Network of Regional Hubs for EU Policy Implementation Review

Brochure - Implementation Report
First Consultation, on Public Procurement
Regions and cities are at the forefront of implementing EU policies. In fact, regional and local authorities implement approximately 70% of EU legislation. This gives them distinctive and valuable experience. What is more, they are the governance level that is closest to citizens. Direct involvement of regions and cities in the process of creating EU rules and the process of assessing their effectiveness can therefore improve the quality of those rules, which is one of the keys to the success of European integration.

Monitoring and evaluation are crucial for improving legislation. However, new EU legislation is often implemented before a full and proper evaluation of the impact of the existing legislation has been completed. That is why in 2018, the European Committee of the Regions (CoR) launched a pilot project, consisting of a network of regional hubs (RegHub) for gathering local and regional data on EU policy implementation, through specific consultations.

The efforts of the network’s 36 contacts points during its first consultation, on the implementation of the EU’s 2014 public procurement directives, enabled RegHub to reach out to more than 250 stakeholders. This went far beyond the usual ‘tick the box’ consultation exercise. It has thus produced a goldmine of precious information into which the CoR has been digging. The results of the consultation were compiled into the first concrete result of this flagship project of the CoR: the implementation report on public procurement. The key findings of that report are summarised in this brochure.

The implementation report is an important first step towards a better application of the principles of subsidiarity and proportionality, which are cornerstones of EU law and I very much look forward to the results of RegHub’s future consultations and implementation reports. This is because I consider RegHub to be a good example of how ‘active subsidiarity’ can promote greater ownership and understanding of what the EU does, by those who are involved.

Regional networks such as RegHub can help address some of the challenges currently facing the EU’s better regulation efforts and many regions have expressed great interest in participating in the project. However, developing and maintaining such networks requires investments of financial and human resources, along with support for the participating regions and cities. Only this can ensure long-term contributions to the network’s activities once the pilot phase is completed.

I welcome that the European Commission has confirmed its support for this project. This calls for further efforts to be made to strengthen this project and to concretely integrate it into EU policy making. Hence, after a successful completion of the pilot phase, RegHub can become a key channel for increased cooperation between the CoR and the European Commission as well as other EU institutions.
It is local and regional authorities that implement European regulations on the ground, affecting both the general public and businesses. This gives them a wealth of experience in the application of EU law, and the Committee of the Regions’ initiative to make use of this expertise is a good one, not least in the interests of “better regulation”!

At the same time, the diversity and sheer number of local and regional authorities in Europe mean that they are the political players whose impressions are the most difficult to gather, which makes the creation of the Network of Regional Hubs a real achievement. This network also forges a more direct link between the EU institutions and the needs and experiences of local and regional authorities.

In my work as rapporteur for the Committee of the Regions’ opinion on the implementation of the public procurement directives in the Member States, I have seen for myself how useful reliable data can be in developing a balanced CoR position.

In its Opinion, the CoR rejects in particular a legislative modification of the current public procurement regime in the coming years, in view of the short period of legal application practice and the still ongoing adaptation processes. The option of strategic procurement that was introduced by the Directives, is supported in principle, but simultaneously, the mandatory application of green, social and innovative procurement criteria, which is contrary to local autonomy and overburdens procurement procedures, is rejected. The CoR also stresses the possibility of encouraging local structures and local economic growth in the interests of sustainability and good environmental outcomes and calls on the Commission to develop EU-wide uniform and reliable certificates and labels, particularly in this area. Finally, the CoR recalls that public procurement is only one of many ways of providing public services. Re-municipalisation, in-house business and inter-municipal cooperation remain legitimate options.

As head of Rhön-Grabfeld district council, I firmly believe that the development of this RegHub network will not only provide valuable insights for the European Commission, but also have a number of positive side effects. It will improve networking between regions and municipalities, and facilitate an exchange of ideas and experiences that goes far beyond the simple objective of gathering valid data.
The RegHub network and the report setting out the results of the first consultation are proof of the European Committee of the Regions' commitment to put into practice the recommendations of the Task Force on subsidiarity, proportionality and doing less more efficiently by setting up a pilot network of regional hubs to support reviews of policy implementation.

Taking into account that regional and local authorities are a major economic actor in public contracts, public procurement was chosen as the first topic for consultation of the regional hubs. The main aim of the first consultation was to identify key challenges encountered by regional and local authorities in implementing the new provisions of the 2014 Public Procurement Directives and the most frequent sources of incorrect application or legal uncertainty. This will help all levels of government to focus their efforts on addressing these challenges and improving implementation.

