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# The division of public contracts into lots under EU Directive 2014/24/EU: minimum harmonisation and impact on SMEs in public procurement?

Martin Trybus\*

*Small and Medium Sized Enterprises (SME) are at the heart of the economies of all Member States. However, many deem their share of public contracts insufficient. This article provides a detailed discussion of the most important 'innovation' of the EU Public Sector Directive 2014/24/EU directed at increasing the participation of SMEs in public procurement: the regime on the division of larger contracts into smaller lots. The analysis considers economic theory and a selection of national laws transposing the Directive. It is argued that, due to a low level of harmonisation, no substantial change occurred compared to the previous Directive. It is thus unlikely that SME participation in public procurement will increase in many Member States through this regime on the division into lots.*

## 1. Introduction

Small and Medium Sized Enterprises (SME)<sup>1</sup> are at the heart of the economies of all EU Member States. In 2011 over 20 million SMEs were active in the EU, which equalled 99.8% of all enterprises, contributed more than half to the Union's GDP,<sup>2</sup> and created considerably more employment than larger companies do. However, many consider their share of the public procurement market too small. Not least the consultation conducted before the 2011 Draft Proposal which led to Public Sector Directive 2014/24/EU<sup>3</sup> had identified that, according to many stakeholders, better

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<sup>1</sup> There is no universally accepted definition of an SME in the EU. Therefore, the precise understanding of the concept varies in the Member States. However, for its purposes Article 83(3) Public Sector Directive 2014/24/EU adopted Commission Recommendation 2003/361/EC, which defines SMEs as enterprises with up to 250 employees and an annual turnover of up to €50 million and/or an annual balance sheet total not exceeding €43 million (Article 2(1) of Title I of the Annex to Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises [2003] OJ L124/36). A further differentiation is provided with definitions of micro- (Ibid., Article 2(3): “[...] an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million.”), small, (Article 2(2) Recommendation 2003/361/EC: “[...] an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million.”), and medium sized enterprises (the limit of Article 2(1) Recommendation 2003/361/EC). These definitions are also used in the UK, see the Lord Young report of May 2012: *Make Business Your Business: Supporting the Start-up and Development of Small Business* (First Part of the Report on Small Firms, at 2.).

<sup>2</sup> G. Wessel Thomassen et alera, *SME's access to public procurement markets and aggregation of demand in the EU*, PwC, ICF-GHK and ECORYS, Study commissioned by the European Commission, Directorate General for Internal Market and Services, Brussels, February 2014, at 5.

<sup>3</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65. For overviews of this Directive see: F. Lichère, R. Caranta and S. Treumer, *Modernising Public Procurement: The New Directive* (Djøf: Copenhagen, 2014). Directive 2014/24/EU is part of the 2014 procurement reform package

access of SMEs to public contracts was one of the issues of concern.<sup>4</sup> This should not only be achieved through the targeting of administrative burdens and costs of participation but also through changes to the EU legislative framework, an opinion supported by most stakeholders. The promotion of SMEs was then highlighted as one of the five main points of the 2014 reform of the EU procurement Directives.<sup>5</sup> Recital 124 of the final Directive 2014/24/EU emphasises the importance of SMEs for the Internal Market and the necessity to address this in the instrument.<sup>6</sup> More specifically, the Directive purportedly contains four main ‘innovations’ directed at increasing their participation in public procurement: the division of contracts into lots, the European Single Procurement Document, the limitation of requirements for participation, and direct payments to subcontractors.<sup>7</sup>

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which also includes two further Directives: Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L94/243 and Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L94/1. For an overview of the reform: R. Caranta, “The changes to the public contract directives and the story they tell about how EU law works” (2015) 52 CML Rev. 391–459; Issues 3 and 4 of the (2014) 23 PPL Rev.; and G. Skovgaard Ølykke and A. Sánchez Graells (eds.), *Reformation or Deformation of the EU Public Procurement Rules in 2014* (Edward Elgar: Cheltenham, 2017).

<sup>4</sup> European Commission “Working Paper, Green Paper on the Modernisation of EU Public Procurement Policy: *Towards a More Efficient European Procurement Market*, Synthesis of Replies [http://ec.europa.eu/internal\\_market/consultations/docs/2011/public\\_procurement/synthesis\\_document\\_en.pdf](http://ec.europa.eu/internal_market/consultations/docs/2011/public_procurement/synthesis_document_en.pdf) [accessed 9 February 2018], at 14. The division of contracts into lots and caps on turnover was more controversial. Public authorities were generally sceptical whereas the private sector was divided over these issues.

<sup>5</sup> See the 11 February 2014 Council Press Release and European Parliament Press Release.

<sup>6</sup> See also Recital 87 Utilities Directive 2014/25/EU.

<sup>7</sup> Marta Andrecka and the author recently discussed these four regimes in “Favouring Small and Medium Sized Enterprises with Directive 2014/24/EU?” in (2017) 12 EPPPL 217-232 <https://epppl.lexxion.eu/article/EPPPL/2017/3/6> [accessed 9 February 2018]. The new Directive 2014/24/EU also introduced additional measures for SMEs in less obvious places. These refer to large scale dynamic purchasing systems (Recital 66), time limits (Recital 80), design contests (Recital 120) and thresholds (Recital 134). Moreover, SME are mentioned for example in Recital 59 where the Commission calls for the monitoring of the aggregation of demand as a practice that has the potential to disadvantage SMEs. Finally, Saussier has argued that the new Directive moving away from price as an award criterion in favour of “the most economically advantageous tender” will have a positive effect on SME participation. See: S. Saussier, “L’accès PME aux marchés publics: une analyse économique” (2009) <http://www.webssa.net/files/MARCHEPUB-VFINALE.pdf> [accessed 9 February 2018], at 7. According to Susie Smith, who discussed this matter with the author in late September 2016, the new rules on large scale dynamic purchasing systems appear to prove a particularly effective regime to increase SME participation in the UK. Promoting SMEs through public procurement is a long-standing policy of the EU, see *inter alia*: *SMEs Participation in Public Procurement in the European Community* SEC(1992) 722; *European Commission Action Programme for SMEs* COM(1986) 445 final; *Public Procurement: Regional and Social Aspects* COM(1989) 400 final; *Promoting SME Participation in the Community* COM(1990) 166 final. The promotion of SMEs has also been high on the agenda in the UK where, more than a year before the April 2016 deadline, the UK Public Contracts Regulations 2015 transposed most of the EU measures, and, following the proposals of Lord Young, *Growing Your Business: A Report on Growing Micro Businesses*, The Second Part of the Report on Small Firms May 2013, at 19-23, additionally abolished Pre-Qualification Questionnaires for contracts below the thresholds, and established the single contract portal ‘contracts-finder’ <https://www.gov.uk/contracts-finder> [accessed 9 February 2018] to promote SME participation and success in public procurement.

To contribute to the discussion on the significance of the 2014 reform towards increasing the participation of SMEs in public procurement across the EU,<sup>8</sup> this article provides a legal analysis of the regime on the division of larger public contracts into smaller lots. Public contracts can be very complex and of substantial size and value, requiring considerable financial and staff resources and technical expertise. Thus, SMEs will often be excluded from public contracts simply because they lack the capacity to manage such a large contract in its entirety.<sup>9</sup> Moreover, other problems SMEs are facing in public procurement, such as the complexity of rules, difficulties of access to information, or award criteria are also to a large extent connected to the size of the contracts.<sup>10</sup> Therefore, there is some indication that a division of large public contracts into smaller lots<sup>11</sup> would extend the supplier and provider base beyond large

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<sup>8</sup> The literature containing this discussion comprises *inter alia* of: A. Semple, *A Practical Guide to Public Procurement* (OUP, 2015), chapter 7 and see also her blog at <http://www.procurementanalysis.eu/> [accessed 14 July 2017] entries of 20 January 2014: “Five myths of the new procurement directives”, 6 March 2014: “New procurement directives: comparing the final text to earlier versions”, 30 March 2015: “Can we have an evidence based procurement policy?”, and 26 January 2016: “Of tick boxes and time bombs”; P. Telles and A. Sánchez Graells, *Public Contracts Regulations Commentary*, <http://pcr2015.uk/regulations/regulation-46-division-of-contracts-intolots/>, <http://pcr2015.uk/regulations/regulation-59-european-single-procurement-document/>; I. Herrera Anchustegui, “Division into Lots and Demand Aggregation – Extremes Looking for the Correct Balance?” in Skovgaard Ølykke & Sánchez Graells, *supra* note 3, 125-145; F. Lichère, “L'accès PME dans la Directive 2014/24” in Y. Marique and K. Wauters (eds.), *EU Directive 2014/24 on Public Procurement: A New Turn for Competition in Public Markets?* (Larcier: Brussels, 2016) 109-120; P. Telles, “The European Single Procurement Document” (2017) 4 *Upphandlingsrättslig Tidskrift* 1; M. Trybus, “The Promotion of Small and Medium Sized Enterprises in Public Procurement: A Strategic Objective of the New Public Sector Directive?” in Lichère, Caranta and Treumer, *supra* note 3, 255-280; Trybus & Andrecka, *ibid*.

<sup>9</sup> While there is no comprehensively convincing empirical evidence, this is common ground for the relevant academic disciplines: for law see: C. Bovis, “The Regulation of Public Procurement as a Key Element of European Economic Law” (1998) 4 *ELJ* 220-242, at 223-224; for economics see: V. Grimm, R. Pacini, G. Spagnolo, and M. Zanza, “Division into lots and competition in procurement”, chapter 7 in N. Dimitri, G. Piga and G. Spagnolo (eds.), *Handbook of Procurement* (CUP, 2006), at 179-180; Saussier, *supra* note 8, at 6, 8, 9 and 10; P.-H. Morand, “SMEs and public procurement policy” (2003) 8 *Review of Economic Design* 301-318, at 303; for business studies see: R. Fee, A. Erridge and S. Hennigan, “SMEs and government purchasing in Northern Ireland” (2002) 14 *European Business Review* 326-334, at 329; K. Loader, “Supporting SMEs through government purchasing activity” (2005) 31 *Public Money and Management* 287-294 and C. Bovis, *Public Procurement and Small and Medium Sized Enterprises in the United Kingdom and the Republic of Ireland* (Certified Accountants Educational Trust: London, 1996); and for political science see: E. K. Sarter, S. Fuchs and D. Sack, *SME-friendly public procurement in Germany? Legal challenges and political strategies* (University of Bielefeld supported by the Hans Böckler Stiftung, Working Paper Series ‘Comparative Governance’, Working Paper 2, September 2014); see also the European Commission’s 2008 *European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts* SEC(2008) 2191, at 5.

<sup>10</sup> Saussier, *supra* note 7, at 9.

<sup>11</sup> The Government Procurement Agreement (GPA) of the World Trade Organisation (WTO) does not provide rules on the division into lots. Neither does the 2011 UNCITRAL Model Law on Procurement does not contain rules on the division into lots. The techniques to favour SMEs discussed in the Guide to Enactment, at 5-6 do not include the division into lots either. The author proposed the inclusion of a division into lots regime for the UNCITRAL Model Law on procurement in a paper delivered to the UNCITRAL 50<sup>th</sup> Anniversary Congress in Vienna in July 2017, see: M. Trybus, “Small and Medium Sized Enterprises and public procurement regulation: the division of public contracts into lots” in *Modernising International Trade Law to Support Innovation and Sustainable Development: Proceedings of the Congress of the United Nations Commission for International Trade Law*, Volume 4: Papers presented at the congress (United Nations: Vienna, 2017), 371.

companies to SMEs<sup>12</sup> and thus at the same time increase competition,<sup>13</sup> provided, as will be discussed below, the division has no parallel negative effects on competition, especially due to collusion.

## 2. Research question and methodology

The research question discussed in this article is whether the regime on the division into lots in Directive 2014/24/EU is likely to achieve its objective of increasing the participation of SMEs in competitive procurement procedures. Due to the relative novelty of the 2014 Directive and its mostly 2016 but often later transposition, there is no sufficient empirical data on its use in practice to conclusively assess whether the division into lots regime meets this objective. Therefore, a comparative methodology is used to assess the *likely* impact. This involves most importantly a critical comparison with the situation under the old Public Sector Directive 2004/18/EC.<sup>14</sup> The assumption is that if the new regime does not differ substantially from what was available under the 2004 EU Directive, little impact towards increasing SME participation can be expected from Directive 2014/24/EU. Moreover, economic theory, some statistics, and the opinions of stakeholders are used in the analysis.

As part of the discussion on the likely impact outlined above, the article examines the regime on the division into lots as an example of minimum harmonisation.<sup>15</sup> Minimum harmonisation Directives typically establish a firm floor upon which Member States may build stricter standards. Under this approach, Member States continue to exercise considerable discretion which could lead to national legislative diversity undermining the establishment of a level playing field across the EU. SME participation might be increased in some jurisdictions but not in others. To determine whether the Directive led to such legislative diversity, a selection of national laws transposing the Directive will be discussed, namely those of France,<sup>16</sup> Germany<sup>17</sup> the United Kingdom,<sup>18</sup> the Republic of Ireland,<sup>19</sup> and Austria.<sup>20</sup>

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<sup>12</sup> L. Carpineti, G. Piga, and M. Zanza, “The Variety of Procurement Practice: Evidence from Public Procurement” in Dimitri, Piga, and Spagnolo, *supra* note 9, 14, at 23-24; C. Bovis, *EC Public Procurement Law* (Longman: London, 1997), at 117; M. Burgi, “Small and medium-sized enterprises and procurement law- European legal framework and German experiences” (2007) 15 PPL Rev. 284, at 293-294.

<sup>13</sup> Grimm, Pacini, Spagnolo, and Zanza, *supra* note 9, at 179; R. P. McAfee and J. McMillan, *Incentives in Government Contracting* (Toronto University Press, 1987), at 57-60; A. Sánchez Graells, *Public Procurement and the EU Competition Rules* (Hart: Oxford, 2<sup>nd</sup> ed. 2015), at 348-349 citing recent empirical support for this effect: M. Amaral, S. Saussier, and A. Yvrande-Billon, “Expected Number of Bidders and Winning Bids: Evidence from the London Bus Tendering Model” (2013) 47 *Journal of Transport and Economic Policy* 17-34 and also citing J. de Brux and C. Desireux, “To allot or not to Allot Public Services? An Incomplete Contract Approach” (2014) 37 *European Journal of Law and Economics* 455-476 emphasising the positive effects of competition for contracting authorities. Saussier, *supra* note 7, at 12, points out that in many sectors the response rate is so low and as a consequence competition so limited that an increase in SME participation can be expected to have tangible effects on competition and thus drive prices down.

<sup>14</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114.

<sup>15</sup> On minimum harmonization under EU law generally, see S. Weatherill, “Beyond preemption? Shared competence and constitutional change in the European Community” in D. O’Keefe and P. Twomey (eds) *Legal Issues of the Maastricht Treaty* (Chancery Law Publishing: London, 1994) and M. Dougan, ‘Minimum Harmonization and the Internal Market’ (2000) 37 CML Rev. 853, 854-856.

