

**PROCUREMENT LAWYERS' ASSOCIATION**

**PAPER ON**

**THE IMPLEMENTATION OF CERTAIN ASPECTS  
OF THE 2014 PROCUREMENT DIRECTIVES**

**July 2017**

## About the Procurement Lawyers Association

The Procurement Lawyers' Association (PLA) is an organisation which exists to bring together all procurement lawyers, whether in private practice or in-house, public or private sector and including solicitors, barristers and academics based in the UK and elsewhere.

The PLA aims to represent, promote and strengthen procurement law expertise in a number of ways, including through in-depth discussion of procurement law issues.

## About this Paper

This Paper was prepared to reflect the position as at 1 July 2017 and explores how the jurisdictions of England and Wales, Scotland, Northern Ireland and Ireland have implemented Directive 2014/24/EU on Public Procurement (“the 2014 Directive”) in certain important respects.<sup>1</sup> In particular, it considers how policy and regulations within each jurisdiction:

- a. Seek to promote the greater participation of Small and Medium Enterprises (“SMEs”) in public procurements (Part A); and
- b. Address the ways in which social considerations can increasingly shape public procurement processes and outcomes (Part B).

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<sup>1</sup> This paper takes the 2014 Directive as representative of the EU’s approach to these issues and therefore does not separately address the provisions in the Utilities Directive 2014 or the Concessions Contracts Directive 2014.

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## PART A: ENHANCING SME PARTICIPATION

### AI SMEs AND BARRIERS TO ACCESS

#### A1.1 Introduction

1. The 2014 Directive seeks to give effect to the wider strategy set out in the Commission Communication of 3 March 2010 entitled 'Europe 2020, a strategy for smart, sustainable and inclusive growth' ("the 2020 Strategy"), a strategy that was formulated as the EU's response to the financial crisis.<sup>2</sup> In very general terms, the 2020 Strategy identified - as one of the EU's goals - the development of "[a]n industrial policy for the globalisation era ..." in relation to which Member States would be required to "improve the business environment especially for innovative SMEs, including through public sector procurement to support innovation incentives."<sup>3</sup>
2. This purpose is reflected in the 2014 Directive, recital (124) of the 2014 of which states:

*"Given the potential of SMEs for job creation, growth and innovation it is important to encourage their participation in public procurement, both through appropriate provisions in this Directive as well as through initiatives at the national level. The new provisions provided for in this Directive should contribute towards an improvement of the level of success, by which is understood the share of SMEs in the total value of contracts awarded. It is not appropriate to impose obligatory shares of success, however, the national initiatives to enhance SME participation should be closely monitored given its importance."*

#### A1.2 Definition of an SME

2. Article 83 of the 2014 Directive which deals with governance provides that for the purposes of Article 83(3)<sup>4</sup> and (4)<sup>5</sup> of the 2014 Directive, an "SME" shall be understood in the same way as it is defined in Commission Recommendation 2003/361/EC ("the Recommendation").<sup>6</sup> Pursuant to the Recommendation, the main factors determining whether an enterprise is an SME are:
  - a. Staff headcount; and
  - b. Either turnover or balance sheet total.

Company category	Staff headcount	Turnover [or]	Balance sheet total
Medium-sized	< 250	≤ € 50 m	≤ € 43 m
Small	< 50	≤ € 10 m	≤ € 10 m
Micro	< 10	≤ € 2 m	≤ € 2 m

<sup>2</sup> Available here:

<http://ec.europa.eu/eu2020/pdf/COMPLET%20EN%20BARROSO%20%20%200007%20-%20Europe%202020%20-%20EN%20version.pdf>

<sup>3</sup> Ibid, page 15.

<sup>4</sup> Article 83(3) obliges Member States to submit to the Commission every three years a monitoring report covering certain information including the level of SME participation in public procurement.

<sup>5</sup> Article 83(4) obliges Member States to ensure among other things that information and guidance on the interpretation and application of EU procurement law is available free of charge to assist contracting authorities and economic operators, in particular SMES, in correctly apply EU procurement rules

<sup>6</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003H0361>

3. These ceilings apply to the figures for individual firms only. A firm that is part of a larger group may need to include staff headcount/turnover/balance sheet data from that group too.
4. The European Commission's revised "*User Guide to the SME Definition*" was published in 2015 and contains details and explanations of the SME Definition which took effect on 1 January 2015.<sup>7</sup> In addition it contains a model declaration form that individual companies may complete when applying to SME support schemes in order to establish their SME status.<sup>8</sup>
5. Importantly in this regard, the 2014 Directive has introduced a turnover cap to facilitate SME participation. Contracting authorities will not be able to set company turnover requirements at more than twice the contract value except where there is a specific justification: see Article 58(3) of the 2014 Directive which, subject to the above qualification, provides that contracting authorities may impose requirements ensuring that economic operators possess the necessary economic and financial capacity to perform the contract, including by requiring a minimum yearly turnover in the area covered by the contract.

### A1.3 Barriers to SME engagement: A comparative analysis

#### England

6. By February 2011, a number of factors had been identified as inhibiting greater SME participation, including a lack of transparency in procurement and contracting; the need for strategic dialogue; the need for representation of SME interests at the top levels of government; and unnecessarily bureaucratic and time-consuming procurement procedures.
7. In February 2011, the Government opened a Strategic Supplier Summit for SMEs by announcing a series of measures aimed at unlocking Government purchasing for small companies, social enterprises, charities and voluntary organisations. In addition to echoing the European-level policy initiatives,<sup>9</sup> the summit reiterated the Government's 2010 pledge that, in order to bolster the Coalition drive for economic recovery and growth, 25% of government business should be placed with SMEs by the end of the Government's 5-year term.<sup>10</sup> In the 2009/2010 financial year, business between central government departments and SMEs had accounted for only 6.5% of the former's collective £50bn annual spend. By 2011/2012 that figure had reached almost 14%.<sup>11</sup>
8. In May 2013 the Government published Lord Young's report entitled '*Growing Your Business: A Report on Growing Micro Businesses*'. That report indicated that progress had been made but echoed the perceived issues faced by SMEs when participating in public sector procurement, noting:<sup>12</sup>

<sup>7</sup> The Guide is available in English here:

<http://ec.europa.eu/DocsRoom/documents/15582/attachments/1/translations>

<sup>8</sup> The European Commission also published a SME self-assessment questionnaire to enable businesses to determine whether they qualify as an SME. The questionnaire is here: [http://ec.europa.eu/growth/tools-databases/SME-Wizard/smeq.do;SME\\_SESSION\\_ID=zIPwmik-zJeXrGkqn47Mnw4cA2w99vLUnpSixkRbxutTDdixC-3U!1855083556?execution=e1s1](http://ec.europa.eu/growth/tools-databases/SME-Wizard/smeq.do;SME_SESSION_ID=zIPwmik-zJeXrGkqn47Mnw4cA2w99vLUnpSixkRbxutTDdixC-3U!1855083556?execution=e1s1)

<sup>9</sup> Particularly the Commission's Document '*European Code of Best Practices facilitating access by SMEs to public procurement contracts*'.

