EUROPEAN PARLIAMENT

Potential impact on SMEs of certain EP amendments to two proposed Public Procurement Directives

Proposal for a Directive on public procurement (COM(2011)896) and Proposal for a Directive on procurement by entities operating in the water, energy, transport and postal services sectors (COM(2011)895)

EN

PE 507.505
IAAM-2013-1

IMPA
Impact Assessment

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Abstract
This paper contains an assessment of a set of amendments proposed by the Internal Market and Consumer Protection Committee of the European Parliament to the new Public Procurement Directives. The paper first gives a high-level assessment of all proposals that were initially considered relevant from the perspective of SMEs' access, which is followed by a more detailed assessment of those amendments that are likely to have a significant impact on SMEs.

IMPA
Impact Assessment

PE 507.505 IAAM-2013-1

This document was requested by the European Parliament's Committee on Internal Market and Consumer Protection (IMCO).

AUTHOR
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Contents

List of figures

List of abbreviations

CAE	Contracting authority and entity
CEE	Central and Eastern Europe
CEN	European Committee for Standardization
CPV	Common Procurement Vocabulary
DG ENTR	Directorate-General Enterprise and Industry
DG MARKT	Directorate-General Internal Market and Services
DPS	Dynamic Purchasing System
EBC	European Builders' Confederation
EPP	European Procurement Passport
IMCO	Internal Market and Consumer Protection Committee
MEAT	Most economically advantageous tender
PIN	Prior information notice, periodic indicative notice
SME	Small and medium-sized enterprise
TED	Tenders Electronic Daily
UEAPME	Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises

Introduction

This document provides an "SME - related impact assessment on amendments concerning two current public procurement proposals", commissioned by the European Parliament, Directorate on Impact Assessment and European Added Value.

The task was to prepare an 'SME test' of the amendments by the Parliament's Internal Market and Consumer Protection Committee (IMCO)[1] [2] on two legislative proposals put forward by the Commission:

Proposal for a Directive of the European Parliament and of the Council on public procurement COM(2011) 896, to replace Directive 2004/18/EC[3] (the 'Classic' Directive);

and

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, to replace Directive 2004/17/EC[4] (the 'Utilities' Directive).

The paper should outline, describe and dimension the expected impacts of the amendments on SMEs. More specifically, it intends to answer the following two questions:

1. What is the impact on SMEs of the IMCO amendments which explicitly delete or add references to SMEs?

2. What is the impact on SMEs of the IMCO amendments relating to certain key provisions which, although not explicitly referring to SMEs, may have a more pronounced effect, either favourable or negative, on SMEs, in comparison to other companies?

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[1] Committee on the Internal Market and Consumer Protection (2013a) *Report on the proposal for a directive of the European Parliament and of the Council on public procurement* (A7 - 0007/2013), adopted on 11 January 2013. Rapporteur: Marc Tarabella. Available at: http://www.europarl.europa.eu/document/activities/cont/201301/20130115ATT59102/20130115ATT59102EN.pdf

[2] Committee on the Internal Market and Consumer Protection (2013b) *on the 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* (A7 - 0034/2013), adopted on 7 February 2013. Rapporteur: Marc Tarabella. Available at: http://www.europarl.europa.eu/document/activities/cont/201302/20130207ATT60717/20130207ATT60717EN.pdf

[3] 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. 114–240. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0018:en:NOT

[4] 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. 1–113. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0017:en:NOT

This research paper assesses the amendments, which were identified as relevant to SMEs' access to public contracts. First it gives a summary assessment of these amendments, indicating which ones are likely to have significant impact on SMEs and whether this impact is positive or negative. Selected amendments – primarily those that have a significant impact on SMEs – were assessed in more detail.

Summary review of key IMCO amendments potentially affecting SMEs' access to public procurement

The IMCO committee has made a total of 253 amendments to the 'Classic' Directive and 238 amendments to the 'Utilities' Directive. However, only a few of these were considered to have a potential – direct or indirect – impact on SMEs. The following table presents all the key amendments; gives a short assessment thereof, and indicates which of them are covered in the detailed assessment (in brackets the corresponding Article in the proposal for the new 'Classic' Directive).

Figure 1 - IMCO amendments potentially affecting SMEs' access to public procurement

Amendment Article number ('Classic' Directive)	Summary assessment	Expected impact on SMEs	Detailed assess-ment
Reference in the recitals that overly demanding requirements raise transaction costs and are an obstacle to the participation of SMEs [Recital 1a].	As the modification is only a non-binding reference, no particular impact on SMEs is expected.	o	No
Reference to the role of public procurement in the Europe 2020 strategy and the need for facilitating equal access for SMEs. [Recital 2]	Reference to SMEs was included in the original Commission proposal, and has been kept by IMCO. No impact is expected.	o	No
Reference that whilst time limits for participation should be kept as short as possible, this should not create undue barriers to SMEs' access [Recital 14a].	As the modification is only a non-binding reference, no particular impact on SMEs is expected.	o	No
Requiring the Commission to provide guidance to Member States and contracting authorities on the obligatory monitoring of aggregated and centralised purchases to avoid excessive concentration of purchasing power and collusion [Recital 20].	Joint purchasing is seen as being often detrimental to SMEs' access due to larger volumes and contract values. Guidance – including good practice recommendations – on how to centralise procurement without creating undue barriers to SMEs will be, if taken on board by Member States and contracting authorities, a very useful tool to mitigate the problem.	+	No
Reference that specific attention should be paid to the accessibility of centralised procurement and other forms of aggregated demand to SMEs [Recital 24].	As the modification is only a non-binding reference, no particular impact on SMEs is expected.	o	No

Amendment Article number ('Classic' Directive)	Summary assessment	Expected impact on SMEs	Detailed assess-ment
Recommendation that public procurement should be adapted to the needs of SMEs and that contracting authorities should use the European Code of Best Practices[5] [Recital 30].	Including this clear recommendation in the Directive should contribute to a better uptake of good practice solutions, facilitating SMEs' access to public contracts (concerning e.g. the use of lots, more and better information, interaction with tenderers, administrative simplification, and avoiding late payment) among Member States and contracting authorities.	+	No
Reference to administrative burden in general and ways to reduce these [Recital 32].	As the modification is only a non-binding reference, no particular impact on SMEs is expected.	o	No
Reference to the role of SMEs in job creation, the European Code of Best Practices facilitating access by SMEs to public procurement contracts, and the need to create SME-friendly procurement strategies [Recital 32a].	This new recital encourages national authorities and contracting authorities to take barriers to SMEs duly into account when devising their public procurement strategy. By referring to the code of best practices, it may promote its uptake. This will have a positive impact on SMEs' access.	+	No
Reference that contracting authorities should respect time-limits for payment as provided for in the Directive on late payment [Recital 48a].	Unduly long payment terms and late payments are one of the most prohibitive factors for small businesses to participate in public procurement, and is often the cause of avoidable bankruptcies. Any new emphasis on respecting time limits is a useful addendum to the legislation - although the recital is only referring to obligations already existing under EU law (the Late Payment Directive).	+	Yes
Reference to the need for a uniform approach in transposition to guarantee the legal certainty required, inter alia, by SMEs [Recital 53a].	No particular impact on SMEs is expected.	o	No
Emphasising that temporary associations of economic operators can fulfil technical, legal and financial requirements together [Article 16].	This stipulation is already included in the legislation, so the IMCO amendment is seen only as a confirmation that groupings of economic actors should be allowed to jointly fulfil requirements. This possibility shall be highlighted in the contract notices. The amendment is likely to have a slight positive impact on SMEs.	+	Yes

[5] European Commission (2008) *Commission Staff Working Document: European Code of Best Practices facilitating access by SMEs to public procurement contracts*. Available at: http://ec.europa.eu/internal_market/publicprocurement/docs/sme_code_of_best_practices_en.pdf

Amendment Article number ('Classic' Directive)	Summary assessment	Expected impact on SMEs	Detailed assess-ment
Extension of the maximum duration of framework agreements from four to five years [Article 31].	The extension of the duration restricts competition (inter alia from SMEs) and renders the contracts generally larger and less accessible for SMEs.	- -	Yes
Stressing the possible use of dynamic purchasing systems for service contracts, though not mentioning works contracts in this relation [Article 32].	Promoting the use of dynamic purchasing systems in service contracts indirectly may lead to a better uptake of this form of demand aggregation, thus leading to possible barriers to SMEs which may find it more difficult to compete against larger companies. On the other hand, omitting works from the Article may reduce its usage in the construction sector, helping SMEs.	- (general) + (construc-tion)	Yes
The deletion of the "apply or explain" principle for the subdivision of contracts into lots [Article 44].	The amendment is likely to reduce the incentive for contracting authorities to use lots (especially since the subdivision is mainly recommended in the recitals for products that require quality for welfare).	- - -	Yes
The reduction of the minimum turnover requirement to twice the value of the contract (instead of three times) [Article 56.3, Recital 31].	This amendment may open up a new, although modest, tranche of public contracts to small businesses.	+ + +	Yes
Retaining the European Procurement Passport and amending its content and validity, as well as the possible grounds for CAEs to reject it. [Article 59 & Annex XIII].	Introducing the passport may not be politically feasible, and its added value is questionable. Expanding the information content of the passport does not contribute to its value whilst it may increase the administrative burden on actors. The general escape clause for contracting authorities can be used as an excuse to limit the access of SMEs (of another Member State), while setting the validity of the passport to one year is beneficial for SMEs.	- - / +	Yes
The deletion of the "lowest cost" criterion [Article 66].	A technical amendment only, as the Directive would allow price to be the only criterion even under the "most economically advantageous tender" approach.	-	Yes
Obligation to indicate any share of the contract that tenderers intend to subcontract [Article 71.1].	The obligation is useful for policy monitoring purposes and may have a small positive impact on local SMEs, if contracting authorities intend to favour tenders with more significant local subcontracting when awarding the contract. The additional burden on tenderers will be very small.	+	Yes

Amendment Article number ('Classic' Directive)	Summary assessment	Expected impact on SMEs	Detailed assess-ment
An obligatory system of liability covering the full supply chain; and in this context the mandatory provision of subcontractors' names, contact details and legal representatives along the full subcontracting chain [Articles 71.1, 71.3a].	In theory, this amendment could provide strong protection for SMEs against unfair competition from companies not in compliance with applicable laws (cf. also "abnormally low tenders"), but its legal and political feasibility is questionable. Significant administrative burden on both economic operators' and contracting authorities' side.	(++?)	Yes
Changing the frequency of a mandatory publication of monitoring data on SME access and on initiatives to raise the level to 50% in terms of value from an annual to bi-annual basis. Expanding the information content of bi-annual monitoring reports [Article 83.1b, Recitals 49, 50].	Decreasing the frequency of reporting from annual to bi-annual is a sensible approach, reducing the burden on Member State authorities. The requirement for CAEs to cite initiatives in place to improve SME participation if lower than 50% is positive for SMEs: it will oblige Member States to commit themselves and take action, and will supply SME organisations with necessary (comparative) information for their lobbying activities. The additional administrative burden on the authorities will be modest.	+	Yes
Deletion of the obligation for the Member States to ensure that SMEs will receive appropriate technical assistance, including through existing support networks [Article 87.2, Recital 51]; requesting the Commission on the other hand to assist Member States in providing training and guidance on competitive dialogue to SMEs [Recital 43a].	The original proposal may be seen as an undue burden on national authorities, and the exact obligation as being otherwise difficult to specify. Deleting this obligation may weaken the motivation of individual authorities to do everything in their power to improve SMEs' access, but it is not likely to have a significant impact on SMEs. Guidance and support tools are already available in all Member States through electronic documents or through existing enterprise support networks (e.g. the Enterprise Europe Network). There is a renewed emphasis on competitive dialogue and more guidance will help SMEs to understand and successfully participate in such procedures. Action from the Commission (good practice repositories, peer learning activities etc.) is considered to be beneficial for the effectiveness of training and guidance at national level.	- (general) + (compe-titive dialogue)	Yes

The following section presents the detailed assessments of IMCO amendments identified as having a significant potential impact on SMEs.

Detailed assessment of selected IMCO amendments believed to affect SMEs' access to public procurement

Recital 48a – Late payment

(Recital 56a in the Utilities Directive)

Background

The new Directive is to be complemented with a new recital referring to the obligation of contracting authorities to respect time limits for payment as set out in Directive 2011/7/EU on late payments in commercial transactions **[Am. 46]**.