<sup>16</sup> In France Directive 2014/24/EU was transposed by the Ordonnance n° 2015-899 du 23 juillet 2015 consolidée par le décret n°2016-360 du 25 mars 2016 (Journal officiel du 27 mars 2016). However, at time of writing a larger procurement law reform towards a new *Code de la commande publique* is still

This selection aims to cover the largest jurisdictions of the EU and some smaller Member States which use the languages the author is most familiar with. Moreover, France and Germany are essential references as they already provided for the (compulsory) division into lots before the 2014 reform.<sup>21</sup> The article thus also adds to literature by providing the contextual and cross-disciplinary analysis of the division into lots regime of Directive 2014/24/EU in view of its likely impact and by extending the analysis to its national transposition level. It will be argued that, due to a low level of harmonisation, no substantial change occurred compared to the previous Directive. It is thus unlikely that SME participation in public procurement will increase in many Member States through this regime on the division into lots.

Before discussing the division into lots regime in Directive 2014/24/EU in sections 4 to 7, section 3 on the relevance of SMEs in the Internal Market, their share of the public contract market, how their promotion interacts with other objectives of public procurement regulation, and how the division into lots was addressed in the old Directives will facilitate the understanding of the change introduced in 2014.

### 3. Context: SMEs in the Internal Market and under the old Directives

Neither the European Commission<sup>22</sup> nor Member State governments<sup>23</sup> are satisfied with the share of SMEs in public contracts. The Commission found in 2008 that for contracts above the thresholds of the procurement Directives, the average share of

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ongoing: <https://commande-publique.info/2017/03/17/un-code-de-la-commande-publique-en-2018/> [accessed 9 February 2018].

<sup>17</sup> In Germany Directive 2014/24/EU was transposed in §§[sections]97–184 Gesetz gegen Wettbewerbsbeschränkungen (GWB) [English: Act against Restrictions of Competition] BGBl. Teil I Nr. 8 vom 23.02.2016, S. 203 bis 232 (hereinafter GWB 2016), the Vergabeverordnung (VgV) [English: Public Tender Regulation], see Verordnung zur Modernisierung des Vergaberechts (VergModVO) vom 12.04.2016 BGBl. Teil I Nr. 16 S. 624 ff. (hereinafter VgV 2016), and the Verdingungsordnung für Bauleistungen-EU (VOB/A-EU) [English: Contracting Rules for the Award of Public Works] BAnz AT 01.07.2016 B4 and BAnz AT 19.01.2016 B3.

<sup>18</sup> In the United Kingdom Directive 2014/24/EU was transposed with the UK Public Contracts Regulations 2015 S.I. 2015 No. 102 which entered in force on 26 February 2015. The United Kingdom transposed early because her “Crown Commercial Service team (formerly Cabinet Office) has delivered an excellent negotiating outcome for the UK Authorities and business will have earlier access to simpler and more flexible rules, freeing up markets and facilitating growth, in particular allowing [inter alia] better access to public procurement for SMEs, consistent with non-discrimination and a value for money approach [sic].” This statement from a slide show published at <https://www.gov.uk/transposing-eu-procurement-directives> [accessed 9 February 2018], slide 9, was confirmed by the presentation of the Crown Commercial Service’s Sally Collier at the *Public Procurement Week* in Cardiff in March 2015 and Peter Bennett at the conference *Public Procurement: Global Revolution VII* in Nottingham in June 2015.

<sup>19</sup> In the Republic of Ireland Directive 2014/24/EU was transposed with the European Union (Award of Public Authority Contracts) Regulations 2016, S.I. No. 284/2016 which entered into force on 5 May 2016.

<sup>20</sup> In Austria Directive 2014/24/EU was partly transposed with the amendment of the Bundesvergabegesetz (English: “Federal Procurement Law”) 2006 (BVergG 2006) BGBl. I Nr. 7/2016 which entered into force on 1 March 2016 (hereinafter BVergG 2016). However, transposition is not complete although parts of the SME provisions were transposed with the 2016 amendment.

<sup>21</sup> Lichère, “L’accès PME dans la Directive 2014/24”, *supra* note 8, at 110.

<sup>22</sup> This is already clear from the first mentioning of SMEs already in Recital 2 of Directive 2014/24/EC containing the main objectives of the reformed Directive: “facilitating in particular the participation of [SMEs] in public procurement.”

<sup>23</sup> For the UK: H.M. Government Consultation Document: *Making public sector procurement more accessible to SMEs* (2013). According to H.M. Government, in the UK, in 2010 only 6.5% of the central government procurement budget went to SME, see: Cabinet Office, *Making Government business more accessible to SMEs* (July 2011), at 7.

SMEs in the then EU25 was 64% by number and 42% by value, and as low as 31% in the UK.<sup>24</sup> However, the 2014 Study *SME's access to public procurement markets and aggregation of demand in the EU*<sup>25</sup> reveals a more differentiated picture. This is based on (1) the market share of micro-, small-, and medium-sized businesses,<sup>26</sup> (2) contracts below or above the thresholds of the Directives,<sup>27</sup> (3) the number of contracts or their aggregate value, (4) the type of contract: supply, service, or works, and (5) the type of contracting entity: central government, regional government, utility or other.<sup>28</sup> These 2009-11 figures suggest a 56% share of the number of contracts above the thresholds awarded to SMEs in the then EU27. By aggregate value of these contracts this would be a figure of 29% for contracts above the thresholds of the EU procurement Directives and 58-59% for contracts below these thresholds. These are the figures for SMEs winning contracts on their own or as the lead of a grouping of companies. If SMEs participate in joint bidding arrangements with larger companies or as their subcontractors, their share of contracts based on aggregate contracts value rises from 29% to 45%. This is still less than their 58% share in the economy but not dramatically less.<sup>29</sup> Overall, it can be said that SMEs already had a considerable share of the procurement markets of the then EU27, with variations depending on their size, the size of the contract, the type of the contract, the type of the contracting entity and the specific market in question. Moreover, there has never been proof of systematic discrimination against them in public procurement. The evidence for a discrepancy between their importance for the economy and their share of public contracts is “largely anecdotal”, and any figure suggesting such a gap, such as the 6.5% figure of the UK Cabinet Office,<sup>30</sup> do normally not take account of the sectors in which SMEs operate.<sup>31</sup> This raises the question whether any legislative measures to further promote their participation are warranted. Moreover, this puts the research question of this article on the impact of the 2014 division into lots regime into perspective, as the participation of SMEs cannot be increased significantly if it is already relatively high. There can be only limited impact if there is only limited room for improvement.

### **3.1 Obstacles for SMEs in public procurement**

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<sup>24</sup> 2008 *European Code of Best Practices*, *supra* note 9, at 4.

<sup>25</sup> Wessel Thomassen et al., *supra* note 2, at 24-42.

<sup>26</sup> See *supra* note 2 for these types of enterprises.

<sup>27</sup> The EU procurement Directives only apply above certain thresholds: see Article 4 Directive 2014/24/EU: €5,186,000 for works contracts, €134,000 or €207,000 for supply and service contracts and €750,000 for particular service contracts (for example for social services). These thresholds are updated by the Commission every other year. Thus, currently the thresholds are at €5,548,000 for works contracts, €144,000 or €221,000 for supply and service contracts and €750,000 for particular service contracts (for example for social services). See: Commission Delegated Regulation 2017/2365/EU of 18 December 2017 amending Directive 2014/24/EU of the European Parliament and of the Council in respect of the application thresholds for the procedures for the award of contracts [2017] OJ L337/19. More on these thresholds in section 3 below.

<sup>28</sup> Wessel Thomassen et al., *supra* note 2, at 24-42.

<sup>29</sup> Similarly, the figures for the UK (Wessel, Thomassen et al., *ibid.*, at 34-35) suggest an SME share of 55% of the number of contracts and 26% of their aggregate value for contracts above the thresholds. This means that H.M. Government might not be and has never been that far away from its 25% by value target of central government spend for SMEs (directly and through the supply chain), see: H.M. Government Consultation Document, *supra* note 23, at 8.

<sup>30</sup> H.M. Government Consultation Document, *ibid.*

<sup>31</sup> Semple, “Can we have evidence-based procurement policy?” Public Procurement Analysis, blog 30 March 2015, <http://www.procurementanalysis.eu/> [accessed 14 July 2017]. See also her book *A Practical Guide to Public Procurement*, *supra* note 8, chapter 7.

A 2013 UK Federation of Small Business survey found varied reasons for their members not *participating* in public procurement procedures. 44% perceived public contracts as not being relevant to their business, 31% were not aware of suitable opportunities, 20% found the process too time consuming or costly and 13% thought that they could not compete with other suppliers or had little chance of winning.<sup>32</sup> These findings are comparable to those of a 2005 Study on the basis of questionnaires sent to 800 SMEs in the Rhine/Main Region of Germany,<sup>33</sup> a Study into the works contracts awarded by a selection of German local authorities of the same year,<sup>34</sup> and a 2004 online survey of the Court Registrar of the Commercial Court of Paris.<sup>35</sup> The size of contracts is not directly listed as one of the main problems in these surveys and in the 2010 *Evaluation of SME Access to Public Procurement Markets in the EU*<sup>36</sup> only a relatively small number of SMEs saw the large contract size as a main problem. However, Saussier argues that this can be explained with an ‘auto-selection effect’ of SMEs responding to surveys.<sup>37</sup> SMEs do not name the size of the contract as an important problem because they do not intend to bid for large contracts anyway due to their limited capacity and concern to become over-dependent on one single contract.<sup>38</sup> The *European Code of Best Practices* and economic theory consider that one of the main problems SMEs are facing most frequently in public and utilities procurement are the high financial and staff costs for participating in large contracts and connected to this challenge the administrative burden involved in producing the required documentation to prove financial and technical capability, demanding participation requirements for public contracts such as minimum turnovers, and the late payment of bills.<sup>39</sup> Thus, most problems SMEs are facing in public procurement are to a large extent connected to contract size.<sup>40</sup> These conditions also affect large companies. However, large companies have more staff to deal with the administrative burden of public procurement, can more easily meet financial participation conditions such as a minimum turnover requirement due to their size, and can wait longer for payments due to their larger resources and better access to private finance.

Moreover, there is some evidence that SMEs are less successful in being awarded larger contracts. The 2014 *SME’s access to public procurement markets and aggregation of demand in the EU* Study revealed a general rule that the larger a contract or lot, the less likely it will be awarded to an SME, from a contract or lot value of about €60,000.00 (£59,000.00).<sup>41</sup>

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<sup>32</sup> Federation of Small Businesses, *Local Procurement: making the most of small business, one year on* (June 2013), <http://www.fsb.org.uk/docs/default-source/fsb-org-uk/policy/assets/local-procurement-2013.pdf> [accessed 11 September 2017].

<sup>33</sup> E. Ruh, “Mittelstandsbeteiligung an öffentlichen Aufträgen“ (2005) 5 *Vergaberecht* 718 et seq.

<sup>34</sup> W. Golembiewske and F. Migalk, *Praxis der Vergabe öffentlicher Bauaufträge unter besonderer Berücksichtigung staatspolitischer Zielsetzungen* (Institute of SME Studies of the University of Mannheim, 2005).

<sup>35</sup> [www.greffe-tc-paris.fr/communication/marches\\_publics.htm](http://www.greffe-tc-paris.fr/communication/marches_publics.htm) [accessed 9 February 2018].

<sup>36</sup> 7% of companies raised contract size: GHK and Technopolis for the European Commission (2010), [https://www.uzp.gov.pl/\\_data/assets/pdf\\_file/0019/28054/8.Raport\\_dostc499p20do20rynku.pdf](https://www.uzp.gov.pl/_data/assets/pdf_file/0019/28054/8.Raport_dostc499p20do20rynku.pdf) [accessed 11 September 2017], at 49.

<sup>37</sup> Saussier, *supra* note 7, at 6.

<sup>38</sup> *Ibid.*

<sup>39</sup> *European Code of Best Practices*, *supra* note 9, at 2-3. Saussier, *supra* note 7, at 8; L. Rapp, « 7 solutions pour améliorer l’accès des PME aux contrats de la commande publique », CP-ACCP, Nov. 2014, at 55.

<sup>40</sup> Saussier, *ibid.*, at 9.

<sup>41</sup> Thomassen et al., *supra* note 2, at 5.



### 3.2 Problems with and benefits of the promotion of SMEs in public procurement

A problem caused by any measure promoting SME participation is that this can make the applicable procurement law more complicated and therefore less user-friendly and prone to violations and litigation. This can be a deterrence for SME participation in itself.<sup>42</sup> Moreover, these measures can lead to additional costs for both bidders and contracting authorities<sup>43</sup> and are often intended to promote local economies; smaller companies are frequently local companies, and ‘local’ almost inevitably means national.<sup>44</sup> This implies protectionism which cannot be reconciled with the Internal Market,<sup>45</sup> which is one reason why, as explained below, the old Public Sector Directive 2004/18/EC did not contain many adjustments to promote SMEs<sup>46</sup> and the Commission initially addressed SMEs with soft law.<sup>47</sup> However, the protectionist aspect of the objective has to be put into perspective: not all SMEs can be seen as only local and therefore national enterprises; some SMEs operate globally.

More SME participation in public contracts could increase competition through a wider and more innovative supplier and provider base and thus have an

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<sup>42</sup> Ibid.

<sup>43</sup> This article does not discuss whether the promotion of SMEs can be classified as a ‘secondary’ (term used *inter alia* in by M. Burgi, D. Dragos *et altera* and G. Racca in their chapters in R. Caranta and M. Trybus (eds.), *The Law of Green and Social Procurement*, Djøf: Copenhagen, 2010), ‘sustainable’ (term used in the chapters of R. Caranta, S. Treumer, L. Vidal, M. Spyra, J. González Garcia and M. Trybus in Caranta and Trybus, *ibid.*), ‘horizontal’ (term coined by S. Arrowsmith and P. Kunzlik in “Public procurement and horizontal policies in EC law: general principles” *Social and Environmental Policies in EC Procurement Law*, CUP, 2009), or ‘strategic’ (term used *inter alia* in W. Kahlenborn *et altera*, *Strategic Use of Public Procurement in Europe*, Final Report to the European Commission, MARKT/2010/02/C 2011) objective, as a ‘community benefit’ (term used in a session of the *2015 Procurement Week* organised by the University of Bangor and the Welsh Government in Cardiff), akin to social or environmental (see Caranta and Trybus, *ibid.*) considerations in public procurement. However, this discussion is provided in Trybus and Andrecka, *supra* note 7.

<sup>44</sup> Ruh, *supra* note 33, at 735 reports that 80% of the turnover of the SMEs who returned his questionnaire is made within 20 km from the seat of the company. Promoting SME thus often means promoting domestic SMEs and even SMEs from the same region as the contracting authority. To an extent, deeply integrated border regions of two or more Member States, such as the Belgian-Dutch-German region around Hasselt-Maastricht-Aachen, might be an exception. The danger of SME friendly policies to foster an anti-competitive or anti-free movement effect is acknowledged by Lichère, “L’accès PME dans la Directive 2014/24”, *supra* note 8, at 119.