<sup>10</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/61148/SME-Progress-20Report-Summary.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61148/SME-Progress-20Report-Summary.pdf)

<sup>11</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/61384/SME-Progress-Report-Management-Summary-One-Year-On.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61384/SME-Progress-Report-Management-Summary-One-Year-On.PDF)

<sup>12</sup> The report is here:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/198165/growing-your-business-lord-young.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/198165/growing-your-business-lord-young.pdf)

*“Chief amongst the criticisms from SMEs about public sector procurement is the complexity, cost and inconsistency when trying to sell to more than one authority. An obvious example is the disparity between central government’s removal of PQQs for small value procurements and their continued use by the wider public sector, usually with different thresholds and often requiring burdensome details and the “gold plating” of training, health and safety policies and wider objectives of the contracting authority. SMEs want procedures in place to make contracts quicker to award, and more certainty about the likely success of a tender.”*

9. The report outlined recommendations for enhancing SME access to public procurement in three key sections:
  - a. First, there would be greater focus on what SMEs are able to offer public sector customers, including, in particular, a more direct route for SMEs into the market through programmes such as the Small Business Research Initiative, and greater encouragement of pre-dialogue engagement and publication of Government 'pipeline' opportunities;
  - b. Second, a Government consultation on establishing a 'single market' for the public sector, focussing on:
    - i. ease of access afforded by the removal of PQQs for contracts below the EU threshold, and a standardised, 'passport' PQQ for opportunities above threshold;
    - ii. greater visibility in the form of all opportunities advertised centrally on the Contracts Finder platform;
    - iii. removal of financial barriers; in particular an examination of whether an insurance scheme would be a viable alternative to the requirement for SMEs to provide completion bonds;
    - iv. standardisation of payment terms across the public sector; and
    - v. increased accountability through monitoring and central reporting of public sector SME expenditure.
  - c. Third, a Cabinet Office review of how the 'Mystery Shopper' scheme could operate more proactively in defence of SMEs and hold public bodies and supply chain managers to account and *"embed a stronger inspectorate function to ensure that procurement contract agreements are better enforced."*
10. Following Lord Young's report, in September 2013 a Government consultation on a proposed package of measures including:
  - a. Elimination of PQQs for below-threshold procurement;
  - b. Adoption of a standardised, core PQQ for above-threshold procurement;
  - c. Implementation of a 'supplier passport' to remove the requirement to submit PQQ data repeatedly, potentially by way of an electronic database with a modest fixed fee;
  - d. Advertisement of all public sector contract opportunities on the Contracts Finder platform;

- e. Reporting by all contracting authorities of their SME spend to central Government for publication;
  - f. Publication on a 'comply or explain' basis of data on usage by contracting authorities of centrally negotiated, SME-friendly deals;
  - g. Standardisation of payment terms through the supply chain, so that all sub-contractors would be paid promptly by prime contractors, in line with the 30 day payment requirement imposed on contracting authorities;
  - h. Evaluation of whether requirements for performance bonds were disproportionate and creating barriers to SME entries; and
  - i. Encouragement of the use of electronic invoicing.
11. The broadly positive response to the consultation<sup>13</sup> culminated in the Government's publication of *'Small Business: GREAT Ambition'* in December 2013,<sup>14</sup> in which it committed to legislate in order to:
- a. *"Cut down on process by abolishing Pre-Qualification Questionnaires (PQQs) for low-value contracts;*
  - b. *Mandate the use of a standard core PQQ for high-value contracts and ensure small business needs are taken into account in the design of procurement processes;*
  - c. *Make contract opportunities easier to find by making them all accessible on a single online portal;*
  - d. *Make sure small firms get treated fairly by mandating prompt payment terms all the way down a public procurement supply chain."*
12. Many of the proposals made following the consultation were implemented in England by way of Part IV of the Public Contracts Regulations 2015 (PCR 2015). In particular:
- a. Chapter 7 sets out additional rules for above threshold procurements;
  - b. Chapter 8 makes new provision for below threshold procurements; and
  - c. Chapter 9 contains miscellaneous provisions, including as to prompt payment.

## Wales

13. SMEs in Wales faced many of the same problems. In 2008, the Welsh Assembly Government (now the Welsh Government) launched "Opening Doors: The Charter for SME-friendly Procurement."<sup>15</sup> The Welsh Public Sector were asked to implement the Charter in relation to the award of public contracts.<sup>16</sup> By the Charter, the Welsh Public sector committed, amongst other things, to:

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<sup>13</sup>Available at:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/264101/LYCons\\_response3final.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/264101/LYCons_response3final.pdf)

<sup>14</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/266212/bis-13-1313-small-business-great-ambition-FINAL.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/266212/bis-13-1313-small-business-great-ambition-FINAL.pdf)

<sup>15</sup> The Charter is here: [https://www.hefcw.ac.uk/documents/about\\_us/internal\\_policies/Opening\\_Doors\\_Refreshed\\_English.pdf](https://www.hefcw.ac.uk/documents/about_us/internal_policies/Opening_Doors_Refreshed_English.pdf)

<sup>16</sup> For the purposes of the Charter, SMEs were considered to be a 'diverse group of businesses, ranging from sole traders to substantial, established firms – including start-ups, black and minority ethnic businesses (BMEs), voluntary and community organisations (VCOs), social enterprises and supported businesses.'

- a. Become more familiar with the SMEs in Wales and the services they provided;
- b. Take steps to find out what the barriers were to doing business with appropriate SMEs and seek to remove and lower them;
- c. Not assume that larger suppliers always offered better value for money;
- d. Publish guidance and brief SMEs on public sector requirements, the opportunities available, who to contact and how to tender for business;
- e. Making it easier for SMEs to contact and discuss procurement issues with the public sector;
- f. Ensure all processes create a level playing field for SMEs;
- g. Ensure genuine and fair competition that does not discriminate against SMEs;
- h. More widely advertise contracts over £25,000 in value, making best use of the National Procurement Website, [sell2wales.co.uk](http://sell2wales.co.uk);
- i. Welcome applications from new businesses;
- j. Actively encourage main suppliers to provide opportunities for SMEs to deliver elements of appropriate contracts;
- k. Welcome bids from small businesses that are collaborative or on a consortia basis.

