

**Revision of EU procurement legislation  
Matters of concern for Local and Regional  
Authorities and potential subsidiarity issues**

**The report was written by  
t33 Srl and OIR  
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# 1. Introduction and Main Findings

This report aims to provide useful insights for regional parliaments involved in Early Warning System mechanisms into the three new legislative proposals issued by the Commission on public procurement. The report presents the background to the new proposals, the main expectations of the local and regional authorities (LRAs)<sup>1</sup>, and an initial overview of potential issues regarding the subsidiarity and proportionality principles.

On 20 December 2011, the European Commission issued three new legislative proposals regarding public procurement. They concern specifically:

- public procurement in general<sup>2</sup>;
- procurement by entities operating in the water, energy, transport and postal services sectors<sup>3</sup>;
- the award of concession contracts<sup>4</sup>.

The current EU public procurement (PP) directives have helped to establish a culture of transparency and outcome-driven procurement in the EU by triggering competition for public contracts, as well as generating savings and improvements in the quality of procurement outcomes. It is estimated that open and competitive procurement procedures drove down costs by around 4% in 2009, generating savings of approximately €20 billion for the €420 billion of public contracts published at EU level, far exceeding the €5 billion costs generated by the regulatory framework. This could generate increases in employment of 160-240 thousand jobs and GDP of between 0.08 and 0.12%. If these savings were achieved for all PP the gains would be correspondingly greater (0.5% growth in GDP and employment)<sup>5</sup>.

The aim of the legislative proposals is to enhance the role of PP in the European market by modernising the existing instruments and methods to make them better suited to deal with the evolving political, social and economic context. In fact, if compared with the private sector, cross-border participation in EU PP

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<sup>1</sup> The expectations of the LRAs are based on positions expressed so far during the Green Paper consultation by the CoR (as a representative of the local and regional authorities), associations of LRAs (such as CEMR, Eurocities, etc.) and individual regions. In addition we integrated the opinions expressed in various relevant documents, relating to Commission consultation and conferences / seminars.

<sup>2</sup> COM(2011) 896 final.

<sup>3</sup> COM(2011) 895 final.

<sup>4</sup> COM(2011) 897 final.

<sup>5</sup> Vogel L., 'Macroeconomic Effects of Cost Savings in Public Procurement', Economic Papers 389, Economic and Social Affairs, European Commission, November 2009.

procedures remains low – only 1.6% of public contracts are awarded to operators from other Member States – as does the participation of SMEs. There is still therefore considerable potential to be tapped and many stakeholders have been demanding a review of the EU PP system to increase its efficiency and effectiveness.

The new legislative proposals on PP meet several expectations expressed by LRAs during the consultation. Firstly, they provide greater legal certainty for various issues including the scope of the directives, definitions of tools and procedures, as well as cooperation between public and public organisations. Secondly, they simplify the rules for sub-regional contracting authorities (CAs) especially in terms of information and communication. Finally, the new proposals enhance the flexibility of PP procedures, introducing a ‘tool box’ approach.

Although the LRAs attach great importance to the achievement of PP objectives relating to innovation, social inclusion, sustainability and the environment as indicated in the Green Paper, the new proposals only partially support the strategic use of PP. On the one hand, the possibility of requiring specific social and environmental labelling in the life-cycle costing may help LRAs to pursue the Europe 2020 horizontal objectives (innovation, environment, social inclusion). On the other hand, the use of these criteria is still linked to the subject matter of the contract, which limits the potential impact on PP.

Despite the LRAs’ scepticism regarding the need for specific and detailed legislation, the Commission issued a new proposal specifically addressing concession. Although it was less detailed than the proposal on PP, the new proposal provides for rules on many aspects such as publication in the Official Journal, deadlines, selection and exclusion criteria, award criteria, procedural guarantees, and remedies.

Although action is required at EU level to successfully tackle some of the most important problems regarding procurement, there are some issues to be tackled regarding the subsidiarity and proportionality principles. The more critical issues relate to the mandatory use of e-procurement and the establishment of a ‘national oversight body’ which may increase administrative costs and burdens without any clear immediate benefits, especially for small CAs.

## 1.1 Facts and Figures<sup>6</sup>

- In 2009, public expenditure on goods, services and works was €2.1 trillion, or 19% of EU GDP. This makes the public sector the largest consumer in the European economy.
- This money was spent by 250,000 extremely diverse CAs, varying greatly across the Member States (here-after MS).
- Only 20% of public expenditure was covered by EU PP directives.
- It was estimated that e-procurement represents less than 5% of total procurement.
- Tenders receive an average of 5.4 bids – 20% of EU advertised tenders receive only one bid.
- There is increased use of framework agreements and joint/centralised procurement: in 2009, joint purchasing bodies awarded over 40% of the total value of contracts to framework agreements.
- Between 2006 and 2010, the most commonly used procedure was the traditional open tender with 73% of award notices accounting for 52% of the total value. Next was the restricted procedure, which was used in 9% of cases but with a notable 23% of the value of all contracts awarded. Negotiated procedures with public authorities accounted for 8% of the contract award notices and 14% of the value.
- Although 60% of contracts covered by the directives were won by SMEs between 2006 and 2008, their value made up just 34% of the total value.
- Utility operators are responsible for about 20% of procurement advertised in accordance with EU rules.
- In 2005, import penetration in the public sector stood at 8%, lagging behind the private sector, which stood at 19%.

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<sup>6</sup> Sourced from official EC documents (see, for example, documents mentioned in footnotes 2, 3 and 4).



- Direct cross-border procurement accounted for only 1.6% of public contracts between 2006 and 2009, whereas indirect cross-border procurement through affiliates made up 11.4% of the contracts awarded. Moreover, it seems that the smaller the country was, the shorter the distance between CA and successful bidder.
- Open and competitive PP reduced the costs by around 4%, generating savings of approximately €20 billion.