<sup>45</sup> Traditionally the Court of Justice established a rather restrictive approach to the use of public procurement to promote secondary objectives. See *inter alia*: Case C-513/99, *Concordia Bus Finland v. Helsinki Kaupunki* [2002] ECR I-7213; Case C-448/01, *EVN Wienstrom AG v. Austria* [2003] ECR I-14521; Case C-31/87, *Gebroeders Beentjes v. The Netherlands* [1988] ECR 4365; Case C-225/98, *Commission v. France (Nord Pas de Calais)* [2000] ECR I-4475. See also: S. Arrowsmith, *The Law of Public and Utilities Procurement. Regulation in the EU and the UK*, Vol. 1 (London: Sweet & Maxwell, 3<sup>rd</sup> ed. 2014), at 8 and 1256-93; and P. A. Trepte, *Regulating Procurement. Understanding the Ends and Means of Public Procurement Regulation* (OUP, 2004), at 168-76. However, there is some evidence to demonstrate CJEU’s shift towards allowance of pursuing broader sustainable objectives. See: CJEU’s more recent ruling in Case C-115/14, *RegioPost GmbH & Co. KG v Stadt Landau in der Pfalz, (RegioPost)* EU:C:2015:760, upholding minimum wage clause; and Case C-368/10, *Commission v Netherlands (Dutch Coffee)* EU:C:2012:284, allowing to address social considerations such as fair trade in award criteria. See Trybus and Andrecka, *supra* note 7.

<sup>46</sup> Recital 32 Directive 2004/18/EC wants to “encourage the involvement of small and medium-sized undertakings in the public contracts procurement market, [...]” but to that end only considers that “it is advisable to include provisions on subcontracting.” The emphasis on subcontracting is confirmed by the provisions on subcontracting in Articles 25 and 60, the remainder of the instrument not containing any SME relevant provisions, apart from the aggregation rule in Article discussed below. See: Lichère, “L’accès PME dans la Directive 2014/24”, *supra* note 8, at 110.

<sup>47</sup> *European Code of Best Practices*, *supra* note 9.

effect on the objective of value for money.<sup>48</sup> Economic theory supports this positive effect on competition; it also emphasises that specialised SMEs can be more efficient on certain contracts or contract parts requiring their specialism; and that their participation makes collusion between the big companies more complicated.<sup>49</sup> Moreover, since in contrast to large companies SMEs exist in all and especially also the smaller Member States, the participation of these companies has also an Internal Market dimension, furthering the free movement of goods and services in *all* Member States. In other words, it promotes a European procurement market not just for big business in big Member States. Finally, SMEs create proportionately more employment than large companies, train more people, provide economic stability even during an economic crisis, and are loyal to the regions in which they are based.<sup>50</sup> For all these reasons, which as Burgi rightly points out are difficult or impossible to quantify,<sup>51</sup> SMEs are close to the heart of politicians in all the Member States, as shown *inter alia* by the references to SMEs in Articles 158(2)(b), 173(1) and 179(2) TFEU.<sup>52</sup>

#### **4. The division of larger contracts into lots**

Public contracts can be divided into lots until any resulting lot becomes indivisible.<sup>53</sup> Lots can be homogeneous<sup>54</sup> and heterogeneous.<sup>55</sup> Regarding the number of lots, there is some evidence indicating that a division into many lots (more than 10) considerably increases the participation and chances of micro-and small companies of being awarded the contract. In contrast, the division into only a few lots (2-4) reduces participation from small, medium-sized, and large enterprises and only increases participation and chances of micro-companies.<sup>56</sup> Additionally, the size of the lots determines which companies have sufficient capacity to bid for at least one lot.<sup>57</sup> Thus the number and size of the lots appears crucial for SME participation and success. The *European Code of Best Practices* had highlighted this quantitative effect of the division into lots.<sup>58</sup> It also emphasised a qualitative effect whereby “the content of the

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<sup>48</sup> M. Burgi, “Mittelstandsfreundliche Vergabe: Möglichkeiten und Grenzen (Teil1)“ (2006) 17 *Neue Zeitschrift für Bau- und Vergaberecht* 606-610, at 607.

<sup>49</sup> See Grimm, Pacini, Spagnolo, and Zanza, *supra* note 9, 168-192; Saussier, *supra* note 7, at 2.

<sup>50</sup> Burgi, “Small and medium-sized enterprises and procurement law”, *supra* note 12, at 285.

<sup>51</sup> Burgi, “Mittelstandsfreundliche Vergabe“, *supra* note 48, at 607, who also cites H. Willems, *Die Förderung des Mittelstands: Wirtschaftsverfassungsrechtliche Legitimation und Vergaberechtliche Realisierung* (Carl Heymanns: Cologne, 2003), at 56 for a systematic documentation of the political motivations for SME promotion in public procurement.

<sup>52</sup> These are Treaty articles which require the unanimous approval of all Member States.

<sup>53</sup> M. M. Linthorst, J. Telgen, and F. Schotanus, “Buying bundles: the effects of bundling attributes on the value of bundling”, Proceedings of the 2008 International Procurement Conference in Amsterdam, at 4, define the term ‘undividable’ as undividable for buyer’s markets, which they explain by example: “Consider buying a bundle of electricity for two office buildings. According to the definition this will be a bundle of two products; you can find a supplier willing to deliver electricity for one of your office locations. Buying electricity for a part of an office building would be much harder, because no markets exist for supplying electricity to parts of office buildings. So the undividable product of the bundle is one office building.”

<sup>54</sup> Each lot consists of the same product (for example cars or cleaning services).

<sup>55</sup> Each lot consists of a different product, for example when the contracts for a new airport is divided into different lots for the construction of the building, doors, electrical appliances, windows, toilets, etc.

<sup>56</sup> J. Stake, “SME Participation and Success in Public Procurement” (Södertörn University, 2014), at 23.

<sup>57</sup> See Grimm, Pacini, Spagnolo, and Zanza, *supra* note 9, at 168.

<sup>58</sup> *Supra* note 9, at 17.

lots may correspond more closely to the specialised sector of the SME.<sup>59</sup> These two effects reappear in the crucial Recital 78 of Directive 2014/24/EU<sup>60</sup> discussed below. In addition to number, size, and specialism of the lots, their geographical dispersion can be of importance, for example by reducing transportation costs for relevant contracts.<sup>61</sup> Proximity is regularly an advantage for SMEs.<sup>62</sup> Lots can even be divided according to duration:<sup>63</sup> ‘lots as slots’. Overall, to meet its objectives the division into lots requires knowledge of and proximity to the market on the side of the contracting authorities.

#### **4.1 Problems with and benefits of the division into lots**

The division into lots was already suggested by the *European Code of Best Practices* which, however, warned that this had to be “appropriate and feasible in the light of the respective works, supplies and services concerned.”<sup>64</sup> This addresses an issue that needs to be balanced with the objective of facilitating SME access to procurement procedures: the effect of a division into lots on the costs, complexity and management of public contracts.<sup>65</sup> Awarding a larger contract lowers administrative costs<sup>66</sup> and increases buying power<sup>67</sup> and economies of scale.<sup>68</sup> Moreover, division might undermine the effectiveness of procurement when it is not technically or economically feasible or when the number or size of the lots is not geared towards the market in which they are to generate competition. Reasons not to divide into lots include that the different components of a contract are highly dependent on each other or when there is a need to coordinate them.<sup>69</sup>

These potential disadvantages are also reasons why stakeholders were divided on the issue of division into lots during the consultation process for the new procurement Directives. Public authorities were in general quite sceptical about “coercive measures” whereas business’ opinions were divided.<sup>70</sup> Some legal academics emphasise the disadvantages. Telles<sup>71</sup> and Sánchez Graells<sup>72</sup> argue that the division into lots undermined the benefits of aggregation by increasing the procurement costs for contracting authorities and even the bidders who are required to submit multiple bids. Moreover, some argue that lots facilitated collusion

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<sup>59</sup> *European Code of Best Practices*, *ibid.*

<sup>60</sup> As pointed out by Sánchez Graells, *Public Procurement and the EU Competition Rules*, *supra* note 13, at 349. See also Recital 87 Utilities Directive 2014/25/EU.

<sup>61</sup> Grimm, Pacini, Spagnolo, and Zanza, *supra* note 9, at 168.

<sup>62</sup> Saussier, *supra* note 7, at 2.

<sup>63</sup> Saussier, *ibid.* points out that long duration has a negative impact on SME participation just as large size has.

<sup>64</sup> *Supra* note 9, at 8.

<sup>65</sup> On the additional costs see: McAfee and McMillan, *supra* note 13, at 57-60.

<sup>66</sup> A. Loman, F. Ruffini and L. de Boer, “Designing ordering and inventory management methodologies for purchased parts” (2002) 38 *Journal of Supply Chain Management* 22-29. In contrast, the division into lots can lead to additional administrative burden: Arrowsmith, *supra* note 45, at 470.

<sup>67</sup> J. Ramsay, “The resource based perspective, rents, and purchasing’s contribution to sustainable competitive advantage” (2001) 37 *Journal of Supply Chain Management* 38-47; V. A. Mabert and T. Schönherr, “An online RFQ system: a case study” (2001) 5 *Practix* 1-6.

<sup>68</sup> L. Birou, S. E. Fawcett, and G. M. Magnan, “Integrating product life cycle and purchasing strategies” (1997) 33 *Journal of Purchasing and Materials Management* 23-31.

<sup>69</sup> Linthorst, Telgen, and Schotanus, *supra* note 53, at 10.

<sup>70</sup> Green Paper, Synthesis of Replies, *supra* note 4, at 14.

<sup>71</sup> <http://www.telles.eu/blog/2015/4/30/public-contracts-regulations-2105-regulation-46> [accessed 22 August 2017].

<sup>72</sup> <http://howtocrackanut.blogspot.co.uk/2015/04/division-of-contracts-into-lots-under.html> [accessed 30 June 2015].

significantly, especially when the lots are of a similar size and in sectors with limited supplier base or where collusion is already prevalent.<sup>73</sup> This is also highlighted by economists.<sup>74</sup> Practitioners are equally sceptical, emphasising the “impracticality and headaches associated” with the division into lots.<sup>75</sup>

Economic theory, however, also suggests positive effects of the division of larger contracts into lots, depending on the type of contracting authority, the type of contract, contract size, lot size, lot number, the relevant market, and the effects of collusion.<sup>76</sup> Most importantly, competition and value for money can be improved through increased SME participation.<sup>77</sup>

#### **4.2 Division onto lots under (the old) Directive 2004/18/EC**

Hidden in the fifth paragraph of a provision on “methods for calculating the estimated value of public contracts [...]”, art.9(5)(a) Public Sector Directive 2004/18/EC<sup>78</sup> and before that even art.7(4) Services Directive 93/36/EEC,<sup>79</sup> art.5(4) Supplies Directive 92/50/EEC<sup>80</sup> and art.6(3) Works Directive 93/37/EEC<sup>81</sup> already allowed the division of contracts into lots. These provisions were part of the old aggregation regimes with an underlying concern about the division into lots with the intention to artificially push the value of the lots below the thresholds to avoid the application of these old procurement Directives.<sup>82</sup> Nevertheless, as Arrowsmith explains, the third paragraph of art.9(5)(a) Directive 2004/18/EC was an exception to the aggregation rules ultimately designed to encourage division into lots, as some of the lots below the thresholds could even be awarded without following the procedures of the Directive.<sup>83</sup>

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<sup>73</sup> Ibid.

<sup>74</sup> See Grimm, Pacini, Spagnolo, and Zanza, *supra* note 9, at 168-192; M. Fana, and G. Piga, “SMEs and public contracts”, in G. Piga and S. Treumer, *The Applied Law and Economics of Public Procurement* (Routledge: Oxford, 2013), at 291.

<sup>75</sup> See Semple, *supra* note 8.

<sup>76</sup> See Grimm, Pacini, Spagnolo, and Zanza, *supra* note 9, at 171, 172, 184, and 188, citing *inter alia* P. Klemperer, *Auctions: Theory and Practice* (Princeton University Press, 2004); J. Anton and D. Yao, “Split awards, procurement, and innovation” (1989) 20 *RAND Journal of Economics* 538-52; P. Milgrom, *Putting Auction Theory to Work* (CUP, 2004); M. Armstrong, “Optimal Multi-Object Auctions” (2000) 67 *Review of Economic Studies* 455 – 481.

<sup>77</sup> Saussier, *supra* note 7, at 2.

<sup>78</sup> Article 9 (5) Directive 2004/18/EU [2004] OJ L134/114 read: “(a) Where a proposed work or purchase of services may result in contracts being awarded at the same time in the form of separate lots, account shall be taken of the total estimated value of all such lots.

Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 7, this Directive shall apply to the awarding of each lot.

However, the contracting authorities may waive such application in respect of lots the estimated value of which net of VAT is less than EUR 80000 for services or EUR 1 million for works, provided that the aggregate value of those lots does not exceed 20 % of the aggregate value of the lots as a whole.”

See also the very similar Article 17(6)(a) Utilities Directive 2004/17/EC [2004] OJ L134/1.

<sup>79</sup> Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts [1993] OJ L199/1. See also the very similar art.14(1) subparagraph 2 Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1993] OJ L-199/84.

<sup>80</sup> Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts [1992] OJ L209/1.

<sup>81</sup> Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts [1993] OJ L199/54.

<sup>82</sup> Article 9(5)(a) paragraph 2 Directive 2004/18/EC: “Where the aggregate value of the lots is equal to or exceeds the threshold laid down in Article 7, *this Directive shall apply to the awarding of each lot.* [emphasis added].”

<sup>83</sup> Arrowsmith, *supra* note 45, margin number 6-122, at 472.

However, this exception was strictly limited<sup>84</sup> and no other useful detail on lots was provided.<sup>85</sup> Herrera argues that lots were thus “indirectly incorporated”<sup>86</sup> in the Directive 2004/18/EC. The discretion about their use was left to the Member States.<sup>87</sup> It is submitted that the provisions of the old Directives also allowed national laws to require the division into lots in addition to just allowing it, an interpretation supported by the wording of these provisions which do not rule out such a requirement. Moreover, the transposing laws in some Member States, not challenged in this respect by the Commission or in the CJEU, confirm this interpretation. For example, the division into lots was already mandatory under the pre-2014/2016 French<sup>88</sup> and German<sup>89</sup> laws.

Based on a study of contract award notices, the 2014 Study *SME’s access to public procurement markets and aggregation of demand in the EU* found that for 2009-11 in the then EU27 16% of contracts were divided into 2-4 lots, 7% into 5-9, 3% into 10-19 and 2% even into 20-50 lots. In the UK, where the division into lots was not prescribed by law, the figures were close to this average with 15% (2-4), 8% (5-9), and 4% (10-19). In France with her since 2006 compulsory division into lots the figures were slightly higher with 24% (2-4), 10% (5-9), and 5% (10-19).<sup>90</sup> Perhaps surprisingly, since covering a period before the transposition of the 2004 Directives, the 2007 Study *Evaluation of SMEs’ Access to Public Procurement Markets in the EU* reported that for 2002-2005 across the then EU15 and later EU25 38% of contracting authorities divided contracts regularly.<sup>91</sup> The crucial feature of this old division into lots regime of the EU was that it was rather permissive, allowing national regimes that (a) did not allow division, (b) did leave the decision about division to the contracting authorities, and (c) required division, with or without exceptions. Moreover, most crucially art.9(5) Directive 2004/18/EC appeared to merely tolerate and perhaps timidly encourage division into lots, rather than require it. The practice was only clearly encouraged in the later 2008 *European Code of Best Practices*,<sup>92</sup> a Commission Staff Working Document just about qualifying as soft law. There was no ‘hard law’ harmonisation beyond allowing division.