14. On 6 December 2012, the Welsh Government issued the Wales Procurement Policy Statement which was designed to set out the procurement practices and specific actions that will be required of every public sector organisation in Wales. The Policy Statement built upon “Opening Doors, the Charter for SME Friendly Procurement” and set out a series of procurement principles which the Welsh Public Sector were required to adopt, including:

- a. Principle 5 requires “*Open accessible competition*” and stated “*public bodies should adopt risk based proportionate approaches to procurement to ensure that contract opportunities are open to all and smaller local suppliers are not precluded from winning contracts individually, as consortia, or through roles within the supply chain.*”<sup>17</sup>
- b. Principle 6 requires “*Simplified Standard Processes*” and stated “*procurement processes should be open and transparent and based on standard approaches and use of common systems that appropriately minimise complexity, cost, timescales and requirements for suppliers.*”

15. The Wales Procurement Policy Statement was re-issued on 9 June 2015.<sup>18</sup>

16. Several Procurement Advice Notes (“PANs”) have also been issued, including in relation to:

- a. Blacklisting in the Construction Industry: On 10 September 2013, the Welsh Government published a procurement advice note on the blacklisting of individuals in the construction industry.<sup>19</sup> The guidance sets out when contracting authorities can exclude blacklisters from bidding for public contracts.

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<sup>17</sup> To that end, the Welsh Public Sector was required to (i) use [www.sell2wales.co.uk](http://www.sell2wales.co.uk) to advertise all contracts over £25k; (ii) proactively publish their forward contract programmes; (iii) ensure that appropriate ‘lotting’ strategies are used; and (iv) apply the SQuID (being the Supplier Qualification Information Database) approach as standard to supplier selection. Further, the Welsh Public Sector was obliged to encourage main contractors to use the Tier 1 facility to advertise supply chain opportunities on [www.sell2wales.co.uk](http://www.sell2wales.co.uk)

<sup>18</sup> It is here:

<http://gov.wales/docs/prp/toolkit/june15walesprocurementpolicystatement2015v1.pdf>

<sup>19</sup> Blacklisting is defined as “the systematic compilation of information on individual trade unionists and their use by employers and recruiters to discriminate against those individuals because of their trade union membership or because of their involvement in trade union activity.”



- b. Project Bank Accounts (“PBAs”) in Construction:<sup>20</sup> In April 2014, recognising finance and cash flow are vital to SMEs operating in the construction sector, the Welsh Government announced the introduction of PBAs on the basis that fairness required that SMEs in the sector receive prompt payment in accordance with contract performance. The Minister stated: *“The introduction of PBAs will help ensure sub-contractors involved in delivery of public construction projects are paid on time. This is a vital development that will help improve cash flow for many of our smaller contractors and improve supply-chain collaboration.”*
  - c. Employment Practices on Publicly Funded Projects: In February 2015, the Welsh Government published a further PAN to inform and provide guidance to the public sector in Wales about how to address fair treatment in terms of pay and employment rights through procurement within publicly funded construction/infrastructure projects.<sup>21</sup> The PAN was particularly concerned with “false employment”, noting the *“increasing evidence that some companies and Employment Businesses are using employment intermediaries to disguise the employment of their workers as self-employment primarily to avoid employer National Insurance and reduce the costs associated with workers’ employment rights.”*<sup>22</sup>
17. The PCR 2015 applies to Wales save that, as regulation 1(8)(b) provides, part IV *“does not apply to a contracting authority if its functions are wholly or mainly ... (b) Welsh devolved functions, that is to say functions which could be conferred by provision falling within the legislative competence of the National Assembly for Wales (as defined in section 108 of the Government of Wales Act 2006)”*. All references to the PCR 2015 in this Paper should be construed accordingly. The Wales Act 2017 Parts 1 and 2 provide further detail on devolved matters.

### Scotland

18. The difficulties relating to SME participation in public procurement were recognised a decade ago within the Scottish Procurement Policy Note (“SPPN”) 03/2005 which was entitled ‘Removing Barriers for SMEs’.<sup>23</sup> That SPPN identified the main barriers to business as follows:
- a. SMEs often find it difficult to identify and access public sector procurement opportunities;
  - b. SMEs often face excessive and costly bureaucracy in procurement processes, in particular lengthy and non-standard pre-qualification and bidding processes;
  - c. SMEs are often hindered by a lack of transparency of procurement processes (they find it difficult to understand the process and/or the authority’s requirements); and
  - d. Debriefing of unsuccessful bidders is often inadequate insofar as it fails to help the bidder to understand how they can do better next time they compete.

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<sup>20</sup> The Ministerial announcement is here: <http://gov.wales/about/cabinet/cabinetstatements/previous-administration/2014/projectbankaccountupdate/?lang=en>

<sup>21</sup> The PAN is here: <http://prp.gov.wales/docs/prp/toolkit/20160324employmentpractisespanenglish.pdf>

<sup>22</sup> See also the Code of Practice on Ethical Employment in Supply Chains published in March 2017 which addresses modern slavery and human rights abuses, black-listing, false-employment, unfair use of umbrella schemes, zero hours contracts and the payment of a living wage.

<sup>23</sup> Available here:

<http://www.gov.scot/Resource/Doc/1265/0012493.pdf>

19. The remedial focus at this time was twofold:

- a. The introduction of a Code of Conduct between public purchasers and SMEs. The stated aim of the draft Code was to seek to simplify procurement procedures, ensure that contracts were advertised widely and ensure that unsuccessful bidders were debriefed on request; and
- b. A move towards the development of a model PQQ for use across the Scottish public sector with a view to minimising the burden on SMEs.<sup>24</sup> This PQQ initiative continued until 18 April 2016 when it was replaced with the European Single Procurement Document (“ESPD” - discussed further below)

20. In 2006 an overall review of public procurement in Scotland was carried out. This led to the publication of “*Review of Public Procurement in Scotland - Report and Recommendations.*”<sup>25</sup> The remit of this review was a broad one and provided a report on the state of Scottish public sector procurement as it then stood as well as identifying areas for improvement and how this might be done.

21. The report identified a high level of general dissatisfaction amongst suppliers with the procedures and practices then operated by public sector organisations in Scotland, with this sentiment particularly strong among SMEs. The list of concerns included poor communication, lack of access to information about opportunities, inconsistent approaches, multiple sets of terms and conditions, non-compliance with EU rules, a perceived lack of transparency and lack of redress.