## 2. Rationale for Revision

### 2.1 Weaknesses of current legislation

Current PP legislation is based on Directives Nos 2004/18/EC<sup>7</sup> and 2004/17/EC<sup>8</sup>. These directives regulate the publication and organisation of tender procedures for higher-value contracts. They apply common principles of transparency, open competition and sound procedural management to public contract award procedures, which are likely to be of interest to suppliers across the single market. Open and well-regulated procurement markets are expected to contribute to better use of public resources.

In June 2011, the Commission published an evaluation of the impact and effectiveness of EU PP legislation. Two major reasons for a revision of the current legislation have been identified:

- **Structural changes in PP markets.** This includes structural changes for increased sophistication and aggregation of demand through framework contracts and central purchasing, often combined with the development of e-procurement platforms.
- **Use of PP to support the achievement of other objectives.** There is growing policy interest in re-orienting public expenditure towards solutions that are more compatible with environmental sustainability, promote social policy considerations or support innovation.

This evaluation, as well as other documents, identifies the following weaknesses in the current legislation:

#### 2.1.1 SMEs – participation and success

The analysis of the participation and success rates in PP has shown that the share of SMEs participating in PP is still relatively low – especially compared to their overall economic power in the EU (60% of contracts won by SMEs between 2006 and 2008 the value of which accounted for just 34 % of the total)<sup>9</sup>. This is

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<sup>7</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004, p. 114.

<sup>8</sup> Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 134, 30.4.2004, p. 1.

<sup>9</sup> EC (2011), 'Evaluation Report – Impact and Effectiveness of EU Public Procurement Legislation – Part 1', DG Internal Market and Services, Commission Staff Working Paper, Brussels, June 2011.

due to an unfavourable cost-benefit ratio when participating in tendering procedures. Moreover, technical and language capacities are very often limited.

### **2.1.2 Utilities**

Utility operators were brought under the PP regime on the grounds that, because they enjoy monopoly or special and exclusive rights, they could not be presumed to have the incentives to procure efficiently. The weakness in this respect is/was that a number of factors changed; the degree of liberalisation and privatisation, the extent of competition and the effectiveness of regulation<sup>10</sup>. Significant EU legislation has been adopted to liberalise market access in four sectors covered by the directive: electricity, gas, postal services and exploration for oil and (natural) gas. There has been less EU legislative activity to liberalise access to rail or other land transport such as buses, as well as ports. There has been little or no direct action in the area of water, heating or airports. The liberalisation of air transport and ground-handling services has intensified competitive pressure on some airport operations. All of these liberalisation steps have led to the conclusion that utilities may no longer have the status of natural monopolies and thus procurement in this field could be adapted to the free market.

### **2.1.3 Cross-border procurement**

One of the most crucial aspects when implementing the procurement directives has been to increase the volatility of goods and services in the field of PP and to open up markets. However the Evaluation Report on Impact and Effectiveness of the EU Procurement Legislation states that only a small proportion of contracts are awarded to firms from another Member State (direct cross-border procurement accounts for just 1.6% of total awards). The main obstacles faced by potential suppliers have been language barriers and unfamiliar or complicated formal requirements. It seems that supplies have the highest propensity to be traded cross-border, while services are facing more trade barriers across borders. This weakness is also seen in indirect cross-border procurement (i.e. firms bidding for contracts through their foreign affiliates or subsidiaries), which again does not account for a very high share of contracts awarded under PP.

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<sup>10</sup> See Annex 9 in EC (2011), 'Evaluation Report – Impact and Effectiveness of EU Public Procurement Legislation – Part 2', DG Internal Market and Services, Commission Staff Working Paper, Brussels, June 2011.

## 2.1.4 Use of procurement to support the achievement of other objectives

In general, Member States have adopted National Action Plans for green or sustainable PP<sup>11</sup> and many have set targets for some or all of the priority product groups identified by the Commission<sup>12</sup>. It appears that the majority of CAs surveyed in 2010 seek to buy green, where this is feasible<sup>13</sup>. In general, where they do so, they obtain a greener outcome in the final contract award. However, it has not yet been possible to estimate the extent to which these environmental requirements have had an actual measurable or differential impact on the environment. The main weakness in this context has been that incorporating these other policy objectives is generally perceived to increase the complexity of the procurement process and can require procurement staff to learn new skills and competences.

There is very wide efficiency variation across Member States, particularly in the time and cost involved in running a procedure. The worst performers take several times as long as the best performers<sup>14</sup>. This suggests that the directives support relatively efficient procurement practice but that some Member States have considerable scope for improving the efficiency of their procurement administration. Generally, the directives seem to have boosted openness and transparency, which have triggered increased competition, and this in turn translates into savings<sup>15</sup>.

## 2.2 Stakeholders' demands

Many stakeholders have demanded a review of EU PP legislation in order to increase the efficiency and effectiveness of the PP system. The following section addresses policy shortcomings and proposed remedies.

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<sup>11</sup> Bianchi T. and Guidi V., *The Comparative Survey on the National Public Procurement Systems across the PPN*, December 2010.

<sup>12</sup> Kahlenborn, W., Moser C., Frijdal J. And Essig M., *Strategic Use of Public Procurement in Europe – Final Report to the European Commission*, 2011, Berlin: Adelphi.

<sup>13</sup> See footnote 1.

<sup>14</sup> Strand I., Ramada P. and Canton E., *Public Procurement in Europe – Cost and Effectiveness*, PwC, London Economics and Ecorys, March 2011.