Expected impacts of the amendment

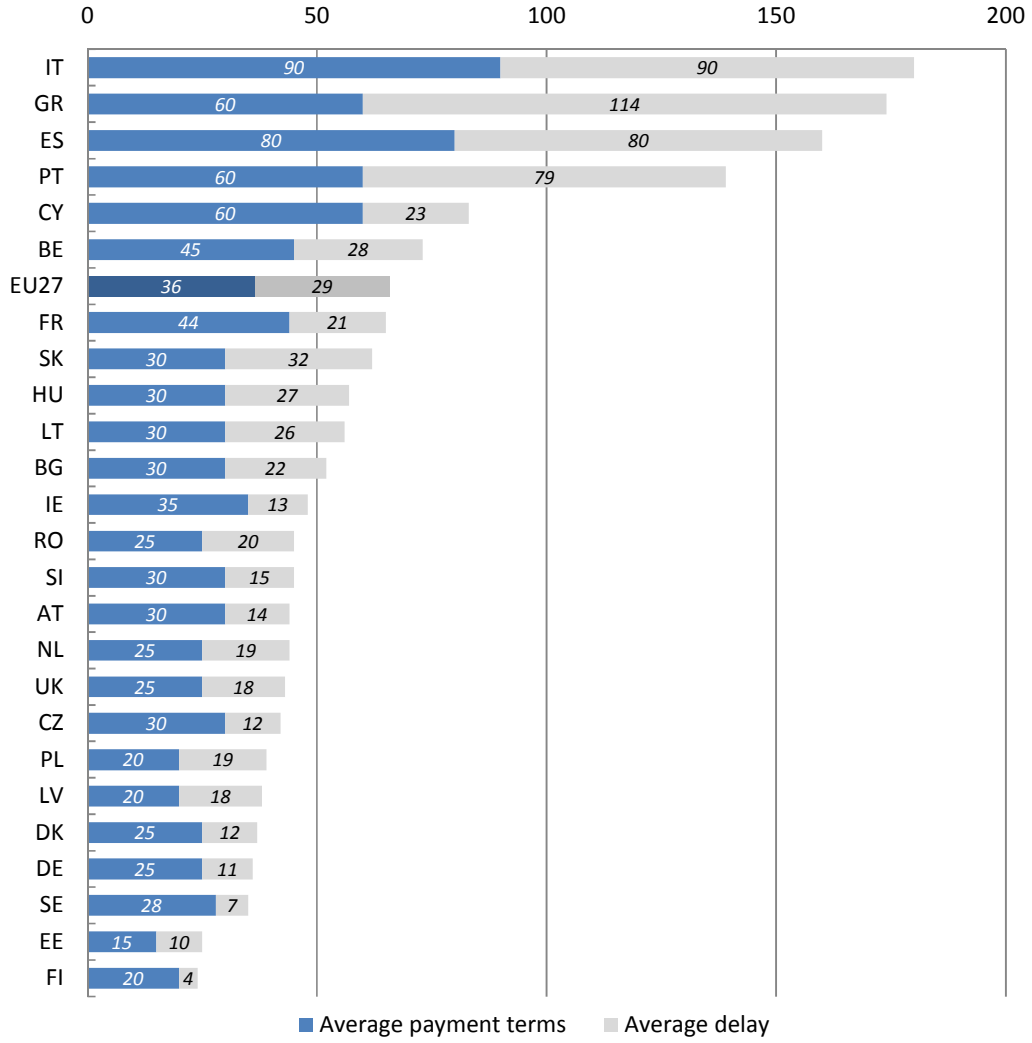
Unduly late payment terms and payment delays are one of the most important problems for SMEs in public procurement (but not only in public procurement); sometimes with devastating consequences. SMEs may not only be compelled to reject new business opportunities because of being unable to bridge the financing gap between performance and payment, but - upon entering the project - may also be forced out of business because of falling into an unsolvable liquidity trap. The amendment is therefore – even though it does not define new obligations as compared to what is already set out in EU law - **beneficial for SMEs as it draws the attention of contracting authorities to the problem of late payments**.

Long payment terms and payment delays are considerable obstacles for SMEs in making good business with the public sector in many countries. In the 2010 study on SMEs' access, long payment terms were identified as the second most important problem in connection with public procurement. 40% of the companies surveyed reported that they faced this problem 'always' or 'often'.

Surveys conducted by Intrum Justitia show that the average payment terms in public procurement were over 30 days in eight Member States (BE, CY, ES, FR, GR, IE, IT, PT). Furthermore, this problem is aggravated to the extreme by payment delays that can reach 80, 90, and even up to 110 days in four countries (ES, GR, IT, PT). At the other end of the scale, average payment terms in public procurement are attractive in Nordic countries, Germany and some CEE Member States – average payment delays are also small.[6] According to the survey, 57% of companies suffer liquidity problems due to late payments (including commercial transactions with public authorities) and 70% say that they do not get the legislative support they need. SMEs are particularly disadvantaged as they are normally less likely to have the necessary liquidity to survive long payments under public contracts – which may often be relatively large compared to their size and financial means.

[6] The Intrum Justitia figures are also used in Eurochambres' '30max' campaign: http://www.30max.eu/

Figure 2 - Average payment terms and late payment in public administration/business relations in the EU by country (2012)



Source: Intrum Justitia (2012) European Payment Index 2012. EU27 figures are the simple average of Member State figures.

The current EU legislation on late payments is governed by Directive 2011/7/EU on combating late payments in commercial transactions (deadline for transposition: 16 March 2013)[7]. Article 4 sets default payment terms by obliging public authorities to pay for goods and services within 30 calendar days (or, in exceptional circumstances – 60 days). As of Article 3, businesses must pay within 60 calendar days, unless otherwise expressly agreed and if it's not grossly unfair to the creditors. Articles 3(1) and 4(1) also set out that creditors should be entitled to (statutory) interest for late payment – of at least the central bank's reference rate plus 8%; usually after 30 days upon invoicing or delivery of goods – without the necessity of a reminder, providing it has fulfilled its contractual and legal obligations and the debtor is responsible for the delay. The creditors

[7] Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:048:0001:0010:en:PDF

are also entitled to charge an additional €40 for recovery costs, as well as any other reasonable compensation for the recovery of costs. It is, incidentally, important to note that creditors are not obliged to claim the statutory interest for late payment. In practice, suppliers are sometimes so dependent upon their main clients (including public authorities) that they would not be willing to jeopardise their friendly commercial relationship by taking advantage of their rights.

Despite the significance of the problem, neither the current procurement Directives (2004/17/EC and 2004/18/EC) nor the Commission's new proposal make reference (in the recitals or elsewhere) to the need of avoiding unduly long payment terms or payment delays. Annex VII of Directive 2004/18/EC requires the contract notices only to include information on the "main terms concerning financing and payment and/or references to the texts in which these are contained"- and even this is missing from the new proposal.

There are however interesting and important initiatives at Member State level, for instance:

- The "Prompt Payment Code" in the **UK**: signatories commit to paying suppliers within clearly defined terms, targeting 10 days, and ensuring proper process for dealing with issues.
- A centralised electronic invoicing system in **Sweden** (managed by the Ekonomistyrningsverket under Ministry of Finance) which speeds up procedures.
- A special "bridging loan" in **Belgium**, set up by the federal government through an investment fund to finance late payments by all public authorities - not just at a federal level.
- A government advance payment faculty for local authorities in **Spain**, which guarantees the recovery of invoices of businesses for services rendered under public procurement contracts.

Given the importance of the topic and that late payment was not yet brought up in the Directives, the reference proposed by IMCO helps especially SMEs which have less financial reserves and more restricted access to bridging loans; and for which a public contract that is in delay with payments may be relatively big compared to their size. Whilst the recital only refers to existing EU law, adding it to the Directive is still advisable as it gives additional weight to the problem.

SME views

SME organisations consider the fight against late payments in business-to-business, business-to-consumer transactions and also in public procurement as a key issue, as evidenced by UEAPME's position paper on the Commission's proposal on the late payments Directive[8], Eurochambres' comments[9], or in the UK Federation of Small Business recommendations.[10]

[8] Available at: http://www.ueapme.com/IMG/pdf/0907_pp_late_payments.pdf
[9] Available at: http://www.eurochambres.be/DocShare/docs/5/FECNOMABEGMLBANHEMNJDPEHBG9EBOH

Article 16 – Economic operators

(Article 30 in the Utilities Directive)

Background

IMCO has added a sentence to Article 16 of the new Directive requiring contracting authorities to allow temporary associations of economic operators to fulfil all technical, legal and financial requirements jointly as a single entity, summing up individual characteristics of the companies **[Am. 91].**

In connection with this proposal, an earlier amendment - part of Recital (32) - stresses that groups or consortia of economic operators, and particularly SMEs, should be allowed to submit tenders jointly **[Am. 31].** The possibility for groupings of companies to put themselves forward as candidates was already clearly established in earlier public procurement Directives (see Article 4(2) in Directive 2004/18/EC). Amendment 31 is thus merely reinforcing the policy emphasis on SMEs' access and is not considered a substantial modification. The subsequent assessment therefore only covers Amendment 91.

Expected impacts of the amendment

The amendment is **further reinforcing earlier provisions and spelling out more clearly** that groups of economic operators must be given the opportunity to fulfil all technical, legal and financial requirements jointly. In doing so, it may have a **slightly positive impact on SMEs**, especially if supported by practices leaving SMEs sufficient time to form such groups (prior information notices, adequate tender submission deadlines) - although it may also be argued that the amendment brings some redundancy into the legislation.

The joint fulfilment of technical and financial criteria by members of a group of economic operators (or via subcontractors) has historically formed part of the EU's public procurement Directives (reinforced in the 2004 Directives) and has also been retained in the Commission's current proposal. Article 47(2) and (3) of Directive 2004/18/EC stipulates that an economic operator may, "where appropriate", rely on the capacities of other entities concerning its economic and financial standing – while it can be asked to prove that it will have the resource necessary at its disposal. Article 48(3) and (4) say the same with regard to technical and/or professional ability. Contracting authorities must thus accept the joint fulfilment of criteria. Article 62(1) in the new proposal repeats these provisions with only slight modifications. Correspondingly, all Member States have similar provisions enshrined in their national legislation, albeit smaller variations of how the provisions are interpreted and applied in practice may exist.

1BBADUO6CPW3E/EUROCHAMBRES/docs/DLS/09-LatePayments_28Apr10-2010-00224-01.pdf

[10] Available at:
http://www.fsb.org.uk/policy/rpu/london/assets/late%20payment%20july%202011.pdf

The Articles above are in essence the same provisions as IMCO's proposal, which would thus be redundant; however, the proposed amendment does not include the words "where appropriate" and may therefore be thought of as somewhat stricter. It is however not expected that this would have any perceptible impact on contracting authorities' behaviour in practice. Groupings of economic operators are already, under the current Directives, treated as one tenderer, being allowed to fulfil technical and financial requirements together, relying on one another's capacities.

A further reinforcement of these stipulations may help in directing the attention of contracting authorities and SMEs to this possibility. In this regard, it is important that SMEs have sufficient time at their disposal to prepare for joint bidding to actually take advantage of the opportunity. This is emphasised in the European Code of Best Practices which recommends that contract notices - or tender documentation – should draw attention to this possibility, and contracting authorities should leave SMEs enough time to prepare for joint bidding by publishing prior information notices (PINs; periodic indicative notices in the case of entities under the Utilities Directive). In addition, it may be recommended that contracting authorities consider the time needed for forming consortia or subcontracting arrangements when setting submission deadlines (going thus beyond the minimum time requirements).

Interestingly, the IMCO amendment refers to a "temporary association" of economic operators (a terminology that appears only here) instead of "groups" of economic operators, as used elsewhere. It may be advisable not to introduce this new phrase, as it may cause confusion among readers, and keeping instead the commonly used terminology.

SME views

SME organisations did not comment upon the rules pertaining to the situation of groupings of economic actors as the stipulations remained unchanged vis-à-vis the 2004 Directives. The European Code of Best Practices reiterates that the Directives already allow economic operators to rely on the economic and financial capacities and on the technical abilities of any other company, whether participant in the group or a subcontractor. It also recommends the use of PINs to allow SMEs sufficient time to form groups.

Article 31 – Framework agreements

(Article 45 in the Utilities Directive)

Background

The proposal put forward by IMCO extends the maximum duration of framework agreements from four to five years, and replaces the flexible wording concerning exceptions from these rules in the original proposal, which talks about "exceptional" and

"duly justified" cases with only two possible cases: a) works or services that take longer than five years to carry out; and b) cases when investments need to be made for which the amortisation period is longer than five years, or which are linked to maintenance, the recruitment or training of staff to perform the contract. The amendment also foresees the term of the framework agreement to be calculated on the basis of the life - cycle of the work, service or supply **[Am. 135].**

Expected impacts of the amendments

Extending the maximum duration of framework agreements to five years is **expected to significantly increase the proportion of five-year framework agreements on the ground**, and is thus in general **detrimental for SMEs** as opportunities for competing for these contracts will be reduced.

Article 32(2) of the current 'Classic' Procurement Directive (2004/18/EC) has already set the maximum duration of framework agreements at four years, "save for exceptional cases duly justified, in particular by the subject of the framework agreement". This stipulation has been kept unchanged in the Commission's proposal.

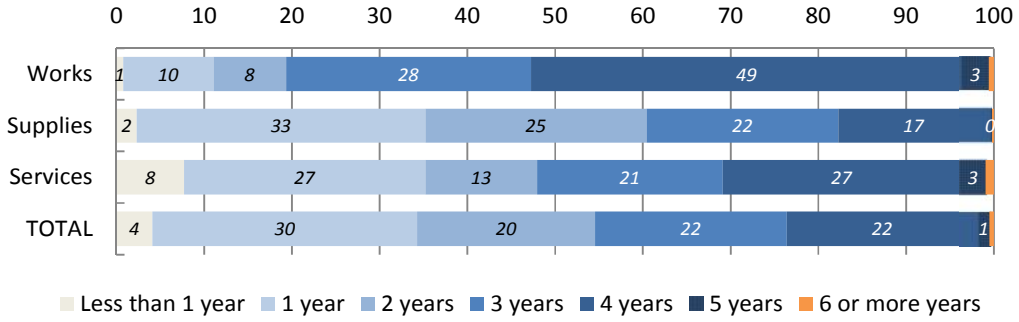
Statistical data confirm that only a small number of framework agreements are concluded for more than 4 years under the 'Classic' Directive, but a significant proportion under the 'Utilities' Directive. For the former, the analysis of contract award notices above EU thresholds[11] shows that most framework agreements (30%) are concluded for a period of only one year; and the proportion of agreements of 2, 3 or 4 years duration are roughly equal (at 18-23%). Agreements lasting 5 or more years account only for about 1% of all framework agreements. In line with expectations, longer-term framework agreements are much more prevalent among works contracts (among framework agreements in the field of public works, 12% are concluded for 5 years or more), still significant among service framework agreements (3%) and much less among supply contracts. For entities subject to the 'Utilities' Directive, the situation is somewhat different: framework agreements extending over 5 or more years account for 12% of all framework agreements concluded.

From these data we can conclude that the current regulation governing the procurement of public authorities was an effective barrier to the duration of framework agreements – restricting most contracts indeed to 4 years, unless an exception was made on a "duly justified" basis – mostly for services and public works (the constraint was less visible for utilities).