The added value of the consultation is not limited to the report. One significant achievement of the consultation process is that it has created a network of various actors at regional and local level (public authorities, NGOs, business associations and others), of which over 250 have acted as a channel for conveying key messages on the implementation of EU legislation from the regional and local to the EU level, through their exchanges and interactions during the consultation process.

The 2014 Directives marked an important shift from traditional patterns of procurement towards an approach that regards public procurement as a strategic tool for delivering public policy objectives by encouraging contracting authorities to take into account environmental and social considerations, as well as innovation aspects, when awarding public contracts. Moreover, the 2014 Directives include provisions aimed at helping public buyers in the EU to capitalise on the benefits of the digital revolution and making access by SMEs to public procurement markets easier, as this would help them unlock their potential for job creation, growth and innovation, while having a positive impact on the wider economy. The extended provisions on grounds for exclusion and award criteria and the stronger provisions on integrity and transparency that target corruption and fraud, are also expected to facilitate high quality investment and increase openness and transparency regarding the way public money is spent. These changes were aimed at making public procurement a key building block in the EU’s policies to stimulate growth and remove barriers to investment within the EU single market.

The results of the regional hubs consultation shows that despite the fact that the vast majority of hubs regard every single change brought about by the new Directives as positive, there are some concerns with regard to the practical implementation of the provisions, and some hubs have a more nuanced view of specific changes.

To a considerable extent, the results of the consultation confirmed the CoR’s analysis, through its past and ongoing consultative work, but they also highlight some new points,

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such as problems with the ESPD form, the divide or explain principle, the Common Procurement Vocabulary (CPV) coding and many specific examples of "gold-plating" of EU rules by the Member States.

In relation to strategic procurement, the majority of respondents value the option to use strategic criteria other than price and to make quality a parameter in the tender process and overall, it transpires that the hubs and stakeholders consulted are aware of the specific resources and overall commitment needed to use public procurement as a strategic policy tool. One key concern, however, is the fact that due to the lack of resources/staff, professional skills and time, many authorities rely heavily on external consultants to provide technical or content expertise. This is likely to make public procurement procedures time-consuming and more expensive.

From the comments, it transpires that despite the fact that the majority of the hubs welcome strategic criteria, there are concerns due to the lack of resources, technical expertise and overall commitment; the over-complexity of the legal framework, particularly in the national rules transposing the Directives; and the difficulty in objectively describing or defining the specific quality aspects which could be made subject to competition and thus have to be objectively quantifiable. Due to these difficulties, some hubs argued that the pursuit of policy objectives by means of procurement rules makes these procedures even more difficult and that public procurement law should be limited to its primary objectives, namely to ensure free and non-discriminatory competition.

Taking into account the fact that some authorities see no need or only a limited need to use strategic criteria, along with the fact that it is very challenging to consider strategic criteria in public procurement and requires expertise not available to all authorities, the onus to enhance administrative capacity (or professionalisation) with a view to enhancing the uptake of strategic procurement should be placed on larger authorities where the financial and administrative burden of factoring in strategic criteria is more likely to be proportional to the benefits any given authority may reap from using strategic criteria. This approach would be in line with one key dimension of the Better Regulation Agenda.

It is also stressed that making quality or strategic criteria a competition parameter in the tender process demands specific resources and overall commitment that are not usually available and this limited expertise makes many authorities rely heavily on external consultants to provide technical or content expertise. Given the fact that strategic procurement adds another layer of complexity to procurement procedures, some hubs argue that the administrative burden has to be proportional to the benefits that strategic procurement can bring.

With regard to the main sources of misapplication or legal uncertainty, one important issue raised by many hubs is the sometimes problematic interaction between national and European law since there seems to be a problem of over-regulation at national
level, partly due to the need to coordinate with legislation in other sectors, which makes applying the rules extremely complicated. Another problem stressed is continuous amendments to national public procurement law, which prevents public authorities from maintaining uniform practices, creates legal uncertainty and requires continuous updates and highly professional input from operators. Similar concerns are raised with respect to the plethora of national legislative and implementing acts. The result is an unduly bureaucratic approach to public procurement that undermines the aims of European policy. Other challenges concern the differing requirements for certificates and electronic signatures across borders and the lack of compatible IT systems.