<sup>15</sup> 'Publication of a contract notice results in a savings of 1.2% compared to contracts where neither contract nor prior information notice was published. Using an open procedure is associated with a further 2.6 % savings. Based on these findings, a contracting authority that publishes an invitation to tender and uses an open procedure may expect total benefits equal to savings of 3.8 % on the final contract value. For restricted procedures, the corresponding savings appear smaller at around 2.5%', European Commission *Evaluation Report – Impact and Effectiveness of EU PP Legislation – Part 1*, DG Internal Market and Services, Commission Staff Working Paper, Brussels, June 2011, p. xviii.

### **2.2.1 Legal certainty**

The PP rules and procedures, as specified in the legislative framework, allow a certain leeway for interpretation. In its Green Paper, the Commission proposed refining certain notions and concepts in the fields of purchasing activities, public contracts and public purchasers to ensure more legal certainty for the CAs.

According to their responses during the consultation, stakeholders generally consider the existing concepts and structures to be appropriate. Nevertheless, they support a clarification of the concept of ‘body governed by public law’ and a simplification of the ‘works contract’. There is dissent regarding the need to review the distinction between A and B services and an increase of the thresholds set in the directives. Stakeholders ask that the scope of PP directives be explicitly limited to actual purchases by the CAs, and that specific rules applicable to public utilities operators be retained<sup>16</sup>.

### **2.2.2 Efficiency**

Increasing public spending efficiency is the main aim of the Commission initiative revising existing PP legislation. To achieve this goal, the Green Paper suggests adapting regulatory instruments to the purchasing needs of CAs by modernising procedures, developing specific instruments for small contracting authorities, adapting the scope and conditions of public-public cooperation, developing instruments for joint procurement and introducing provisions addressing contract execution.

In summary, stakeholders support the simplification of procedures and the need to make them more flexible<sup>17</sup>. Emphasized in particular is the need for general acceptance of the negotiated procedure with prior publication of a contract notice. Furthermore, stakeholders are in favour of allowing contract authorities to explicitly take past performance of the bidder into account, and of allowing a stronger aggregation of demand in some areas. Respondents are therefore aware of the associated risk of favouritism and discrimination. Reactions to the Commission’s proposed lighter procedural framework for LRAs was mixed, whereas a majority supported the development of clarifying provisions on public-public cooperation and on the consequences of contract modifications during its execution.

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<sup>16</sup> European Commission ‘*Green Paper on the Modernisation of EU Public Procurement Policy – Towards a More Efficient European Procurement Market – Synthesis of Replies*’, DG Internal Market and Services, Working Document, Brussels, June 2011.

<sup>17</sup> *Modernising Public Procurement Conference – Summary of the Proceedings*, Brussels, 30 June 2011.

### **2.2.3 Accessibility**

The review of PP policy is also driven by the Commission's concerns regarding the accessibility of the European procurement market. Generating strong competition and streamlining procurement procedures should benefit small CAs and encourage cross-border procurement.

First and foremost, stakeholders support the proposed measures to decrease the administrative burden relating to the choice of bidder, in particular the introduction of a rule according to which certificates may only be required from the successful bidder. The introduction of coercive measures of positive discrimination in relation to SMEs is unpopular. The need to strengthen competition and encourage cross-border participation is also acknowledged. Whereas specific EU-level instruments, such as the requirement to draw up tenders in a second language, are rejected, ideas for better coordination and recognition of certificates across borders receive support.

### **2.2.4 Strategic use**

The purchasing power of public authorities can contribute to achieving the Europe 2020 strategy goals. Hence one objective of the EC's review process is to raise the issue of PP ('how to buy?' and 'what to buy?') in support of common societal goals: promoting social inclusion, innovation and protection of the environment.

Some LRA associations are against obligations to buy high societal value products and services<sup>18</sup>. They fear too much interference, increased complexity and higher prices creating barriers for SMEs. Attitudes vary among the stakeholder groups towards the EC's proposal to enable public procurers to take into account factors such as corporate social responsibility etc. when choosing a bidder. An overall majority, however, is in favour of maintaining the link with the subject matter of the contract. To stimulate innovation through PP, stakeholders recommend greater use of procedures such as competitive dialogue, design contests and negotiated procedures, as well as the sharing of best practices amongst Member States. Possible adaptations of the current rules to take better account of specific characteristics of social services provoked mixed reactions. Responses to these aspects show a clear dividing line between business and CAs on the one hand and civil society on the other.

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<sup>18</sup> E.g. Council of European Municipalities and Regions (CEMR), '*Over-reliance on Public Procurement as a Policy Instrument*', Brussels, January 2010.

### **2.2.5 Sound procedures**

The Commission sees room for improvement in the legislation to ensure sound procedures, especially to include more specific rules to prevent and sanction conflicts of interest, penalise favouritism and corruption and include guarantees against unsound business practices.

Reactions vary amongst stakeholders. In general, the majority believes that the EU rules on these matters are sufficient but would benefit from definitions of concepts, such as ‘conflicts of interest’ and ‘professional misconduct’, as well as reinforced transparency in the bidding process.

## **3. From the regional and local perspective**

In the consultation on the Green Paper, LRAs welcome the Commission's intention to reform the directives and agree with the Commission on the importance of PP as one of the 12 levers for boosting growth and strengthening confidence as laid out in the Single Market Act<sup>19</sup>.

This section contains a synthesis of the most relevant issues for LRAs in the new proposal concerning public procurement in general - COM(2011) 896 final ('the proposal'). Issues have been differentiated on the basis of the potential degree of satisfaction/dissatisfaction of LRAs, assumed on the basis of positions expressed so far, including opinions from the CoR (as a representative of the local and regional authorities), associations of LRAs (such as CEMR, Eurocities, etc.) and individual regions as expressed in various relevant documents, such as replies to the Commission consultation and conferences/seminars **on** specific articles of the proposal. Relevant issues regarding which LRAs<sup>20</sup> are likely to be satisfied are in sub-section 3.1 (positive). Other issues on which substantial disagreement is likely to arise have been included in sub-section 3.2 (negative).

