



Committee of the Regions

The EU's Assembly of Regional and Local Representatives



Subsidiarity Monitoring Network

Institution:	Austrian State Governors' Conference
Title of the EU initiative:	Proposal for a Directive on the award of concession contracts
Reference: (e.g. COM(2005)112)	COM(2011) 897 final

The principle of subsidiarity is designed to ensure that decisions are taken as closely as possible to the citizen by the most appropriate level where the intended objective(s) can be most effectively achieved. It thus requires that constant checks be made as to whether EU action is justified in the light of the possibilities available at central, regional or local level. The Lisbon Treaty completed the definition of the EU principle of subsidiarity by referring explicitly to its local and regional dimension.

The present grid is designed as a tool for the Subsidiarity Monitoring Network's partners, with a view to facilitating their assessment of the compliance of EU initiatives with the subsidiarity and proportionality principles while also addressing the concept of better lawmaking. It includes an appendix which provides relevant sources of information.

1. TYPE OF COMPETENCE/LEGAL BASIS

*The principle of subsidiarity applies only in areas which do not fall within the exclusive competence of the Union (Art. 5 TEU), i.e. **shared and supporting competences**.*

At the outset of a subsidiarity analysis, the **type of competence** involved in the EU initiative must be defined.

In order to do so, it is necessary to begin by identifying the underlying **legal basis**.

The legal basis of an EU initiative is an article of the Treaty empowering the EU institutions to act in a given policy area. It is particularly important to identify the specific legal basis for legislative acts, but it is also relevant in the case of non-legislative acts, like communications, White and Green Papers. In this case however, it would suffice to identify only the policy area(s) appearing in the pertinent titles or chapters of the Treaty.

The legal basis and type of competence can be identified by answering the following questions:

1.1 Which article(s), title(s) or chapter(s) of the Treaty form(s) the basis for the EU's competence to act in the area in question? (for articles, see appended table, pt. 1)

The proposal is based on Articles 53(1), 62 and 114 of the Treaty on the Functioning of the European Union.

.../...

1.2 Is the competence exclusive, shared or supporting? (see appended table) In the case of exclusive competences of the EU, only compliance with the principle of proportionality needs to be appraised (go to point 3).
The competence is shared pursuant to Article 4 TFEU.

2. SUBSIDIARITY PRINCIPLE - "Should the EU act?"
<i>In 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 (Art.5 TEU).</i> The EU should act only if its action is deemed to be necessary and to provide a clear benefit . You can assess whether these two cumulative conditions are fulfilled by looking into the following questions. Useful sources of information for this analysis are impact assessments (see appendix, point 2) and/or explanatory memoranda and recitals of legislative proposals.
2.1 Is the proposed action necessary
<ul style="list-style-type: none">because 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
<ul style="list-style-type: none">because 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 the other Member States' interests?
and/or
<ul style="list-style-type: none">because existing EU measures and/or targeted assistance provided in this framework are not sufficient to achieve the intended objective(s)?
<p>In the explanatory memorandum to the proposal, the European Commission states that the objectives of the proposed directive cannot be achieved by regulation in the Member States, largely because it would result in divergent requirements and possibly conflicting procedural regimes, thereby increasing regulatory complexity and causing unwarranted obstacles to cross-border activity, and also because many Member States have not interpreted, clarified or implemented the relevant Treaty principles of transparency and equal treatment in a manner that ensures that concession contracts are awarded correctly.</p> <p>In light of the working paper accompanying the proposal – SEC(2011) 1589 (based on SEC(2011) 1588 final) – these claims do not seem entirely justified. In that document, the European Commission justifies the proposal by referring to the lack of legal certainty surrounding the award of concession contracts, particularly the definition of the term "concession" itself. At the same time, however, it notes that the CoJ has already explained the main</p>

features of a "concession". It should be noted in this connection that CoJ case-law (e.g. Krankentransport Stadler, 10 March 2011 (C-274/09) and WAZV Gotha, 10 September 2009 (C-206/08)) has sufficiently clarified the conditions under which a contract should be categorised as a concession. No doubt the Court would issue further clarifications if necessary.