Moreover, the uncertainty of the legality of using best price-quality ratio and strategic criteria, as seen in strategic procurement, is also considered to be a key source of misapplication. Due to this legal uncertainty, many respondents feel that any deviation from the traditional procedure to use additional criteria increases the likelihood of errors and opens the door to increased risk of legal action, notably when those criteria are not easy to identify, define in legal terms and measure. This suggests that beyond the actual number of formal legal challenges, which in some cases might be minimal, the mere threat of legal challenge may lead to risk-averse behaviour, such as running more expensive procurement procedures than strictly necessary, or even changing a decision to outsource a service in the first place.

These difficulties and concerns suggest that it can be reasonably expected that only a kind of match-making and risk-sharing mechanism would do much to help authorities tackle the challenges and support the paradigm shift from risk-averse behaviour towards a more entrepreneurial and results-oriented approach by public authorities. The consultation also shows that the extensive changes introduced by the 2014 Directives triggered high investments by contracting

RegHub promotes active subsidiarity, collecting contributions of local and regional authorities in monitoring the implementation of EU laws and their impact on the ground. These contributions help improve evaluations of EU policies and serve as a basis for evidence-based policy-making.

Source: CoR-CEMR survey
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authorities and businesses in terms of time, training, education and hiring of external staff, in order to align systems and procedures with the new rules. This finding clearly supports the argument that changing the current Directives would not be a good option.

Unsurprisingly, the regional hubs consultation shows that the light-touch regime for social and health services is regarded as a positive development by all the respondents who use it. There are however, some hubs that expressed concerns about the CPV codes which identify the services subject to the new regime. It is argued that these Annexes are inconclusive or too general and that there is a need for further explanation of each CPV code. Another difficulty caused by the new regime stems from the fact that the new threshold provides a degree of procurement regulation of services that were previously excluded altogether (for instance, care services for adults and children). However, the reason for excluding these types of services under the previous rules (limited cross-border interest) remains valid, and it is therefore argued that they should not be further regulated.

From the consultation, it is also clear that most respondents welcomed the increased thresholds and would like to see them increased still further. The few examples of a higher threshold not helping reduce the administrative burden appear to be caused by national rules or practices and not by rules included in the Directives.

Regarding e-procurement, overall, the hubs agree that the use of digital tools will contribute to greater transparency in public spending, improved access to market opportunities and better value for money. Quite a few hubs argue that the European Single Procurement Document creates a massive additional burden, particularly on SMEs, compared to the documents previously required for proof of qualification, and therefore puts SMEs in particular at a disadvantage. Given these difficulties, there are calls for an in-depth evaluation of the ESPD in the light of its objectives. It is also stressed that the lack of uniformity among platforms leads to increased costs for both businesses and public authorities. Therefore, electronic procedures can become a barrier to access by SMEs to public procurement.

More than half of respondents believe that cross-border purchasing brings added value to their area, whereas only a quarter believe the opposite. With respect to the overall advantages, stakeholders feel that the participation of companies from neighbouring countries enriches the procurement process for contracting authorities, because it fosters competition and integration, particularly of neighbouring areas. Even those who see added value in cross-border procurement note, however, that some sectors do not have a cross-border dimension, e.g. social fields such as youth care, care for people with disabilities and social support. Another issue mentioned is the introduction of different implementation/reference legislation in other policy areas such as taxation, or the language barrier and the fact that despite costly and time-consuming EU-wide advertising, there are no or only a few cross-border tenders.
When asked about the **measures that could improve implementation**, a large majority of the hubs think that fewer and simpler rules, further training, more continuity and less frequent changes to the Directives will help improve implementation. Others say that the European Directives should explicitly stipulate under which circumstances local and regional governments are allowed to promote local economic growth, local social structures and local environmental benefits (this is linked to the “buy-national” principle). It is even proposed by some to introduce the “0 kilometre” principle in the form of mechanisms enabling contracting authorities to use local SMEs such as, for instance, a EUR 200 000 threshold below which this would be left to the discretion of the public authorities. A call to revise or replace the remedies regime was expected, given the problems reported by the hubs. This would help reduce vulnerability of award procedures to legal challenges and the litigious culture, and associated costs currently surrounding public sector procurement. There is also a call to increase the interoperability of IT systems, which would also facilitate cross-border procurement. Other hubs stress the need for management to encourage exploring and risk taking with a view to reducing the fear of making mistakes.

With regard to **the involvement of local and regional authorities**, through their respective Member States, in the implementation report drawn up by the European Commission, only 17% of respondents said that they had been involved. Similar findings are observed in the CoR-CEMR survey, with only 10% of respondents saying that they had been involved. It should, however, be noted that of the respondents that said they had been involved, almost all come from Member States with a federal structure (Spain, Germany, Belgium and Austria, the exceptions being Finland and Greece). The difference between consulted small and large entities was surprisingly small: 6% and 10% respectively.

