



**REPORT ON THE REGPEX EARLY WARNING SYSTEM FILE
ON THE REVISION OF EU LEGISLATION ON PUBLIC PROCUREMENT
(COM(2011) 895, 896, 897)
27 MARCH 2012**



<http://subsidiarity.cor.europa.eu>

Disclaimer:

This report does not seek to reproduce all the contributions to the Subsidiarity Monitoring Network, but rather to summarise the main points. The information it contains is purely for illustrative purposes. The report is not binding on the CoR administration and does not prejudice the final content of the relevant CoR opinion.

Table of Contents

1. Introduction	3
2. Background and presentation of the proposals for directives on public procurement and concessions.....	4
2.1 <i>Background</i>	4
2.2 <i>The new legislative proposals</i>	5
3. Subsidiarity positions collected through REGPEX and reasoned opinions published on IPEX.....	7
4. Synthesis and analysis of contributions and reasoned opinions.....	8
4.1 <i>Proposal for a directive on concessions (COM (2011) 897)</i>	8
4.2 <i>Proposal for directives on public procurement (COM (2011) 895 & 896)</i>	10
5. Conclusions	12
Appendix:.....	13

This document consists of 13 pages.

1. Introduction

In line with its Treaty responsibilities for subsidiarity monitoring, the Committee of the Regions (CoR) is committed to supporting regions with legislative powers in exercising their new rights in the context of the Early Warning System (EWS)¹. To this end, the CoR has developed a specific online knowledge centre as part of the Subsidiarity Monitoring Network (SMN), REGPEX².

Designed to be a source of information and exchange with other regional parliaments and governments in the preparation of subsidiarity analyses, REGPEX focuses on a number of selected files and operates as a central access point for the relevant sources of information on EU legislative proposals at the EU institutions and national parliaments. Mirroring the IPEX database, which publishes reasoned opinions adopted by national parliaments, REGPEX enables regional parliaments to upload and share their respective subsidiarity analyses.

REGPEX was launched in February 2012, and this launch had been preceded by a file on the EWS phase for the legislative proposals issued by the European Commission on 20 December 2012 to review EU legislation on public procurement³. This report presents the contributions posted on REGPEX by regional parliaments and governments, as well as other SMN partners (associations of local and regional authorities, national parliaments) and reasoned opinions issued by national parliaments during the early warning phase, which ran from 11 January 2012 to 8 March 2012⁴.

¹ *The EWS is a procedure established by the **Lisbon Treaty** to enable **national parliaments** to carry out subsidiarity checks on draft EU legislative acts and possibly object to the draft on this basis. They have eight weeks from the date of transmission ([Article 6 of Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality](#)), to send to the presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why they consider that the draft in question does not comply with the subsidiarity principle. Each national parliament or each chamber of a national parliament may, should this be deemed appropriate, consult regional parliaments with legislative powers.*

The following two procedures can result from the EWS ([Article 7 of Protocol No 2](#)):

"Yellow card": If reasoned opinions represent one third (one quarter in the area of freedom, security and justice) of the all the votes (each national parliament shall have two votes), the draft must be reviewed. After such a review, the legislative initiator may decide to maintain, amend or withdraw the draft, but should justify its decision.

"Orange card": applying only to EU draft legislative acts under the ordinary legislative procedure. If more than 50 per cent of the national parliaments oppose such an act on grounds of subsidiarity, the latter must be reviewed. The European Commission may then decide to maintain, amend or withdraw the proposal. If the European Commission decides to maintain its proposal, it has to provide a reasoned opinion justifying why the Commission considers the proposal to be in compliance with the subsidiarity principle. On the basis of this reasoned opinion and that of the national parliaments, the European legislator (by a majority of 55 per cent of the members of the Council or a majority of the votes cast in the European Parliament) shall decide whether or not to block the Commission's proposal.

² www.cor.europa.eu/subsidiarity

³ Proposal for a directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors, COM(2011) 895; Proposal for a directive of the European Parliament and of the Council on public procurement, COM(2011) 896; Proposal for a directive of the European Parliament and of the Council on the award of concession contracts, COM(2011) 897.

