulings of the European Court of Justice are respected.

Ireland will have two years to implement the Directive.

Further information on the revision of the EU Public Procurement rules can be found at:

[http://ec.europa.eu/internal\\_market/publicprocurement/remedies/remedies\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/remedies/remedies_en.htm)

## EU Waste Shipment Rules Come into Force

New notification and consent procedures must now be followed before waste is shipped abroad, following the entry into force of new EU regulations on 12<sup>th</sup> July. Regulation (EC) No 801/2007 of 6 July 2007 on shipments of waste within the EU and to non-EU countries aims to ensure that waste is handled in an environmentally sound manner and tracked from the time it is shipped to the time it is disposed of or recovered at destination. To achieve these objectives, it reinforces and clarifies the current legal framework for waste shipment and establishes a National Competent Authority to manage the rules in each country. In addition, it establishes a total ban on the shipment of waste for disposal to all countries outside the EU, preventing the export of large amounts of electronic and electric waste and end-of-life vehicles being dumped elsewhere. It also establishes a total ban on exports of hazardous waste to developing countries.

83% of waste generated in Ireland is currently shipped abroad for recycling or recovery. From now on, the new rules will apply to these shipments, whether they are:

- Exported from Ireland to other EU countries;
- Exported from Ireland to countries outside the EU;
- Imported into Ireland from EU countries;
- Imported into Ireland from countries outside the EU.

The Regulation sets out a system for the classification of waste into three lists, with some wastes more strictly controlled than others:

**The green list:** In broad terms, 'green-listed' wastes are non-hazardous and easily recyclable, such as paper and plastic.

**The amber list:** When green wastes are mixed ("co-mingled"), they become 'amber-listed' wastes. Consequently, as a waste becomes more difficult to recover or more hazardous it goes onto the amber list.

**The red list:** This covers particularly dangerous wastes.

The lists are too lengthy to be set out in full, but can be downloaded from either:

[http://www.environment-agency.gov.uk/commodata/acrobat/waste\\_list\\_1777345.pdf](http://www.environment-agency.gov.uk/commodata/acrobat/waste_list_1777345.pdf) (relevant extract of regulation), or:

<http://ec.europa.eu/environment/waste/shipments/legis.htm> (full regulation)

Different notification and consent procedures apply according to the category of waste. Shipments of green-listed waste for recovery may move across international borders within the EU without having to request permission or advance notification. Even these wastes, however, are subject to certain requirements, must be accompanied by the relevant information on their composition. Shipments of amber-listed waste for recovery and all shipments of waste destined for disposal are subject to the prior written notification and consent procedures. The export of all waste except items on the green list to developing countries is banned, and any waste that is found to have been shipped abroad illegally will be returned to Ireland at the cost of the organization responsible.

Dublin City Council has been designated as the National Competent Authority to implement and enforce these rules in Ireland. A written application for notification and movement documents must be made to Dublin City Council at the National TransFronteir Shipments (TFS) Office prior to any shipment of amber or red waste originating in a local authority area. The notification document provides the TFS office with information such as the waste type, waste generator, intended quantity of shipments, disposal/recovery process, and expiry date, while the movement document provides information on the notifier, importer, carriers of the consignment and means of transport. The movement document must accompany the waste shipment at all times through the country (ies) of transit on route to the disposal/recovery facility in the country of destination. The main objective of this document is to track and trace the movement of the waste shipment, including the certification regarding the acceptance and the completed recovery/disposal operation at the authorised waste recovery/disposal facility.

Requests can be made by post to the National TFS Office, Office, Dublin City Council, Eblana House, 68-71 Marrowbone Lane, Dublin 8, or by email: [nationaltfs@dublincity.ie](mailto:nationaltfs@dublincity.ie) or by fax: 01 4544830.

The new rules also bring in greater enforcement measures. They require all EU countries to carry out inspections and spot checks, allow for physical checks of shipments - such as the opening of containers - to be carried out, and oblige national governments to report to the Commission on the implementation of the legislation. Recent proposals on criminal sanctions for environmental crimes (see *EU Policy Review*, February-March 2007 for further details), will also contribute to this objective.

## Update on EU Investigation into Local Planning Restrictions

The European Commission has confirmed that it is to investigate whether certain planning criteria set out in county development plans are discriminatory under EU law (see *EU News Bulletin*, No.39). The Commission has now made a formal 'request for information' on the practice of favouring local people in decisions over whether to grant planning permission for one-off houses (see *EU News Bulletin*, No. 39 for further information).

The Commission explained that its intention was "to verify whether the measures in question are compatible with Article 43 and 56 of the EC Treaty which guarantee respectively the freedom of establishment and the free movement of capital." This official request takes the form of a 'letter of formal notice', the first step in the infringement procedure under Article 226 of the EC Treaty.

The conditions that may be investigated include:

- The requirement by most counties that the person applying for permission to build have residency in the area or family members in the area;
- The requirement that the applicant be employed locally, often in agricultural activities;
- The requirement that the applicant speak Irish.