The low level of involvement is of course worrying as local and regional authorities are responsible for a large share of public procurement and the purpose of the implementation report is to communicate possible bottlenecks or other problems to the European Commission in order for it to be able to properly assess the situation and suggest measures to improve it. The low level of involvement of local and regional authorities could, therefore, mean that important information on various aspects of public procurement in practice never reach the European Commission and that key objectives of the legislation are not achieved.

With respect to the new provisions aimed at reducing red tape for SMEs, notably **the divide or explain principle**, a very large majority of respondents regard this change as mainly positive, despite it having a number of shortcomings. While the logic of the scheme is viewed as positive, it is argued that it is not easy for local authorities already labouring under a heavy workload to carry out the envisaged simplifications for SMEs, which is possibly the reason why a large majority of the comments are negative. Many respondents suggest that the requirement for the contracting authority to explain in a report why

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In order to enrich the replies, I organised focus groups to be close to the stakeholders and motivate them to give the reasons behind their answers.

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a contract was not divided into lots was probably envisaged as a motivation to divide contracts, but that it has only added unnecessary workload and legal uncertainty to the process. It is also stressed that the administrative burden has been transferred to the contracting authority and the coordination at implementation level is very challenging, as the subsequent coordination of the individual lots requires significant technical expertise on the part of the contracting authority.

With respect to the new provisions on integrity and transparency, it is noted that the provisions as finally enacted are considered by many to be excessively complicated and ineffective by loopholes such as “self-cleansing” declarations. It is also argued that the provisions lead to increased costs for businesses, especially for SMEs, and that the transparency rules do not correspond to or effectively prevent the new forms of corruption.

Moreover, some respondents seem to think that there is continuing uncertainty surrounding public-public cooperation. It is argued that despite the inclusion of a new approach to public-public cooperation in Directive 2014/24 (Article 12.4),
many contracting authorities are reluctant to rely on the exemption as some of the EU terms involved ("cooperation" and "considerations relating to the public interest") are not easy to define or understand. Therefore, it needs to be made clear that agreements exclusively between public sector bodies do not necessarily entail contact with the market – they can be internal reorganisations of public functions, or collaborations to deliver a common task. Greater use of shared services arrangements would help to achieve significant cost savings, not only in terms of the procurement procedure itself, but also in terms of economies of scale when two (or more) authorities join forces to deliver a common service.

Some stakeholders consulted by the hubs stressed the need to also take into account the burden that changes to the Directives impose on suppliers as several operators invested considerably pre-2014 in upskilling their staff on the EU procurement regime only to find those investments made redundant by the extensive changes introduced in 2014. A call to revise or replace the remedies regime was expected, given the problems reported by the hubs. In the hubs’ view, this would help address the significant and pressing need to reduce the culture of litigation, and associated costs, currently surrounding public sector procurement. There is also a call to increase the interoperability of IT systems as it is thought that this will also facilitate cross-border procurement. Other hubs stress the need for management to encourage exploring and risk taking with a view to reducing the fear of making mistakes.

Taking into account the extensive changes brought about by the 2014 Directives, the regional hubs consultation also looked at how contracting authorities and businesses dealt with the changes in practical terms, i.e., whether they had to recruit new staff or retrain their staff or whether they had to take other initiatives in order to align their systems and procedures with the new rules. Half of the respondents said that new recruitments were needed, a vast majority reported that training courses were needed and very few responded that neither was needed. The findings are similar to those of the CoR-CEMR survey. This, if anything, supports the argument that changing the current Directives would not be a good option.
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RegHub: Architecture

Regional implementation body
Regional Ministries
Local Administration
Regional Parliament
Etc.

CoR

European Commission
European Parliament
European Council

Regional Contact Points
Created in 1994 following the signing of the Maastricht Treaty, the European Committee of the Regions is the EU’s assembly of 350 regional and local representatives from all 28 Member States, representing over 507 million Europeans. Its mission is to involve regional and local authorities and the communities they represent in the EU’s decision-making process and to inform them about EU policies. The European Commission, the European Parliament and the Council are obliged to consult the Committee in policy areas affecting regions and cities. It can appeal to the Court of Justice of the European Union if its rights are infringed or it believes that EU law infringes the subsidiarity principle or fails to respect regional or local powers.