⁴ See appended "Chronology of the EWS file on the Revision of EU legislation on public procurement".

2. Background and presentation of the proposals for directives on public procurement and concessions

2.1 Background

Many stakeholders have voiced demands for a review of the EU public procurement system. The EC also sees public procurement as one of the market-based instruments that should be used to achieve the objectives of the Europe 2020 strategy. Therefore, the revision of EU public procurement Directives is one of twelve key actions identified in the [Single Market Act](#).

A Green Paper was released in January 2011 in order to gather stakeholders' opinions as to shortcomings of the existing EU public procurement system and views on how to achieve the most efficient use of public funds. The consultation ran until 18 April 2011. In parallel with the Green Paper, the EC undertook a comprehensive evaluation of the impact and cost-effectiveness of EU public procurement legislation. Along with responses to the Green Paper, this ex-post evaluation was to provide an important input for the preparation of the proposals for review of the Directives. The Single Market Act provided for the publication of the EC proposals before the end of 2011, paving the way for adoption of the revised legislation before the end of 2012.

Many local and regional authorities, as well as their main European associations, have contributed to the Green Paper. The Committee of the Regions adopted an opinion on the matter on 11 May 2011⁵.

Local and regional authorities are benefiting from the European internal market and its rules: more competition can lead to lower costs and higher quality; more transparency helps to fight corruption and fraud; cross-border cooperation creates new opportunities. However, the EU public procurement directives are also seen as increasing the administrative burden, both on public authorities and their private contractors, particularly small and medium-sized companies, making the process of awarding contracts unnecessarily slower and more costly. Some provisions of the directives themselves are not necessarily clear and lead to legal uncertainties. Complex rules are also not always compatible with attempts to develop socially responsible and innovative procurement.

The question of whether and how far the EU should act in this area of shared competences between the EU and the Member States is therefore relevant.

⁵ Opinion of the Committee of the Regions on the modernisation of EU public procurement policy: towards a more efficient European procurement market, CdR 70/2011.

2.2 The new legislative proposals

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

- public procurement in general⁶;
- procurement by entities operating in the water, energy, transport and postal services sectors⁷;
- the award of concession contracts⁸.

As public purchasers, local and regional authorities are primarily concerned by EU public procurement legislation, even though actual international/cross border public procurement remains very limited. In many Member States, regional and local authorities are the largest public contracting authorities.

Therefore the European Commission's current review of EU public procurement policy is of particular interest to local government in general and regions with legislative powers in particular, which, under the Early Warning System, have the opportunity to voice their concern with regards to subsidiarity.

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.

The aim of the legislative proposals is to enhance the role of PP in the European market by modernising existing instruments and methods to make them better suited to deal with the changing political, social and economic context. In fact, when compared with the private sector, cross-border participation in EU PP procedures remains low – only 1.6% of public contracts are awarded to operators from other Member States – and the same is true of the participation of SMEs. There is therefore still considerable potential to be tapped and many stakeholders have been calling for 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 on various issues, including the scope of the directives, definitions of tools and procedures and cooperation between public and private organisations. Secondly, they simplify the rules for sub-regional contracting authorities (CAs)

⁶ op. cit. Note 3, COM(2011) 896 final.

⁷ op. cit. Note 3, COM(2011) 895 final.

⁸ op. cit. Note 3, COM(2011) 897 final.

especially in terms of information and communication. Finally, the new proposals enhance the flexibility of PP procedures, introducing a 'tool box' approach.

Despite the LRAs' scepticism regarding the need for specific and detailed legislation, the Commission issued a new proposal specifically addressing concessions. 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.

Given the relevance of the topic to LRA and in terms of subsidiarity, it was included in the SMN Work Programme for 2011 as an "EWS file" on which regional parliaments were likely to be consulted. Indeed, between January and March 2011, a number of regional parliaments and governments, as well as other SMN partners, responded to the call made by the SMN secretariat and shared their contributions on the new REGPEX section of the SMN website.