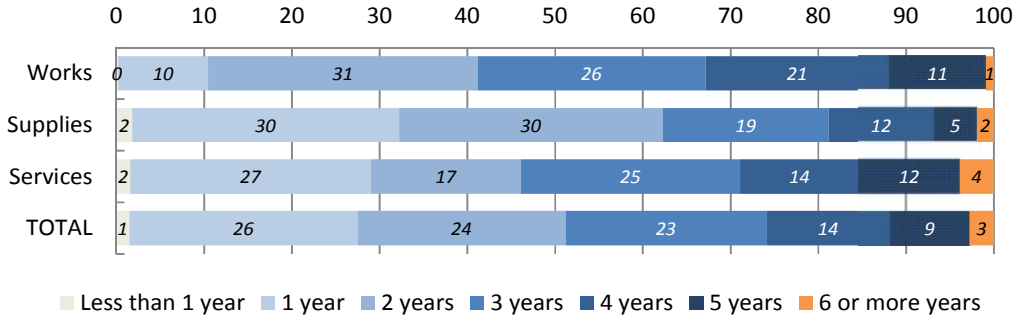
[11] About 25,000 contracts - combined for the 'Classic' and 'Utilities' Directive - flagged in the database as framework agreement for which sufficient information on its duration was given (there were about 106,000 contracts in total categorised as framework agreement).

Figure 3 - Breakdown of framework agreements concluded (under 'Classic' and 'Utilities' Directives combined) above EU thresholds concluded in 2012 by the number of (full) years and type of contract, 2009-2012

Classic Directive



Utilities directive



Source: Own calculations based on contract award notices published on TED (2009-2012).
N = 81,656 ('Classic' Directive); 3,885 ('Utilities' Directive)

Consequently, an extension of the maximum duration by one year in the Directive is likely to have an impact on the actual duration structure. It can be anticipated that the proportion of 5-year framework agreements may increase from 1 up to 6 percentage points over the years, to the detriment of 4-year contracts. This corresponds to an increase of about 5,000 contracts out of 106,000 framework agreements concluded annually above EU-thresholds. The increase will be especially concentrated in public works, and to a lesser extent in services.

As a result, SMEs and groupings of SMEs will obtain the opportunity to compete for these contracts and replace the incumbent (which can be an SME as well) only every 5 years instead of 4, this being evidently detrimental for them, and often too for the longer-term market development aims of contracting authorities. In addition, the implied increase in the total size of the contract makes it harder for SMEs to successfully compete (note that whilst in Directive 2004/18/EC the calculation method of contract size in relation to procurement thresholds limits the aggregation of expected monthly fees to 4 years, this restriction has been omitted from the Commission's current proposal).

On the other hand, the extension of the maximum duration may increase value-for-money in public procurement by enhancing economies of scale and justifying longer-term investments needed to perform the contract.

SME views

SME organisations generally voice criticism concerning the widespread use of framework agreements and other forms of aggregation of demand, as this restricts the successful participation of SMEs in public procurement. UEAPME in its position paper on the Commission's proposal asks to limit the use of framework agreements to the minimum, only in cases where it can create economic benefits that exceed the costs of reduced competition and reduced opportunities for SMEs. Similar concerns have been expressed by Eurochambres.

Article 32 – Dynamic purchasing systems

(Article 46 in the Utilities Directive)

Background

The amendment suggested by IMCO spells out explicitly that dynamic purchasing systems (DPS) can be used for purchasing goods and services **[Am. 131]**. Current legislation and the proposed new Directive do not preclude contracting authorities from purchasing services (or works) through DPS, although the text does not refer to the type of contract that can be tendered through DPS. The IMCO amendment does not create a new right or obligation, merely emphasises the option that DPS can be used for services – it does not include works, however, among the options.

Expected impacts of the amendment

The reference to services in Article 32 **may have a small positive indirect impact on the use of DPS in service sectors**, which **may adversely influence SMEs' chances of winning contracts**. The amendment is not a substantial change, it is merely drawing the attention of contracting authorities to the fact that DPS can be employed not only for supplies but also for service contracts, which is already the case. However, **it seems to restrict the scope of application as it does not refer to works**. If this is the case, **this can have a slight positive impact on SMEs active in the construction sector** (mainly routine repairs).

Directive 2004/18/EC defines "dynamic purchasing systems" in Article 1(6) as "a completely electronic process for making commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting authority, which is limited in duration and open throughout its validity to any economic operator which satisfies the selection criteria and has submitted an indicative tender that

complies with the specification." This definition does not restrict the use of DPS to only certain types of contracts (supplies, services or works), nor does Article 33, which gives detailed provisions on dynamic purchasing systems. The same generic approach has been followed by the new proposed Directive (Article 32).

Indeed, DPS under the current EU legislative framework is not only used for purchasing supplies. The analysis of contract award notices above EU thresholds shows that the construction works (e.g. highways resurfacing, patching) and various services (e.g. taxi services) are equally represented among the sectors where DPS has been employed as a tendering tool.

Figure 4 - Top 10 sectors by use of dynamic purchasing system (DPS) in contracts above EU thresholds (2012)

CPV code	Sector name	Nr. of contracts using DPS
34	Transport equipment and auxiliary products to transportation	8,137
33	Medical equipment, pharmaceuticals and personal care products	393
45	Construction work	319
60	Transport services (excl. waste transport)	271
30	Office and computing machinery, equipment and supplies except furniture and software packages	140
15	Food, beverages, tobacco and related products	106
85	Health and social work services	104
80	Education and training services	103
9	Petroleum products, fuel, electricity and other sources of energy	78
51	Installation services (except software)	66

Source: Own calculations based on contract award notices published on TED in 2012.
N = 24,522

DPS is considered to be problematic for SMEs who may not be able to fulfil the requirements for inclusion, lack sophisticated eProcurement skills and may not be in a position to offer standardised products or services in large quantities. Extending the use of it – which may be to some extent an indirect impact of the IMCO amendment pointing to the possibility to use DPS in the procurement of services – is therefore generally detrimental to SMEs. An eventual discouragement of contracting authorities to use DPS when procuring public works – i.e. mainly routine maintenance and repair works such as patching – may improve the competitive position of SMEs.

SME views

As the use of DPS can be detrimental to SMEs accessing public contracts, UEAPME insists that such procedures shall be restricted to the purchasing of commonly used more or less standardised products generally available on the market.

Article 44 - Division of contracts into lots

(Article 59 in the Utilities Directive)

Background

The amendment made by IMCO proposes to drop the so-called "apply or explain" principle for the subdivision of contracts into lots for above-threshold procurement contracts with a value of above € 500,000. The original Commission proposal foresees that contracting authorities and entities (CAEs) should by default split tenders into lots, and if this does not deem this appropriate, it shall provide in the contract notice or in the invitation a specific explanation of its reasons **[Am. 162]**.

Furthermore, IMCO also suggests deleting point 3 of the Article, which allows CAEs to conclude contracts covering one or more contracts awarded to the same tenderer, requiring them to communicate in the procurement documents which lots may be grouped together in such cases, as well as the methods to be used to award contracts for more than one lot to a tenderer that is not ranked first in respect of all individual lots covered by the contract **[Am. 163]**.

The assessment focuses on Amendment no. 162, having a far more substantive impact on SMEs than Amendment no. 163. The latter merely omits an explicit reference in the Commission's proposal to the possibility of concluding contracts covering more than one lot, as well as the requirement to communicate this and the method of awarding single lots in the procurement documents. It is very unlikely for any Member State to have stipulations in its core legislation governing contract law or public procurement conventions that would refrain CAEs from concluding contracts covering more than one lot. Communicating this possibility to the public contributes to the higher transparency of public procurement, but it does not influence any economic operator's access to public contracts or the willingness to participate in public tenders. The original Article is therefore not expected to have any significant impact on Member State practices.

In conjunction with the above amendments, IMCO also proposes to revise Recital 30 by emphasising in the text that public procurement should be adapted to the needs of SMEs, and CAEs should make use of the Code of Best Practices, and by explicitly referring to the subdivision of contracts into lots (especially for products that require quality for welfare) **[Am. 30]**. This amendment is not assessed below.

Expected impact of the amendment

The proposed Amendment no. 162 ***is in general detrimental to SMEs' access to public contracts.*** At the same time ***it has the potential to slightly reduce the administrative burden on CAEs*** in connection with public procurement. The amendment ***may also help mitigating the risk of appeals*** (protracting the public procurement process, possibly leading to the cancellation of the tender) and ***reducing the workload of public bodies involved in the appeals and remedies procedure***.

The **detrimental effect on SMEs** follows from the observation that without the "apply or explain" principle CAEs will have fewer incentives to subdivide tenders into lots, which has been emphasised in studies, policy papers and by stakeholders as being beneficial for SMEs access. CAEs often prefer to assign a general contractor, as this makes the administration of the contract easier for them and relieves them from carrying out complex project management tasks which they may not have sufficient experience with.

Indirect evidence that "apply or explain" provisions do lead to a higher number of contracts broken down to lots than otherwise exists at national level. While the existing European legislative framework does not contain such requirements, a few Member States have already enshrined the "apply or explain" principle in their national legislation on public procurement through provisions on the mandatory or quasi-mandatory subdivision of contracts into lots - if the object of the contract allows such subdivision. Relevant stipulations have been identified in the procurement legislation of four Member States: France, Germany, Hungary and Slovenia.

- The *French* Public Procurement Contracts Code sets out in Article 10 that CAEs, in order to achieve the highest level of competition, must award contracts in separate lots, unless distinct services cannot be identified due to the object of the contract. The CAEs are allowed to award a global contract if they consider that subdividing the contract in separate lots is likely to restrict competition, make the execution of the contract technically difficult or too expensive, or if they see themselves unable to ensure the organisation, management and coordination of the separate lots. CAEs are free to choose the number of lots, taking into account the technical characteristics of the services requested, the structure of the related economic sector concerned and, if appropriate, rules governing certain professions.[12] When defining the content of the separate lots, CAEs have to take into account relevant guidelines from the Ministry of Economy which stipulate that individual lots shall be *i)* homogenous, suitable for being carried out by one undertaking; and *ii)* autonomous, suitable for being carried out separately by an undertaking which is not involved in other lots under the contract.

- The *German* Act Against Restraints of Competition requires CAEs to consider the interests of SMEs at tendering and foresees contracts to be broken down by default to lots (Article 97(3)), unless the subdivision would be unreasonable from an economical or technological point of view.[13] The subdivision of contracts into lots is also applied to contracts of private undertakings if assigned by a public authority to procure goods or services on their behalf (including public-private partnerships).

[12] Code des Marchés Publiques (2011 édition). Available at: http://www.marchespublicspme.com/documents/CMP-2011-septembre-2011-pdf.pdf
[13] Gesetz gegen Wettbewerbsbeschränkungen (GWB). Available at: http://www.gesetze-im-internet.de/bundesrecht/gwb/gesamt.pdf

- In *Hungary*, Article 46 (3) of Act CVIII of 2011 on Public Procurement requires (most) CAEs to verify in the planning stage whether the object of the procurement allows the contract to be subdivided into lots. If the subdivision into lots is possible, and is not unreasonable from economic, technical, quality or other aspects linked to the execution of the contract, it is mandatory for the CAEs to draw up separate lots.[14] CAEs may allow, but cannot prescribe, tenderers to tender for several lots under the contract.

- Article 6 of the *Slovenian* Public Procurement Act (ZJN-2) stipulates that where the object of the public contract allows it, and where it is beneficial for the economy and efficiency of the public contract, the contracting authority shall permit the contract to be awarded by separate lots.[15] In doing so, the contracting authority shall ensure non-discriminatory treatment of economic operators and thus make public contracts accessible to a wider circle of economic operators.

No other occurrences of the "apply or explain" principle with regard to the subdivision of contract into lots have been found in Member State legislation. However, procedures or guidelines encourage CAEs to do so in a further group of Member States. In *Lithuania*, for instance, the public procurement office is tasked with an ex-ante check of draft contract notices above the European threshold before these are sent for publication to the Official Journal of the EU (the TED-database). As part of this ex-ante check, the office considers whether the contract could be subdivided into lots and may suggest the contracting authority doing so. In *Ireland*, The National Public Procurement Policy Unit of the Department of Finance recommends in its guidance for public CAEs on SME participation that "where appropriate and practical and without compromising efficiency and value for money, CAEs should consider dividing contracts into lots."[16]

Evidence suggests that the introduction of the "apply or explain" principle in national legislation may have pushed CAEs in the countries concerned towards breaking down tenders into lots. France, Hungary and Slovenia all rank very high in terms of the proportion of above-threshold procurement contracts subdivided into lots (see **Figure 5**). Lithuania and Ireland are also above the EU average. The only exception is Germany, which, despite having legal provisions on the subdivision of contracts, does not have many tenders with more than one lot. It must be noted however that public procurement in Germany is relatively decentralised and the median value of contracts is correspondingly relatively low, the need to specify lots is therefore not as strong as in other Member States with more centralised procurement approaches.