## **5. Divide (or explain) under Directive 2014/24/EU**

In contrast to the situation described under 4 above, art.46(1) Directive 2014/24/EU now expressly and specifically provides that contracting authorities may award contracts divided into separate lots while they are free to determine the size and

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<sup>84</sup> See the value thresholds for the lots and the limitation of the share of the lots in art.9(5)(a) para 3.

<sup>85</sup> Nor in Article 17(6)(a) Utilities Directive 2004/17/EC. Only, equally hidden, Annex VII A Directive 2004/18/EC provided that contract notices for contracts that are subdivided into lots, must indicate “the possibility of tendering for one, for several or all of the lots”.

<sup>86</sup> Herrera Anchustegui, *supra* note 8, at 127 also citing arts.11, 12, 13 of the 2001 Draft Proposal for this Directive.

<sup>87</sup> Sánchez Graells, *Public Procurement and the EU Competition Rules*, *supra* note 13, at 347.

<sup>88</sup> Article 10 Code des Marchés Publics 2006.

<sup>89</sup> Old § 97 III Competition Act (GWB). See Burgi, “Small and medium-sized enterprises and procurement law”, *supra* note 12, at 288-289.

<sup>90</sup> Wessel Thomassen et alera, *supra* note 2, at 53.

<sup>91</sup> M. Vincze et alera, *Evaluation of SMEs’ Access to Public Procurement Markets in the EU*, GHK and Technopolis for the European Commission DG Enterprise and Industry, Brussels, 2007, Executive Summary, at 7.

<sup>92</sup> *Supra* note 9.

subject-matter of such lots.<sup>93</sup> This is clearly intended as a technique to promote SME participation in public procurement.<sup>94</sup>

### 5.1 Scope of the regime

Article 46 of the final 2014 Directive differs from art.44 of the 2011 Draft Proposal which set a threshold of €500,000 for the division into lots.<sup>95</sup> By abandoning that higher threshold, the final text of art.46 Directive 2014/24/EU extended the regime to its entire scope above the general thresholds of €135,000 (central government) or €209,000 for supplies and services and €5,225,000 for works.<sup>96</sup> This is relevant for supplies and services contracts between these thresholds but not for works contracts. The 2014 Study *SME's access to public procurement markets and aggregation of demand in the EU* found that the share of micro businesses bidding for public contracts decreased from a contract value of about €100,000.00, of small enterprises from about €300,000.00 and of medium-sized companies from about €5 million.<sup>97</sup> The extension of the scope of the division into lots regime in the final text of the Directive is therefore particularly relevant for micro-businesses and small businesses the participation of which normally decreases from contract values very close to the thresholds of the Directive for supplies and services (micro)<sup>98</sup> or below the originally envisaged threshold of €500,000.00 (small). In Austria,<sup>99</sup> France,<sup>100</sup> Germany,<sup>101</sup> Ireland,<sup>102</sup> and the UK<sup>103</sup> the division into lots regime applies to the entire scopes of their respective transposing legislation.

With regards to micro-businesses, the division into lots can even be relevant for some contracts below the thresholds of the Directive. However, that would be for the national legislators to decide since this would be outside the scope of the Directive, although the basic principles of the TFEU would still apply.<sup>104</sup> There is no

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<sup>93</sup> See also the very similar art.65 Utilities Directive 2014/25/EU.

<sup>94</sup> Recital 78 Directive 2014/24/EC reads: “[...] Such division could be done on a quantitative basis, making the size of the individual contracts better correspond to the capacity of SMEs, or on a qualitative basis, in accordance with the different trades and specialisations involved, to adapt the content of the individual contracts more closely to the specialised sectors of SMEs or in accordance with different subsequent project phases [...]”.

<sup>95</sup> On that earlier proposal: A. Sánchez Graells, “Are the Procurement Rules a Barrier for Cross-Border Trade within the European Market? — A View on Proposals to Lower that Barrier and Spur Growth” in C. Tvarnø, G. S. Ølykke & C. Risvig Hansen (eds.), *EU Public Procurement: Modernisation, Growth and Innovation* (Copenhagen: DJØF, 2012), 107-133.

<sup>96</sup> See *supra* note 27 for the revised 2018-20 thresholds: for supply and service contracts for schedule one bodies is €144,000, for the same contracts awarded by other bodies it is €221,000. For light touch regime contracts (also known as Annex XIV contracts) the threshold remains at €750,000. The works contract threshold is now €5,548,000.

<sup>97</sup> Wessel Thomassen et alera, *supra* note 2, at 39. The Study also found that the share of medium sized enterprises increased from about €1 million to €5 million.

<sup>98</sup> *Supra* note 96.

<sup>99</sup> §§12-16 and 22 BVergG 2006 as amended.

<sup>100</sup> The Ordonnance n° 2015-899 du 23 juillet 2015 does not contain any thresholds and is therefore at least applicable to contracts above the thresholds of Directive 2014/24/EU.

<sup>101</sup> §§106 and 97(4) GWB 2016.

<sup>102</sup> Regulations 5 and 46 [Irish] European Union (Award of Public Authority Contracts) Regulations 2016.

<sup>103</sup> Regulations 5 and 46 [UK] Public Contracts Regulations 2015.

<sup>104</sup> See: Case C-243/89, *Commission v. Denmark* (‘Storebaelt’) [1993] ECR I-3353; Case C-359/93, *Commission v. The Netherlands* (‘UNIX’) [1995] ECR I-157; Case C-59/00, *Bent Moustén Vestergaard v. Spøttrup Boligselskab* [2001] ECR I-9505. See also Arrowsmith, *supra* note 45, at 185; P. Trepte, *Public Procurement in the EU* (OUP, 2007), at 8 and M. Trybus, “Public procurement in

indication in the relevant case law to imply that the TFEU would suggest the division into lots. The thresholds represent an example of minimum harmonisation as they represent a floor above which harmonisation occurs. Below the thresholds, Member States can go deeper than the minimum floor and introduce legislation, but based on the principles of TFEU, not based on a detailed Directive. The question whether Member States should introduce the division into lots below the thresholds cannot be addressed within the confines of this article. There is nothing in the Directive to encourage division below the thresholds and the original higher threshold of €500,000.00 suggests that the EU legislator envisaged lots only for larger contracts. The transposing laws of Austria, Ireland, and the UK, which allow but do not require the division into lots, also allow it below the thresholds. In Austria, a special regime for contracts below the thresholds applies when the cumulative value of the lots remains under the thresholds and lots of supplies and services contracts below €50,000.00 can be awarded without competition.<sup>105</sup> In the UK,<sup>106</sup> Ireland,<sup>107</sup> and Austria,<sup>108</sup> there are also rules for contract values above €4,000.00 for supplies and services and €1 million for works. The transposing law of France does not contain any thresholds. The German GWB 2016 applies only above the thresholds.<sup>109</sup> The thresholds for €80,000.00 for supplies and services and €1 million for works in the Austrian, British, and Irish laws reflect the lot-specific aggregation rules in art.5(8) - (10) Directive 2015/24/EU, normally requiring application of the Directive and transposing national legislation to the award of lots below the thresholds of the Directive but only above these lot-specific thresholds.<sup>110</sup> Thus the thresholds as minimum harmonisation have already led to legislative diversity in the national transpositions, also with respect to the division into lots.

### ***5.2 Discretion of the contracting authorities: nature of the lots***

According to art.46(1) Directive 2014/24/EU the size and subject matter of the lots are to be determined by the contracting authority. This discretion does not change the division into lots regimes in Member States where such rules have been in place before the Directive, such as France<sup>111</sup> and Germany<sup>112</sup> or the old non-regulated approach in the UK.

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European Union internal market law”, in R. Nogouellou and U. Stelkens (eds.) *Comparative Law on Public Contracts Treatise* (Bruylant: Brussels, 2010) 81-121.

<sup>105</sup> §15(5) BVergG 2006 as amended (supplies), §16(6) BVergG 2006 as amended (services).

<sup>106</sup> Regulation 5(14) [UK] Public Contracts Regulations 2015.

<sup>107</sup> Regulation 5(13) [Irish] European Union (Award of Public Authority Contracts) Regulations 2016.

<sup>108</sup> §14(3) BVergG 2006 as amended (works), §15(4) BVergG 2006 as amended (supplies), §16(5) BVergG 2006 as amended (services).

<sup>109</sup> However, in 2017 new procurement order for contracts below the thresholds was issued, the *Verfahrensordnung für die Vergabe öffentlicher Liefer- und Dienstleistungsaufträge unterhalb der EU-Schwellenwerte (Unterschwellenvergabeverordnung – UVgV)* BAnz AT 07.02.2017 B1, Berichtigung der Bekanntmachung vom 8. Februar 2017 in BAnz AT 08.02.2017 B1, was published, which however is not enforceable through the GWB but is linked to §55 BHO (Federal Budget Order). §22 UVgV contains the regime on the division into lots.

<sup>110</sup> Thus for lots of services and supplies contracts for contracts from €80,000 to €144,000 or €221,000 and for lots of works contracts from €1 million to €5,548,000, see the “small lots” thresholds for 2018-20, *supra* note 27 or <https://www.ojec.com/thresholds.aspx/> [accessed 9 February 2018].

<sup>111</sup> Article 10 CMP 2006: “A cette fin [passer le marché en lots séparés], il [le pouvoir adjudicateur] choisit librement le nombre de lots [...]”. Translation of the author: “To the end of dividing the contract into lots, the contracting authority is free to choose the number of the lots. “

<sup>112</sup> The old § 97(3) GWB (Competition Act) did not prescribe the number of size of lots. See also (old) Article 2 (2) VOL/A 2009.

The number, subject matter, size, and geographical dispersion of the lots affect competition in the procurement procedure, the contracting authority's budget and value for money.<sup>113</sup> Economic theory supports this discretion to be left to contracting authorities.<sup>114</sup> Determining the number, size and subject matter of the lots has to take account of the frequently evolving market structure, which is determined by the number and the behaviour of the potential bidders, otherwise competition and ultimately value for money will be compromised.<sup>115</sup> Therefore, these characteristics can only be determined by the contracting authority, possibly advised by a centralised procurement authority or private consultant. In other words, this should not be determined in abstract rules by the EU or national legislators. It is therefore submitted that the approach in art.46 Directive 2014/24/EU of 'leaving the details' to be determined by the contracting authorities is appropriate. Nevertheless, the necessity to study the relevant market before dividing the contract into lots can stretch the capabilities of many contracting authorities and the involvement of private consultants and even centralised procurement authorities in this process can be problematic in itself, a problem that cannot be discussed further within the confines of this article. However, the complexity of the division into lots can also be addressed with training and non-binding guidance.

### ***5.3 Compulsory or optional division into lots***

According to art.46(4) Directive 2014/24/EU, Member States may also *require* rather than just allow the division into separate lots in their national laws transposing the Directive.<sup>116</sup> Thus the French and Germans could continue their already existing regimes of compulsory division into lots.<sup>117</sup> However, in cases in which this has not been made obligatory in the transposing national law, such as in the UK,<sup>118</sup> Ireland,<sup>119</sup> and Austria,<sup>120</sup> or when not dividing into lots is allowed in certain cases, such as in France,<sup>121</sup> contracting authorities shall indicate the main reasons for their decision not to divide into lots. This means that the division into lots is the default approach suggested by the Directive and Member States have the option to make this obligatory for all or parts of the contracts subject to the Directive and their transposing national laws. However, Directive 2014/24/EU does not require the compulsory division into lots,<sup>122</sup> although the decision not to divide a contract into lots requires a communication of the reasons: the "divide or explain principle".<sup>123</sup>

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<sup>113</sup> Grimm, Pacini, Spagnolo, and Zanza, *supra* note 9, 168-192; Sánchez Graells, *Public Procurement and the EU Competition Rules*, *supra* note 13, at 349-350.

<sup>114</sup> *Ibid.*

<sup>115</sup> Grimm, Pacini, Spagnolo, and Zanza, *supra* note 9, 168-192; Sánchez Graells, *Public Procurement and the EU Competition Rules*, *supra* note 13, at 349-350.

<sup>116</sup> Also art.65 (4) Utilities Directive 2014/25/EU.

<sup>117</sup> See: the old art.10 CMP 2006 and old §97(3) GWB, see below, after the transposition of Directive 2014/24/EU, art.32 Ordonnance n° 2015-899 du 23 juillet 2015 and §97(4) GWB 2016 respectively.

<sup>118</sup> Regulation 46 [UK] Public Contracts Regulations 2015.

<sup>119</sup> Regulation 46 [Irish] European Union (Award of Public Authority Contracts) Regulations 2016.

<sup>120</sup> §22 BVergG 2006 as amended in 2016.

<sup>121</sup> Article 32 II. Ordonnance n° 2015-899 du 23 juillet 2015.

<sup>122</sup> See also: Sánchez Graells, *Public Procurement and the EU Competition Rules*, *supra* note 13, at 348. Contrary, art.46 is interpreted as requiring the compulsory division into lots by M. Assis Raimundo (Lisbon Law School), "Aiming at the market you want? A critical analysis of the purpose, coherence and judicial review of the duties regarding division into lots under Directive 2014/24/EU", at the *Public Procurement Global Revolution VIII* conference in Nottingham, 13 June 2017.

<sup>123</sup> S. Smith, "Practical Issues of division into lots (divide and explain principle)", at the *Public Procurement: Global Revolution VII* conference in Nottingham, 16 June 2015.