3. Subsidiarity positions collected through REGPEX and reasoned opinions published on IPEX

a) During the eight-week period of the EWS, the following authorities posted their contributions/positions on subsidiarity on REGPEX:

- **Regional parliaments or sub-state assemblies (5):**
 - Extremadura Regional Assembly (public procurement, concessions);
 - Emilia Romagna Regional Legislative Assembly (public procurement, concessions);
 - Thuringia State Parliament (public procurement, concessions);
 - Bavarian State Parliament (concessions);
 - Welsh National Assembly (public procurement).
- **Regional governments or executives (2):**
 - Scottish Government (public procurement);
 - Lower Austrian State Government (public procurement, concessions).
- **Associations of local and regional authorities (4):**
 - German Association of Towns and Municipalities (public procurement, concessions);
 - Local Government Association (public procurement, concessions);
 - Convention of Scottish Local Authorities, COSLA (public procurement);
 - Austrian State Governors' Conference (concessions).
- **National parliament**
 - Austrian Federal Council (Bundesrat) (concessions)

b) During the same period, five chambers of national parliaments issued reasoned opinions, i.e. opinions stating that the legislative proposals do not comply with the principle of subsidiarity, which were posted on the IPEX website, as follows:

- the Swedish Parliament (public procurement);
- the UK House of Commons (public procurement);
- the German Federal Council (Bundesrat) (concessions);
- the Spanish Cortes Generales (concessions);
- the Austrian Federal Council (Bundesrat) (concessions).

Neither on the draft directive on public procurement nor on the draft directive on concessions was the threshold reached obliging the European Commission review its drafts (in accordance with Article 7 of Protocol No 2 on the application of the principles of subsidiarity and proportionality).

4. Summary and analysis of the contributions and reasoned opinions

The CoR (ECOS Commission) has decided to adopt two distinct opinions – on concessions (rapporteur: Mr Henk Kool, NL/PES), to be submitted to the Plenary session on 18-19 July 2012, and on the two proposals for directives on public procurement (rapporteur Ms Segersten-Larsson, SV/EPP), to be submitted to the 9-10 October 2012 session. This section will therefore first present the contributions by regional parliaments, other SMN partners and the reasoned opinions on the proposal for a directive on service concessions (4.1) and then on the public procurement proposals (4.2).

4.1 Proposal for a directive on concessions (COM (2011) 897)

- Among the contributions posted on REGPEX during the EWS phase, the **State Parliaments of Bavaria and Thuringia (DE)**, the **Lower Austrian State Government**, the **Austrian Federal Council**, the **German Association of Towns and Municipalities** and the **Austrian State Governors' Conference** have adopted resolutions stating that the measures contained in *the draft Directive did not comply with the subsidiarity principle*⁹.

From a formal point of view first, the **State Parliaments of Bavaria and Thuringia** regard the arguments put forward by the Commission to justify the need for EU action as inadequate. In their view, the EC did not provide sufficient evidence of "serious distortion of competition or market foreclosure". This view was also put forward by the **German Bundesrat**, the **Austrian Bundesrat** and the **Spanish Parliament** in their reasoned opinions, and was highlighted by the **European Parliament** in its resolution adopted on 25 October 2011 ([\(2011/2048\(INI\)\)](#)).

Questioning the need for the EU to act in the field of service concessions, the **State Parliaments of Bavaria and Thuringia**, as well as the **German** and **Austrian Federal Councils**, the **German Association of Towns and Municipalities** and the **Austrian State Governors' Conference** consider that the Treaty of Lisbon has limited the scope for general EU provisions on service concessions that also concern local authorities. They refer to the principle of regional and local self-government, set out in Article 4(2) of the Treaty on European Union (TEU), and to provisions related to services of general economic interest (Article 14 of the Treaty on the Functioning of the EU (TFEU) and Protocol No 26), which specify the important role and the wide discretion given to Member States and to local authorities when deciding how these services should be made available to their users, commissioned and organised. This flexibility should not be taken away by secondary EU legislation. Services of general economic interest should as a rule be excluded from the scope of directives, while the draft only excludes social and health services (**Austrian State Governors' Conference**).