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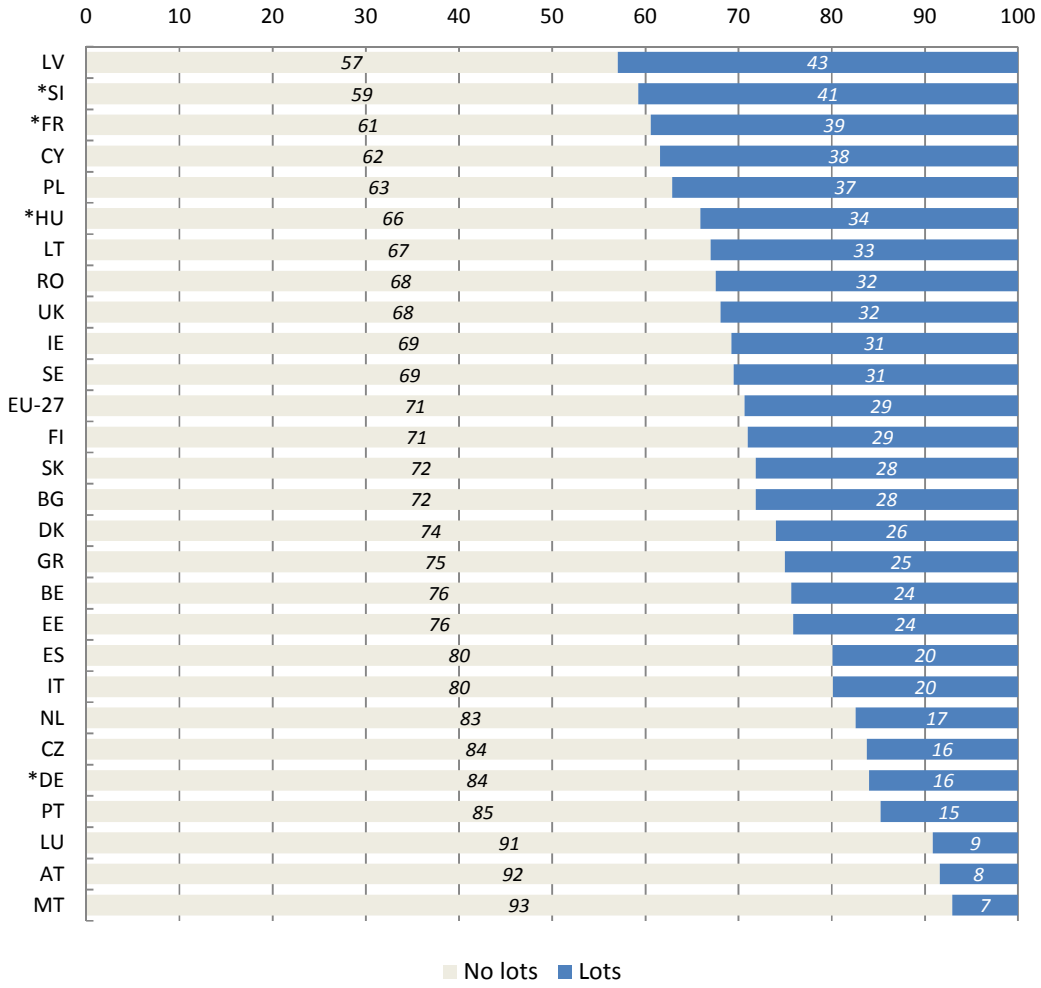
[14] 2011. évi CVIII. törvény a közbeszerzésekről. Available at: http://kozbeszerzes.hu/data/documents/2013/01/07/Kbt_2013_01_01.pdf

[15] Zakon o javnem naročanju (uradno prečiščeno besedilo) (ZJN-2-UPB5). Available at: http://zakonodaja.com/zakon/zjn-2

[16] Guidance for Public Contracting Authorities: Facilitating the Participation of SMEs in Public Procurement. Available at: http://www.procurement.ie/sites/default/files/Guidance-on-SME-participation-13-Aug-10-1.pdf

Figure 5 - Proportion of above-threshold contracts subdivided into lots by Member State (2012)



Source: Own calculations based on contract award notices published on TED in 2012

The use of lots reduces the size of an individual contract, delimits the scope of the service or its geographical coverage, making them more accessible for smaller companies with modest financial and technical capacities. A 2010 study prepared by GHK exploring to what extent SMEs can access above-threshold public contracts confirmed that the subdivision of contracts into separate lots increases SMEs' success rate, even above the evident effect of smaller resulting contract values.[17] The results of the logarithmic regression (logit) model, populated with public procurement data above EU-thresholds from 2008, showed not only that contracts with a lower value are more likely to be won by SMEs, but also that the odds ratio of SMEs improves under contracts broken down

[17] GHK (2010) *Evaluation of SMEs' access to public procurement markets*, DG Enterprise and Industry. Available at: http://ec.europa.eu/enterprise/policies/sme/business-environment/files/smes_access_to_public_procurement_final_report_2010_en.pdf, hereafter the „GHK (2010) study".

into lots - e.g. along geographical service areas or professional activities - (with the exception of contracts over 50 lots), irrespectively of the value of the contract.

Integrating the "apply or explain" principle into the new Directive would not have an impact on CAEs' behaviour in France, Germany, Hungary and Slovenia which already have similar provisions in their national legislation, but is expected to increase the propensity of procurers in Member States which currently are lagging behind, e.g. Italy, the Netherlands, Portugal, Czech Republic and Austria, to break down more contracts into lots.

If the proportion of contracts subdivided into lots in the countries concerned would increase by 10 percentage points, and if these would be broken down in only two lots (halving their value on average) the odds of SMEs winning them would improve - on the basis of the results from the logit model - by around 10% through introducing lots, and by an additional 10% through reducing the value of a single contract. SMEs' share of above-threshold contracts in terms of value was 34% in 2008 in the EU-27 (estimated in the same study), which the provision – if implemented – may ultimately increase by up to 0.7-1 percentage point. [18]

This gain will not materialise if the principle will be omitted from the text, although some Member States may "goldplate" the Directive and include the "apply or explain" principle in their national public procurement legislation voluntarily. It is not expected that countries that already have such provisions will abandon them if Amendment 162 will be adopted.

In addition, a contract that is subdivided into lots is a necessary precondition for excluding small lots (with an estimated net value of under €80,000 for supplies or services or under €1 million for works) from the application of the public procurement Directives, provided that the aggregate value of the lots excluded do not exceed 20% of the total value of the contract (see Article 9.5.(a) in Directive 2004/18/EC and Article 5.9 in the new proposal). This possibility may be used by CAEs to favour local SMEs.

The "apply or explain" principle puts a clear **administrative burden** upon CAEs, who will need to justify why they had not broken down a contract above thresholds into lots. This burden would be mitigated by Amendment no. 162. Whereas a considerable one-off burden after transposition can be reasonably expected – including additional work in studying the new provisions and the relevant legal environment, drafting and reviewing explanations for the first tenders concerned, eventually the development guidance material at national level, training and ad-hoc advice – the ongoing administrative burden will be minimal. The learning curve for CAEs will be exceptionally steep: in practice, staff will most likely simply copy over texts from earlier tenders.

[18] The simplified formula used to approximate the level of change is $(-0.6931 *(OR_1 - 1)+OR_2 - 1)*34\%*10\%$, where OR_1 is the odds ratio of an SME winning an above threshold contract when increasing the logarithm contract value by one unit (halving an arbitrary contract value correspond to a change in the logarithm of -0.6931); OR_2 is the odds ratio of an SME winning the contract if it is broken down to 2-4 lots compared to a global contract. 34% is the original estimated share of SMEs in above-threshold procurement in terms of value, and 10% the hypothetical increase in the number of contracts broken down into two lots.

The Commission's proposal would **heighten the risk of legal uncertainty** for CAEs and tenderers alike. The proposed Article does not give any indication as to what the reasons for not subdividing contracts into lots might be. It can be assumed that its transposition into national law will maintain this openness of the text, but a number of Member States may at least make references to a broad set of reasons such as technical feasibility or economy of execution – which will still allow CAEs great flexibility in defining reasons. This level of flexibility however may easily lead to legal uncertainty. It is very likely that some tenderers will challenge the reasons put forward by the CAEs. This may put tenders on hold and may even lead to the cancellation of the procedure.

This concern was already picked up by the Impact Assessment of the Commission's proposed Directives[19]. Although one can assume that case law (by public procurement bodies, courts) elaborating which reasons and under what circumstances are eligible will quickly emerge, the French example shows that even court decisions can be contradictory. Omitting the "apply or explain" principle from the new Directive would help mitigate the risk of appeals and reduce the workload of public bodies involved in the appeals and remedies procedure.

SME views

Breaking down tenders into lots is seen by most stakeholders as an important tool helping SMEs access public tenders and is prominently featured in the Commission's Code of Best Practice.[20]

In the GHK (2010) study, a survey of SMEs participating in public procurement showed that 47% of responding SMEs considered the subdivision of contracts into lots as a 'helpful' or 'very helpful' tool in facilitating their access to public procurement. Although this option was not included among the priority actions CAEs should do in order to facilitate SMEs' access, this was due to many SMEs not having a problem with large contract sizes in their sector. For the smallest companies, the subdivision of contracts into lots is still an important tool to help them compete in public procurement markets.

The "apply or explain" principle has strongly been advocated by SME organisations. UEAPME has supported it in its position papers on the modernisation of the public procurement Directives,[21] [22] [23] as well as Eurochambres[24] and various other organisations participating in the public consultation.

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[19] European Commission, 2011. *Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council on Public Procurement and the Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal sectors*. SEC(2011) 1585 final. Available at: http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/SEC2011_1585_en.pdf

[20] European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts SEC(2008) 2193. Available at: http://ec.europa.eu/internal_market/publicprocurement/docs/sme_code_of_best_practices_en.pdf

[21] UEAPME, 2013. *Position Paper: UEAPME demands from the Trilogue on the Public Procurement Directive*. Available at: http://ueapme.com/IMG/pdf/130220_PP_UEAPME_Trilogue_final.pdf

Article 56.3 - Minimum turnover requirements

(no corresponding Article in the Utilities Directive)

Background

IMCO proposes to reduce the minimum turnover requirement to twice the estimated value of the contract, vis-à-vis three in the original Commission proposal. An exception can be made in duly justified circumstances relating to the special risks attached to the nature of the works, services or supplies – these circumstances are to be indicated in the procurement documents **[Am. 177]**.

Expected impact of the amendment

The proposed amendment **is beneficial to SMEs' access to public procurement** as compared to the original proposal, through opening up further contracts above thresholds for SMEs of all size classes – especially for micro-enterprises. The impact is modest on small or medium-sized undertakings. The Commission involves a legal risk to CAEs and tenderers linked to the possibility of appeals against CAEs' decision to apply a higher limit. This legal risk will persist with the IMCO amendment at an unchanged level (thus no impact of the amendment can be identified). Similarly, the level of administrative burden added on CAEs and tenderers by the Commission proposal will remain unchanged.

The distribution of the values of individual lots in the contract award notices above threshold published on TED in 2012 suggest that reducing the turnover criteria from 3 to 2 times the value of the contract (lot) will open a sizeable new market tranche for a 'typical' micro-enterprise (assuming it participates as a single enterprise in the tender and is not part of a consortium, in which case the annual turnover of the partners would be added up). The number of individual lots awarded in 2012 was close to 500,000, of which data on the contract value - above a technical threshold of €4,000 - was given for almost 298,000.[25] If we assume that a typical micro-enterprise tendering for above-threshold contract would have an annual turnover of €500,000; a small enterprise €5 million and a medium-sized enterprise €25 million, the proportion of contracts theoretically accessible for these company size classes under the Commission's proposal would be 61%, 92%, and 98%, respectively (unless the CAE opts to raise the minimum turnover threshold due to special risks in connection with the delivery of the contract). Lowering the turnover

[22] UEAPME, 2012. *Position paper: UEAPME position paper on the proposal of the European Commission on Public Procurement*. Available at: http://ueapme.com/IMG/pdf/120425_PP_UEAPME_final.pdf

[23] UEAPME, 2011. *Position paper: UEAPME reply to the green paper consultation on the modernisation of EU public procurement policy "Towards a more efficient European Procurement Market"*. Available at: http://ueapme.com/IMG/pdf/110414_PP_greenpaper_final.pdf

[24] Eurochambres, 2011. *Position paper: Response to the Commission consultation on the modernisation of EU public procurement policy towards a more efficient European procurement market*. Available at: http://www.eurochambres.be/custom/PP_public_procurement_2011_V1_0-2011-00360-01.pdf

[25] €4,000 was chosen already in the 2010 study on SMEs' access as an arbitrary cut-off point to exclude from the analysis records with an abnormally low value indication.

threshold to two times the contract value would put these figures to 69% (8 percentage points improvement), 94% (2%p) and 99% (1%p).

SMEs deriving particular advantage from the Commission's proposal and IMCO's amendment will be young, rapidly growing companies whose annual turnover from the last closed business year will be significantly lower than their current economic potential, as well as service providers with easily upscalable operations (who will be more willing to hire temporary workers and accept contracts worth 33% or 50% of their annual turnover).

Like under the Commission proposal, CAEs will retain the option to formulate higher turnover requirements if this is justified by the nature of the contract, and if this is duly explained in the tender documents. The CAE however has also other tools at its disposal to effectively exclude small companies from the tender if it wishes to do so. It may charge relatively high fees for tender documentation; formulate high requirements for the tenderer's technical capacity; or request an excessive track record of services rendered in the past.

SME views

SME organisations support the introduction of a maximum turnover threshold. Both Eurochambres[26] and UEAPME[27] have asked for a maximum ratio to be set out in the Directive. The latter has proposed a turnover threshold of 5 times the value of the contract. The Commission's proposal already goes beyond this and IMCO's amendment would further improve SMEs' position.

Article 59 & Annex XIII – European Procurement Passport

(no corresponding Article in the Utilities Directive)

Background

Whereas the Council wishes to omit the European Procurement Passport (EPP) from the Commission's legislative proposal, IMCO proposes to retain this tool in the Directive. It adds a set of clarifications to the text and suggests smaller modifications to the terms of using the passport. In Annex XIII, IMCO further details the content of the document.

Under Article 59(1), it adds a reference to the need of implementing acts to be adopted by the Commission to establish the standard form of the EPP **[Am. 180]**. This amendment is perceived only as a minor clarification to the text and not investigated further. In Article 59(3), IMCO adds to the text that in cases when the information necessary for issuing the passport can only be furnished by the economic operator, the issuing authority shall collect this information from the operators **[Am. 181]**. This option is not excluded in the

[26] Eurochambres, 2011. *Position paper: Response to the Commission consultation on the modernisation of EU public procurement policy towards a more efficient European procurement market*. Available at: http://www.eurochambres.be/custom/PP_public_procurement_2011_V1_0-2011-00360-01.pdf

[27] UEAPME, 2011. *Position paper: UEAPME reply to the green paper consultation on the modernisation of EU public procurement policy "Towards a more efficient European Procurement Market"*. Available at: http://ueapme.com/IMG/pdf/110414_PP_greenpaper_final.pdf

original Commission proposal and is therefore seen only as a minor amendment aimed at improving the clarity of the text.

As for more substantial changes, IMCO proposes in Article 59(4) that contracting authorities shall be allowed not to recognise the passport on the basis of the "nature of the individual case", and that the period of validity, after which the passport may be rejected by the contracting authority, shall be extended from six months to one year. Furthermore, it requires economic operators to confirm by signing the passport that the information contained in it is correct **[Am. 182, Am. 252]**.

IMCO also proposes to significantly expand the information content of the EPP, with a set of amendments made to Annex XIII of the Directive. **[Am. 246-251]**.