### **3.1 Aspects of the proposals that could be seen positively by LRAs**

#### **3.1.1 Scope of the directives (Article 1: Subject matter and scope)**

Current EU PP directives do not explicitly limit their scope to the purchasing activities of CAs. The proposal now clearly defines this scope. The common opinion among LRAs on this issue is that the scope of the PP directives should embody the principle of 'the immediate economic benefit' stated by the Court in its most recent case-law<sup>21</sup>. The new proposal states 'the meaning of this directive is the purchase or other forms of acquisition of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities'.

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<sup>19</sup> Michel Barnier, *Modernising Public Procurement Conference*, Brussels, 30 June 2011.

<sup>20</sup> See judgments of 25.3.2010 in Case C-451/08 Helmut Müller GmbH, paragraphs 47 to 54, and of 15.7.2010 in Case C-271/08 Commission v Germany, paragraph 75).



### **3.1.2 Definitions (Article 2: Definitions)**

The proposal now provides a common vocabulary for public procurement with 23 different definitions. This vocabulary is very important for LRAs because the lack of common understanding has caused serious problems in the application of PP directives. An example is the definition of ‘public works contracts’, particularly the criterion ‘the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority’ and there are calls for this definition to be adapted and simplified. A second issue relates to ‘public body’.

### **3.1.3 Simplification for small CAs (Article 26.4: Restricted procedure – Article 46.2: Prior information notices)**

A common issue relates to the fact that small CAs have to apply the regime’s full procedural rules and safeguards, spending a disproportionate amount of time and effort considering the relatively small nature of the contracts. The new proposal provides for a lighter regime for sub-central CAs, i.e. all CAs below the central government level, such as local and regional authorities. For this category of purchasers:

- a prior information notice can be used to call for competition. Sub-central CAs using this facility do not have to publish a separate contract notice before launching the procurement procedure;
- in a restricted procedure, sub-central CAs can set time limits in a more flexible way by mutual agreement with participants.

Furthermore the proposal adopts a tool box approach which should create greater flexibility and guarantee transparency<sup>22</sup> (see the following paragraph).

### **3.1.4 Adoption of new tools and instruments (Title II, Chapter II: Techniques and instruments for electronic and aggregated procurement- Article 59: European Procurement Passport)**

The proposal includes procedures which can be adopted by LRAs in their role as CAs to increase flexibility and reduce administrative costs. They are competitive procedures with negotiation, competitive dialogue and innovation partnerships.

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<sup>22</sup> Rühle, Heide, *Modernising Public Procurement Conference*, Brussels, 30 June 2011.

Furthermore there is a set of six specific procurement tools: framework agreements, dynamic purchasing systems, electronic auctions, electronic catalogues, central purchasing bodies and joint procurement. These are instruments for electronic and aggregated procurement, which should simplify the award process and minimise costs. Finally, the proposal adopts a tool already proposed by the CoR: the **European Procurement Passport**, in the form of a standardised registration system<sup>23</sup>, which in two years will be in electronic format. This will demonstrate, without entailing high costs, that an operator has the relevant declarations and documentation often requested by CAs. The passport will enable operators to avoid presenting the same declarations and documents and will ensure considerable savings in time and resources.

### **3.1.5 Pursuing horizontal objectives (Article 41: Labels - Article 55: Exclusion grounds – Article: 6 Quality assurance standards and environmental management standards - Article 67: Life cycle and life-cycle costing)**

The proposal offers LRAs a degree of flexibility in the procurement of goods and services that contribute to the achievement of the Europe 2020 sustainable development and social inclusion objectives. Even if this opportunity is not fully exploited because it is linked to the contract (see next subparagraph 3.2), the LRAs could:

- a) require that works, services or supplies bear a specific environmental or social label;
- b) exclude any economic operator aware of any violation of social, labour or environmental law from participation in a public contract;
- c) adopt the life-cycle costing approach and include external environmental costs.

The proposal promotes innovation by providing the option of adopting the ‘innovation partnership’ tool which should improve research and development in Europe.

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<sup>23</sup> Kool, Henk, *Modernising Public Procurement Conference*, Brussels, 30 June 2011.

### **3.1.6 Contract between public authorities (Article 11: Relations between public authorities)**

LRAs have called for an exclusion in the new directive for contracts between CAs. The proposal excludes contracts from the scope of the directive when:

- a) the CA exercises over the legal person concerned a decisive influence over both strategic objectives and significant decisions. There is also no private participation in the controlled legal person.
- b) The scope of the contract is genuine cooperation, pursuing the public interest, without financial transfer or private participation.

Moreover, the proposal for a new regulation on concession also provides clarifications regarding the degree to which public-public cooperation is covered by EU legislation.

### **3.1.7 Past experience (Article 55.3: Exclusion grounds)**

In line with the opinion of individual LRAs and the CoR, the proposal attaches more importance to past experience. The CA may exclude an economic operator where it has shown significant or persistent deficiencies. CAs should therefore benefit from previous experience of an economic operator in future calls for tender.

## **3.2 Aspects of the proposals that could be seen as negative by LRAs**

### **3.2.1 Use of strategic procurement outside the subject matter of the contract**

LRAs believe that relevance to the subject matter of the call for tender should not be required when applying additional criteria relating to innovation, social inclusion and the environment in order to better pursue the strategic objectives of Europe 2020. Although the new proposal encourages a CA to use environmental or social criteria, they should always be linked to the subject matter of the contract, e.g. Art. 41. This will limit the potential impact of procurement since it does not allow the CA to fully exploit its purchasing power in order to achieve other ‘horizontal’ objectives. For example, the requirement to employ disabled people will not be allowed under this new proposal and may be treated as discriminatory.