23 county councils in Ireland (Carlow, Clare, Cork, Donegal, Fingal, Galway, Kerry, Kildare, Kilkenny, Mayo, Meath, Monaghan, Laois, Longford, Limerick, Louth, Offaly, Sligo, Tipperary North and South, Wexford, Westmeath and Wicklow) currently take into consideration some or all of these criteria when deciding whether to grant permission for the construction of one-off houses in particular areas. The criteria are in line with government guidelines on one-off housing in rural areas, introduced in 2004. The government will have until September to respond to the Commission's request for information justifying the practice.

Ireland is not the only country applying such criteria. Local authorities in other countries such as France and Spain are also likely to be affected by the Commission's investigation. If the case goes to court and the court finds against the Irish Government, local councils will have to revisit these practices.

## Directives on Surface Water and Waste among EU's Priorities for the Rest of 2007

A new proposal on drought management and water scarcity (see page 4, below) is just one of several high profile environmental initiatives that will dominate the EU agenda over the next six months. The Portuguese government, which holds the Presidency of the European Union between July and December of this year has indicated that the environment is one of its key priorities. Agreement can be expected before the end of 2007 on a number of pending new laws that will have important implications for local authorities, including Directives on surface water, waste, soil, air quality and the marine environment. Non-legislative proposals to be discussed include a new action plan on biodiversity and a wide-ranging maritime strategy, covering all sectors from shipping and fisheries to tourism. This article looks in detail at the likely content of two of these Directives: one on waste and one on surface water quality. Agreement on both of these proposals has been reached between EU Environment Ministers, but they may still be amended by the European Parliament in the coming months.

### *Directive on Surface Water*

The proposed Directive on Surface Water, which is required to support the Water Framework Directive, will set limits on concentrations in surface waters of dangerous chemical substances that pose a particular risk to animal and plant life and to human health. The proposal will replace five older Directives. EU Environment Ministers have now agreed on 41 pollutants liable to be found in surface waters that should be listed as priority substances. Of these 41 substances (pesticides, heavy metals and others), eight are already covered by existing legislation. The European Parliament wants to add an additional 27 pollutants to these substances, but the most likely outcome is that these will be included in a separate Commission proposal.

Environmental Quality Standards (EQS) will apply to each of these priority substances, setting limits to the allowable concentration in surface waters. The overarching objective of the Water Framework Directive is to cease or phase out emissions and discharges of all these substances within 20 years.

The Commission's proposed list of pollutants can be found here:

[http://ec.europa.eu/environment/water/water-framework/priority\\_substances.htm](http://ec.europa.eu/environment/water/water-framework/priority_substances.htm)

### *Revision of the Waste Framework Directive (2006/12/EC)*

All EU law on waste management is based on the Waste Framework Directive, originally adopted in 1975. This Directive obliges national governments to promote the prevention, reuse and recycling of waste, and to prepare waste management plans providing for the establishment of a network of disposal facilities and infrastructure. This is the basis for the regional/local waste management plans adopted by local authorities in Ireland, and establishes standards that must be met by the relevant waste management facilities.

In 2005, the Commission proposed a major shake up of the Directive, on the basis of the following approach (see *EU Policy Review*, June-July 2005 for further details):

- Life-cycle approach: The strategy proposes to look beyond the pollution caused by waste to consider its potential contribution to a more sustainable use of natural resources and raw materials. This aspect is dealt with in a related strategy on the sustainable use of natural resources;
- Prevention: EU countries are required to develop national waste prevention policies, defining objectives and quantitative or qualitative indicators, and report on these every three years;
- Recycling: An EU-wide definition of recycling and new environmental standards on recycling are to be adopted to "support the development of an EU market for secondary (recycled) materials";
- Simplifying existing legislation: This is also a major priority which is part of the Commission's 'better regulation' initiative to simplify and streamline EU laws;
- Targets: The new strategy does not impose specific waste recycling or prevention targets and leaves it up to each country to set their own if they wish;
- Incineration: A revision of the Integrated Pollution Prevention and Control (IPPC) Directive is to be tabled that will set a benchmark to improve energy recovery from municipal incinerators. The Commission says the new energy efficiency benchmark "will determine whether an incinerator can be identified as a recovery facility instead of a disposal facility".

National governments last month reached agreement on the key controversial aspects of the review. These include:

### Waste Hierarchy

EU Environment Ministers agreed on a five step waste hierarchy, prioritising prevention, reuse, and recycling ahead of energy recovery and disposal, which will serve as a guiding principle for the Directive. However, in a controversial move, they decided that incineration should be classified as recovery, rather than disposal. This distinction will be taken into consideration for the classification, based on an energy efficiency factor, of

incineration plants. For this purpose, thresholds will be set under which a plant would be considered as only for disposal. This will be an energy efficiency factor of 0.6 for existing plants and of 0.65 for new plants as from 2009. Annex II of the draft Directive (see below for the link) provides details of how to calculate this factor).

In addition, a mechanism has been drawn up to define the criteria under which some products, such as compost or construction materials, may no longer be considered as waste. Under the terms of the Directive, the Commission will define minimum environmental standards for all waste processing plants.