Expected impacts of the amendments

The political feasibility and the added value of the European Procurement Passport for SMEs is questionable. Whilst the passport was expected to reduce the administrative costs borne by tenderers, it is **not clear to what extent this will materialise**, considering the impact of other initiatives. The amendments proposed by IMCO to the information content of the passport **will impose additional administrative burden on companies and on issuing authorities**. Promoting the mutual recognition of certificates is considered to be a simpler, more effective and flexible solution.

The European Procurement Passport in the Commission's proposal is a short and simple standardised document, containing only a limited amount of information on the economic operator. According to Annex XIII of the proposed Directive, the passport shall contain the following:

- identification of the economic operator;
- certification that the economic operator is not in one of the situations described in Article 55(1) that lead to the automatic exclusion from the procedure (participation in a criminal organisation; corruption; fraud in connection with the financial interests of the European Communities; terrorist activities; money laundering)
- certification that the economic operator is not insolvent or being wound up
- certification, if applicable, that the economic operator is listed in a professional or trade register prescribed in the Member State of establishment (these are listed in Annex XII)
- certification, if applicable, that the economic operator possesses a particular authorisation (e.g. health, education, public passenger transport services) or is member of a particular organisation (e.g. a bar association for lawyers; chamber of auditors) if this is needed to perform particular public service contracts in the country concerned
- indication of the period of validity of the passport (not less than 6 months)

The passport has been conceived as a fully electronic document but the legislative proposal allowed national authorities to issue a paper-based document for a transitional period extending to up to two years after the final deadline for transposition of the Directive.

The passport **was seen by the Commission and many stakeholders as a tool with the potential to reduce the administrative burden for companies**, especially SMEs, as they would only need to supply the above core set of information and evidence once every 6 months (or more, depending on how the provision is transposed into national legislation) rather than for every tender, and avoid the cost of translating the supporting documents. Being a standardised document, the passport would be easily understood by contracting authorities abroad.

There are however **arguments that go against including the concept of the EPP into the new Directive**. As the information contained in the passport is very limited, it will need to be complemented with a number of additional data, supporting documents and certifications during an actual public tender. It also remains a concern whether Member States are ready to accept certifications issued by Member States where the specific requirements, as well as systems and mechanisms for verifying these, are not considered sufficiently strict and reliable. Experience shows that there is often reluctance among contracting authorities to accept qualification systems, professional standards etc. that differ from the ones used in their country. The feasibility of a meaningful pan-European standardisation of these underlying elements is minimal, as evidenced by the example of CEN Technical Committee 330, which has worked on a standardised European prequalification system in the construction sector for about 10 years (from 1995 onwards) but ultimately failed after hundreds of meetings to reach a consensus and is now dormant.

In addition, the proposal should be interpreted in conjunction with other actions aimed at reducing the administrative burden on tenderers, notably the emphasis on accepting self-declarations (in the tendering phase) and on retrieving supporting documents directly from official databases (Article 57; the priority for obtaining information from official databases rather than requesting them from the economic operator is also emphasised in Article 59). If only winning tenderers need to produce the required documents and certificates and the number of documents to supply would be generally reduced by contracting authorities accessing them directly (although this seems to be to date difficult in cross-border procurement), then the rationale for a European Procurement Passport would be significantly weakened. Importantly, the trend in most European Member States to use prequalification systems[28] – with different degree under supplies, services or public works contracts – is also working against the concept. The certificates after successful prequalification are also valid for a given period of time and are more and more adapted to dealing with foreign tenderers.

Concerning the economic context for the passport, **the significance of cross-border procurement in the EU is still relatively low, especially for SMEs**. A study prepared for

[28] Prequalification systems allow contracting authorities to compile a shortlist of suitable candidates for certain types of services. The economic operators filling in the prequalification questionnaire usually have to provide basic legal information about the company and contact details, data about its economic and financial standing and a description of their relevant technical capabilities and capacities, including previous experience. The contracting authority will choose on the basis of this information which operators it wishes to retain on the shortlist. The actual tenders will be circulated among shortlisted entities (restricted procedure).

the European Commission by Ramboll (2011) sets the share of direct cross-border procurement (where the sole or lead contractor is based in a different country than the contracting authority or entity) above EU thresholds for the three years between 2007-2009 at only 1.6 % in terms of number of contracts (14,216 contracts), and 3.5 % in terms of aggregate value. [29] It is estimated that about 47 % of the direct cross-border contracts – i.e. 0.8 % of all contracts above the thresholds – were won by SMEs. Not many SMEs bid regularly across borders, focusing rather on their local or regional, perhaps national, market. Detailed analysis of the data also shows that cross-border procurement tends to occur more often between countries (regions) that share a language. This eliminates the need for translation of documents and may increase the likelihood that qualification systems and professional standards are similar and certifications are more readily accepted by contracting authorities.

IMCO however takes the opposite direction by retaining the concept and substantially expanding the information content of the passport – with information almost always required from tenderers by contracting authorities. This is a possible answer to the criticism about the restricted information content of the original proposal (although there may always be certificates, especially in public works, that are specific to the tender and can therefore not be included in a procurement passport), but no remedy to the other possible problems of the passport. The information to be added to the passport and their likely effects on SMEs or economic operators in general are as follows:

- the name of the economic operator's bank (supplying the company registration number, name and address of the economic operator is not explicitly required but implied by the original proposal) **[Am. 246]**. This information is readily available, easily confirmed when issuing the passport (through a declaration of the bank) and thus not considered a noticeable administrative burden.
- a description of the economic operator: year of establishment, corporate form, owner(s), board members, industry code, short description of the main services sold **[Am. 247].** Whereas the year of establishment, corporate form and industry code are considered "time-invariant" and readily available pieces of information which can be included in the passport without problems, owners and also board members (if a board exists) can be subject to frequent changes, even among SMEs. The same applies, albeit at a lesser scale, to the list of main services provided. Economic operators will need to request in such cases a new passport, inform the contracting authority that the information in the passport is incorrect (although valid at the time when the document was issued), or supply outdated information without notifying the contracting authority and risk the consequences (note that another amendment requires the economic operator to sign the passport verifying that its content reflects the truth). Also note that data on ownership and board members is not always and everywhere requested from tenderers during a public procurement procedure. Including this information is thus not recommended.

[29] Ramboll-HTW Chur (2011) *Cross-border procurement above EU-thresholds.* Available at: http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/cross-border-procurement_en.pdf

- certification that the economic operator has fulfilled its obligations in relation to the payment of taxes or social security contributions **[Am. 248]**. It should be noted here that taxes and social security contributions are due considerably more frequently than 12 months, the proposed validity of the passport. Currently, contracting authorities may request evidence not older than 30 days that the obligations have been met.
- a declaration on honour as referred to in Article 22 (on illicit conduct) **[Am. 249]**. As this is a self-declaration, not supported by official documents, there is no clear reason to include it in the procurement passport which is issued by an authority validating that the information contained in it is correct (when issued).
- key economic indicators – gross sales, earnings before interest and tax (EBIT) and solvency ratio – for the last three accounting years (or since establishment, if the company is less than three years in business) **[Am. 250]**. Data on gross sales can be supplied by all SMEs; and EBIT by most, although it is assumed that simplified national accounting rules for micro-enterprises may require only the calculation of earnings before tax, not EBIT itself. The rationale for the indicator may not be very strong as EBIT is not the best indicator for the company's long-term solvency. "Solvency ratio" should be more exactly defined as the term is ambiguous, certain sectors (banking, insurance) may have their specific solvency ratios. Also, simplified balance sheets of micro-enterprises may not be subject to calculate such ratios under national accounting rules.
- key organisational indicators - average number of employees, number of employees by the end of the last accounting year – for the last three accounting years (or since establishment) **[Am. 251]**. Supplying this information is not a substantive administrative burden on SMEs (although it would not always be requested in a public procurement tender), but it is questionable why both an average and closing headcount is needed.

The IMCO amendment allowing contracting authorities not to recognise the passport on the basis of the "nature of the individual case" leaves them a large room for manoeuvring, possibly leading to legal uncertainty, as the explanation provided by the contracting authority may be challenged.

The extension of the passport's period of guaranteed validity from six months to one year would have *per se* a positive impact on SMEs. There is a perceptible administrative burden on economic operators stemming from the obligation to supply information and documents in public procurement tenders. A baseline study from 2009 (calculating with the EU's Standard Cost Model[30]) estimated the total administrative cost of submitting documents related to exclusion and selection criteria (obligations under the current Classic Public Procurement Directive 2004/18/EC) to €217 million per annum (corresponding to more than €1,000 per procedure above EU thresholds - a procedure may involve several lots).[31] Cross-border procurement accounts for ca. 1.6% of the total,

[30] See at: http://ec.europa.eu/dgs/secretariat_general/admin_burden/eu_scm/eu_scm_en.htm

[31] Deloitte, Cap Gemini & Ramboll (2009) *EU project on baseline measurement and reduction of administrative costs: Report on the Public Procurement Priority Area*. Available at:

but these tenders are likely to involve higher administrative costs, so we assume that they may account for about €5 million (around €2,000 per procedure). We further assume that at least half of the tenderers are SMEs, as it is known that they win about half of cross-border contracts. This gives an annual estimated administrative cost of €2.5 million affecting SMEs participating in cross-border procurement. Any reduction of this burden is beneficial for SMEs. One should keep in mind however that the administrative burden is set to fall in any case, as contracting authorities are requested to furnish as much of the documents as possible directly from official databases. Also, some of the information content proposed by IMCO to be included in the passport does not seem to be consistent with the 12 month validity period. Notably, evidence that the economic operator has met its tax and social security obligations, as well as owners and board members are all pieces of information that involve or may involve a much shorter turnaround time.

SME views

SME organisations have some reservations about the European Procurement Passport. UEAPME expresses its concerns about its practicability in its position paper on the Commission's original proposal, referring also to the possible confusion of companies as to how it will complement or replace established national or regional qualification systems.

Article 66 - Contract award criteria

(Article 76 in the Utilities Directive)

Background

IMCO proposes to fully delete the possibility of using the 'lowest cost' (previously 'lowest price') as the single criterion in the selection of tenders. Instead, the most economically advantageous tender (MEAT) should be used in all cases **[Am. 185]**.

It is however understood that the bid price or life-cycle cost (see Article 67) can remain the sole criterion (i.e. 100%) under the obligatory MEAT approach, and non-price criteria such as quality, environmental and social performance do not necessarily have to be added. The proposal is therefore considered a technical amendment.
The reference to life-cycle costing was deleted from the Article but this is only for reasons of coherence and does not weaken the emphasis put on the wider use of life-cycle costing set out in Article 67.

Expected impact of the amendment

The proposal would only bring a **change in the terminology** but would have **no significant effects on practices or on SMEs' access**.

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http://ec.europa.eu/dgs/secretariat_general/admin_burden/docs/enterprise/files/abst09_pubproct_en.pdf

There is a long tradition of making a clear distinction between the "lowest bid" criterion and MEAT. This distinction is also currently at the core of policy debate, with SME organisations, Member State authorities and the Commission (see e.g. the European Code of Best Practices) recommending the use of the MEAT criterion – wherever possible – to facilitate SMEs' access to public contracts and to better achieve environmental and social objectives through procurement. It is most likely that policymakers and stakeholders will continue making this distinction even if the IMCO amendment is adopted, albeit the terminology used may change (for instance, to "price-only" tenders vs. "multi-criteria" tenders). In parallel, the forms for contract notices and contract award notices will have to be modified but it is assumed that the modified forms will still indicate a distinction between price-only and multi-criteria tenders. It is however possible that the amendment will be seen as a reinforcement of the EU's policy recommendation to use multi-criteria awarding more often.

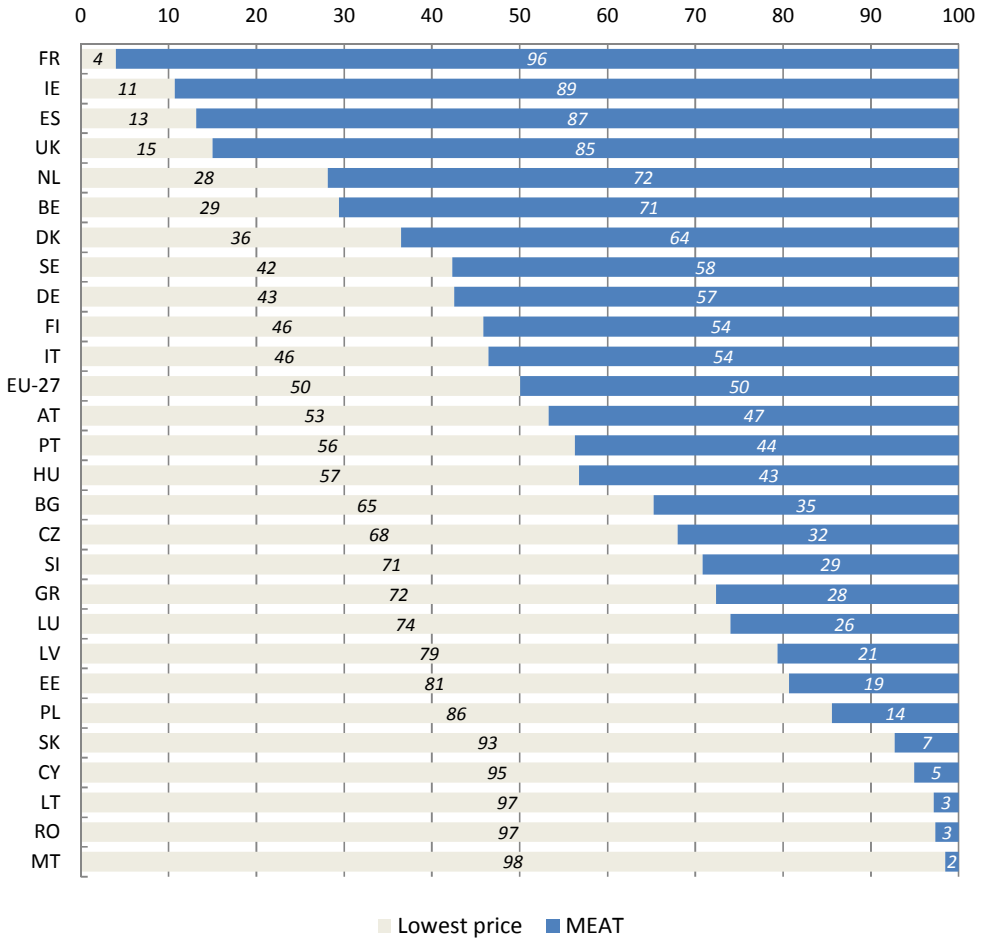
As for background, the use of the MEAT criterion is generally considered to be beneficial for SMEs' access, which normally do not operate under the same economies of scale than large enterprises and may not be able to offer the same unit price, but which may be able to offer more flexibility, better quality, new, innovative solutions, as well as environmental benefits (reducing its environmental footprint e.g. through the local sourcing materials, thus avoiding CO2 emissions from unnecessary transport) or positive social impacts (working e.g. with long-term unemployed, being able to hire temporary staff from vulnerable groups). It should be noted though that the GHK (2010) study does at first sight not confirm this hypothesis, estimating in a logit model[32] that the use of the MEAT criterion decreases the chance of SMEs winning above-threshold procurement contracts by about 9%. However, this may well be the result of confounding factors in the analysis such as large companies having an advantage in calls for tender asking for complex, leading-edge supplies or services. Also, experts suspect that even when using the MEAT criterion, most contracts would be won by economic operators offering the lowest price (with the price having a decisive weight).