In the same document, the European Commission also justifies the proposal for a directive by claiming that there are barriers to market entry. It should be noted in this regard that, contrary to what the Commission claims, the award of concession contracts is not "only" subject to the principles of the Treaty on the Functioning of the European Union (TFEU) (equal treatment, non-discrimination, transparency and proportionality), but rather these principles are binding on the Member States. Moreover, even if the proposed directive is implemented in the Member States, businesses will still need some "knowledge of specific local [legal] conditions", and businesses interested in concession contracts generally do have this knowledge. The European Commission itself also notes that "the aforementioned problems" produce their material effects at national level.

It should also be pointed out in this context that discussions on service concessions – which are covered by the proposed directive – should continue to be seen in connection with the provision of services of general (economic) interest. The Treaty of Lisbon (see Article 3 TEU, Articles 14 and 106 TFEU and protocols 26 and 27) particularly highlights the provision of such services, and any new rules in this area should therefore be scrutinised critically. In this vein, Mario Monti points out in his report of 9 May 2010 to the President of the European Commission on "A new strategy for the single market" that the EU's public procurement rules should be amended and made more flexible, particularly with regard to social services. The proposed directive, however, flatly contradicts this (cf. one of Mr Monti's key recommendations: "Re-think public procurement policy to make it simpler, more effective and less onerous for national and local authorities"). The creation of a legal instrument for service concessions would be detrimental to the current positive aspects such as the low levels of disputes, the legal certainty and the speed of implementation in the interests of long-term provision.

Accordingly, the Lisbon Treaty also assigns the Member States a responsibility to ensure that services of general economic interest operate (Article 14 TFEU). At the same time, the Treaty stresses the principle of municipal and local self-government, which it recognises as a component of national identity (Protocol No 9 to the TFEU). To do justice to this principle, services of general economic interest should be generally excluded from the scope of this directive; the current proposal, however, only excludes social and health services, which we do not think is adequate.

It is by no means the least relevant point that the conclusion of service concession contracts does not usually involve public money, as the services are not usually paid for by the contracting authority. In view of this, there is clearly no need for new rules on service concessions.

In conclusion, therefore, contrary to what the European Commission claims, there is already a standard definition of a concession at European level, and there is thus no legal uncertainty. Nor are the Commission's claims of barriers to market entry particularly convincing on closer examination.

2.2 Would the proposed action provide a **clear benefit**, by reason of its scale and/or effectiveness, compared with action at national, regional or local levels (e.g. economies of scale, legal clarity, homogeneity in legal approaches, etc.)?

As stated above, the European Commission itself points out that the "problems" underlying the draft directive

would primarily have an impact at national level. With regard to CoJ case-law, the Member States are currently working with a uniform legal situation when awarding concession contracts. In order to transpose the proposed directive, they would have to adopt national legislation, and the legislation in each Member State would not transpose the specific elements of the proposal in exactly the same way (the Commission itself notes, in point 6.3 of the working paper SEC(2011)1589, based on SEC(2011) 1588 final, that "the introduction of detailed rules might prove counter-productive and substantially decrease the attractiveness of concessions"). Bidders would therefore still need to be familiar with the relevant legislation in the other Member State, and the directive would thus be of no benefit to "cross-border procedures". At the same time, the transposing legislation could cast doubt on the existing legal situation in the Member States – as harmonised by CoJ case-law – thus leading to less legal certainty, not more. Therefore, **the proposed action is unlikely to provide a clear benefit.**