22. The report recommended the creation of a Charter for Suppliers to set out standards that economic operators can expect in their dealings with the Scottish public sector. This was to broadly recommend the continuation of work on the existing Code of Conduct. The report also recommended greater standardisation in a number of areas such as information requested at PQQ regarding business scale, insurances, accounts information, recognition of accreditation as well as other matters such as the procedures actually used and contractual issues such as payment terms. The report further recommended the creation of a single public sector electronic portal, which led to the creation of Public Contracts Scotland portal. The report also suggested an effort be made to use procurement to facilitate the development of regional suppliers to provide goods and services to local markets.

23. SPPN 2/2009 advocated the adoption of “six simple steps” to promote SME involvement:

- a. Adopting the Suppliers’ Charter;
- b. Advertising on Public Contracts Scotland;
- c. Review procedures to ensure they place the minimum burden on suppliers;
- d. Use of outcome / output based specifications;

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<sup>24</sup> The SPPN stated “*Businesses participating in the SME forum and workshops were critical of the bureaucracy they perceived as being involved in public sector tendering, such as providing very similar pre-qualification information in a wide variety of formats demanded by public bodies. To tackle this, the forum recommended that a model pre-qualification questionnaire be developed for use across the Scottish public sector. It was proposed that businesses should complete and maintain the questionnaire and hold it for use as a business “CV”, to be submitted to public bodies as part of the supplier assessment process. Suppliers will hold the “CV” so they can update and tailor information for specific contract opportunities.*”

<sup>25</sup> Available here:

<http://www.gov.scot/Resource/Doc/96269/0023302.pdf>

- e. The need to address the payment of subcontractors in the terms and conditions of contracts; and
  - f. The need to monitor actual spend on SMEs.
24. Later in 2009, SPPN 4/2009 introduced a presumption that all public sector contract opportunities valued at over £50,000 should be advertised on the Public Contracts Scotland portal specifically mentioning the opening of new markets to SMEs as an intended benefit.
25. SPPN 2/2012 subsequently addressed the issue of relevance and proportionality of supplier requirements at the selection stage of procurement procedures. The Note discusses barriers to SME participation arising from disproportionate minimum financial requirements and insurance levels.<sup>26</sup>
26. A Review of Scottish Public Sector Procurement in Construction was published in October 2013,<sup>27</sup> making significant recommendations relevant to promoting SME involvement in construction procurement. Steps implementing the majority of the Review's recommendations were ultimately fused with the approach taken forward within the Procurement Reform (Scotland) Act 2014, Procurement (Scotland) Regulations 2016, the Public Contracts (Scotland) Regulations 2015 and associated Statutory Guidance.

#### Northern Ireland

27. In Northern Ireland, Procurement Guidance Notes ("PGNs") have been issued and re-issued from time to time by the Procurement Board. PGNs are a non-legislative, administrative means by which contracting authorities are advised of procurement policy and best practice developments. Two key PGNs issued in 2012 are PGN 02/12<sup>28</sup> and PGN 06/12,<sup>29</sup> each of which have been updated and re-issued to take account of the Public Contracts Regulations 2015.<sup>30</sup>
28. PGN 06/12 outlined a number of issues that were facing SMEs in Northern Ireland, including:
- a. Advertising: *"In order to facilitate participation of smaller businesses in the supply chain, there needs to be greater visibility of opportunities for SMEs and, indeed, all potential suppliers to government either as contractors or as potential subcontractors."*<sup>31</sup> A survey by the Federation of Small Business in Northern Ireland ("FSB") indicated that 48% of SMEs surveyed were unaware of the Northern Ireland civil service e-tendering website, eTenderingNI (also known as e-Sourcing NI).
  - b. Administrative complexity / perceptions of incumbent advantage: SMEs have complained that the procurement process is costly, complex and burdensome, with an over-emphasis on price. The FSB has reported that SMEs in Northern

<sup>26</sup> The Note is available here:

<http://www.gov.scot/resource/0039/00394311.pdf>

<sup>27</sup> <http://www.gov.scot/Resource/0043/00436662.pdf>. See in particular appendix 4 for the recommendations.

<sup>28</sup> Available here:

<https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/PGN-02-12-Public-Procurement-A-Guide-SMEs.PDF> PGN 02/12's purpose is to help SMEs to increase their knowledge and understanding of public sector procurement.

<sup>29</sup> Available here:

<https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/PGN-06-12-Helping-SMEs-Benefit-Subcontracting-Opportunities.pdf> PGN 06/12's purpose is to help Contracting Authorities to ensure that contractors operate SME-friendly procedures in their supply chains and how authorities can enhance the visibility of relevant subcontracting authorities.

<sup>30</sup> And which give effect to NI Public Procurement Policy agreed by the NI Executive in 2002. The Procurement Board is the body which implements the NI Procurement Policy.

<sup>31</sup> Ibid, page 9

Ireland attribute success in winning bids to a preference by the contracting authority for a known and/or incumbent supplier.<sup>32</sup>

- c. Scaling issues: Some SMEs considered that the public procurement process required more time, energy, resources and funding than their business will allow (something which was confirmed by the FSB). Consortium bidding was thus low and was often found to be an unsatisfactory experience.<sup>33</sup> In addition, the FSB also found that frameworks were under-utilised by SMEs in Northern Ireland; only 12% of businesses surveyed were on a Northern Irish framework and of the SMEs on frameworks, 70% believed that they were not a useful way to manage procurement.<sup>34</sup>
  - d. Capacity issues: In addition, concerns amongst SMEs in Northern Ireland include that they do not have the necessary financial or technical capabilities in order to perform certain contracts by themselves. In particular, SMEs have faced difficulties as a result of high required levels of professional indemnity (and other insurance requirements) and company turnover requirements.<sup>35</sup>
  - e. Payment terms: Feedback from SMEs has shown that smaller organisations working in a supply chain often experience delays in payment of invoices. This can compromise successful contract delivery.<sup>36</sup>
29. The PCR 2015 also applies in Northern Ireland save that Part IV again does not apply to a contracting authority if its functions are wholly or mainly “(a) Northern Ireland devolved functions, that is to say functions which could be conferred by provision included in an Act of the Northern Ireland Assembly made without the consent of the Secretary of State (see sections 6 to 8 of the Northern Ireland Act 1998;” Regulation 1(8)(a) of the PCR 2015.