Currently there are dramatic differences between Member States concerning the use of the 'lowest price' criterion in tender selection. In 2012, the proportion of above-threshold contracts awarded on the basis of 'lowest price' was only 4% in France, and below 15% in Ireland, Spain and the UK - but more than 95% in Lithuania, Romania and Malta. This is a reflection of national legislative frameworks but also of the extent to which public officials are encouraged and motivated to be less defensive and take bold decisions for the common good. It should be noted that all Central and Eastern European Member States are above the EU average in the use of the 'lowest price' criterion. In *France*, in order to create a level playing field for SMEs, Article 53 of the Public Procurement Contracts Code sets out that the selection of the 'most advantageous' offer can happen either through multi-criteria selection (which should be understood as the default option)

[32] A logistic regression, or logit, model is a type of regression model which uses a binary variable (in this case whether the company being awarded the contract is an SME or not) as its dependent variable.

or through making the selection on the basis of the price only, given the subject of the contract.[33] The IMCO proposal would constitute a move towards the French system. The use of the MEAT criterion is also recommended in, inter alia, Ireland and the United Kingdom, although legislation does not make it explicitly the default option.

Figure 6 - Proportion of above-threshold procurement using 'lowest price' vs. 'MEAT' criterion by Member State (2012)



Source: Own calculations based on contract award notices published on TED in 2012

The MEAT criterion is generally less emphasised in the Member States which joined the EU in 2004 and 2007. There is apparently an over-emphasis on price in these countries (and in some 'old' Member States such as Greece). Using the 'lowest price' criterion is usually an attractive solution for procurement officials as it saves time and effort in the planning phase of the tender, and – most importantly – it may save them allegations of corruption or mismanagement from competitors, the wider public or auditors. There is generally little support from politics and senior management to overcome this defensive behaviour.

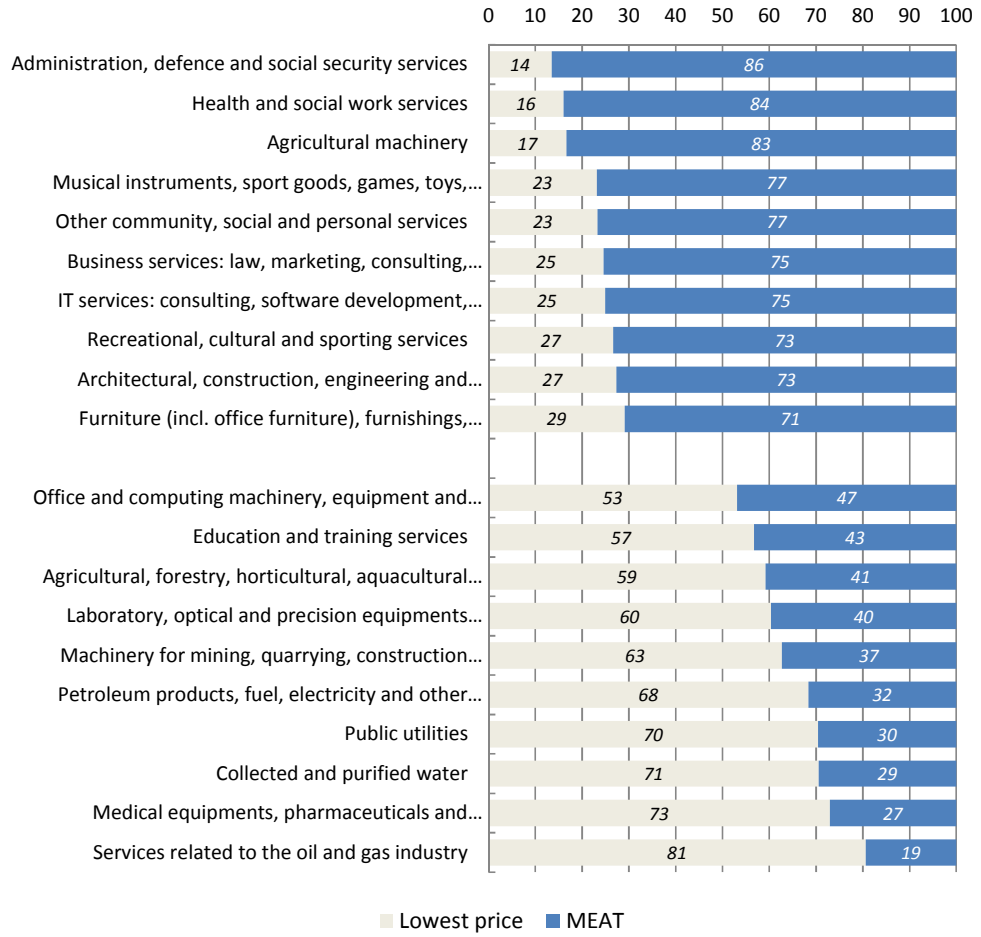
[33] Code des Marchés Publiques (2011 édition). Available at: http://www.marchespublicspme.com/documents/CMP-2011-septembre-2011-pdf.pdf

Applying the proposed system in which multi-criteria selection is seen as the default option – but allowing selection on the basis of the lowest price if the subject matter of the purchase warrants it could possibly contribute to a wider update of the MEAT criterion in the countries lagging behind, thus supporting innovative SMEs.

It should be borne in mind that for certain goods, the use of the MEAT criterion is not practicable or recommendable. For a standardised good, particularly a homogenous commodity, contracting authorities would struggle to find relevant selection criteria other than the unit price. If the specifications are clear ('A4 paper, 80 g/m2, chlorine-free bleaching' etc.), it does not make sense trying to find additional, artificial selection criteria.

The analysis of above-threshold contract award notices published on TED in 2012 shows that the MEAT criterion is rarely used for the procurement of pharmaceuticals, water, fuel and electricity – interestingly also for education and training services, where quality is very important.

Figure 7 - Proportion of above-threshold procurement using 'lowest price' vs. 'MEAT' criterion by CPV codes - top 10 and bottom 10 (2012)



Source: Own calculations based on contract award notices published on TED in 2012

SME views

The Code of Best Practices advocates the use of the MEAT criterion, which may be – apart from taking quality, environmental or social aspects into account – a means to evaluate not only the direct costs of a purchase, but also its life-cycle costs.[34]

The survey of SMEs in the GHK (2010) study on SMEs' access to public procurement contracts showed that the most frequently encountered barrier by SMEs was the over-emphasis on price (54% of companies experienced it 'always' or 'often').[35]

The French "apply or explain" solution was supported by UEAPME and Eurochambres in the public consultation of the green paper.[36] [37]

Article 71 – Subcontracting

(Article 81 in the Utilities Directive)

Background

Several amendments are proposed to Article 71 about subcontracting. The new Directive shall require contracting authorities to ask tenderers to indicate any share of the contract they intend to subcontract **[Am. 203]**.

A new provision has been added to the Article which requires the tenderer to indicate upon being selected the name, contact details and legal representatives of all subcontractors along the full subcontracting chain. This information has to be kept up to date during the delivery of the contract **[Am. 204]**.

The Parliament has also proposed in a new paragraph (71(3a)) the obligatory introduction of a system of liability covering the full supply chain, under which any contractor along the chain is directly liable if its subcontractor fails to comply with mandatory legal, regulatory and administrative provisions in force in the Member States of contract performance. These provisions include applicable environmental, social and labour law provisions made obligatory (instead of merely being a possibility for contracting authorities) in an amendment to Article 15(2). The liability moves to the next level in case the direct contractor is insolvent. Member States are allowed to apply more stringent liability rules [Am. 205].

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[34] European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts SEC(2008) 2193. Available at: http://ec.europa.eu/internal_market/publicprocurement/docs/sme_code_of_best_practices_en.pdf

[35] Part of the GHK (2010) study on SMEs' access to public procurement markets.

[36] UEAPME, 2011. *Position paper: UEAPME reply to the green paper consultation on the modernisation of EU public procurement policy "Towards a more efficient European Procurement Market"*. Available at: http://ueapme.com/IMG/pdf/110414_PP_greenpaper_final.pdf

[37] Eurochambres, 2011. *Position paper: Response to the Commission consultation on the modernisation of EU public procurement policy towards a more efficient European procurement market*. Available at: http://www.eurochambres.be/custom/PP_public_procurement_2011_V1_0-2011-00360-01.pdf

Expected impacts of the amendments

Amendment 203 obliging tenderers to supply any share of the contract they intend to subcontract will put **a very small additional burden** on tenderers in countries where this is not yet mandatory; but it is **useful for policy monitoring purposes** and may even have a **small positive impact on SMEs** in the relevant countries as contracting authorities can take into account in their awarding decision the significance of subcontracting (often going to local SMEs).

The stipulation that contracting authorities can ask tenderers to indicate the value of the contract they wish to subcontract was left in the Commission's proposal – as well as in the current Directive in force (Directive 2004/18/EC, Article 25) – to the discretion of the transposing Member State. IMCO's amendment makes this mandatory. The provision will however only affect a minority of European tenderers as it is already an obligation under national law in most Member States (e.g. Austria, Finland, Ireland, Latvia, United Kingdom).

The administrative burden imposed on tenders will be minimal, as any preparation for a public tender involves a careful consideration of which tasks (and in about what value) would be subcontracted. It must be emphasised that the data to be provided is and shall be purely indicative – the contractor may find himself in a position (for capacity or any other reason) that it will need to make changes to the subcontracting arrangements, and – if necessary - ask from the contracting authority for permission to subcontract tasks that were not foreseen to be subcontracted, or to perform tasks that were initially planned to be subcontracted.

If introduced, national authorities and the EU would have a better information basis to monitor public procurement policy development and the impact of the Directives. Furthermore, SMEs may benefit from this obligation, as contracting authorities would be in a better position to assess – in case they want to consider this aspect of the purchase - which tender is likely to have a larger impact on the local economy by involving more subcontractors - which may often be, depending on the subject matter of the contract, local SMEs. Contracting authorities that want to take into account environmental (lowering emissions by cutting long-haul transport of materials) or social aspects (working with the local unemployed etc.) in their awarding decision will have more information at their disposal, if the IMCO amendment is to be adopted.

Amendment 204 obliges the tenderer to supply – upon being selected - the name, contact details and legal representatives of all subcontractors along the full subcontracting chain, and to keep this information up-to-date during the delivery of the contract. The main rationale for this obligation seems to be to supply contracting authorities with the necessary information to follow through the mandatory "chain liability" relationships of subcontractors, as provided for under **Amendment 205**. These interlinked amendments (and in combination with rules on excluding "abnormally low tenders") would provide a **strong protection to local SMEs against the unfair competition of companies (usually from abroad)** which deliberately circumvent applicable environmental, social and labour law. However, **concerns exist about its feasibility in all Member States**. The

amendments would also **impose a significant administrative burden on contractors** and **some administrative burden on contracting authorities**.

Subcontractors – usually from abroad – not respecting environmental, social and labour law applicable in the country of performing the contract (including issues such as handling of hazardous waste, legal minimum wages or wage agreements, employment conditions, work safety) is a well-known and often condemned phenomenon in many Member States, especially in the construction sector. This non-compliance may occur in public procurement as well as under other types of contracts. Furthermore, the general contractor (or the subcontractor contracting these sub-subcontractors) is normally well aware of the non-compliance, this being the key factor for him to offer a more competitive price to the client. Back-of-the-envelope calculations of competitors show in many cases that it would be impossible to carry out the contract with statutory minimum wages, the general contractor has therefore apparently counted on breaching applicable labour law along the supply chain. As such, the proposed provision is closely linked to Article 69 about "abnormally low tenders", Article 54 about the awarding of contracts and Article 55 on exclusion grounds (cf. Amendments 167 170 197, 199). It is also mentioned in the Recitals.

It is a pressing question whether liability may be extended above intermediate subcontractors that may – and do – easily disappear through liquidation. The legal approach taken to address subcontracting liability issues differs among Member States. Two main types of liability exist[38]:

- "joint and several liability", which only applies to one level of subcontracting relationship – i.e. only the direct contractor can be held liable to pay in addition or in place of his subcontractor (a one-level system exists e.g. in France – according to analysis in a report prepared in 2008 for Eurofund[39]); and
- "chain liability", where the join and several liability explained above may extend over the whole subcontracting chain. Variations of chain liability can be found e.g. in Germany, Italy, the Netherlands and Spain.