### **3.2.2 Concessions**

The common opinion of LRAs is represented by the CoR’s position in its 2007 opinion on Public-Private Partnerships (PPP) and Concessions<sup>24</sup>. More recently<sup>25</sup>, the CoR reasserted its view that it is still too early for the Commission to regulate on service concessions. However, the CoR recommended that, if the Commission decides that service concessions are to be covered by the procurement directives, it is extremely important that these rules be as simple and flexible as possible. In this case, they should be guided by the provisions of the directives on public works concessions and on no account by the provisions governing procurement of services. Another important concern here is the specific nature of services of general economic interest concessions and their importance to local economies.

One important thing to note is that, even if service concessions are exempted from detailed procurement procedures, they are nonetheless subject to the principles and rules enshrined in the EU Treaties. More specifically, the principles arising from Article 34 and Article 37 of the Treaty on the Functioning of the European Union include not only non-discrimination and equality of treatment, but also transparency, mutual recognition and

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<sup>24</sup> CoR opinion on the ‘Green Paper on Public-Private Partnerships and Community law on public contracts and concessions’, CdR 239/2004.

<sup>25</sup> CoR opinion (2011) ‘Mobilising private and public investment for recovery and long-term structural change: developing public-private partnerships’ (2011/C 15/05).

proportionality<sup>26</sup>. The European Court of Justice (CJEU) further clarified<sup>27</sup> that the basic principles of the Treaties required potential bidders to have equal access to suitable information regarding the intent of a contracting entity to set up a public-private entity and to award it a public contract or a concession. This implies an obligation of transparency which consists in ensuring, for the benefit of any potential bidder, a degree of advertising sufficient to enable the market to be opened up to competition<sup>28</sup>. Furthermore, the CJEU judgment in the Eurawasser case<sup>29</sup> re-defined the nature and extent of the risk which needs to be accepted by the concessionaire and thus potentially widened the number of transactions which may be classified as concessions.

The Commission does not meet CoR expectations in the new proposal on concessions. Moreover, the new proposal does not only express general principles but also lays down specific obligations for contracting authorities, mirroring the proposal for PP in a less pervasive way. In fact, the proposal governs: publication in the *Official Journal of the European Union*, deadlines, selection and exclusion criteria, award criteria, procedural guarantees and remedies.

### **3.2.3 Social services (Title III, Chapter I: Social and other specific services)**

Social services are now included in B-services and are currently exempt from the procedural requirements of the directives. The proposal provides a specific regime for public contracts for these services, with a higher threshold of €500,000. Even if it imposes lighter obligations than for other PP contracts, it will represent an additional administrative cost for LRAs. Since there is very limited cross-border interest in these services (direct cross-border procurement accounts for just 1.6% of public contracts between 2006 and 2009), LRAs believe that burdens on them should be minimised.

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<sup>26</sup> Cf. Commission interpretative communication on concessions under Community law, OJ C 121 of 29.4.2000, page 6.

<sup>27</sup> Case C-324/98, *Telaustria*, ECR 2000, I-10745, paragraphs 60 and 61.

<sup>28</sup> Case C-324/98, *Telaustria*, paragraph 62; Case C-458/03, *Parking Brixen*, paragraph 49.

<sup>29</sup> Case C-206/08, *Wasser- und Abwasserzweckverband Gotha und Landkreisgemeinden (WAZV Gotha) v Eurawasser Aufbereitungs- und Entsorgungsgesellschaft GmbH*.

## 4. Subsidiarity and Proportionality

In order to assist regional parliaments in carrying out their own subsidiarity and proportionality (S&P) analysis in accordance with the strict deadlines of the Early Warning System mechanisms, the current section provides an initial overview of S&P issues that the new directives may raise.

The analysis has been structured in line with the S&P grid<sup>30</sup> developed by the CoR and analyses in detail some aspects of the proposals from an S&P point of view. At this stage, the analysis seeks to raise the most important issues relevant to LRAs in order to provide guidelines and feed the debate among regional parliaments.

### 4.1 Type of Competence / Legal Basis

The legal basis for EU action is provided by **Articles 53(1), 62, and 114** of the **Treaty on the Functioning of the European Union**, as stated in the preamble to the directives. These articles authorise the adoption of measures aimed at the establishment and functioning of the internal market.

Competence in the field of procurement is a **shared** one; the subsidiarity principle therefore applies.

The EU has the competence to regulate Member State procurement policies in order to ensure that policies do not hinder the internal market. The procurement directive is best understood as a negative effort towards harmonisation, in that its aim is to eliminate Member State policies that present a hindrance to trade in the PP market<sup>31</sup>. In short, a CA must act fairly in the course of PP. Acting fairly means following the principle of ‘equal treatment (or non-discrimination)’, which means that all competitors should have an equal opportunity to compete for the contract. To ensure this level playing field, the principle of transparency must also be applied. The ‘transparency’ provisions set out in the procurement directive essentially require CAs to use objective criteria, and to explain these criteria and how they will be used to evaluate the tenders in the tender notice. In addition, EU procurement rules are designed to remove certain other restrictions on access to the market - even non-discriminatory restrictions - that are

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<sup>30</sup> Refer to the Grid available in the Subsidiarity Monitoring Network section of the CoR’s website: [http://portal.cor.europa.eu/subsidiarity/SiteCollectionDocuments/GridFinalB\\_EN.doc](http://portal.cor.europa.eu/subsidiarity/SiteCollectionDocuments/GridFinalB_EN.doc)

<sup>31</sup> See Case C-19/00 *SIAC Construction Ltd v. County Council of the County of Mayo* [2001] ECR I-07725, paragraph 32 (‘[T]he purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State’).

considered disproportionate to their objectives, in keeping with the ‘proportionality principle’, which requires that governments should not take any regulatory action beyond that which is necessary in order to achieve the objective of the regulatory action.