## Ireland

30. In Ireland, the vast majority of businesses are SMEs with approximately 163,711 businesses being classified as SMEs providing approximately 853,887 jobs and representing 99.7% of total businesses in Ireland<sup>37</sup>. SMEs in Ireland account for a lower proportion of the value of public procurement contracts than the European average (25% versus 29% in the EU). Nevertheless, according to the European Commission, the public procurement system is comparatively SME-friendly in Ireland.<sup>38</sup> Notably, the proportion of Irish SMEs submitting proposals using e-tendering is 2.5 times higher than the EU on average (30.08% versus 12.85% in the EU)<sup>39</sup>. However, the high costs of legal proceedings are seen as a problem as they may prevent SMEs from challenging procurement decisions<sup>40</sup>.

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<sup>32</sup> GHK; Evaluation of SMEs Access to Public Procurement Markets in the EU, September 2010

<sup>33</sup> See ‘Evaluating SME experiences of Government Procurement in Northern Ireland’, 2009. The FSB survey in 2009 found that the majority of SMEs prefer to bid for public sector contracts on their own rather than in partnership with others. It went on to state that SME experiences of bidding with others is at best satisfactory (12%), poor (20%) and at worst very poor (26%). PGN 02/12 thus warns that it is important to ensure that consortium members will be able to work together effectively before entering into such a commitment.

<sup>34</sup> Ibid.

<sup>35</sup> Northern Ireland Assembly; Committee for Finance and Personnel, Report on the Inquiry into Public Procurement in Northern Ireland, published 10 February 2010

<sup>36</sup> Ibid, page 11 and see *Northern Ireland Assembly: Research Paper: Supporting SME access to public procurement opportunities, December 2011*

<sup>37</sup> The 2016 Small Business Act Fact Sheet, Ireland, published by DG Internal Market, Industry Entrepreneurship and SMEs, available at: <https://www.isme.ie/assets/SBA-Fact-Sheet-2016-Ireland.pdf>

<sup>38</sup> Ibid

<sup>39</sup> Ibid

<sup>40</sup> European Commission (2015), Public Procurement Knowledge Fiche Ireland — executive summary, European Commission: Brussels, mimeo.

31. The Enterprise Europe Network<sup>41</sup> published “*Best Practice Guide: Promoting SME participation in public contracts*” in February 2013 (“the Guide”). Its aim was to address the issues which inhibit SME procurement from the public sector. The variables impacting on SME engagement in Ireland included (a) type of procurement (a decentralised public procurement system); (b) size and value of contracts; (c) type of procedure (open procedure was the most accommodating procedure for SMEs); and (d) evaluation methods (SMEs were more likely to win contracts evaluated on the basis of MEAT rather than lowest price).
32. The Guide noted a range of internal and external constraints on SME participation. As to the internal constraints, it identified (i) the lack of technical qualifications and capabilities; (ii) lack of professional qualifications and capabilities; (iii) inability to meet financial and insurance requirements; and (iv) inadequate tendering skills. The external constraints identified were: (i) lack of knowledge of tender opportunities; (ii) over-emphasis on price; and (iii) inadequate feedback from procurers. When asked to list barriers to participation, the most common responses were (a) excessive administrative burden; (b) lack of knowledge about tender procedures; (c) the cost of preparing the proposal; (d) insufficient time to prepare the proposal; (e) use of unclear jargon; (f) difficulty in obtaining information; (g) the large size of contracts; and (h) the extent of the financial guarantees required.
33. The Guide made six recommendations as follows: (a) reduction of administrative burdens by e.g. increasing the use of standardised tender documents, earlier advertisements elimination of jargon and facilitating electronic submission and evaluation of tenders; (b) dividing contracts into lots; (c) application of proportionate financial capacity requirements; (d) clearer award criteria; (e) improving the accessibility of public procurers to SMEs and (f) provision of feedback to unsuccessful tenderers.

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<sup>41</sup> The Enterprise Europe Network is a European Commission network established to assist SMEs to undertake work in the EU and beyond. It provides assistance on researching markets, identifying new customers or suppliers and resolving European business issues.

## A2. ENHANCING SME PARTICIPATION - KEY AREAS

34. It follows from the foregoing concerns that this paper will focus on the following key areas relating to the facilitation of SME access to public procurements:

- a. Knowledge of and access to procurement opportunities;
- b. Administrative complexity;
- c. The use of Dynamic Purchasing Systems;
- d. Scaling down and up: The breaking up of contracts into lots / use of consortium bids;
- e. A residual category of measures to enhance SME participation; and
- f. Below threshold requirements.

### A2.1 Supplier Knowledge: Publicity and Access

35. Facilitating SME access to procurement opportunities will depend on how well publicised opportunities are and the mechanisms by which SMEs are informed of and enabled to bid for such opportunities.

#### England

36. Steps already taken by the Government between 2010 and 2012 to drive up SME participation had included the appointment of an SME 'Champion' in Steven Allet, as Crown Representative to Government on SME interests, and the establishment of the 'Contracts Finder' platform as a single point for electronic advertising of all central government contract opportunities.<sup>42</sup>

37. Regulation 106 of the Public Contracts Regulations 2015 ("PCR 2015"), entitled '*Publication of information on Contracts Finder where contract notices are used*', requires the publication of information on Contracts Finder within 24 hours of the earlier of (i) publication of the relevant contract notice in the OJEU; and (ii) the expiry of 48 hours from confirmation of receipt of the notice by the EU Publications Office. Regulation 106(2) sets out the information to be published as follows:

*(2) The information to be published on Contracts Finder shall include at least the following:—*

- (a) the internet address at which the procurement documents are accessible;*
- (b) the time by which any interested economic operator must respond if it wishes to be considered;*
- (c) how and to whom such an economic operator is to respond; and*
- (d) any other requirements for participating in the procurement.*

38. Regulation 108 of the PCR 2015 makes similar provision for the publication of contract award notices on Contracts Finder.