The interpretation that art.46 does not require Member States to introduce the compulsory division into lots is based on the wording of the provision, a contextual interpretation, a historical interpretation, and the Directive's general approach of minimum harmonisation. According to the wording of art.46(1) sentence 1 contracting authorities “may” divide into lots, which clearly expresses an option rather than an obligation (wording). In contrast, they “shall” provide reasons when not doing so – art.46(1) sentence 2, which clearly expresses an obligation rather than an option, an obligation to give reasons not an obligation to divide into lots (context).<sup>124</sup> The wording of Recital 78 Directive 2014/24/EU, which provides that “contracting authorities should in particular be *encouraged* to divide large contracts into lots [emphasis added]”, does not suggest a compulsory division into lots either. The third paragraph of Recital 78 also contains a list of possible measures to promote SMEs that Member States who wish to go further could take in their transposition of the Directive. This includes “rendering a division into lots obligatory under certain conditions”. As this is only suggested as a possible option to Member States, this implies that transposition as a compulsory division into lots is not required from the Member States by the Directive (context). Neither the Green Paper,<sup>125</sup> nor the consultation,<sup>126</sup> nor material from the legislative process<sup>127</sup> suggest that the final art.46 of the Directive intended a compulsory division into lots (historical).<sup>128</sup> Moreover, Member States such as notably the UK, which already transposed the Directive in 2015, have not made the division into lots compulsory and in over two years have not been challenged regarding this fact by the Commission or the CJEU (historical). This suggests that the Member States and the Commission do not interpret art.46 as requiring the division into lots. Finally, an interpretation of art.46 as requiring the compulsory division into lots in the transposing laws of the Member States cannot be reconciled with the division into lots regime as an example of

<sup>124</sup> It is argued that the use of the word “shall” in art.46(1) sentence 2 is not to be interpreted as a preference for the division into lots. The express authorisation or permission to divide into lots requires an explanation why this choice is not exercised, providing an accountability mechanism and safeguard against challenges including through judicial review. Thanks to Luke Butler for discussing this issue with me when commenting on an earlier draft of this article.

<sup>125</sup> *Green Paper on the modernisation of EU public procurement policy: Towards a more efficient European Procurement Market* COM(2011) 15 final.

<sup>126</sup> Green Paper – Synthesis of Replies, *supra* note 4.

<sup>127</sup> See the European Parliament Press Release: <http://www.europarl.europa.eu/news/en/press-room/20140110IPR32386/new-eu-procurement-rules-to-ensure-better-quality-and-value-for-money>: [accessed 27 September 2017]: New EU-procurement rules to ensure better quality and value for money, “The new rules also *encourage* the division of contracts into lots to make it easier for smaller firms to bid [emphasis added].” See the Council debate summary, 2011/0438(COD) -30/05/2012, <http://www.europarl.europa.eu/oeil/popups/summary.do?id=1208755&t=e&l=en> [accessed 27 September 2017]: “[Council members] (ii) fully support the involvement of SMEs in public procurement markets, by encouraging contracting authorities to *duly consider* dividing contracts into lots [emphasis added].” Council debate summary, 2011/0438(COD) – 10/12/2012, <http://www.europarl.europa.eu/oeil/popups/summary.do?id=1238893&t=e&l=en> [accessed 27 September 2017]: “[...] (iii) an incentive for contracting authorities to *consider* dividing contracts into smaller lots that are more accessible for SMEs [emphasis added]”. 2011/0438(COD) Committee report tabled for plenary, first reading/single reading – 11/01/2013, <http://www.europarl.europa.eu/oeil/popups/summary.do?id=1242067&t=e&l=en> [accessed 27 September 2017]: “[...] to *give consideration* to dividing contracts into lots [emphasis added]”. On the legislative process see also: Herrera Anchustegui, *supra* note 8, at 126-132.

<sup>128</sup> See the Commission press release: “New EU public procurement rules: Less bureaucracy, higher efficiency”, published on: 20/11/2015, last update: 11/01/2017, [http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item\\_id=8562](http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8562): [accessed 27 September 2017]: “[...] introducing the *option* of dividing tenders into lots [emphasis added]”.

minimum harmonisation proposed below. The compulsory division into lots would go beyond the minimum floor of harmonisation and is thus to be decided by the Member States. This decision was taken by the French and German legislators but not the British and Irish.

#### ***5.4 Divide or explain: discretion and review***

It is submitted that a Member State could make the ‘or explain’ in ‘divide or explain’ in art.46(1) very easy. This could lead to refraining from a division into lots becoming the default approach in practice, unless there is local pressure to divide. Sánchez Graells even suggests that ‘divide or explain’ is “conceived as a soft requirement”.<sup>129</sup> Article 46 only requires an *explanation*, not a *justification*. Recital 78 suggests a justification as an option for Member States who want to go beyond the minimum harmonisation requirements of the Directive. This suggests a “soft” nature of the explanation requirement in art.46 and could be interpreted as implying that in contrast to a *justification*, the *explanation* would not have to be subject to judicial review, as will be discussed further below. On the other end of the spectrum, as discussed under the previous heading above, Member States may also legally require the division into lots in their transposing legislation according to art.46(4) Directive 2014/24/EU, without the possibility for contracting authorities to refrain from doing so and communicate the reasons. In other words, Member States may take the ‘or explain’ out of ‘divide or explain’ when transposing the new Directive (‘divide only’), as Germany appears to have done.<sup>130</sup>

For the Member States who, in contrast to Germany, have introduced some form of ‘divide or explain’, two important and interrelated questions remain to be addressed in their transposing laws: (a) the reasons that can legitimately be an explanation to refrain from the division into lots and (b) whether that decision of the contracting authority is subject to (judicial) review. There is no harmonisation regarding the first question: art.46(1) provides no details on the reasons. However, Recital 78 provides some examples:

“[...] the contracting authority finds that such division could risk restricting competition, or risk rendering the execution of the contract excessively technically difficult or expensive, or that the need to coordinate the different contractors for the lots could seriously risk undermining the proper execution of the contract.”

Thus, it is submitted that the context of the Directive imposes certain limitations. It can safely be assumed that at least (1) technical reasons related to the management of the contract can make the division into lots disproportionately difficult or expensive and thus would constitute a valid reason not to divide. This case is addressed in Recital 78. The Concessions Directive 2014/23/EU, which regulates highly complex contracts, does not even include the division into lots, but highly complex contracts can also occur within the scope of Directive 2014/24/EU. Moreover, (2) market analysis can reveal that the market structure is not susceptible to a division into lots, that it would only complicate the procurement without producing the SME bids it is designed for – and this would also constitute a valid reason. Finally, it could be argued that (3) circumstances such as urgency that allow for the use of less

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<sup>129</sup> Sánchez Graells, *Public Procurement and the EU Competition Rules*, *supra* note 13, at 347.

<sup>130</sup> Neither §97(4) GWB 2016 nor §30 VgV contain the “or explain” regime from art.46 Directive 2014/24/EU.

competitive procedures could also justify the decision not to divide into lots. However, again, none of these reasons are mentioned in the binding provisions of the Directive.

Recital 78 is very permissive regarding the reasons by highlighting that the contracting authority should take the decision “freely” and “autonomously” and “on the basis of any reasons it deems relevant”. However, while this suggests a very wide and liberal notion of ‘reasons’, again, a contextual interpretation would still impose at least some limitations. For example, (1) a categorical policy not to divide into lots or an express (2) ‘anti-SME’ approach would compromise the default nature of the division into lots in art.46 and the overall SME-friendly approach of the provision and the Directive. Moreover, it can be assumed that (3) protectionist motives, for example not dividing into lots to favour a large domestic company, would go against the Internal Market rationale of the Directive and EU law. Therefore, there are limitations and contrary to the wording of Recital 78, what constitutes a “relevant” reason is not entirely left to the subjective judgment of the contracting authority but can be assessed objectively. English public law, for example, has a doctrine of relevant and irrelevant considerations as a ground of judicial review.<sup>131</sup>

Germany does not provide for the “or explain element” and consequently the German law does not contain any reasons. Neither reg.46 of the (UK) Public Contracts Regulations 2015 nor reg.46 of the Irish Regulations 2016 address these questions. However, art.32(I) of the 2015 French Ordonnance<sup>132</sup> is more specific in excluding cases where the subject matter of the contract does not allow the definition of distinct lots, when contracting authorities cannot organise, manage, and coordinate the divided project by themselves, or when the division into lots could limit competition or risks to make the performance of the contract technically more difficult or increase costs.<sup>133</sup> §22(1) sentence 2 (Austrian) BVergG also provides that economic and technical considerations, “for example the necessity of a single performance or liability” are reasons for the decision not to divide into lots.<sup>134</sup> §22(4) containing the “explain” requirement was only introduced in 2016.<sup>135</sup> The French and Austrian transpositions are compliant with the limitations of the context of the Directive and its Recital 78 discussed above. The question is whether the French and Austrian laws, in contrast to the British and Irish regulations, require a justification or are just more specific on the explanation. None of these national transpositions is clear on this issue, although in contrast to an explanation, a justification would have required further clarification.

This leads to the second and related question of whether the decision not to divide is subject to judicial review. This is not a matter for Directive 2014/24/EU, but ultimately to be determined in the context of the Public Sector Remedies Directive

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<sup>131</sup> Thanks to Luke Butler for pointing this out to the author when commenting on a draft of this article.

<sup>132</sup> Ordonnance n° 2015-899 du 23 juillet 2015 consolidée par le décret n°2016-360 du 25 mars 2016 (Journal officiel du 27 mars 2016).

<sup>133</sup> Translation of the author, original: “[...] sauf si leur objet ne permet pas l'identification de prestations distinctes [...]” and “[...] s'ils ne sont pas en mesure d'assurer par eux-mêmes les missions d'organisation, de pilotage et de coordination ou si la dévolution en lots séparés est de nature à restreindre la concurrence ou risque de rendre techniquement difficile ou financièrement plus coûteuse l'exécution des prestations [...]”.

<sup>134</sup> Translation of the author. The German original of [Austrian] §22(1) sentence 2 BVergG 2006 as amended reads: “Für die Gesamt- oder getrennte Vergabe von Leistungen sind wirtschaftliche oder technische Gesichtspunkte, wie zB die Notwendigkeit einer einheitlichen Ausführung und einer eindeutigen Gewährleistung, maßgebend.“

<sup>135</sup> Artikel 1 (5) of the 2016 amendment, *supra* note 20.

665/89/EEC<sup>136</sup> and the relevant case law of the CJEU. Neither suggest that the decision not to divide into lots would be immune from review. Recital 78 of Directive 2014/24/EU provides that the decision and the reason(s) for it should be taken “autonomously” by the contracting authority “without being the subject to administrative or judicial supervision”. However, it is submitted, that despite this unfortunate and ill-advised passage of Recital 78, which as part of a mere recital is not legally binding anyway, the decision not to divide and the reason(s) for this decision are in principle reviewable. First, as Caranta pointed out, the question of review is to be assessed on the basis of higher law, namely the principle of effective judicial protection enshrined in Articles 47 ECHR and 19(1) TEU, and the case law of the CJEU and ECHR,<sup>137</sup> as well the rule of law principle of the constitutions of the Member States and the review system required in the Public Sector Remedies Directive. These sources require the decision not to divide into lots to be reviewable, just like any other procurement decision, irrespective of whether that has been expressly spelled out in any of the laws transposing Directive 2014/24/EU. Second, the administrative judges, or in Germany and the UK also the ordinary judges, put in charge of public procurement review have a long experience to review public discretion to varying intensity, even when that discretion is very wide. They can leave a wide margin of discretion to the contracting authorities and only rule against a division in cases of clear violations of legal principles, unreasonableness, or when the discretion was not actually exercised at all. There is therefore no strong argument to exclude the decision not to divide into lots from judicial review.

Member States who introduce the division into lots as the default approach may then allow the award as a single contract in exceptional circumstances, require the communication of the reasons for doing so and allow challenging the decision not to divide into lots in national review bodies.<sup>138</sup> In other words, Member States can make the ‘or explain’ very difficult by narrowing the situations in which this is permissible and make the decision subject to review, as France appears to have done.<sup>139</sup> However, Directive 2014/24/EU does not harmonise this. Considerable room for manoeuvre was therefore left to the national legislators, provided the minimum harmonisation standard of ‘divide or explain’ is in place. Directive 2014/24/EU allows for both a relatively light touch on the one hand but also rather strict regimes on the division into lots on the other hand. This preserved the different national regimes on the division into lots<sup>140</sup> and is thus likely to preserve the different national

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<sup>136</sup> Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] OJ L395/33 as amended especially by Directive 2007/66/EC [2007] OJ L335/31.

<sup>137</sup> Caranta, *supra* note 3, at 428.

<sup>138</sup> According to Martin Burgi (Munich) this is the situation in Germany before and after the transposition of Directive 2014/24/EU and according to François Lichère (Aix-en-Provence) also in France, discussions during the 9<sup>th</sup> Network Meeting of the European Procurement Law Group in Turin on 2 September 2016. Lichère, *supra* note 8, at 114 highlights the importance of the administrative judge (the administrative courts are responsible for public procurement review proceedings in France) to police the decision not to divide into lots and points to examples of judgments of the Conseil d’Etat in CE 21 mai 2010, Commune d’Ajaccio, req. n°333737 (which allowed the division into only two lots) and CE 11 avril 2014, Commune de Montreuil, req. n° 375051 (which imposed a detailed division).

<sup>139</sup> Article 32 I sentence 2 Ordonnance n° 2015-899 du 23 juillet 2015.

<sup>140</sup> ‘Divide or explain’ in reg.46 [UK] Public Contracts Regulations 2015; compulsory division into lots *with* ‘explain’ in certain circumstances in French Article 32 Ordonnance n° 2015-899 du 23 juillet 2015; compulsory division into lots *without* ‘explain’ in German §97(4) GWB 2016 and §30 VgV 2016.

levels of SME participation in public procurement.<sup>141</sup> The permissiveness of the new Directive, arguably a lack of or insufficient harmonisation, did not change the procurement laws and practices of the Member States. For example, as mentioned above, in France a *duty* to divide contracts into lots had been introduced in 2006<sup>142</sup> and the French now continue with this rule without any effect of Directive 2014/24/EU.<sup>143</sup> The same can be said about Germany.<sup>144</sup> On the other end of the spectrum, as explained below, Member States such as the UK, Ireland, or Austria have not introduced an obligatory division into lots, thereby also continuing a crucial feature of their pre-2014/24/EU practice, which appears to have allowed but not encouraged “entering into a number of contracts for a single requirement”.<sup>145</sup> However, as discussed below, the division into lots is now called by its name and given a much higher profile in the transposing UK and Irish Regulations and Austrian *Bundesvergabegesetz*. This could be described as an example of minimum harmonisation in which the legally prescribed divide or explain principle is the firm floor. Following a general approach of only transposing the minimum<sup>146</sup> the British, but also the Irish and Austrians did not go beyond this firm floor. Making the ‘or explain’ option difficult (France) or not transposing it (Germany) are already higher standards beyond the firm floor. A crucial question is the precise ‘location’ of the firm floor with regards to the modalities of ‘or explain’ – how difficult does art.46(1) subparagraph 2 require the ‘or explain’ option in a transposing law to be and what is the review mechanism to control the relevant practice in the UK, Ireland, and Austria?<sup>147</sup>

### **5.5 Article 46 Directive 2014/24/EU: an innovation?**

As this is the first time that a Directive expressly encourages the practice of dividing larger contracts into lots, the details of the practice are formally upgraded from soft law (*European Code of Best Practices*) to hard law (art.46) and thus subject to harmonisation. However, with regards to substance it is submitted that the only innovation introduced by art.46 of Directive 2014/24/EU, in contrast to the old regime under art.9(5) Public Sector Directive 2004/18/EC<sup>148</sup> and the *European Code of Best Practice*, is the division of larger contracts into lots as the default approach. As Lichère rightly points out, expressly addressing the division into lots in art.46 was not necessary as it was already permitted before.<sup>149</sup> Harmonisation in this respect has no

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<sup>141</sup> See the difference in figures in France (higher) and the UK (lower) reported by Wessel Thomassen et alera, *supra* note 2, at 53.