In brief, the EU’s competence is to ensure that procedures required for the smooth functioning of the internal market are established. Member States, on the other hand, have broad discretion in regulating the content of their procurement.

## **4.2 Subsidiarity – ‘Should the EU act?’**

The principle of subsidiarity is designed to ensure that decisions are taken as closely as possible to the citizen at the level most appropriate for the intended objective(s) to be achieved effectively. The Lisbon Treaty completed the definition of the EU principle of subsidiarity by referring explicitly to its local and regional dimension.

*"[...] [I]n areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level" (Article 5, paragraph 3, Treaty on the European Union).*

In order to carry out an analysis of subsidiarity issues, the most relevant factors to consider and a logical break-down of the principle is provided (refer to Box 1 below) for the convenience of regional parliaments.

## Box 1: Guidelines for carrying out subsidiarity analysis

The subsidiarity principle can be summarised as follows: ‘the EU should act only if its action is deemed to be **necessary** and to provide a **clear benefit**’.

There are therefore two steps in the subsidiarity analysis: first to ascertain whether action is necessary at EU level, and then, if it is necessary, to establish what clear benefits it provides.

In order to evaluate the **necessity of the action**, the following factors need to be taken into account:

- **Trans-national aspects**

The issue being addressed has trans-national aspects that cannot be satisfactorily regulated by Member States and/or local and regional authorities acting alone.

- **(and/or) Conflict of Member States’ interests**

Action taken by Member States alone or lack of action at EU level would conflict with the requirements of the Treaties or otherwise significantly damage other Member States' interests.

- **(and/or) Insufficiency of existing EU measures**

Existing EU measures and/or targeted assistance provided in this framework are not sufficient to achieve the intended objective(s).

Once it is established that action at EU level is necessary, the next check is whether such action will generate *clear benefits*, as a result of its **scale and/or effectiveness** compared to similar action at national, regional or local levels. Some examples of such clear benefits are economies of scale, legal certainty, and homogeneity amongst Member States.

*Source: t33 explanation on CoR’s S&P grid*

## 4.3 Subsidiarity issues

The need for EU action on these issues is questionable or may not even exist. The issues explored only cover whether EU action is recommended and if the action is deemed to be necessary. The extent of such action is discussed further in the next section regarding proportionality. Where no action is required, the issue is not considered any further.



### 4.3.1 Horizontal objectives of procurement

PP, due to its size (19% of EU GDP in 2009) and strategic importance, can serve to further the achievement of the Europe 2020 goals. Any public purchaser, besides its obvious functional objective, may also choose to pursue other ‘horizontal’ objectives such as fostering innovation, respecting the environment and fighting climate change, reducing energy consumption, improving employment, public health and social conditions, and promoting equality while increasing inclusion of disadvantaged groups of people<sup>32</sup>.

**a) Necessity of action:** The necessity of the action here is debatable. The legal opinion on the issue is that it is the competence of the Member States to decide ‘what to buy’ and the EU must only ensure common procedural standards by regulating ‘how to buy’. Logically, it is usually the CA making the purchase that is in the best position to decide how much sustainability should be taken into account on a case-by-case basis. However, EU action is justified to some extent by the fact that there is a need for some legal definitions from the Commission, on the basis of which LRAs and national authorities could securely develop their procurement policies, also taking account of their horizontal objectives. Even if the action is partially justified, the Commission imposes the adoption of “horizontal objectives” only if linked to the “subject matter of the contract”. This is not opportune (see Chapter 4.5 on proportionality).

**b) Clear benefit:** Legal certainty.

*Supporting evidence and justification:* The legal basis for EU action in the field of procurement stems from its competence to ensure the smooth functioning of the internal market. This can be done by regulating the procedural requirements. It is true that sustainable development is recognised in Article 3(3) of the Treaty on European Union as one of the EU’s guiding principles. Moreover, Article 11 of the Treaty on the Functioning of the European Union requires that environmental issues be ‘integrated’ into the implementation of Union policies and activities. However, it should be noted that Article 11 does not have specific addressees but simply refers to EU policies and activities. In the absence of any limitation and given that integration has to take place both during the definition of the policies and during their implementation, it seems logical that both the EU and Member States should be targeted. In strictly legal terms, therefore, EU competence is largely limited to regulating ‘how to buy’ and not ‘what to buy’<sup>33</sup>. Moreover, the CJEU has repeatedly emphasised the CAs’ discretion to use

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<sup>33</sup> For a detailed analysis of Member States’ competence in regulating ‘what to buy’, see ‘*Legal Briefing, Briefing No. 2: Horizontal Objectives in Public Procurement*’, ClientEarth, 2011.

procurement in pursuit of horizontal policies – in *Beentjes*<sup>34</sup> (recognition of social objectives), *Concordia Bus*<sup>35</sup> (recognition of environmental policies) and *Wienstrom*<sup>36</sup> (recognition of horizontal criteria relating to production characteristics).

### 4.3.2 Service concessions

Service concessions are currently exempt from the procurement directives. However, the Commission has also taken action on the issue by a separate directive, including these contracts under the procedural requirements.

**a) Necessity of action:** EU level action in this field is very *debatable*. The EC's justification is to further open up the market and to ensure more homogeneity amongst Member States. However, a large proportion of stakeholders are convinced that the current procedures, along with various examples of case-law, are sufficient and that no further action is called for.

**b) Clear benefit:** Homogeneity amongst Member States; legal certainty.

*Supporting evidence and justification:* The European Parliament, as stated in the Rühle report<sup>37</sup>, believes that with the 2004 directives and the supplementary case-law of the CJEU, the process of defining the term 'service concession' and establishing the legal framework governing such concessions is complete. It also goes on to question the added value of action at EU level, stating that '*service concessions were excluded from the scope of the PP directives in order to offer CAs and contractors a greater degree of flexibility*'. It is also worth noting that the Commission's original proposal for the 2004 directives contained provisions on public service concessions similar to those existing in the Works Directive for public works concessions. However, the Member States in the Council decided not to include this type of contract because of the wide divergence of national practices in the area of public service concessions. The CEEP<sup>38</sup>, representing public employers in the European Social Dialogue, is also of the opinion that the current framework combined with the case-law interpretation provides sufficient clarity.