#### Transport of waste

The proposed Directive specifies that all countries must carry out the processing of their own waste as close as possible to where it is produced. Nonetheless, certain countries were concerned that a lot of waste may end up on their territory. In order to address these fears, EU Environment Ministers agreed that, as an exception to the Regulation on the shipment of waste (see above) national governments "may, in order to protect their network, limit incoming shipments of waste destined to incinerators that are classified as recovery, where it has been established that such shipments would have the consequence that national waste would have to be disposed of or that waste would have been treated in a way that is not in coherence with their national waste management plan".

These rules were of specific concern to the Irish government, which argued that as a small country, Ireland could not be expected to have the facilities to treat all types of waste within its territory. In response, an additional phrase was added to the Directive, stipulating that the rules '[do not imply] that each member state must possess the full range of final recovery facilities within that member state'.

The debate will continue over the coming months in the European Parliament.

The proposed Directive can be found at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005PC0667:EN:NOT>

## POLICY INITIATIVES AND ANNOUNCEMENTS

### **Communication on Droughts and Water Scarcity Raises Water Pricing Issues**

Although drought may be the last thing on most people's minds in Northern Europe during this wet summer, water scarcity is causing as much concern across the EU as flooding. Recent trends show a dramatic increase in the problems of drought and water scarcity in Europe, and this growth is thought to be directly linked to climate change. For this reason, the Commission has published a communication document to reflect on the appropriate policy options that should be put in place at local, national and European level to address these challenges.

The Water Framework Directive (WFD) focuses not only on guaranteeing quality, but also sufficient quantity of water.

However, it is the former that has been the focus of much of the attention to date. Many of the responses proposed to address shortcomings in the latter area are linked to the implementation of the Water Framework Directive, but others may require additional action from local authorities.

The Commission notes that over the past thirty years, droughts have increased by almost 20%, with total costs amounting to over €100 billion. Water scarcity has also risen sharply, and is increasingly affecting northern as well as southern countries. The Intergovernmental Panel on Climate Change estimates that if temperatures were to rise by 2 to 3° C, between 1.1 and 3.2 billion people could lack access to sufficient water. Water scarcity and droughts also have broader impacts on natural resources through negative side-effects on biodiversity, water quality, increased risks of forest fires and soil impoverishment. The aims of the communication are to analyse the legislative and financial instruments that could best be used to address this problem and study if and which measures would be necessary EU-wide.

The communication focuses on four key areas:

- Water demand management;
- Policy making and land-use planning;
- Implementation of a water hierarchy;
- Improved knowledge and data collection.

#### *Water demand management*

The Commission returns in the document to the issue of water pricing policies, already a component of the Water Framework Directive, which requires EU countries to set up a water pricing framework by 2010. It notes that Europe continues to waste at least 20% of its water due to inefficiency, and makes clear that it sees the implementation of extensive water pricing policies reflecting the 'user pays' principle as an essential first step to encouraging more efficient water use. It also proposes that compulsory metering be introduced into all water-using sectors. Both the level of water rates and the scope of their application should be reviewed immediately, the Commission says, urging all countries to set up compulsory water metering programmes in all sectors concerned. It stresses that if there are any delays in implementation of the pricing policy, it will not hesitate to initiate infringement proceedings.

#### *Policy-making and land use planning*

The Commission notes that land-use planning is one of the main drivers of water use, and must be central to efforts to improve efficiency. Inappropriate allocation of water resources between different sectors results in imbalances between water needs and existing water resources, the Commission says. It believes that a pragmatic shift is required in order to change policy-making patterns, and stresses that the impact of all national and local policies on water management should be taken into account during the decision-making process. A clear water hierarchy should guide all such decisions. In this context, the existence of high quality information on the extent of the challenge and projected trends will be paramount.

#### *Improved knowledge and data collection*

Reliable information on the extent and impacts of water scarcity and droughts is crucial, not only as a guide for evidence-based policy, but also to ensure that policies are

consistent across Europe. In this context, the Commission points to the recently established Water Information System for Europe (WISE) (see *EU Policy Review*, April/May 2007 for further details) as the ideal platform to integrate and disseminate such information.

In summary, it is proposed that by 2010, each European country should:

- Put in place water tariffs based on a consistent economic assessment of water uses and water value, with adequate incentives to use water resources efficiently and an adequate contribution of the different water uses to the recovery of the costs of water services, in compliance with WFD requirements;
- Enhance efforts to introduce compulsory metering programmes in all water using sectors;
- Ensure stringent implementation of the Directive on Strategic Environment Assessment in all economic sectors;
- Identify river basins which face near-permanent or permanent water stress or scarcity;
- For those river basins, set up appropriate regulations to restore a sustainable balance;
- Develop fiscal incentives for the promotion of water-efficient devices and practices, in particular in water scarce areas, taking into account the social context and the potential regional differences.

The Commission stresses that if results prove insufficient in very sensitive areas, compulsory measures on water saving and water efficiency may be introduced.

The Commission's proposal can be found at:  
[http://ec.europa.eu/environment/water/quantity/scarcity\\_en.htm](http://ec.europa.eu/environment/water/quantity/scarcity_en.htm)

The WISE database is available at:  
<http://water.europa.eu/>

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