<sup>142</sup> [French] Article 10 CMP 2006.

<sup>143</sup> [French] Article 32 Ordonnance n° 2015-899 du 23 juillet 2015.

<sup>144</sup> [German] §97(4) GWB 2016: “The interests of small and medium-sized undertakings shall primarily be taken into account in an award procedure. Contracts shall be subdivided into partial lots and awarded separately according to the type or area of specialisation (trade-specific lots). Several partial or trade-specific lots may be awarded collectively if this is required for economic or technical reasons.” This is exactly the same wording as that of the pre-transposition §97(3) GWB.

<sup>145</sup> Regulation 8 (11) [UK] Public Contracts Regulations 2006 S.I. 2006 No.5. See also the prohibition in Regulation 8 (15).

<sup>146</sup> Transposition Guidance: How to transpose European Directives effectively (H.M. Government, April 2013), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/229763/bis-13-775-transposition-guidance-how-to-implement-european-directives-effectively-revised.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229763/bis-13-775-transposition-guidance-how-to-implement-european-directives-effectively-revised.pdf) [accessed 27 September 2017], at 6 (Points 2.2-2.4).

<sup>147</sup> The rules of lot bundling and limitation, discussed under the next heading, are also subject to the possibility of higher standards.

<sup>148</sup> And art.17 (6) (a) Utilities Directive 2004/17/EC.

<sup>149</sup> Lichère, “L’ accès PME dans la Directive 2014/24”, *supra* note 8, at 111.

effect on France and Germany where this already was the legally prescribed default approach,<sup>150</sup> or even on the UK where transposition was already allowed before 2015.<sup>151</sup> Sánchez Graells thus rightly sees the situation as only “slightly altered”.<sup>152</sup> The main aspect of the default nature of the division into lots is introduced by the obligation to communicate the reasons for not doing so (“divide or explain”) if it is not made compulsory in the transposition. This obligation differs from the other Directives of the 2014 reform package, where this is possible but not required<sup>153</sup> or does not feature at all.<sup>154</sup> The formal upgrade to hard law and its default nature give the division into lots a “higher profile” in Directive 2014/24/EU.<sup>155</sup> As under the old Directive 2004/18/EC,<sup>156</sup> Member States may legally require the division into lots but, as discussed above, Directive 2014/24/EU does not impose this as the only approach.

While, as explained above, the only change introduced by the new Directive is the default nature of the division into lots, its higher profile, its upgrade from soft law to hard law, it is argued that this is still an innovation. The obligation to provide reasons for awarding a single contract forces contracting officers to pause to consider the possibility of a division into lots.<sup>157</sup> They are obliged to either divide the contract into lots or communicate reasons for not doing so. The number of single contract awards and the communicated reasons for not dividing them into lots will be in the public domain. This will make it possible for the Commission and national legislators to review the approach of art.46, to see whether the division into lots is seriously considered or whether the use of ‘cut and paste’ standard reasons to explain the award of a single large contract suggests that there is an almost automated avoidance of division into lots.

While only the use of the technique in practice will determine whether Directive 2014/24/EU did really introduce the division into lots as a default approach, certain predictions are already possible now. First, little will change in Member States such as France where, as explained above, a mandatory division into lots has been operational since 2006 and arguably a maximum of SME participation has been achieved.<sup>158</sup> The French experience is based on art.10 CMP 2006 which is very similar and served as a model for art.46 Directive 2014/24/EU. However, it is submitted that the French experience and the very similar German experience, was also influenced by very litigious bidder communities with 1,000-2,000 review cases

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<sup>150</sup> See [French] art.10 CMP 2006 and old [German] §97(3) GWB and Article 2 (2) VOL/A 2009.

<sup>151</sup> See old Regulation 8(11) [UK] Public Contracts Regulations 2006, S.I. 2006 No. 5 which implies that the division into lots is allowed, but does not encourage let alone require it. This is part of the provision on thresholds and thus part of the aggregation regime.

<sup>152</sup> Sánchez Graells, *Public Procurement and the EU Competition Rules*, *supra* note 13, at 347.

<sup>153</sup> Article 65(1) Utilities Directive 2014/25/EU provides for the division into lots but does not include a “divide or explain” requirement, which is only foreseen as a possibility for Member States to go beyond the requirements of the Directive in Recital 87 of Directive 2014/25/EU.

<sup>154</sup> The Concessions Directive 2014/23/EU does not provide for the division into lots.

<sup>155</sup> Smith, “Divide or Explain”, *supra* note 123.

<sup>156</sup> And the old Public Sector Directive 2004/18/EC.

<sup>157</sup> Sánchez Graells, *Public Procurement and the EU Competition Rules*, *supra* note 13, at 347, poignantly put it as follows, art.46 “fundamentally rest[s] on a general expectation that contracting authorities will consider the possibility of dividing contracts into lots and where they decide against it, provide a justification”.

<sup>158</sup> According to François Lichère the relevant data that does not clearly prove an impact of the obligatory division into lots according to art.10 CMP 2006. See also the data in *infra* note 206. According to Wessel Thomassen et al., *supra* note 2, at 31-40, the share of SME in public contracts is not particularly high in France.

each year in which the division into lots featured prominently.<sup>159</sup> In Germany with its compulsory division into lots without discretion of contracting authorities to deviate from this obligation, the non-division into lots is fully reviewable.<sup>160</sup> This is also the case in France where contracting authorities can deviate from the obligation only in exceptional circumstances.<sup>161</sup> By contrast, in the UK where the Directive was transposed a year early, it has been criticised that there are no clear consequences if a contracting officer does not comply with the obligation to “explain”.<sup>162</sup> He or she only has to report “afterwards” and it is not even clear whether this has to be communicated in the contract award notice or the reg.84 UK Public Contracts Regulations 2015 report.<sup>163</sup> Thus this communication ultimately lacks transparency, happens too late in the process, and most importantly is not reviewable in practice.<sup>164</sup> In the anyway much less litigious UK, with its handful of procurement judgments per year, an increase in SME participation in public procurement appears doubtful.<sup>165</sup> Having said that, this cannot safely be predicted and the numerous but by their nature not publicly documented out of court settlements in UK procurement disputes also put pressure on contracting authorities to follow the Public Contract Regulations. Thus, despite the problems highlighted above,<sup>166</sup> “divide or explain” might well increase SMEs participation in procurement in the UK.

## 6. Lot bundling and limitation

In addition to allowing or requiring the division into lots, procurement laws often allow or prohibit that one economic operator bids for more than one of the lots. In an ideal market, where there is a multitude of interested bidders, large and small, there would be - at the one end of the spectrum - a micro-enterprise bidding for only one of the specialised lots and - on the other end - a large company bidding for all lots, with many variations in between. Allowing multiple bids for the divided lots might appear to contradict the very purpose of the division into lots, which is to increase SME

<sup>159</sup> For example in France: Conseil d’Etat [Supreme Administrative Court], CE 9 juillet 2007, EGF-BTP, n° 297711 or CE 20 février 2013, Société Biomnis, n° 363656. Examples for Germany: [Federal] Vergabekammer Bund, VK 2-105/15 vom 7.12.2015; [State] Vergabekammer Saxony, 1/SVK/O14-16 vom 26.7.2016; Vergabekammer Bund, VK 2-35/15 vom 17.8.2015; Oberlandesgericht [High Court] Munich, Verg 1/15 vom 9.4.2015; Vergabekammer Bund, VK 2-101/14 vom 12.12.2014; [State] Vergabekammer Mecklenburg-Hither Pomerania, 2 VK 14/14 vom 9.9.2014; Vergabekammer Bund, VK 2-115/14 vom 30.1.2015; Vergabekammer Bund, VK 1-114/14 vom 19.1.2015; [State] Vergabekammer Brandenburg, VK 11/15 vom 5.8.2015; Kammergericht [High Court] Berlin, Verg 10/13 vom 20.2.2014.

<sup>160</sup> Burgi, *supra* note 12, at 293 citing Oberlandesgericht [High Court] Düsseldorf [2005] VergabeR 109 [responsible for the second instance review of federal contracts] who left it open whether the contracting authority has the discretion not to divide into lots. Assuming a discretion not to divide into lots: Kulartz, §97 GWB, in Kulartz, Kus and Portz, *Kommentar zum GWB Vergaberecht* (Werner, 2<sup>nd</sup> ed. 2006), margin number 69.

<sup>161</sup> Article 32 (1) subparagraph 2 Ordonnance n° 2015-899 du 23 juillet 2015

<sup>162</sup> Smith, “Divide or Explain”, *supra* note 123.

<sup>163</sup> Regulation 84 Public Contract Regulations 2015 contains a number of reporting duties towards the Cabinet Office.

<sup>164</sup> Smith, “Divide or Explain”, *supra* note 123. Sánchez Graells, *Public Procurement and the EU Competition Rules*, *supra* note 13, at 347, also argues that this is a “soft requirement not amenable to review”.

<sup>165</sup> See: P. P. Craig and M. Trybus, “Public contracts: England and Wales” in R. Nogouellou and U. Stelkens (eds.) *Comparative Law on Public Contracts Treatise* (Bruylant: Brussels, 2010), 339-366 and M. Trybus, “An Overview of the United Kingdom Public Procurement Review and Remedies System with an Emphasis on England and Wales” in F. Lichère and S. Treumer (eds.), *Enforcement of EU Public Procurement Rules* (Djøf Publishing: Copenhagen, 2011), 201-234

<sup>166</sup> Smith, “Divide or Explain”, *supra* note 123.

participation by creating smaller and more manageable contract opportunities. In other words, what is the purpose of dividing a contract into lots when the bidder puts them together again by bidding for several or all lots?<sup>167</sup> However, this criticism does not take account of the fact that markets differ. Some bidders might still bid for only one lot and others only for a few rather than all lots. Moreover, it assumes that in all imaginable scenarios the large company capable to bid for several or all lots will always be the economically most advantageous tender, irrespective of lot numbers and sizes, specialisms and geographical dispersion. Furthermore, preventing bidders from competing for more than one lot effectively restricts access to public contracts,<sup>168</sup> which is legally and economically problematic. Economic theory supports flexible rules in this respect, to both foster competition through increased SME participation and at the same time allow larger tenderers to exploit economies of scale - and to encourage bidders to submit more competitive offers for a given package than they would for independent lots or for all the lots.<sup>169</sup> The *European Code of Best Practices* already advised not to limit the number of lots a bidder can *bid for* in a way that would impair the conditions for fair competition.<sup>170</sup> Savas suggested, however, that the buyer should set a relatively low maximum number of lots that a single tenderer can be *awarded* at any one time.<sup>171</sup>

It is also necessary to differentiate not only between SMEs and larger companies but also at least between the three main categories of SMEs, namely micro-, small-, and medium sized enterprises,<sup>172</sup> the latter being relatively strong economically and therefore interested in significantly different contract value ranges. A supply contract with an overall value of €6 million, for example, would mainly be of interest to larger companies. Splitting it into three equal lots of €2 million makes it also interesting for medium-sized enterprises but not for small- and micro-sized ones. Splitting the contract into 30 lots of €200,000 each brings the contract into the reach of small- and even micro-sized enterprises but now the larger and even the medium-sized enterprises might lose interest if only allowed to bid for one contract in a now possibly highly competitive environment with many bidders. The permission to bid for several or even all lots keeps the divided contract interesting for all types of bidders.

### **6.1 Lot bundling and art.46 Directive 2014/24/EU**

According to art.46(2) Directive 2014/24/EU, the transposing national laws may provide that bids “may be submitted for one, for several or for all of the lots” of a divided contract. However, “even where tenders may be *submitted* for several or all lots, [the contracting authority may] limit the number of lots that may be *awarded* to one tenderer”. Furthermore, according to art.46(3) the transposing legislation may provide that “more than one lot may be awarded to the same tenderer,” and that “contracting authorities may award contracts combining several or all lots.” The transparency requirements that come with these paragraphs essentially provide that

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<sup>167</sup> See also Lichère, “L'accès PME dans la Directive 2014/24”, *supra* note 8, at 112.

<sup>168</sup> *Ibid.*, at 111.

<sup>169</sup> N. Dimitri, R. Pacini, M. Pagnozzi, and G. Spagnolo, “Multi-Contract Tendering Procedures and Package Bidding in Procurement” in Dimitri, Piga, and Spagnolo, *supra* note 9, 193, at 194-215; Sánchez Graells, *Public Procurement and the EU Competition Rules*, *supra* note 13, at 350 also citing M. M. Lindhorst, J. Telgen, and F. Schotanus, *supra* note 53.

<sup>170</sup> SEC(2008) 2193, at 6-7.

<sup>171</sup> E. S. Savas, *Privatization and Public-Private Partnerships* (Chatham House: New York, 2000), at 186.

<sup>172</sup> Article 2 of Title I of the Annex to Commission Recommendation 2003/361/EC.



the contract notice must state how many bids for how many lots are allowed. Thus art.46(2)-(3) allows the use of several approaches.

First, bids may only be allowed for one lot, which begs the question of the consequences of submitting bids for more than one lot in such a case. This question had to be addressed in the transposing national laws (which it is not),<sup>173</sup> guidance, or, failing that, case law.

Second, bids may be allowed for several but not all lots, which begs the question of the consequences of submitting bids for all lots in such a case. Again, national laws,<sup>174</sup> guidance, or case law would have to answer this question, although it would have been preferable for this question to be addressed in the Directive. In Germany, before the transposition of Directive 2014/24/EU, the number of lots that could be awarded to a single economic operator was limited, to promote SMEs. This limitation was a procurement condition based not on law but procurement practice which was however endorsed by jurisprudence.<sup>175</sup> The new §30 VgV 2016<sup>176</sup> now suggests various possibilities of allowing bids for several lots but §30(1) sentence 1 VgV contains the option to set an upper limit of the number of lots that can be awarded to a single operator. This would allow the pre-2016 procurement practice of limiting bids for several lots to continue, thus showing an impact of harmonisation on the German *legislation* but not necessarily on procurement *practice*.<sup>177</sup> Directive 2014/24/EU sets a low floor of harmonisation allowing but not requiring lot limitation and, as the French example shows,<sup>178</sup> did not change the national law in the transposition process and consequently has no effect on procurement practice. The Austrian law does not address the issue,<sup>179</sup> and the UK and Irish Regulations just cut and paste the text of the Directive,<sup>180</sup> thereby leaving these decisions to the contracting authorities.

Third, bids for all lots may also be allowed. Again, when *bids* for several or all lots are allowed, that does not necessarily mean that the contracting authority must be obliged to *award* several or all lots to one bidder in case he or she submitted the economically most advantageous bid for all relevant lots. As Smith put it “the winner

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<sup>173</sup> This question is neither addressed in Article 32 [French] Ordonnance n° 2015-899 du 23 juillet 2015; nor §97(4) sentence 3 [German] GWB 2016 and German §30 VgV 2016; nor Regulation 46 [UK] Public Contracts Regulations 2015; nor Regulation 46 [Irish] European Union (Award of Public Authority Contracts) Regulations 2016, nor §22 [Austrian] BVerG 2006 as amended.