3. PROPORTIONALITY PRINCIPLE - "How should the EU act?"
<i>The content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties (Art. 5 TEU).</i>
The means proposed by the EU must be suitable and appropriate to achieve the intended objective(s) .
3.1 You can assess whether the nature and extent of the proposed action comply with the proportionality requirements by looking into the following questions. Useful sources of information for this analysis are impact assessments (see appendix, point 2) and/or explanatory memoranda and recitals of legislative proposals.
<ul style="list-style-type: none"> Is the proposed action an appropriate way to achieve the intended objective(s)?
And
<ul style="list-style-type: none"> Is the proposed form of action (choice of instrument) as simple as possible in order to achieve the intended objective(s)? (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 guidelines, setting up information exchange mechanisms, etc).
And
<ul style="list-style-type: none"> Does the proposed action leave as much room for national (i.e. central, regional and local) decision as possible in order to achieve the intended objective(s)? (While observing the requirements of the Treaty and as long as this is sufficient to achieve the intended objective(s), EU measures should provide Member States with alternative ways of achieving the objective(s); care should be taken to respect well established national arrangements. Where it is necessary to set standards at EU level, consideration should be given to setting minimum standards leaving freedom to Member States to set higher standards).
<p>In light of the comments made under point 2, the proposed action does not seem an appropriate way of achieving the intended objectives. There is no truth in the Commission's comments in, in particular, point 5.1 of working paper SEC(2011) 1589 (based on SEC(2011) 1588 final) that contracting authorities and entities (currently) do not have the opportunity to ensure best value for money in the award of concessions, that economic operators are missing out on substantial business opportunities and that consumer benefits remain limited. Instead, <u>the proposed directive would only add red tape and expense to the current concession procedure, which is efficient and quick and – in light of CoJ case-law – has a sound legal basis</u>. Given that the European Commission acknowledges that the proposal for a directive is of limited relevance to the internal market, the conclusion that the objectives of the proposed legislation could not be achieved using the infringement procedure seems suspect. In fact, it seems likely that only a few preliminary ruling and infringement procedures would be needed to establish a sound legal basis. <u>It is clear that the proposed directive and the necessary transposition measures would significantly restrict local and regional authorities' (and others') room for manoeuvre in awarding concession contracts</u>.</p>

3.2 If you consider that the proposed action goes further than is necessary, what, in your opinion, would be a less restrictive, alternative way of achieving the intended objective(s)?

Maintaining the status quo.

4. BETTER LAWMAKING

4.1 If an **impact assessment** accompanies the EU initiative (see appendix, point 2) do you believe that it duly takes into account **local and regional** aspects? Do you agree with the assessment proposed by the European Commission?

The local and regional aspects are not taken properly into account either in the proposal for a directive itself or in the "Commission Staff Working Paper. Impact Assessment of an initiative on concessions" (point 6 thereof). The European Commission does – as mentioned above – refer to "material" effects at national level, but does not provide further details of the local and regional aspects.

4.2 Would implementation of the proposed action entail **financial and/or administrative burdens**¹ for your administration, and/or economic operators and/or citizens in your region/city/municipality?
Would these costs be **commensurate to the intended objective(s)**?

If the impact of the EU initiative was not assessed (either separately through an impact assessment or directly in the initiative itself), please indicate whether in your opinion potential financial and/or administrative burdens should be further appraised, e.g. via a consultation through the various CoR networks.

Implementation would entail financial and/or administrative burdens both for the administration and for economic operators insofar as it would result in a great many new regulations in the Member States. Compliance with the new regulations would involve excessive costs for contracting authorities and economic operators.

5. ROLE OF THE EU

In your opinion, what **role should the EU play** in the policy area concerned? (For instance: should the EU merely set the main framework/the main targets or rather specify more detailed provisions? Should the EU play a more supporting role, e.g. by coordinating existing national policies, or is more extensive and direct EU action necessary? Are regulatory measures necessary, or do you consider that alternatives to legislation would suffice, i.e. guidance documents from the European Commission?)

As stated above, the status quo should be maintained. CoJ case-law provides sufficient legal certainty, and there would not appear to be any need for additional EU legislation.

¹

Administrative burdens are the costs borne by business, economic operators, citizens and public authorities in the process of complying with information obligations imposed by legislation which they would not have collected and provided in the absence of legislation.

Appendix

1. TYPE OF COMPETENCE AND LEGAL BASIS OF EU INITIATIVES

EXCLUSIVE EU COMPETENCE (Art. 3 TFEU)		
Policy area	Legal basis (Article of the Treaties)	Mandatory CoR consultation?
Customs union	Art. 31 TFEU	NO
Establishment of the competition rules necessary for the functioning of the internal market	Arts 103 & 109 TFEU	NO
Monetary policy for the Member States whose currency is the euro	Arts 127-138 TFEU (Art. 3(4) TEU)	NO
Conservation of marine biological resources under the common fisheries policy	Arts 3, 40 & 43 TFEU	NO
Common commercial policy	Arts 206 & 207 TFEU	NO
Conclusion of an international agreement (in the aforementioned areas as well as in other areas, when its conclusion is provided for in a legislative act of the EU or is necessary to enable the EU to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope)	The legal basis will always be the article of the Treaty pertaining to the subject matter of the agreement and Arts 216 and 218 TFEU for the procedure	NO