⁹ The **German Association of Towns and Municipalities** stated that "both the draft directive on public procurement law and the draft directive on the award of concession contracts contain regulations that infringe the organisational sovereignty of Member States".

The other main argument from the European Commission regarding the need to act is the importance of increasing legal certainty in the field of service concessions. This point is challenged by the **State Parliaments of Bavaria and Thuringia**, as well as the **German and Austrian Federal Councils**, the **Spanish Parliament**, the **Austrian State Governors' Conference**, the **Lower Austrian State Government** and the **German Association of Towns and Municipalities**. According to them, the Court of Justice of the EU has developed sufficient case-law to clarify the legal framework, in particular conditions under which a contract should be categorised as a concession, and refers to principles of primary EU law, i.e. the principles of equal treatment, non-discrimination, transparency and proportionality contained in the TFEU.

Finally, the draft directive is also questioned in light of the set objective of simplifying the legislative framework, and thus regarded as not complying with the principle of proportionality. The **State Parliament of Bavaria**, the **Austrian State Governors' Conference**, the **German Association of Towns and Municipalities** and the **Austrian Bundesrat** argue that the enormous detail in the proposal is counter-productive. By adding technical specifications, selection and award criteria and publication requirements, the proposed directive on service concessions is likely to generate a disproportionate bureaucratic burden.

- Among the eight contributions posted on REGPEX, it should be noted that the **assemblies of Extremadura (ES) and Emilia Romagna (IT)**, as well as the **UK Local Government Association** have adopted positions which did not identify subsidiarity issues.

In particular, the Extremadura Regional Assembly felt that action at EU level was necessary, since the objectives of the draft directive involve transnational aspects that cannot be regulated by Member States alone and EU action will increase legal certainty with regard to international concessions involving services. The LGA regrets that service concessions were not included into the reform of the public procurement directives, as this separate approach is likely to further fragment the regulatory framework and add complexity. However, it stressed the clear benefits that the new EU legislation will bring, i.e. the opening-up of continental energy and waste markets to UK providers.

4.2 Proposal for directives on public procurement (COM (2011) 895 & 896)

- During the EWS phase, seven contributions were posted on REGPEX. Out of these, five adopted resolutions stating that some of the measures contained in *the draft Directive may infringe the subsidiarity principle*¹⁰. In the meantime, two national parliaments or chambers, the **Swedish Parliament** and the **UK House of Commons**, have also issued reasoned opinions, the latter referring to positions adopted by the Welsh and Scottish parliaments.

As with the concessions draft directive, a procedural issue was raised by the **National Assembly for Wales, the Scottish Government and the UK House of Commons** noted that the European Commission failed to consult on the proposal to set up a “single national oversight body”. This measure was not included in the Green Paper or in the Impact Assessment. By failing to do so, the European Commission did not comply with its obligation to consult widely, except in cases of exceptional urgency, before proposing legislative acts, and where appropriate, to take into account the regional and local dimension of the action envisaged (Article 2 of Protocol No 2 on the Application of the principles of subsidiarity and proportionality).

Beyond procedural matters, the main issue raised with regard to compliance with the subsidiarity principle is also related to the proposal to set up a "single national oversight body" (Article 84 of the draft Public Procurement directive). The **National Assembly for Wales, the Scottish Government, the Lower Austrian State Government, the State Parliament of Thuringia** and the **UK House of Commons** regard the setting-up of such a single national body as breaching the principle of devolution and as counter to the division of powers within federal structures. For the **Swedish Parliament**, effective systems for supervision and knowledge centres are best achieved by means of national rule, and it should be left to each Member State to decide on its own internal arrangements. The **State Parliament of Thuringia** sees this new authority as an "excessive interference in Member States' right to organise their own internal administration".