<sup>174</sup> This question is not addressed in Article 32 [French] Ordonnance n° 2015-899 du 23 juillet 2015; §97(4) sentence 3 [German] GWB 2016; Regulation 46 [UK] Public Contracts Regulations 2015; Regulation 46 [Irish] European Union (Award of Public Authority Contracts) Regulations 2016; or §22 [Austrian] BVerG 2006 as amended.

<sup>175</sup> “Euro-Münzplättchen II”, OLG Düsseldorf, NZBau 2000, 440 as cited by Burgi, “Mittelstandsfreundliche Vergabe“, *supra* note 48, at 697.

<sup>176</sup> §30 VgV 2016: “1) Unbeschadet des § 97 Absatz 4 des Gesetzes gegen Wettbewerbsbeschränkungen kann der öffentliche Auftraggeber festlegen, ob die Angebote nur für ein Los, für mehrere oder für alle Lose eingereicht werden dürfen. Er kann, auch wenn Angebote für mehrere oder alle Lose eingereicht werden dürfen, die Zahl der Lose auf eine Höchstzahl beschränken, für die ein einzelner Bieter den Zuschlag erhalten kann.” English: “Irrespective of §97(4) of the Competition Act, contracting authorities may provide, whether bids can be made for one lot, several lots, or all lots. The contracting authority may limit the number of lots that can be awarded to a single bidder, even when bids for several or all lots are allowed, [translation of the author].”

<sup>177</sup> Thanks to Martin Burgi for discussing this issue with the author.

<sup>178</sup> See art.32 Ordonnance n° 2015-899 du 23 juillet 2015 compared to art.10 CMP 2006.

<sup>179</sup> See: §22 BVerG 2006 as amended.

<sup>180</sup> See: Regulation 46 [UK] Public Contracts Regulations 2015; Regulation 46 [Irish] European Union (Award of Public Authority Contracts) Regulations 2016

does not take all”.<sup>181</sup> There is a difference between allowing multiple *bids* and allowing multiple *awards*, both being possible under the Directive,<sup>182</sup> although its Recital 79 is more cautious regarding multiple awards. Moreover, Article 46(2) paragraph 2 Directive 2014/24/EU provides:

“Contracting authorities may, even where tenders may be submitted for several or all lots, limit the number of lots that may be awarded to one tenderer, provided that the maximum number of lots per tenderer is stated in the contract notice or in the invitation to confirm interest. Contracting authorities shall indicate in the procurement documents the objective and non-discriminatory criteria or rules they intend to apply for determining which lots will be awarded where the application of the award criteria would result in one tenderer being awarded more lots than the maximum number.”

This paragraph suggests that if certain requirements are met, the contracting authority could still award a number of lots that exceeds the upper limit set to the same economic operator. However, in the Member States who have transposed this possibility the decision would have to be taken by the contracting authority. This paragraph was transposed in the German §30(2) sentence 2 VgV 2016, Regulation 46(4) and (5) of the [UK] Public Contract Regulations 2015, and Regulation 46(4) and (5) of the [Irish] European Union (Award of Public Authority Contracts) Regulations 2016, but not in Austria and France. The German §30 VgV 2016 and Article 32(1) subparagraph 3 of the 2015 French Ordonnance expressly allows limitation of both bids and awards. In deciding which of these possibilities to use, the contracting authority needs to know the relevant market well and depending on the situation and the possibility used, there are the dangers of conservative bidding, unsustainable bidding, and of collusion.<sup>183</sup>

The procurement laws of Member States that already expressly provided for the division into lots before 2014, notably France,<sup>184</sup> Germany,<sup>185</sup> and Austria<sup>186</sup> also allowed bids for multiple lots and did not change this approach when transposing the Directive.<sup>187</sup> Regulation 46(3)-(6) of the 2015 UK- and Regulation 46(3)-(6) of the 2016 Irish Regulations transposed art.46(2)-(3) Directive 2014/24/EU word for word.

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<sup>181</sup> Smith, “Divide or Explain”, *supra* note 123.

<sup>182</sup> Lichère, “L'accès PME dans la Directive 2014/24”, *supra* note 8, at 112.

<sup>183</sup> Smith, “Divide or Explain”, *supra* note 123.

<sup>184</sup> Article 10 CMP 2006: “Si plusieurs lots sont attribués à un même titulaire [...]” English: “If multiple lots are awarded to one and the same bidder [translation of the author].”

<sup>185</sup> Old § 97(3) GWB: „Mehrere Teil- oder Fachlose dürfen zusammen vergeben werden, wenn wirtschaftliche oder technische Gründe dies erfordern.“ English: „Multiple [...] lots may be awarded together [to one bidder] when this is required for economic or technical reasons [translation of the author].”

<sup>186</sup> §22 BVergG 2006 as amended does not expressly address this issue. §22(2) sentence 3 BVergG 2006 provides: “In diesem Fall ist dem Bieter auch die Möglichkeit einzuräumen, nur einzelne dieser Teile der Leistung anzubieten.” English: “In this case [when the contract has been divided] the bidder has to be given the opportunity to make an offer only for parts of this contract [translation of the author].” As the text speaks of the plural “Teile”, English “parts”, this suggests that offers can be made for more than one lot. There is no provision that would limit the number of lots that can be awarded to one bidder. However, this provision dates from the 2006 version of the Austrian act and is not part of the transposition of Directive 2016/24/EU – in contrast to §22(4) sentence 3 BVergG 2006 as amended.

<sup>187</sup> For France Article 32 I. para 3 Ordonnance n° 2015-899 du 23 juillet 2015 reads: “Les acheteurs peuvent limiter le nombre de lots pour lesquels un opérateur économique peut présenter une offre ou le nombre de lots qui peuvent être attribués à un même opérateur économique.” English: “The contracting authority may limit the number of lots for which an economic operator may submit a tender or the number of lots that can be awarded to one and the same economic operator [translation of the author].”

The Directive allows leaving all decisions regarding lot bundling and limitation to the contracting authorities. Again, this is considered a wise approach since only the earlier are close enough to the market to make these decisions. It would thus be difficult to subject them to abstract rules in national procurement laws, although the Directive allows that as well. France, Germany, Ireland, Austria, and the UK left bundling and limitation decisions to the contracting authorities.<sup>188</sup> According to Sánchez Graells, art.46 largely reflects economic theory regarding lot bundling, by allowing: (1) multiple bidding and (2) restrictions on the number of lots to be *awarded* to the same bidder.<sup>189</sup> The limitation of the number of lots an economic operator can bid for, possible but not required under the Directive, however, is more problematic as competition is compromised because larger bidders are prevented to use their advantages.

### **6.2 Alternative bids and art.46 Directive 2014/24/EU**

A related question is whether art.46 Directive 2014/24/EU allows a bidder to make different bids for each individual lot on the one hand, and a different and lower bid if he or she is awarded several or all lots on the other hand (alternative bids). In other words, whether art.46(2) allows a bidder to offer a rebate if awarded several or all lots.<sup>190</sup> Article 10 of the old French CMP 2006 expressly prohibited such a rebate as favouring larger companies.<sup>191</sup> For the same reason it could be argued that alternative bids would go against the objectives of art.46 Directive 2014/24/EU. If rebates can be offered for all the lots then the SMEs for which the contract has been divided will be priced out of the competition, thereby undermining the SME-friendly objectives of the costly division into lots.<sup>192</sup> On the other hand, it could be argued that offering rebates is desirable as enhancing competition and value for money, unless it infringed EU competition law, mainly on predatory pricing but also on exclusionary rebates.<sup>193</sup> Moreover, it could be argued that if the exploitation of economies of scale by larger

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For Germany: § 97(4) sentence 3 GWB 2016 reads: “Several partial or trade-specific lots may be awarded collectively if this is required for economic or technical reasons.” More specifically then §30(1) VgV reads: “[...] kann der öffentliche Auftraggeber festlegen, ob die Angebote nur für ein Los, für mehrere oder für alle Lose eingereicht werden dürfen. Er kann, auch wenn Angebote für mehrere oder alle Lose eingereicht werden dürfen, die Zahl der Lose auf eine Höchstzahl beschränken, für die ein einzelner Bieter den Zuschlag erhalten kann.” English: “[...] the contracting authority can determine if economic operators may bid only for one lot or several or for all lots. It can, even when bids for several or all lots are allowed, limit the maximum number of lots that can be awarded to any one bidder [translation of the author].”

<sup>188</sup> See art.32 I para 3 Ordonnance n° 2015-899 du 23 juillet 2015; §97(4) sentence 3 GWB 2016 and §30(1) VgV 2016; §22 [Austrian] BVergG 2006; reg.46 [UK] Public Contracts Regulations 2015; reg.46 [Irish] European Union (Award of Public Authority Contracts) Regulations 2016.

<sup>189</sup> Sánchez Graells, *Public Procurement and the EU Competition Rules*, *supra* note 13, at 351.

<sup>190</sup> Thanks to François Lichère for bringing this issue to my attention when commenting on an earlier draft of this article.

<sup>191</sup> Article 10 (1) sentence 3 Code des Marchés Publics 2006: “Les candidats ne peuvent présenter des offres variables selon le nombre de lots susceptibles d’être obtenus.” English: “Bidders shall not submit alternative offers for the lots they are bidding for [translation of the author].” This issue is not addressed in §97(3) of the old German GWB.

<sup>192</sup> Whether the division into lots in art.46 is an SME-friendly measure that does not compromise the other objectives of the Directive such as competition or other procurement objectives such as value for money - or indeed a SME-favouring measure that does compromise these objectives, is not discussed in this article but in Trybus and Andrecka, *supra* note 7, at 230-231, where it is argued that this is merely a SME-friendly measure that does not significantly compromise competition and value for money.

<sup>193</sup> Thanks to Albert Sanchez Graells for discussing this competition law point with me.

companies is to be limited to avoid disadvantages for SMEs, then this should not be done by prohibiting rebates but earlier by limiting the number of lots an individual economic operator can bid for. In other words, the question of what is more important, economics of scale or SME participation, is to be answered as part of the bundling decision not by allowing or prohibiting rebates. If bundling is allowed then rebates should be allowed as well, if bundling is not allowed then the question of rebates does not arise. However, art.46 does not address rebates at all.

A further question relates to the relationship of alternative bids with other relevant rules in Directive 2014/24/EU, most importantly, the rules on variants. As Arrowsmith explains, a variant proposes a solution to the contracting authority's requirements that differs from that set out in the specifications.<sup>194</sup> If alternative bids were covered by this notion, they would have to meet the requirements for variants: to be authorised or required in the contract notice or invitation to confirm interest and to be connected to the subject matter of the contract, art.45(1). Moreover, there are relevant requirements regarding the tender documentation.<sup>195</sup> However, it is submitted that alternative bids are not covered by the notion of variants as they do not offer alternatives to the technical specifications. This does not mean that the Directive precludes alternative bids, but merely that the rules on variants in art.45 do not apply to them.<sup>196</sup> There is nothing in the wording of the rules on award criteria in art.67, on life-cycle costing in art.68, or on abnormally low tenders in art.69 Directive 2014/24/EU that could be interpreted as excluding alternative bids either.

While alternative bids are not addressed in the Directive,<sup>197</sup> it is submitted that the general principles stemming from the TFEU allow them if certain conditions are met. The principle of competition requires alternative bids since they can lead to lower prices. The principles of equal treatment, transparency, and competition require the possibility to make alternative bids to be communicated to bidders – in the national procurement law or in the contract notice or the tender documents. A lack of transparency might compromise competition when bidders refrain from making alternative bids simply by not being aware of the possibility or assuming it to be prohibited. Equal treatment might be compromised, when due to the lack of transparency and clarity some bidders are disadvantaged by not making alternative bids while others are offering rebates. In other words, equal treatment would be compromised since tenderers were disadvantaged because they were complying with what they legitimately perceived to be the rules of a tender involving the division into lots.<sup>198</sup> This would mean that contracting authorities would have to reject alternative

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<sup>194</sup> Arrowsmith, *supra* note 45, at 798 provides two examples: “by providing for a contract length that is greater than that referred to in the standard specification, or by proposing a different technical solution for a construction project”. See also C. Bovis, *EC Public Procurement: Case Law and Regulation* (OUP: Oxford, 2006), at 436-437 and Sánchez Graells, *Public Procurement and the EU Competition Rules*, *supra* note 13, at 391-400 citing at 396 the relevant case law *inter alia* C-421/01, *Traunfelder* [2003] ECR I-11941 and C-423/07, *Commission v Spain* [2010] ECR I-3429.

<sup>195</sup> See also the requirements in art.46(2) and (3) Directive 2014/24/EU.

<sup>196</sup> Arrowsmith, *supra* note 45, at 801.

<sup>197</sup> Nor is the *European Code of Best Practices*, *supra* note 9, at 7-8 (Recital 78 Directive 2014/24/EU still recommends the use of this document).

<sup>198</sup> This point about equal treatment and transparency was highlighted in the similar case of exclusion on the basis violation of administrative (anti-mafia) obligations which were difficult to find because that would disadvantage non-domestic tenderers in Case C-27/15, *Pippo Pizzo v. CRGT Srl* ECLI:EU:C:2016:404 and especially the Advisory Opinion of AG Campos Sánchez-Bardona ECLI:EU:C:2016:48. See also Advisory Opinion of AG Campos Sánchez-Bardona in Case C-171/15, *Connexion Taxi Services BV v. Staat der Nederlanden (Ministerie van Volksgezondheid, Welzijn en*

bids unless they have been authorised by the national procurement law or the contracting authority.

§22(2) of the Austrian BVergG 2006 as amended requires to advertise both the entire contract and its lots *in parallel* if a contracting authority wants to reserve the option to award the contract in its entirety. This suggests that in this case parallel bids from the same operator would also be allowed, possibly including alternative bids, although this is not expressly addressed. France, as Lichère points out “surprisingly”,<sup>199</sup> allowed the previously banned alternative bids in its 2015 Ordonnance transposing Directive 2014/24/EU.<sup>200</sup> The decision about their use was left to the contracting authorities who “authorised”, which also implies communicated about the possibility to make, alternative bids. However, in a 2016 amendment of the 2015 Ordonnance, France reverted to the ban on alternative bids.<sup>201</sup> Neither §97(4) GWB 2016 nor §30 VgV clarify whether alternative bids are allowed in Germany and neither reg.46 [UK] Public Contracts Regulations 2015 nor reg.46 of the Irish 2016 Regulations do address the question. Thus, in accordance with the point on transparency and equal treatment made in the previous paragraph, in Germany, the UK, and the Republic of Ireland this would have to be decided and communicated by the contracting authorities, in the contract notice and tender documentation. Lichère points out, that allowing alternative bids with rebates is good for the public purse but less so for SMEs.<sup>202</sup> He argued that if the French legislator really wanted to favour SMEs they better revert to the prohibition of alternative bids, which the legislator did in late 2016,<sup>203</sup> although this would take economies of scale out of public contracts.<sup>204</sup> It is submitted that the low level of harmonisation leaves the possibility of rebates to be decided by the transposing Member States, the short-lived change of the French law was not required by Directive 2014/24/EU. Nevertheless, it is remarkable that the new Directive with its SME friendly objectives appears to have led to this initial repeal of an SME promoting measure. However, this also shows the low level of harmonisation. As a consequence, provided they meet the requirements discussed above, the Directive allows alternative bids, since it does not expressly prohibit them. A systematic interpretation with art.45 supports this finding: although variants widen the field and are thus increasing competition, the Directive prohibits them unless the

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*Sport) and Others* ECLI:EU:C:2016:506, at paragraph 59 and the judgment of the Court ECLI:EU:C:2016:948, at paragraphs 39 and 40.