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<sup>42</sup> Guidance on the new transparency requirements for publishing on Contracts Finder was published by the CCS in March 2015 and relates to regulations 106, 108, 109, 110 and 112 of the PCR 2015 and is available here: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/524351/Guidance\\_on\\_transparency\\_requirements\\_for\\_Contracts\\_Finder.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/524351/Guidance_on_transparency_requirements_for_Contracts_Finder.pdf)

39. On 18 February 2015, the Crown Commercial Service published Procurement Policy Note 03/15 (“PPN 03/15”) entitled “Reforms to make public procurement more accessible to SMEs. PPN 03/15 set out the key requirement to “advertise as many public sector opportunities in one place (contracts finder) and to publish award notices for contracts and call-offs from framework agreements.”<sup>43</sup>

### Wales

40. The Welsh Government has explained how it will seek to encourage SMEs in business, including by facilitating access to procurements and has indicated that it will apply EU and UK procurement legislation to all tenderers in a fair and transparent manner and will encourage SMEs to embrace the principles of sustainable development. In addition, it indicated that it is in the process of modernising its procurement processes “*to ensure that they are transparent and fair for SMEs.*”<sup>44</sup> They have committed to reduce administrative complexity in procurement, by, amongst other measures:
- a. Ensuring skilled and professionally qualified personnel manage the procurement processes.
  - b. Explaining tender processes to SMEs.
  - c. Keep the tendering process as simple as possible to minimise cost.
  - d. Increase the use of e-procurement including procurement cards and electronic invoicing, in order to improve efficiency.
  - e. Discuss the procurement with SMEs on request to help them understand contracting authorities' requirements and assess their own suitability.<sup>45</sup>
41. To make sure procurement processes continuously improve, the Welsh Government has further resolved to:<sup>46</sup>
- a. Take account of good practice procurement guidance;
  - b. Welcome feedback from SMEs on procurement processes and procedures;
  - c. Have a complaints procedure;
  - d. Continuously improve its procedures and processes.

### Northern Ireland

42. In Northern Ireland, Regulations 106 and 108 of the PCR 2015 apply subject to Regulation 1(8)(a) in relation to devolved matters. PGN 02/12 sets out how and where tendering opportunities are publicised.<sup>47</sup> These include the following e-platforms which are in operation:
- a. Tendertap - Tender Alert Service - Invest NI: Tendertap is a Tender Alert Service provided by Invest NI which sends companies' daily alerts for relevant

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<sup>43</sup> TPPN 03/15 is here:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/405020/PPN\\_reforms\\_to\\_make\\_public\\_procurement\\_more\\_accessible\\_to\\_SMEs.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/405020/PPN_reforms_to_make_public_procurement_more_accessible_to_SMEs.pdf)

<sup>44</sup> <http://www.assembly.wales/en/gethome/abt-procurement/Pages/sme.aspx>

<sup>45</sup> <http://www.assembly.wales/en/gethome/abt-procurement/Pages/sme.aspx>

<sup>46</sup> <http://www.assembly.wales/en/gethome/abt-procurement/Pages/sme.aspx>

<sup>47</sup> Ibid, section 7

tender opportunities published in the Tenders Electronic Daily (“TED”), as well as some smaller value UK and local opportunities. The service currently costs £100 plus VAT annually.

- b. eTendersNI: eTendersNI is a web based portal which provides access to Central Government procurement opportunities. This increases accessibility for SMEs, Social Economy Enterprises (SEEs) and other potential suppliers who wish to do business with the public sector. The portal provides secure, web-based tools for buyers and suppliers to conduct the tendering process online. Using eTendersNI helps to reduce the time and cost of tendering, and simplifies and standardises the tendering process. Suppliers can view current opportunities on the portal and then, if interested, register to respond to a particular tender. Registration is free and is only required once.<sup>48</sup>
43. Moreover, the provisions for e-procurement which will come into force in Northern Ireland in October 2018 should provide for a less resource-intensive system, thus decreasing the administrative burden on SMEs by providing an easily accessible and undeniably cheaper way of procuring.
44. Many ‘meet the buyer’ events take place north and south of the Irish border. These events provide opportunities for suppliers to gain information on future tendering competitions, how to access opportunities on eTenders or eTendersNI and may offer one to one interviews.
45. The ISNI Information Website, launched in June 2009, also provides public access to information on infrastructure investment programmes, projects and procurements, including key milestone dates.<sup>49</sup> Cross-border support for SMEs may come in the form of the Go-2-Tender Programme and the Network and Getwork Programme managed by InterTradeIreland. Passport to Export is an Invest NI programme which aims to facilitate export development among local SMEs.

#### Scotland

46. In Scotland, Directive 2014/24/EU is implemented through the Public Contracts (Scotland) Regulations 2015 (“PCSR 2015”). Quite separately there is national legislation establishing a parallel domestic regime consisting of the Procurement Reform (Scotland) Act 2014 (“PRSA”), the Procurement (Scotland) Regulations 2016 and Statutory Guidance.
47. Of particular importance is the fact that the PRSA introduces requirements for “regulated contracts”. These are contracts with an estimated value in excess of £50,000 (in relation to supplies and services) and £2m (in relation to works). A regulated procurement is a procedure carried out by a contracting authority leading to the award of a regulated contract.
48. The PRSA imposes for the first time a duty to establish and maintain a public contracts website “*for the purpose of publicising, in relation to regulated procurements, (a) the seeking of offers, and (b) the award of contracts.*”<sup>50</sup>
49. Specifically in relation to advertising:

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<sup>48</sup> As part of the registration process, SMEs should also specify the categories of procurement against which they might be interested in providing supplies, services and, where appropriate, works. Buyers can then search the system to help identify potential suppliers for specific categories of procurement.

<sup>49</sup> The website is [www.isni.gov.uk](http://www.isni.gov.uk)

<sup>50</sup> The site is [www.publiccontractsscotland.gov.uk](http://www.publiccontractsscotland.gov.uk). The site itself had already operated for almost a decade. See reference at paragraph 21 to SPPN/4/2009 encouraging its use.



- a. s.23(1) imposes an obligation on a contracting authority to “publicise its intention to seek offers as part of a regulated procurement on the Public Contracts website”; while
  - b. s.23(2) imposes an obligation on a contracting authority to “publicise the award of a contract under a regulated procurement on the Public Contracts website.”<sup>51</sup>
50. The PRSA (s.35) also requires contracting authorities to maintain a contracts register which is publicly available on the internet.
51. The PRSA introduces a sustainable procurement duty (s.9) relevant to a contracting authority’s approach to all regulated procurements. Under that duty, a contracting authority is required to consider (amongst other things) how it can facilitate the involvement of SMEs, third sector bodies and supported businesses in the process.<sup>52</sup>

### Ireland

52. In Ireland, the eTenders website<sup>53</sup> exists and operates as a central facility for all public sector contracting authorities to advertise procurement opportunities and award notices.<sup>54</sup> Since the adoption of Circular 10/10 (replaced in April 2014 by Circular 10/14) there has been a requirement to publish public contracts on the etenders website<sup>55</sup>. Circular 10/14 indicates that the Office of Government Procurement (“OGP”) will continue to promote the optimum use of the eTenders portal as a tool for facilitating the involvement of SMEs in public sector procurement. More particularly, it states:
- a. As regards advertising of contract opportunities to promote SME participation, buyers will continue to be required to advertise all contracts for supplies and services with an estimated value of €25,000 (excluding VAT) and upwards on eTenders. The advertising threshold for works and works related services remains at €50,000;
  - b. As regards the publication of contract award notices, buyers are required to publish all Contract Award Notices over €25,000 on the eTenders website on completion of the award (with effect from 1 August 2014). This is a separate requirement from the OJEU publication requirement.