Furthermore, the planned supervisory body would combine administrative, regulatory and judicial functions. The **National Assembly for Wales, the Scottish Government, the UK House of Commons, COSLA** and the **Lower Austrian State Government** see this confusion of powers as going against the traditional separation of judicial and administrative powers. The new body would carry out functions that would normally fall to the courts.

¹⁰ The National Assembly for Wales, the State Parliament of Thuringia, the Scottish Government, the Lower Austrian State Government and the German Association of Towns and Municipalities (n.b.: the latter stated that "both the draft directive on public procurement law and the draft directive on the award of concession contracts contain regulations that infringe the organisational sovereignty of Member States").

The **Lower Austrian State Government** also raised the issue of the administrative burden that the planned new reporting system (Article 86 of the draft directive on Public Procurement) would entail for small and very small contracting authorities. Along the same lines but in more general terms, with remarks relating more to proportionality than subsidiarity, the **German Association of Towns and Municipalities** sees the extra rules as being counter-productive with respect to the objective of simplification. It considers that the excessive detail included in the directives goes far beyond the scope of a directive as a regulatory instrument.

- As for the draft directive on concessions, among the contributions posted on REGPEX, those of the **assemblies of Extremadura (ES)** and **Emilia Romagna (IT)**, as well as **the UK Local Government Association**, did not identify any explicit subsidiarity issue.

For the Assembly of Extremadura in particular, the measures proposed in the draft directives on public procurement meet the need for EU action and bring added value. Moreover, this EU action complies with compatible objectives at regional level.

The Local Government Association however also questioned the setting-up of a single national oversight body. It stated that "councils do not necessarily want to see a new public agency established specifically for police procurement. Improvement in procurement practices should be led principally by the local government sector itself. As for ensuring the application of procurement law, the LGA suggest that this should be, as is the case today, the role of the national courts, rather than a new agency.

5. Conclusions

The need for and added value of the legislative proposals issued by the European Commission on public procurement and concessions are therefore questioned by some regions with legislative powers and some LRA associations. However, even though some national parliaments have put forward arguments raised by the regions, the thresholds for reviewing the proposals have not been reached.

Nevertheless, arguments may be taken on board during the next phases of the legislative procedure by other institutional actors, starting with the CoR. Contributions collected through REGPEX have been forwarded to rapporteurs, who may take these points into account when drawing up the relevant CoR opinions.

Appendix:

Chronology of the EWS file on the Revision of EU legislation on public procurement

A first "test" EWS file was prepared by the Subsidiarity Unit between December 2011 and March 2012 on the revision of the EU rules on public procurement, as follows:

- **15 December 2011:**
 - Creation of an "EWS" section on the SMN website, with some links to relevant sources of information;
 - Publication of a background note on the SMN website, "Revision of EU procurement legislation, Matters of concern for Local and Regional Authorities and potential subsidiarity issues", commissioned by the Committee of the Regions and written by t33, Srl and OIR. It does not represent the official views of the Committee. It highlights some aspects of the current and proposed legislation that are particularly relevant to local and regional authorities, focussing on subsidiarity and proportionality.
- **20 December 2011:**
 - Publication by the European Commission of the legislative proposals: two proposals for directives (COM (2011) 895 and COM (2011) 896) aimed at replacing Directives 2004/17/EC and 2004/18/EC, which are the core of the EU public procurement system, as well as a proposal for a directive on concessions (COM (2011) 897).
 - Publication of links to the proposals and the impact assessments on the EWS section of the SMN website;
 - Information sent to SMN members and members of the CoR interregional group of regions with legislative powers, calling for contributions.
- **11 and 12 January 2012:**

Opening of the 8-week Early Warning phase, for concessions (until 7 March 2012) and public procurement (until 8 March) respectively.
- **3 February 2012:**

Publication of an updated background note on the SMN website, in the light of the current legislative proposals, focussing on subsidiarity and proportionality.
- **15 February 2012:**

REGPEX section of the SMN website online, including the EWS sub-section.
- **7 and 8 March 2012:**

End of the Early Warning phase.