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<sup>34</sup> Case 31/87 *Gebroeders Beentjes BV v. Netherlands*.

<sup>35</sup> Case C-513/99 *Concordia Bus Finland Oy v Helsingin Kaupunki and Hkl-Bussiliikenne*.

<sup>36</sup> Case C-448/01 *EVN AG and Another v Austria* (Stadtwerke Klagenfurt AG and Another, intervening).

<sup>37</sup> See footnote 22.

<sup>38</sup> European Centre of Employers and Enterprises providing public services is one of the three General Cross-Industry Social Partners recognised by the Commission, and comprises enterprises and associations from across Europe, both public and private, at national, regional and local level.

### 4.3.3 Specific rule to avoid gold-plating for below-threshold contracts

Currently, below-threshold contracts are not regulated by the procurement directives and are left to Member States' discretion. The Commission revised the threshold limit for sub-regional CAs but did not take action to safeguard LRAs from national gold-plating.

a) **Necessity of action:** Trans-national aspects; conflict of Member States' interests. There is wide variation in the way below-threshold contracts are treated at the national level. These diverse national requirements imply that an LRA in one country faces considerable burdens with below-threshold contracts, while an LRA in another country faces no such burdens and is free to choose the procedures it wishes.

b) **Clear benefit:** Homogeneity across Member States; economies of scale.

*Supporting evidence and justification:* The Commission's Green Paper suggests the possibility of 'national gold-plating', referring to national legislations that add on rules or standards required by EU rules. Furthermore, most countries have rules for above-threshold procurements, which also apply to below-threshold procurements, implying equally high burdens for such contracts<sup>39</sup>. In some countries, such as Germany and Romania, a different set of rules apply to contracts above and below the threshold. In Italy, the national legislation essentially brings together all the provisions governing contracts above and below the EU threshold, by applying most of its provisions to the latter, with a few limited exceptions. In other countries, such as the UK, there is no specific discipline, but general EU principles of transparency and non-discrimination apply.

### 4.3.4 Mandatory use of electronic procurement

The new proposal strongly promotes the switchover to e-procurement, providing for the mandatory:

- a) transmission of notices in electronic form;
- b) electronic availability of procurement documents;
- c) switching to fully electronic communication, in particular e-submission, in all procurement procedures within two years.

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<sup>39</sup> See footnote 11.

If fully electronic procurement tools are suitable for highly aggregated procurement centres, they are not necessary for small CAs. For most LRAs, e-procurement is more likely to produce an increased administrative workload, particularly at the initial stage.

- a) **Necessity of action:** is questionable as the issue could be handled better at the national level.
- b) **Clear benefit:** decreased administrative costs will initially be only for some big CAs but for small local and regional authorities this will happen only in the long term. There could also be simplifications for economic operators applying to tender.

*Supporting evidence and justification:* even though adopting e-procurement offers certain advantages, such as time-saving for economic operators, preventing errors and providing more reliable data, in the medium term small LRAs, if they do not already have the system in place, may find the time and effort required to get it up and running would cancel out the savings.

#### **4.3.5 Favouritism and corruption**

Procurement markets, and especially major works projects, are often considered a lucrative target for bribery. Currently, for subsidiarity reasons, the issue is handled at national level. The proposal however establishes a new authority: national supervisory bodies responsible for monitoring and control of public procurement. The CAs will be required to transmit the contracts to the supervisory body, which will investigate suspicious patterns and ensure transparency and access to documents. This will bring additional burdens and costs. Furthermore, it could be a serious constitutional issue in several federal countries and jeopardise the freedom of LRAs.

- a) **Necessity of action:** Action is not required since the issue is handled better at the national level. The EU has already established mechanisms for ensuring maximum transparency in the field of procurement, and this automatically mitigates any possible risks of corruption or favouritism.
- b) **Clear benefit:** None

*Supporting evidence and justification:* The procurement rules of many Member States contain mechanisms specifically designed to prevent and combat corruption and favouritism. It should also be noted that corruption is not only a highly sensitive issue for Member States, but also that the actual problems in this field as well as the potential solutions depend on the different – widely diverging – national administrative and business cultures. Since no action is required there will be no proportionality analysis.

#### **4.4 Proportionality – ‘How should the EU act?’**

The principle of proportionality is a safeguard against the unlimited use of legislative and administrative powers and is considered to be something of a common sense rule, according to which an administrative authority may only act where that action is required in order to achieve its objectives.

*"Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties"* (Article 5, paragraph 4, Treaty on the European Union)

#### **Box 2: Guidelines for carrying out proportionality analysis**

The proportionality principle implies that ‘the means proposed by the EU must be **appropriate** and **no more than is essential** to **achieve the intended objective(s)**.’

The *appropriateness* of the chosen means (or instrument) can be ascertained by examining the **simplicity** of the proposed action. The EU should legislate only to the extent necessary. While observing the requirements of the Treaty and provided this is sufficient to achieve the intended objective(s), directives should be preferred to regulations and framework directives to detailed measures; non-legislative measures, such as non-binding recommendations, to legislative acts; preference should be given to encouraging cooperation between Member States, coordinating national action or complementing and supporting such action by means of guidelines, setting up information exchange mechanisms, etc.

The test for ‘no more than essential’ shall be carried out by examining whether the proposed action leaves as much room as possible for national, i.e. central, regional and local, decisions in order to achieve the intended objective(s).