### EU procurement portal: E-certis

53. “E-certis” is a free, on-line source of information to help companies and contracting authorities deal with different forms of documentary evidence required when tendering for public contracts. It is a central, online system provided and managed by the European Commission. It enables suppliers to find out the type of documents and certificates etc. which they may be asked to provide in any EU country, even before they decide to bid. This should help suppliers to bid cross-border, if they are unfamiliar with these requirements. Recital (87) of the 2014 Directive further indicates that:

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<sup>51</sup> As drafted, the requirement to publish a contract award notice under the PRSA captures framework call-offs.

<sup>52</sup> The PRSA also introduces a duty on all contracting authorities with spend over £5m to produce an annual ‘Procurement Strategy’. One of the many requirements of the Procurement Strategy is that it is to address how the contracting authority is to facilitate the involvement of SMEs, third sector bodies and supported businesses in regulated procurements.

<sup>53</sup> [www.etenders.gov.ie](http://www.etenders.gov.ie)

<sup>54</sup> Most utilities now also utilise the etenders website to advertise contracts.

<sup>55</sup> Circular 10/10 entitled “Facilitating SME Participation in Public Procurement” was adopted on 13 August 2010 by the Department of Finance. Its aim was to provide guidance to contracting authorities on how to structure their tender processes in a manner that facilitates increased participation by SMEs while ensuring that all public sector procurement is carried out in a manner that is legal, transparent and secures optimal value for money for the tax payer . It was replaced in April 2014 by Circular 10/14.

*“Experience acquired so far indicates that voluntary updating and verification is insufficient to ensure that e-Certis can deliver its full potential for simplifying and facilitating documentary exchanges for the benefit of SMEs in particular. Maintenance should therefore be rendered obligatory in a first step. Recourse to e-Certis will be made mandatory at a later stage.”*

## A2.2 Reducing Administrative Complexity

54. A key purpose of Directive 2014/14/EU was to reduce administrative complexity.<sup>56</sup> In particular, the new ESPD and selection arrangements have been introduced with a view to reducing what were seen as burdensome requirements for economic operators.

### The ESPD

55. The European Single Procurement Document (ESPD) is a self-declaration form used in public procurement procedures by public buyers and businesses in the EU. Before the introduction of the ESPD, companies were required to submit various documents to prove that they fulfil the exclusion and selection criteria of a tender, for example have paid taxes and have not been convicted of criminal activity. Now, companies are able to meet these obligations with a single ESPD self-declaration form.

56. Recital (84) of the 2014 Directive states:

*“Many economic operators, and not least SMEs, find that a major obstacle to their participation in public procurement consists in administrative burdens deriving from the need to produce a substantial number of certificates or other documents related to exclusion and selection criteria. Limiting such requirements, for example through use of a European Single Procurement Document (ESPD) consisting of an updated self-declaration, could result in considerable simplification for the benefit of both contracting authorities and economic operators.”*

57. Article 59 of the Directive deals with the ESPD and Article 59(1) obliges contracting authorities to accept submissions of requests to participate or tenders by way of an ESPD.<sup>57</sup> It is a formal statement by the economic operator that it is not in one of the situations in which economic operators shall or may be excluded; that it meets the relevant selection criteria and that, where applicable, it fulfils the objective rules and criteria that have been set out for the purpose of limiting the number of otherwise qualified candidates to be invited to participate. Its objective is to reduce the administrative burden arising from the requirement to produce a substantial number of certificates or other documents related to exclusion and selection criteria.

58. Commission Implementing Regulation 2016/7 of 5 January 2016 establishes the standard form for the ESPD. Article 1 provides that:

*“From the moment the national measures implementing Directive 2014/24/EU enter into force, and at the latest from 18 April 2016, the standard form set out in Annex 2 to this Regulation shall be used for the purposes of drawing up the European single procurement document referred to in Article 59 of*

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<sup>56</sup> That is echoed again in Implementing Regulation 2016/7 at Recital (1): *“One of the major objectives of Directives 2014/24/EU and 2014/25/EU is the lessening the administrative burdens of contracting authorities, contracting entities and economic operators, not least small and medium-sized enterprises...”*

<sup>57</sup> Implemented in Regulation 59 of the PCR 2015

*Directive 2014/24/EU. Instructions for its use are set out in Annex 1 to this Regulation.”<sup>58</sup>*

## England

59. In February 2015, the CCS published “*New requirements relating to [PQQs] to help businesses to access Public Sector Contracts.*”<sup>59</sup> For procurements above the thresholds, Appendix 1 to the guidance explains how contracting authorities might comply with the PCR 2015. Appendix 1 of the guidance also sets out guidance on use of standardised PQQs.<sup>60</sup>
60. Information Notice 03/15 also published in February 2015 is entitled ‘Reforms to make public procurement more accessible to SMEs’ and sets out two key reforms designed to reduce complexity for SMEs as follows:
- a. The abolition of a pre-qualification stage for procurements below the EU thresholds, and a requirement to have regard to guidance on qualitative selection issued by Cabinet Office for above EU threshold procurements; and
  - b. A requirement for contracting authorities to insert provisions in all public contracts to ensure prompt payment through the supply chain.
61. However, on 9 September 2016, the CCS published PPN 8/16 entitled ‘Standard Selection Questionnaire (SQ)’<sup>61</sup> which replaces PPN 03/15. The standard Selection Questionnaire has been developed to simplify the supplier selection process for businesses, in particular smaller firms, across the public sector. In developing the SQ the questionnaire has been made compliant with the ESPD. The guidance also sets out how the rules on the selection of suppliers have been amended.
62. Organisations subject to the guidance (including Welsh and Northern Irish contracting authorities exercising wholly or mainly reserved functions in relation to above threshold contracts) are now required to:
- a. Stop using the standard Pre-Qualification Questionnaire for the supplier selection stage of new procurements covered by the Public Contracts Regulations 2015; and
  - b. Start using the new standard Selection Questionnaire and comply with the guidance, process and the standard form in the annexes to PPN 8/16
63. Contracting authorities must now tell potential suppliers in the procurement documents how they are to access the Selection Questionnaire and submit the completed version. The SQ is in three parts:
- a. Part 1 of the standard Selection Questionnaire covers the basic information about the supplier, such as the contact details, trade memberships, details of parent companies, group bidding and so on;
  - b. Part 2 covers a self-declaration regarding whether or not any of the exclusion grounds apply;

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<sup>58</sup> The Implementing Regulation states that the contracting authority OJEU/call for competition must reference what information the ESPD will require, and that the intention is for ESPDs to be submitted with the tender in an Open procedures and with the Request to Participate in others.