SHARED COMPETENCES (Art. 4 TFEU)		
Policy area	Legal basis (Article of the Treaties)	Mandatory CoR consultation?
Internal market	Art. 26 (general), and 46 & 48 (workers), 50 & 59 (establishment and services), 64 (capital), 113 (taxation) and 114 (general harmonisation clause) TFEU (Art. 3(3) TEU)	NO

Social policy, for the aspects defined in TFEU	Art. 153 TFEU (155 for agreements between social partners),	YES Art. 153
	Art. 157 TFEU non-discrimination between men and women	NO
	Art. 19 TFEU non-discrimination on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation	NO
Economic, social and territorial cohesion	Arts 175, 177 & 178 TFEU, Art. 164 TFEU for the ESF (Art. 3(3) TEU)	YES Arts 175, 177 & 178 Art. 164 for the ESF
Agriculture and fisheries, excl. conservation of marine biological resources	Arts 4, 40 & 43 TFEU	NO
Environment	Arts 192 TFEU (Art. 3(3) TEU)	YES Art. 192
Consumer protection	Art. 169 TFEU	NO
Transport	Arts 91 & 100 TFEU	YES Arts 91 & 100
Trans-European networks	Art. 172 TFEU	YES Art. 172
Energy	Art. 194 TFEU	YES Art. 194
Area of freedom, security and justice	Arts 67 (general), 77 (borders and movement), 78 (asylum, subsidiary & temporary protection), 79 (immigration), 81 (judicial cooperation in civil matters), 82 (judicial cooperation in criminal matters), 83 (substantive criminal law), 84 (crime prevention), 87, 88 and 89 (police cooperation) TFEU (Art. 3(2) TEU)	NO, but special mention of subsidiarity check by national parliaments under Art. 69
Common safety concerns in public health matters, for aspects defined in TFEU	Art. 168 in particular measures adopted under paragraph 4 TFEU	YES Art. 168 (4)

Research, technological development and space*	Arts 182, 188 and 189 TFEU	NO
Development cooperation and humanitarian aid*	Arts 209, 212 and 214 TFEU	NO

EU SUPPORTING COMPETENCES (Art. 6 TFEU)		
Policy area	Legal basis (Article of the Treaties)	Mandatory CoR consultation?
Protection and improvement of human health	Art. 168 TFEU (except par. 4)	YES Art. 168 (5)
Industry	Art. 173	NO
Culture	Art. 167 (Art. 3(3) TEU)	YES Art. 167
Tourism	Art. 195	NO
Education, vocational training, youth and sport	Arts 165 & 166 TFEU	YES Arts 165 & 166
Civil protection	Art. 196	NO
Administrative cooperation	Arts 74 & 197	NO

SPECIAL EU POLICY AREAS		
Policy area	Legal basis (Article of the Treaties)	Mandatory CoR consultation?
Coordination of economic policies	Arts 2(3), 5, 120 – 123 TFEU	NO
Coordination of employment policies	Arts 2(3), 5, 148 & 149 TFEU	YES Arts 148 & 149 TFEU

2. RELEVANT SOURCES FOR IMPACT ASSESSMENTS OF EU INITIATIVES

N.B.: The presence of a "SEC" reference on the cover page of a Commission initiative indicates that an impact assessment was carried out.

2.1 "Better lawmaking" section of the European Commission website:

http://ec.europa.eu/governance/better_regulation/index_en.htm

See in particular "Impact assessment" sub-section in the menu on the left

*

By virtue of article 4(3) and (4) in these areas the exercise of competence by the Union does not prevent Member States from exercising their competences.

2.2. "Impact assessment" section of the European Commission website:

http://ec.europa.eu/governance/impact/index_en.htm

See in particular "List of impact assessments" in the menu on the left

2.3 Impact assessments can also be accessed through the Prelex website:

<http://ec.europa.eu/prelex>

Prelex is a database on interinstitutional procedures which follows the major stages of the decision-making process between the Commission and the other institutions.