*Source: t33 explanation on CoR’s S&P grid*

## 4.5 Proportionality issues

The first three issues continue on from the previous section on subsidiarity issues as regards whether the action is required or debatable. There is no specific analysis of proportionality for favouritism and corruption because the subsidiarity analysis shows there is no need for action.

### 4.5.1 Horizontal objectives of procurement (continued from 4.3)

As established in the previous section, action in this field can be justified on the grounds of creating more legal certainty. As a matter of fact, the proposals allow CAs to pursue horizontal issues. This freedom is limited by the obligation for all strategic criteria to be linked to the subject matter of the contract.

- a) **Appropriateness:** Linking the adoption of strategic criteria to the subject matter is inappropriate and limits the potential positive impact of PP in the achievement of Europe 2020 targets by LRAs.
- b) **Room for LRAs:** Deciding whether to adopt environmental, social and innovation criteria should be left to LRAs since they are in a better position to decide.

*Recommended action:* reconsider the reference to ‘subject matter’ specifically in the following articles: Article 40.4 - Technical specifications, Article 41 - Labels, Article 56.2 – Selection criteria, Article 66 - Contract award criteria. The possibility of including environmental or social criteria in the award phase should be left to LRAs themselves since they acknowledge the importance of the horizontal objectives and flexibility will go a long way towards achieving these objectives.

### 4.5.2 Service concessions (continued from 4.3)

The EC has issued a proposal for a specific directive on this issue, even though the necessity for action is subject to much debate.

- a) **Appropriateness:** More legal certainty can be ensured with simpler measures such as recommendations or clarifying communications.
- b) **Room for LRAs:** Current framework provides enough room for LRAs. The expected course of action is likely to take away some of the flexibility.

*Recommended action:* Since it is a hotly debated issue, legislation would probably further complicate matters. An easier, more practical option would have been to issue a communication explaining the current framework.

### **4.5.3 Specific rule to avoid gold-plating for below-threshold contracts (continued from 4.3)**

As discussed in the subsidiarity section, action in this field is required in order to safeguard LRAs' interests.

- a) **Appropriateness:** -No action taken.-
- b) **Room for LRAs:** -No action taken.-

*Recommended action:* While action is desirable in order to protect LRAs from extensive national regulations, the action should be kept as simple as possible. It is important to recall that the general consensus<sup>40</sup> is that below-thresholds are at the discretion of Member States and not the EU. A solution could be to issue non-binding recommendations and call for the national legislation to minimise the burdens for LRAs, in line with the priorities of the regions as well as the Commission. The recommendations could guide the Member States in ensuring that the procedures for below-threshold contracts are necessarily less burdensome than for contracts above the threshold.

### **4.5.4 Mandatory use of electronic procurement (continued from 4.3)**

The wide use of mandatory electronic procurement can certainly produce savings for both public authorities and economic operators. Nevertheless, as established in the previous section, rigid obligation in this field and the 'one size fits all' approach can be very dangerous and may provoke an increase in administrative costs and burdens for small CAs.

- a) **Appropriateness:** making the use of electronic procurement obligatory is inappropriate since it would impose an additional burden on small LRAs.
- b) **Room for LRAs:** Deciding whether and especially when to adopt electronic procurement should be left to LRAs as they are in a better position to decide.

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<sup>40</sup> View supported by the CJEU as well: in the Case C-195/05, *Commission v Finland*, Advocate General Sharpston went on to question the benefit of advertising below-threshold contracts and argued that the degree of publicity required for such contracts should be a matter of national law rather than EC law.

*Recommended action:* there are two options:

- a) exclusion of subregional CAs from the obligation to use electronic procurement
- b) extension of the time for mandatory use of electronic procurement from two years (as now provided by Art. 19.7 ) to four years to make the switch smoother and have less impact on administrative costs.

## **4.6 Better Lawmaking**

In general terms, the impact assessment of the old directives and the Green Paper take proper account of regional aspects. The EU PP framework, as a whole, is purported to have **saved €20 billion**. However, there are individual issues in which regional aspects have not been taken fully into account and certain issues in which EU action is likely to increase burdens (or there is a potential to cut burdens for LRAs). These considerations have been included in the discussion of potential issues in sections 4.2-4.5 (see also Table 1 in the next page).





## 5. Conclusion (Role of the EU)

There is no question that action is required at the EU level to successfully tackle some of the most important problems regarding procurement. The Commission's decision to revise the current directives is indeed a positive outcome for the whole of Europe (including LRAs) in terms of increasing effectiveness. However, it is essential to remember that action at EU level should be used with caution and should be considered secondary to action at national or regional levels, and not vice versa. In general terms, the actions proposed by the EC are largely satisfactory, i.e. action at EU level is required and is expected only to be to the extent necessary.

Based on prior analysis, this report is intended to stimulate debate in regional assemblies on issues which can potentially violate the principles of subsidiarity and proportionality (see Table 1 below). Regional parliaments can give extra weight to the discussion by treating these issues as guidelines and interpreting them in a region-by-region context.

**Table 1: Summary of potential S&P issues**

Potential Issues	SUBSIDIARITY	PROPORTIONALITY		Impact of action: Admin burdens
	Necessity / Added value	Appropriate -ness	Room for LRAs	
Horizontal Issues	Yes/No	No	Yes if	Increase
Service concessions	Yes/No	No	No	Increase
Gold plating below threshold	Yes	No	Yes	Potential to decrease
Mandatory public procuremnt	Yes/No	No	Yes if	Increase
Favoritism and Corruption	No	--- Action not required ---		Increase

*Source: t33*

In conclusion, the role of the Commission should be to ensure a level playing field for all stakeholders in the single European market. The Commission should aim to push for maximum cooperation at national and regional levels in order to achieve the desired objectives; and if such cooperation proves insufficient, controlled action must be taken at EU level.