A precedent to introduce chain liability in EU legislation has already been made in 2009. Article 8 of the Directive 2009/52/EC on sanctions and measures against employers of illegally staying third-country nationals not only stipulates that the contractor shall be held liable - in addition or in place of their subcontractor employing illegally staying third-country nationals – to pay the resulting financial sanctions and back payments (joint and several liability). [40] It also sets out that the main contractor and all intermediate subcontractors may be held liable if they had known about this violation of law (chain liability). Contactors that have undertaken due diligence obligations as defined under

[38] For further details see Jorens, Peters, Houwerzijl (2012) *Study on the protection of workers' rights in subcontracting processes in the European Union*. Available at: http://ec.europa.eu/social/BlobServlet?docId=7921&langId=en

[39] Houwerzijl, Mijke; Peters, Saskia (2008) *Liability in subcontracting processes in the European construction sector*. Available at: http://www.eurofound.europa.eu/publications/htmlfiles/ef0894.htm

[40] Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:168:0024:0032:EN:PDF

national law are exempt from liability. However, as in IMCO's proposal, Article 8 allows Member States to apply stricter liability rules.

In summary, IMCO would like to apply the "chain liability" principle already introduced into EU law to public procurement as an obligatory tool. However, some Member States have taken a different (one-level) approach to liability in these cases and it seems problematic to impose a mandatory new legal concept upon them. Following the phrasing in of Directive 2009/52/EC however, which only allows but does not make mandatory the application of the "chain liability" principle would be beneficial for local SMEs, as it would reduce the likelihood that their direct competitors or general contractors base their business model on engaging subcontractors who do not comply with national law.

If a contracting authority takes advantage of the "chain liability" principle it would inevitably need information on names, contact details and legal representatives of all subcontractors. It is however advised that asking for this information should not be mandatory for contracting authorities. The Directive shall merely give the possibility for them to do so (using the phrase 'may') if the need arises.

SME views

SME organisations interviewed confirm that environmental and social 'dumping' are a key problem in public procurement, especially in the construction sector. They are however focusing on strengthening the Directive in terms of the exclusion of "abnormally low tenders" and not on introducing mandatory "chain liability" approaches - recognising difficulties in some Member States to extend liability in case of non-compliance of subcontractors with national law to actors other than the direct contractor with whom these subcontractors are in contractual relationship with.

Articles 83-87 & Recitals 43a, 49-51- Governance

(Articles 92-96 in the Utilities Directive)

Background

The section on governance covers five Articles and all of them have been edited by IMCO, of which two amendments have an SME relevance.

Article 83(1b) concerns a report that Member States will have to submit to the Commission on SMEs' access to public contracts. The original Commission proposal (Article 84.2) foresees a relevant section to be included in an annual report, containing an overview of success rates of SMEs in public procurement, and where the percentage is lower than 50% in terms of value of contracts awarded to SMEs, an analysis of the reasons. IMCO proposes this report to be prepared every two years, and to also indicate initiatives in place to increase the success rate (while not explicitly asking for an analysis of the reasons). Furthermore, IMCO proposes that the Commission shall regularly issue a report on the implementation and best practices of such policies on the basis of the data received **[Am. 223]**. The need for monitoring structural problems and policies is also mentioned in Recital 49, including a short reference to a necessary institutional

framework for monitoring procurement outcomes which was originally elaborated under Recital 50, which IMCO proposes to delete **[Am. 47-48]**.

In Article 87, IMCO drops the requirement for Member States to provide assistance to SMEs to facilitate correct understanding of the Directive **[Am. 239]**. IMCO furthermore proposes to drop the obligation to Member States to make available administrative assistance to economic operators intending to participate in cross-border procurement covering (as a minimum, relevant administrative requirements) and to ensure that economic operators have easy access to information on tax, environmental protection, social and labour law obligations in force **[Am. 240]**. On the other hand, the new Recital 43a requests the Commission to assist Member States in providing training and guidance on competitive dialogue to SMEs **[Am. 44]**.

Expected impacts of the amendment

As for Amendment 223, **reducing the frequency of the mandatory reporting from annual to biannual is a sensible proposal from an SME perspective**. Data on SMEs' access to public procurement may fluctuate from year to year due to outliers (very large contracts won by SMEs, probably consortia led by SMEs), possibly leading to wrong conclusions; and the underlying problems do not change on an annual basis. Requiring Member States to also include in the reports an account of the initiatives undertaken to mitigate barriers if SMEs' share in winning public contracts is under 50% in terms of value is likely to **benefit SMEs** as it will require Member States to commit themselves towards such initiatives and be held accountable**;** it will also make – via the Commission's synthesis reporting - the commitments comparable across Member States. The requirement will obviously impose an **additional administrative burden** on authorities, although not significant above what follows from the Commission's proposal.

To date, reliable data on SMEs' access to public contracts (above thresholds, subject to the EU Directives) is available only from a few Member States as most of them do not collect such information. Member States that collect and publish statistical data on SME participation in their public procurement procedures include:

- Hungary: in the annual reports of the public procurement authority (http://www.kozbeszerzes.hu)
- Finland: only for the central purchasing body Hansel Ltd. in its annual report (http://www.hansel.fi/www/files/vuosikertomukset/vuosikertomus2011wwwpdf)
- France: via the Economic Observatory for Public Procurement in France, (http://www.economie.gouv.fr/daj/lobservatoire-economique-lachat-public)
- Lithuania: data is collected but not part of a regular reporting system
- Netherlands: no data collection system but regular studies commission on sample-based estimations (awarded to EIM)
- Slovenia: data is collected but not part of a regular reporting system
- United Kingdom: for central government bodies only (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/120649/Direct___indirect_spend_SMEs.pdf)

Data includes not only above- but also below-threshold procurement (notably public contracts above the national but below the EU-thresholds). The data may be broken down by SME size category, and aggregated figures may be also broken down by various dimensions, such as above or below-threshold procurement, the procedure chosen, and type of contracting authority. For the rest of the Member States, only sample-based estimates exist – prepared on the basis of contract award notices published on TED. The latest data refers to the period between 2006 and 2008.

It would be very useful for the SME community and for public policy actors as well if the information base could be strengthened – following the provisions in the original legislative proposal made by the Commission. However, this would require considerable effort from Member States not yet equipped with collecting data, which they might not be willing to make.

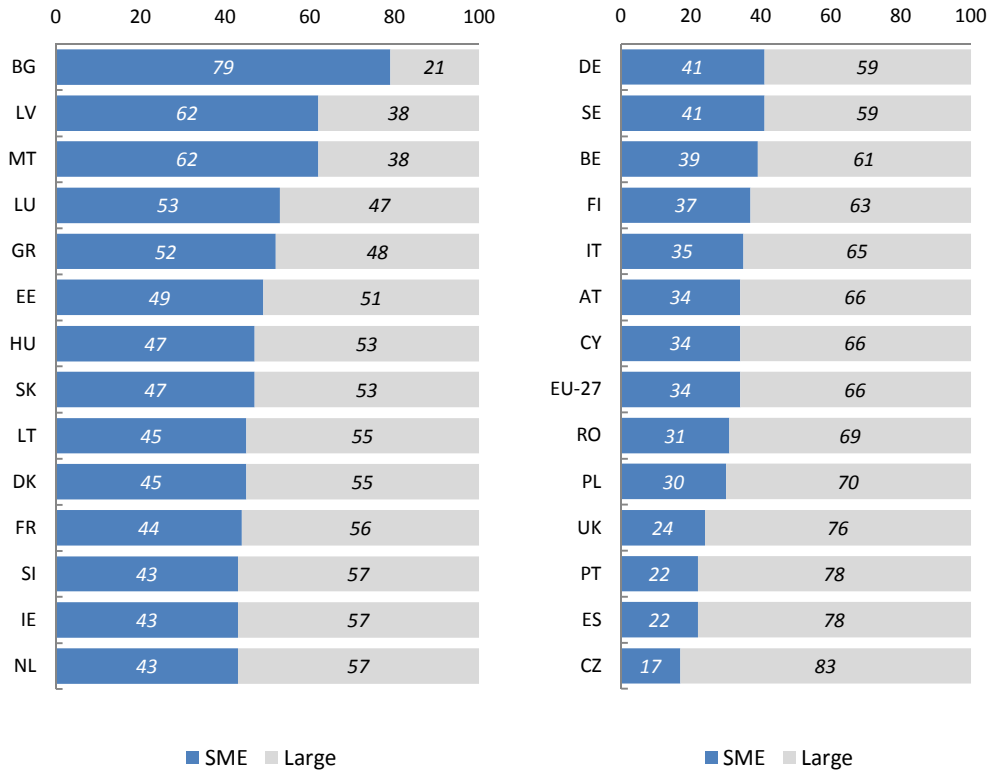
In case the Commission's proposal is adopted, considerable work will need to be undertaken by Member State authorities and guidance from the Commission will be needed to clarify exactly what and by what method should be measured and reported. It is assumed that the information will be collected at the time of awarding the contract (in parallel with filling in the contract award notices to be published in the EU's Official Journal). Key issues in this regard are:

- scope: it is assumed that the provision should cover all above-threshold procurement, as these are the contracts over which the powers of the EU extend.
- method: data collection currently is mainly done through self-declaration: asking from tenderers or from winners, perhaps from consortia partners as well, whether they are SMEs or not. It is also possible to link information on the contractors to existing public company databases, but this approach is likely to be prone to error.
- contract values: contract values that will be collected will only be the bid price. The actual price paid may change during delivery. Also, the price offered is only a unit price, with the total value depending on the quantities ordered. Finally, framework agreements only indicate a maximum budget which may or may not be fully used.
- multiple or cascading framework agreements: SMEs may be part of several shortlisted contractors on a framework agreement, and information on what proportion of the specific contracts they will secure is not available at the time of awarding the contract.
- robustness of data: the share of SMEs in public procurement fluctuates from year to year due to outliers, i.e. very large contracts won by small companies (especially in smaller Member States: 10 percentage points are no exceptions). This may lead to premature conclusions seeing a change in the data where there is only randomness.

IMCO's recommendation to report on initiatives undertaken to facilitate SME access is, in comparison with the excessive workload stemming from collecting and analysing data, relatively benign. This will however affect most Member States as very few of them reach the 50% threshold. The estimated data given in the figure overleaf show that only in very few Member States can SMEs secure 50% of the combined value of public procurement above the EU thresholds.

The impact of such a report would be positive on SMEs. National authorities would be committed to undertake a set of actions facilitating SME access (e.g. those recommended in the European Code of Best Practices), and SME advocates would be able to hold politicians accountable as well as to compare initiatives implemented across countries.

Figure 8 - Estimated share of SMEs in the total value of above-threshold contracts awarded, by Member State (average 2006-2008)



Source: GHK (2010) SMEs' access to public procurement markets in the EU

Amendments 239-240, by dropping businesses from among the actors to which Member States have to provide assistance, are **slightly detrimental for SMEs**. However, Amendment 44, asking the Commission to assist Member States to provide training and guidance on competitive dialogue to SMEs, providing examples of its application and value is **helpful from the SME perspective**, as this relatively new and not often used procedure is less understood by small companies.

It may be argued that the original proposal has put an excessive burden on authorities. Article 87 requires them to support contracting authorities on a case-by-case basis, in carrying out their individual purchases. This is evidently a very considerable burden. It is however not clear what the exact information obligation towards businesses would be. A case-by-case approach is not mentioned and it can be assumed that the Directive only refers to ready-made guidance including web portals containing relevant legislation, guides, templates and additional links (the Article mentions "electronic means"); and to

the work of business assistance networks (such as members of the Enterprise Europe Network). Such material and activities already exist in all Member States, omitting the obligation from the Directive would not influence this. Deleting the obligation may however generally weaken the motivation of individual authorities to do everything in their power to improve SMEs' access.

As for competitive dialogue, the Commission's assistance to training and guidance to be provided by Member States to SMEs is positive, as spreading lessons learned and good practice may help small enterprises to understand this rather complex and demanding procedure – the use of which is normally seen as a potential barrier to SMEs in accessing public contracts. Competitive dialogue has to date a very limited take-up (500-600 above-threshold tenders are concerned in the period 2009-2012 on the basis of contract award notices published on TED, out of ca. 150,000 tenders in a given year), there are however policy recommendations to use it more often to spur innovation and an increased level of take-up is expected in the medium term.

SME views

SME organisations interviewed were supportive of official reporting on initiatives facilitating SMEs' access to public procurement; and were not concerned about the exclusion of businesses from assistance under Article 87, given the many information tools already existing on the ground.