<sup>199</sup> Lichère, “L’accès PME dans la Directive 2014/24”, *supra* note 8, at 112.

<sup>200</sup> Article 32(1) subparagraph 4 Ordonnance n° 2015-899 du 23 juillet 2015: “Les offres sont appréciées lot par lot sauf lorsque l’acheteur a autorisé les opérateurs économiques à présenter des offres variables selon le nombre de lots susceptibles d’être obtenus.: “Les offres sont appréciées lot par lot *sauf lorsque l’acheteur a autorisé les opérateurs économiques à présenter des offres variables* selon le nombre de lots susceptibles d’être obtenus [emphasis added].” English: “The bids are considered lot-by-lot, except when the contracting authority has authorised the economic operators to make alternative bids for the number of the lots they are bidding for [translation of the author].”

<sup>201</sup> Article 32(1) subparagraph 4 Ordonnance n° 2015-899 du 23 juillet 2015 as amended by the loi n° 2016-1691 du 9 décembre 2016: “Les offres sont appréciées lot par lot. Les candidats ne peuvent présenter des offres variables selon le nombre de lots susceptibles d’être obtenus.” English: “The bids are considered lot-by-lot. The bidders may not make alternative bids for the number of lots they can be awarded [translation of the author].”

<sup>202</sup> Lichère, “L’accès PME dans la Directive 2014/24”, *supra* note 8, at 112.

<sup>203</sup> Compare the versions of Article 32(1) subparagraph 4 of 2015 in *supra* note 200 and of late 2016 in *supra* note 201.

<sup>204</sup> Lichère, “L’accès PME dans la Directive 2014/24”, *supra* note 8, at 112.

contracting authority authorises them and informs everyone about it in the tender documentation.<sup>205</sup>

## 7. Likely impact

It is submitted that the impact of the division into lots regime of art.46 Directive 2014/24/EU will be limited and that a significant increase in SME participation cannot be expected in many Member States. This is due to several factors compromising the approach of the Directive.

First, as discussed in the previous sections of this article, while making the division into lots the default approach, art.46 Directive 2014/24/EU does not sufficiently develop the old regime based on art.9 Directive 2004/18/EC and the 2008 *European Code of Best Practices*. Apart from the “and explain” element of “divide or explain”, which as discussed above might be undermined by ‘cut and paste’ explanations which might be difficult to challenge in review bodies in practice, art.46 is so flexible it could be described as only formally hard law. The regime is an example of minimum harmonisation in which voluntary division and the ‘divide or explain’ principle constitute the firm floor. However, this floor is too low as Member States’ transposition and contracting authorities’ implementation can make the ‘or explain’ aspect - and thus refraining from a division into lots - very easy. Above the firm floor, Member States can tightly regulate the ‘or explain’ or even make division compulsory. However, neither the compulsory division into lots, nor bid bundling, nor award bundling, nor the question of alternative bids are harmonised. The effect of this level of minimum harmonisation is that Member States could largely continue their regimes and practices before Directive 2014/24/EU when transposing the instrument. Germany and France continue with a compulsory division into lots and the UK, Ireland, and Austria with an optional approach, adding only the ‘or explain’ aspect, which, again, can be satisfied relatively easily. The result with regards to national transposition is that little has changed. Since the national legal frameworks have not changed significantly, procurement practice is unlikely to change either. Without a change of the legal framework and procurement practice there is no reason to expect a change in the level of the allegedly desired SME participation in public contracts, at least not because of the division into lots regime of Directive 2014/24/EU. Only the higher profile of the division into lots through its formally ‘hard law’ nature might help to slightly increase SME participation in some Member States.

Second, there is data on the French experience which indicates that not even the introduction of a compulsory division into lots in 2006 led to an increase in contracts awarded to SME.<sup>206</sup> While this data does not comprehensively prove the

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<sup>205</sup> Thanks to Albert Sánchez Graells for discussing this point with me.

<sup>206</sup> According to data regularly collected by the *Observatoire Economique de L'Achat Public*, a body under the French Ministry of Finance, Economy, and Industry (on file), the share of SMEs in public contracts (total, State, regional and local authorities) were: in 2004: 64% by number and 36% by value, in 2005: 64% by number and 32% by value, in 2006: 64% by number and 27% by value, in 2007: 62% by number and 35% by value, in 2008: 60% by number and 30% by value, in 2009: 62% by number and 28% by value, in 2010: 60% by number and 27% by value, in 2011: 57% by number and 25% by value, in 2012: 57% by number and 28% by value, and in 2013: 58% by number and 27% by value. While the share of regional and local authorities’ contracts in both number and value stayed broadly the same in this 2004 to 2013 period, the share of the number of contracts awarded by the central State level contracting authorities actually (slightly) decreased: 55% in 2004, 59% in 2005, 52% in 2006 and 2007, 49% in 2008, 43% in 2009, 46% in 2010, 50.3% in 2011, 50.6% in 2012, and 51.1% in 2013. While the interpretation of these figures is difficult and problematic as they are subject to a multitude of influences other than legislative change (for example the economic crises or political changes) they do not show any impact of the introduction of compulsory division into lots in 2006.

absence of such an effect, especially not for all Member States, at least this *a maiore ad minus* suggests that the softer UK ‘divide or explain’ regime is even less likely to produce an increase in SME participation.

Third, the SME friendly division into lots regime cannot be seen in isolation. Directive 2014/24/EU reinforced the aggregation regimes, framework agreements in art.33,<sup>207</sup> dynamic purchasing systems in art.34,<sup>208</sup> and centralised purchasing in art.37.<sup>209</sup> Moreover, a new aggregation regime on *ad hoc* joint procurement was introduced in art.38.<sup>210</sup> These regimes have the objectives to reduce costs and increase buyer power. While this cannot be quantified due to a lack of reliable data, the division into lots will require additional resources, most importantly staff time, thereby increasing costs. Moreover, it is designed to further the interests of SMEs as sellers as contracts are divided into lots with the intention to adapt them to SME capacities. Herrera argued that this constitutes a contradiction of objectives as demand aggregation undermines the division into lots.<sup>211</sup> Not only in times of economic crises and tightening budgets, the need to reduce costs and more generally the interests of contracting authorities might prevail over those of the SMEs. The division into lots regime might prove to be too soft to counteract the effects of the reinforced and extended aggregation regime with a smaller share of the procurement pie for SME as a result. However, even centralised public procurement agencies, such as the Austrian *Bundesbeschaffungs GmbH* or the French UGAP, are subject to the division into lots regime<sup>212</sup> thus softening the contradiction highlighted by Herrera. Moreover, the more

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<sup>207</sup> In framework agreements one or several economic operators are selected for an agreement concerning a particular type of supply, service, or work to be procured during a limited period in the future and on the basis of terms laid down by the contracting entity. During the life time of the framework agreement all relevant individual contracts, also called ‘call-offs’, are awarded to either the only private party or to one of the selected operators party to the agreement on the basis of the same if often more precisely formulated terms. Framework agreements limit competition as only parties to the agreement may be awarded contracts, especially when they are concluded with only one private operator (See Trepte, *supra* note 104, at 212). Framework agreements will not only be used for the purchase of office equipment or spare parts, but also for routine repair and maintenance services for equipment or buildings (Trepte, *ibid.*, at 208). On the rules under Directive 2014/24/EU see F. Lichère and S. Richetto, “Framework agreements, dynamic purchasing systems and public e-procurement” in Lichère, Caranta, and Treumer, *Modernising Public Procurement*, *supra* note 3, 185-224.

<sup>208</sup> Dynamic purchasing systems are a hybrid electronic procedure for commonly used purchases. They have to be based on the open procedure; they are “a new mechanism for the electronic application of the open procedure” as Trepte, *ibid.*, at 410 put it. On dynamic purchasing systems in the old Public Sector Directive: Trepte, *ibid.*, at 409-415; Bovis, *supra* note 12, at 253-256 and 320-323; and in great detail: S. Arrowsmith, *The Law of Public and Utilities Procurement* (Sweet&Maxwell: London, 2<sup>nd</sup> ed. 2005) at 1207-1221. On the rules under Directive 2014/24/EU see Lichère and Richetto, *ibid.*

<sup>209</sup> Centralised purchasing does not necessarily lead to a reduction of chances of SMEs. For example, in Austria procurement is extensively centralised in the *Bundesbeschaffungs GmbH* (BBG, English: ‘Federal Procurement Ltd.’). The BBG awards 65-67 per cent of its contracts to SMEs – through the division of contracts into regional lots, distribution structures through local partners, and the formation of tender consortia: <http://www.bbg.gv.at/english/facts-figures/> [accessed 2 October 2017].

<sup>210</sup> See G. M. Racca, “Joint Procurement Challenges in the Future Implementation of the New Directives in Lichère, Caranta, and Treumer, *Modernising Public Procurement*, *supra* note 3, 225-254.

<sup>211</sup> Herrera, *supra* note 8, at 141-143. See also Report of the UK Federation of Small Businesses: *Public Procurement: A consultation on changes to public procurement rules in Scotland* (FSB, April 2015), Question 11: “This move to collaborative, centralised purchasing has been, by far, the single biggest change to small businesses bidding for public contracts in Scotland in recent years and is the main source of frustration.”

<sup>212</sup> The *Bundesbeschaffungs GmbH* is under the obligation to especially consider the role of SMEs as bidders in contracts regarding predefined supplies and services (for example cleaning services for buildings, office and computer equipment, food, etc.), in line with their general policy and practice to use procurement techniques and approaches as far as they are considered effective for the procurement

professionalised workforce in these agencies is perhaps in a better position to optimise the division into lots without the help of outside consultants.

Fourth and finally, as discussed under 2.1 above,<sup>213</sup> the participation of SMEs in public procurement procedures and even their success rate could be interpreted as already relatively high, with limited room for improvement through any reform, including the division into lots.

## 8. Conclusions

The division into lots regime of art.46 Directive 2014/24/EU is *not* improving the prospects for SMEs in public procurement across the EU. The firm floor of minimum harmonisation is set too low and consequently did not lead to any significant legislative changes at the national level during the transposition process. Consequently, there is no reason to expect a change of practice based on this largely unchanged legal framework. Thus, *no* significant shift towards the promotion of SMEs has occurred through the division into lots regime of Directive 2014/24/EU.

This article isolated the regime on the division into lots as the most extensive measure to facilitate SME participation in Directive 2014/24/EU. The assessment of the regime provided contributes to the discussion but is not sufficient to answer the question whether the Directive can meet its objectives to increase SME participation in public procurement. That would have to include at least the other three measures: the minimum turnover requirement,<sup>214</sup> the European Single Procurement Document,<sup>215</sup> and direct payments to subcontractors,<sup>216</sup> which would go beyond the aims of this article. However, although these measures all address problems raised by stakeholders during the consultation, scepticism is in order, since these regimes have their own issues and are even more limited than the division into lots regime.<sup>217</sup> Moreover, all four measures, with exception of art.71(2) Directive 2014/24/EU, is directed at SME as prime contractors. SMEs want to be prime contractors and subcontracting is considered only the second-best option since SMEs in supply chains often feel squeezed by the larger companies who act as prime contractors. Prime contractors are not subject to Directive 2014/24/EU when awarding subcontracts, unless the contracting authority imposes a contract condition to that effect. Title III of Directive 2009/81/EC on defence procurement shows that more could be done when

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in question based on the detailed market analysis preceding any procurement procedures. This includes the division of larger contracts into lots. In this respect the *Bundesbeschaffungs GmbH* has to advertise lots for which this is adequate with regard to the type and size of the contracts on a regional basis, so that if possible even micro-businesses can participate in the procurement procedure (qualification criteria), in particular considering the structure of local sourcing (*örtliche Nahversorgungsstruktur*). Moreover, for particular supplies or services, such as for medical equipment, contracts are divided into technical lots. Overall, it can be said roughly that for example food contracts are almost always divided into (regional) lots while for example for medical equipment they are sometimes divided into (technical) lots.

<sup>213</sup> See the figures in Wessel Thomassen et alera, *supra* note 2.

<sup>214</sup> Article 58(3) Directive 2014/24/EU. Essentially, to qualify bidders need to have a minimum turnover of (only) twice the contract value. See Trybus and Andrecka, *supra* note 7, at 234-236; and Trybus, *supra* note 8, at 272-274.

<sup>215</sup> Article 59 Directive 2014/24/EU. Essentially, a single electronic proof of qualification and selection criteria replacing a multitude of documents intended to cut red tape. See Trybus and Andrecka, *ibid.*, at 231-234; Trybus, *ibid.*, at 266-271; and Telles, *supra* note 8.

<sup>216</sup> Article 71(3) Directive 2014/24/EU. Essentially, contracting paying the subcontractors directly rather than the prime. See Trybus and Andrecka, *supra* note 7, at 236-237; and Trybus, *supra* note 8, at 274-278.

<sup>217</sup> See Trybus and Andrecka, *ibid.* and Trybus, *ibid.* on all four measures and Telles, *supra* note 8, on the ESPD.



the supply chain, where SME play a bigger role, is addressed extensively in the legislation.<sup>218</sup> However, such a regime for the entire public sector would be burdensome and of doubtful benefit for many contracts.<sup>219</sup>

To significantly promote SMEs as prime contractors, the new Directive would also have to have provided a regime for public contracts below the thresholds. Such a regime regulated in the Directive rather than being based on the principles of the TFEU or, alternatively, lower thresholds could be more effective measures to improve the opportunities of SMEs as prime contractors rather than subcontractors. However, especially the introduction of a regulated regime for contracts below the thresholds is a controversial issue.<sup>220</sup>

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<sup>218</sup> The fact that there are few regulatory constraints on prime contractors may further impact SMEs in the supply chain, although this has never been fully explored. Luke Butler addressed this issue with regards to defence procurement in his paper at the conference “International Public Procurement: comparing the EU and the US. The case of military procurement” at the Turin Congress Centre organised by the European Law Institute at the University of Turin on 22 September 2017.

<sup>219</sup> A possible exception here could be works concession since they are long term contracts. Thanks to François Lichère for pointing this out to me during the European Public Procurement Law Group meeting in Aix-en-Provence in July 2013.

<sup>220</sup> Some stakeholders criticised the lack of clarity of the rules for procurement below the thresholds, see Green Paper-Consultation-Synthesis of Replies, *supra* note 4, at 12. However, they were “evenly divided on the issue”.