Annex

Text of the EP amendments assessed in detail for possible impacts on SMEs, based on the IMCO report of 11 January 2013 on the proposal for a directive of the European Parliament and of the Council on public procurement [41]

Amendment 30

Recital 30

(30) ***Public procurement should be adapted to the needs of small and medium-sized enterprises (SMEs). Contracting authorities should make use of the Code of Best Practices set out in the Commission Staff Working Document of 25 June 2008 entitled 'European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts'[42], providing guidance on how they may apply the public procurement framework in a way that facilitates SME participation.*** In order to foster the involvement of ~~small and medium-sized enterprises (~~SMEs~~)~~ in the public procurement market, ***and to enhance competition,*** contracting authorities should be encouraged ~~to divide~~ ***in particular to give consideration to dividing*** contracts into lots~~, and be obliged to state the reasons for not doing so~~ ***especially for products that require quality for welfare, such as food for passive consumers in hospitals, schools, care for children and other people***. Where contracts are divided into lots, contracting authorities may, for instance in order to preserve competition or to ensure security of supply, limit the number of lots for which an economic operator may tender; they may also limit the number of lots that may be awarded to any one tenderer. **[Am. 30]**

Amendment 31

Recital 32

(32) Many economic operators, and not least SMEs, find that a major obstacle to their participation in public procurement consists in administrative burdens deriving from the need to produce a substantial number of certificates or other documents related to exclusion and selection criteria. Limiting such requirements, for example through self-declarations, can result in considerable simplification for the benefit of both contracting authorities and economic operators. The tenderer to which it has been decided to award the contract should, however, be required to provide the relevant evidence and contracting authorities should not conclude contracts with tenderers unable to do so. Further simplification can be achieved through standardised documents such as the European Procurement Passport, which should be recognized by all contracting authorities and widely promoted among economic operators, in

[41] See footnote 1 for full reference
[42] *SEC(2008)2193*

particular SMEs, for whom they can substantially lessen the administrative burden. ***In addition, it should be possible for groups or consortia of economic operators, particularly of SMEs, to submit tenders or to put themselves forward together as candidates.*** **[Am. 31]**

Amendment 44

Recital 43a

(43a) The Commission should assist Member States to provide training and guidance on competitive dialogue to SMEs, providing examples of its application and value, in order to encourage uptake. **[Am. 44]**

Amendment 46

Recital 48a
Late payment

(48a) Contracting authorities should respect time-limits for payment as provided for in Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payments in commercial transactions[43]. **[Am. 46]**

Amendment 47

Recital 49

(49) The evaluation has shown that ~~Member States do not consistently and systematically monitor the implementation and functioning~~ *there is still considerable room for improvement in the application* of *the Union* public procurement rules. ~~This has a negative impact on the correct implementation of provisions stemming from these directives, which is a major source of cost and uncertainty. Several Member States have appointed a national central body dealing with public procurement issues, but the tasks entrusted to such bodies vary considerably across Member States. Clearer, more consistent and authoritative monitoring and control mechanisms would increase knowledge of the functioning~~ With a view to ensuring a more efficient and consistent application of the rules, it is on the one hand essential to get a good overview on possible structural problems and general patterns in national procurement policies, in order to address possible problems in a more targeted way. Such an overview should be gained through appropriate monitoring, the results of which should be regularly published, in order to allow for an informed debate on possible improvements of procurement rules~~, improve legal certainty for businesses and~~ and practice. On the other hand, better guidance and assistance to contracting authorities~~,~~ and economic operators could also greatly contribute to ~~establishing~~

[43] *OJ L 148, 23.2.2011, p. 1.*

~~a level playing field. Such mechanisms could serve as tools for the detection and early resolution of problems, especially with regard to projects cofunded by the Union, and for the identification of structural deficiencies. There is in particular a strong need to coordinate these mechanisms~~ enhancing the efficiency of public procurement, through better knowledge, increased legal certainty and professionalisation of procurement practices. Such guidance should be made available to contracting authorities and economic operators wherever necessary, to ensure ~~consistent~~ correct application~~, control and monitoring of public procurement policy, as well as systematic assessment of the outcomes of procurement policy across the Union~~ of the rules. For that purpose, Member States should ensure that competent authorities or structures are in charge of monitoring, implementation and control of public procurement. **[Am. 47]**

Amendment 48

Recital 50

(50) Member States should designate a single national authority in charge of monitoring, implementation and control of public procurement. Such a central body should have first-hand and timely information, particularly in relation to different problems affecting the implementation of public procurement law. It should be able to provide immediate feedback on the functioning of the policy and the potential weaknesses in national legislation and practice and contribute to the quick identification of solutions. In view of efficiently fighting corruption and fraud, this central body and the general public should also have the possibility to inspect the texts of concluded contracts. High-value contracts should hence be transmitted to the oversight body with a possibility of interested persons to have access to these documents, to the extent that legitimate public or private interests are not jeopardized. **[Am. 48]**

Amendment 91

Article 16
Economic operators

2. Groups of economic operators may submit tenders or put themselves forward as candidates. Contracting authorities shall not establish specific conditions for participation of such groups in procurement procedures which are not imposed on individual candidates. In order to submit a tender or a request to participate, those groups shall not be required by the contracting authorities to assume a specific legal form.

Contracting authorities shall give the possibility to a temporary association of economic operators to fulfil all technical, legal and financial requirements as a single entity, summing up the individual characteristics of the components of the group. **[Am. 91]**

Contracting authorities may establish specific conditions for the performance of the contract by a group, provided that those conditions are justified by objective reasons and proportionate. Those conditions may require a group to assume a

specific legal form once it has been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract.

Amendment 131[44]

Article 30
Use of the negotiated procedure without prior publication

1. Member States may provide that contracting authorities may award public contracts by a negotiated procedure without prior publication only in the cases laid down in paragraphs (2) to (5).
2. The negotiated procedure without prior publication may be ~~foreseen~~ ***used*** for public works contracts, public supply contracts and public service contracts in any of the following cases: **[Am. 128]**
   (a) where no tenders or no suitable tenders or no requests to participate have been submitted in response to an open procedure or a restricted procedure ***or a negotiated procedure with prior publication***, provided that the initial conditions of the contract are not substantially altered and that a report is sent to the Commission or the ~~national oversight body designated according to Article 84~~ ***Member States' competent authorities*** where they so request.
   (b) where the aim of the procurement is the creation or obtention of a work of art ***or an artistic performance***; **[Am. 129]**
   (c) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons:
      (i) the absence of competition for technical reasons;
      (ii) the protection of patents, copyrights or other intellectual property rights;
      (iii) the protection of other exclusive rights***, including ownership of a property site***. **[Am. 130]**

   This exception only applies when ~~no reasonable alternative or substitute exists and~~ the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement; **[Am. 131]**

Amendment 135

Article 31
Framework agreements

1. Contracting authorities may conclude framework agreements, provided that they apply the procedures provided for in this Directive.
   A framework agreement means an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.

[44] The context of the amendment has been reproduced here for better understanding.

The term of a framework agreement shall not exceed ~~four~~ ***five*** years, save in ~~exceptional~~ ***the following*** cases ~~duly justified, in particular by the subject of the framework agreement~~.:

(a) the subject of the framework agreement concerns works or services that will take longer than five years to carry out; or

(b) economic operators need to make investments for which the amortisation period is longer than five years or which are linked to maintenance, the recruitment of suitable staff to perform the contract or the training of staff to perform the contract.

The term of a framework agreement shall be calculated on the basis of the life cycle of the work, service or supply. **[Am. 135]**

Amendment 162

Article 44
Division of contracts into lots

1. ***To facilitate greater access to public procurement by small and medium-sized enterprises,*** public contracts may be subdivided into ~~homogenous or heterogeneous~~ lots. ~~For contracts with a value equal to or greater than the thresholds provided for in Article 4 but not less than EUR 500 000, determined in accordance with Article 5, where the contracting authority does not deem it appropriate to split into lots, it shall provide in the contract notice or in the invitation to confirm interest a specific explanation of its reasons.~~ **[Am. 162]**
Contracting authorities shall indicate, in the contract notice or in the invitation to confirm interest, whether tenders are limited to one or more lots only.

Amendment 163

Article 44
Division of contracts into lots

~~3. Where more than one lot may be awarded to the same tenderer, contracting authorities may provide that they will either award a contract per lot or one or more contracts covering several or all lots.~~
~~Contracting authorities shall specify in the procurement documents whether they reserve the right to make such a choice and, if so, which lots may be grouped together under one contract.~~
~~Contracting authorities shall first determine the tenders fulfilling best the award criteria set out pursuant to Article 66 for each individual lot. They may award a contract for more than one lot to a tenderer that is not ranked first in respect of all individual lots covered by this contract, provided that the award criteria set out pursuant to Article 66 are better fulfilled with regard to all the lots covered by that contract. Contracting authorities shall specify the methods they intend to use for such comparison in the procurement documents. Such methods shall be transparent, objective and non-discriminatory.~~ **[Am. 163]**

Amendment 177

Article 56
Selection criteria

3. With regard to sufficient economic and financial standing, contracting authorities may require economic operators to have adequate financial and economic capacity. For that purpose, they may require that economic operators have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract and an adequate professional risk indemnity insurance.
The minimum yearly turnover shall not exceed ~~thr~~e ***two*** times the estimated contract value, except in duly justified circumstances relating to the special risks attached to the nature of the works, services or supplies. The contracting authority shall indicate such exceptional circumstances in the procurement documents. **[Am. 177]**

Amendment 180

Article 59
European Procurement Passport

1. National authorities shall issue, at the request of an economic operator established in the relevant Member State and fulfilling the necessary conditions, a European Procurement Passport. The European Procurement Passport shall contain the particulars set out in Annex XIII and shall be drawn up on the basis of a standard form.
The Commission shall be empowered to adopt delegated acts in accordance with Article 89 in order to modify Annex XIII due to technical progress or for administrative reasons. It shall also establish***, by means of implementing acts,*** the standard form for the European Procurement Passport. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 91. **[Am. 180]**

Amendment 181

Article 59
European Procurement Passport

3. The authority issuing the passport shall seek the relevant information directly from the competent authorities, except where prohibited by national rules on the protection of personal data ***and except where the information can only be obtained from the economic operator itself. In those cases, the economic operator shall deliver the information to the authority to obtain the European Procurement Passport.*** **[Am. 181]**

Amendment 182

Article 59
European Procurement Passport

4. The European Procurement Passport shall be recognised by all contracting authorities as proof of fulfilment of the conditions for participation covered by it and shall not be questioned without justification. Such justification may be related to ***the nature of the individual case or*** the fact that the passport was issued more than ~~six months~~ ***one year*** earlier. ***In that case the contracting authority may request more recent or other- types of certificates concerning topics listed in Annex XIII.***
The economic operator shall confirm by signature of the European Procurement Passport that the information contained therein is correct. **[Am. 182]**

Amendment 185

Article 66
Contract award criteria

1. Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the ~~criteria~~ ***criterion*** on which contracting authorities shall base the award of public contracts shall be ~~one of the following:~~ ***the most economically advantageous tender.***
~~(a) the most economically advantageous tender;~~
~~(b) the lowest cost.~~
~~Costs may be assessed, on the choice of the contracting authority, on the basis of the price only or using a cost-effectiveness approach, such as a life-cycle costing approach, under the conditions set out in Article 67.~~ **[Am. 185]**

Amendment 203

Article 71
Subcontracting

1. In the procurement documents, the contracting authority ~~may ask or may be required by a Member State to~~ ***shall*** ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties ~~and any proposed subcontractors~~. **[Am. 203]**

Amendment 204

Article 71
Subcontracting

1a. After the tenderer has been selected, it shall indicate to the contracting authorities the name, contact details and legal representatives of the

subcontractors and any changes related to that information during the course of the contract. The information shall be provided to the tenderer by each subcontractor in the subcontracting chain through the subcontractor's direct contractor. Each subcontractor shall keep the information up to date during the course of the contract. **[Am. 204]**

Amendment 205

Article 71
Subcontracting

3a. ***Member States shall ensure that subcontractors respect all mandatory legal, regulatory and administrative provisions in force in the Member States of contract performance, including the obligations referred to in Article 15(2). To this end, Member States may provide for a system of liability throughout the subcontracting chain so that the direct contractor of a subcontractor is liable in the event that the subcontractor fails to comply with one of those provisions or is insolvent. When a direct contractor is insolvent, such system should provide that the next solvent direct contractor up the subcontracting chain, including the main contractor, is liable.***

3b. ***Member States may provide for more stringent liability rules under national law.*** **[Am. 205]**

Amendment 223

Article 83
Implementation and enforcement ***by competent authorities and structures***

1e. ***Contracting authorities shall, at least for the duration of the contract, keep copies of all concluded contracts with a value equal to or greater than:***

(a) 1 000 000 EUR in the case of public supply contracts or public service contracts;

(b) 10 000 000 EUR in the case of public works contracts. **[Am. 223]**

Amendment 239

Article 87
Assistance to contracting authorities ~~and businesses~~ **[Am. 237]**

~~2.~~ ~~With a view to improving access to public procurement for economic operators, in particular SMEs, and in order to facilitate correct understanding of the provisions of this Directive, Member States shall ensure that appropriate assistance can be obtained, including by electronic means or using existing networks dedicated to business assistance.~~ **[Am. 239]**

Amendment 240

Article 87
Assistance to contracting authorities ~~and businesses~~ **[Am. 237]**

~~3. Specific administrative assistance shall be available to economic operators intending to participate in a procurement procedure in another Member State. Such assistance shall at least cover administrative requirements in the Member State concerned, as well as possible obligations related to electronic procurement.~~

~~Member States shall ensure that interested economic operators have easy access to appropriate information on the obligations relating to taxes, environmental protection, and to social and labour law obligations, which are in force in the Member State, in the region or locality where the works are to be carried out or the services are to be provided and which will be applicable to the works carried out on site or to the services provided during the performance of the contract.~~ **[Am. 240]**

Amendment 246

ANNEX XIII
CONTENT OF EUROPEAN PROCUREMENT PASSPORT

The European Procurement Passport contains the following particulars:

(a) Identification of the economic operator***, company registration number, name, address, bank***; **[Am. 246]**

Amendment 247

ANNEX XIII
CONTENT OF EUROPEAN PROCUREMENT PASSPORT

The European Procurement Passport contains the following particulars:

(aa) Description of the economic operator, in particular year of establishment, corporate form, owner(s) of the economic operator, board members, industry code, short description of the main services sold by the economic operator; **[Am. 247]**

Amendment 248

ANNEX XIII
CONTENT OF EUROPEAN PROCUREMENT PASSPORT

The European Procurement Passport contains the following particulars:

(ca) Certification that the economic operator has fulfilled its obligations in relation to the payment of taxes or social security contributions as referred to in Article 55(2); **[Am. 248]**

Amendment 249

ANNEX XIII
CONTENT OF EUROPEAN PROCUREMENT PASSPORT

The European Procurement Passport contains the following particulars:

(ca) ***A declaration on honour as referred to in Article 22;*** **[Am. 249]**

Amendment 250

ANNEX XIII
CONTENT OF EUROPEAN PROCUREMENT PASSPORT

The European Procurement Passport contains the following particulars:

(da) ***Key economic indicators of the economic operator for the last three accounting years, or, in the case of economic operators which have been in business for less than three years, since the date of commencement of business: gross sales, EBIT and solvency ratio;*** **[Am. 250]**

Amendment 251

ANNEX XIII
CONTENT OF EUROPEAN PROCUREMENT PASSPORT

The European Procurement Passport contains the following particulars:

(db) ***Key organisational indicators of the economic operator, or in the case of the economic operators which have been in business for less than three years, since the date of commencement of business: average number of employees during the last three accounting years and number of employees by the end of the last accounting year;*** **[Am. 251]**

Amendment 252

ANNEX XIII
CONTENT OF EUROPEAN PROCUREMENT PASSPORT

The European Procurement Passport contains the following particulars:

(f) Indication of the period of validity of the Passport, which shall be not less than ~~6~~ ***twelve*** months. **[Am. 252]**

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