<sup>59</sup> The guidance was issued under PCR Reg 107(1) and is available here:  
[https://www.bipsolutions.com/docstore/eu-directives-2015/4279-15\\_GN\\_PQQ\\_Guidance.pdf](https://www.bipsolutions.com/docstore/eu-directives-2015/4279-15_GN_PQQ_Guidance.pdf)

<sup>60</sup> All guidance on the EU procurement Directives and their domestic implementation in the UK can be found here:  
<https://www.gov.uk/guidance/transposing-eu-procurement-directives>

<sup>61</sup> PPN 08/16 is here:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/558531/PPN\\_8\\_16\\_StandardSQ\\_Template\\_v3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/558531/PPN_8_16_StandardSQ_Template_v3.pdf)

- c. Part 3 covers a self-declaration regarding whether or not the company meets the selection criteria in respect of their financial standing and technical capacity.

64. At the time of writing, there is little evidence as to the operation of ESPDs in England, Wales or Northern Ireland.

#### Scotland

65. In Scotland a standard PQQ was in use for a number of years prior to 18 April 2016, the date on which the ESPD was introduced. A standard form “ESPD Scotland” is now in place and additional guidance on its use is included in Scottish Government’s “Procurement Journey”.<sup>62</sup>

66. Scottish practitioners have had rather more experience of using ESPDs and have indicated that there have been teething issues since the introduction of the ESPD issues which do not indicate early use is achieving the ‘simplicity’ objective underlying introduction of the ESPD. For example, there have been examples of: economic operator confusion and frustration with the length of the document and early uncertainty in approaches to the use of ratios in assessing financial standing. The ESPD in Scotland runs to 37 pages, made some amendments to terminology to maximise “pull across” from previous standard PQQ, and imposes restrictions on what additional questions might be asked. It has been observed that the facility to omit questions (from amongst the 37 pages) is not necessarily being used where it might be appropriate to do so.

#### Northern Ireland

67. In Northern Ireland, previous guidance recommended that buyers should explain the process from the outset and only ask for necessary information; the complexity of the process should be proportionate to the size and scale of the requirement; tender documentation should be clear, concise and jargon-free; standardised pre-qualification questionnaires should be used where possible; and financial assessment should be simple and proportionate.<sup>63</sup> In scope Northern Irish contracting authorities will now be required to follow the guidance in PPN 8/16 in relation to above threshold contracts but this guidance will continue to apply for other contracts.

#### Ireland

68. In Ireland, Circular 10/10 indicated that “*further guidance [was] being developed on standardised documentation (including model forms of contract for supplies and services) and in relation to setting minimum standards for works and related services and these [would] be issued shortly.*” Subsequently, standard pre-qualification documents (incorporating standard self declarations) and standard Instructions to Tenders and Forms and Tender were put in place for works and works-related services contracts following development of the Capital Works Management Framework (“CWMF”).<sup>64</sup> As required by Implementing Regulation 2016/7, the Office of Government Procurement also put in place a standard suite of tender documentation and contract templates for routine goods and services contracts and this tender documentation is widely used by public sector bodies for the award of above and below threshold contracts<sup>65</sup>. The ESPD has been incorporated into both the CWMF and the OGP templates.

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<sup>62</sup> <https://www.procurementjourney.scot/>

<sup>63</sup> Northern Ireland Assembly: Research Paper: Supporting SME access to public procurement opportunities, December 2011

<sup>64</sup> The CWMF was developed to ensure more efficient delivery of works projects, better value for money and greater cost certainty at tender stage. The documents are available for download at [www.constructionprocurement.gov.ie](http://www.constructionprocurement.gov.ie)

<sup>65</sup> Available at: <https://www.procurement.ie/suppliers/template-documents>

## A2.3 SMEs and Dynamic Purchasing Systems

69. Recital (66) of the 2014 Directive observes:

*“In order to further the possibilities of SMEs to participate in a large-scale dynamic purchasing system,<sup>66</sup> for instance one that is operated by a central purchasing body, the contracting authority concerned should be able to articulate the system in objectively defined categories of products, works or services. Such categories should be defined by reference to objective factors which might for instance include the maximum allowable size of specific contracts to be awarded within the category concerned or a specific geographic area in which specific contracts are to be performed. Where a dynamic purchasing system is divided into categories, the contracting authority should apply selection criteria that are proportionate to the characteristics of the category concerned.”*

70. Article 34(1) of the 2014 Directive relates to Dynamic Purchasing Systems and provides:

*“For commonly used purchases the characteristics of which, as generally available on the market, meet the requirements of the contracting authorities, contracting authorities may use a dynamic purchasing system. The dynamic purchasing system shall be operated as a completely electronic process, and shall be open throughout the period of validity of the purchasing system to any economic operator that satisfies the selection criteria. It may be divided into categories of products, works or services that are objectively defined on the basis of characteristics of the procurement to be undertaken under the category concerned. Such characteristics may include reference to the maximum allowable size of the subsequent specific contracts or to a specific geographic area in which subsequent specific contracts will be performed.”*

71. The rules of DPSs have thus been greatly simplified with the removal of the onerous obligation to OJEU-advertise call-off contracts made under the DPS.

72. Regulation 34 of the PCR 2015 sets out the rules on Dynamic Purchasing Systems. Regulation 34(5) states that in order to procure under a DPS, contracting authorities should follow the rules of the restricted procedure, and subject to the provisions of clause 34. Therefore, Regulations that apply to the Restricted Procedure, and to procedures generally, apply to a DPS, except where regulation 34 specifically alters or dis-applies those regulations.

73. The CCS have published a paper on DPSs in which they define a DPS as follows:

*“The Dynamic Purchasing System (DPS) is a procedure available for contracts for works, services and goods commonly available on the market. As a procurement tool, it has some aspects that are similar to an electronic framework agreement, but where new suppliers can join at any time. However, it has its own specific set of requirements. It is to be run as a completely electronic process, and should be set up using the restricted procedure and some other conditions (as set out in Regulation 34 of the Public Contracts Regulations 2015).”*

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<sup>66</sup> A Dynamic Purchasing System (DPS) is an electronic system through which contracting authorities can source requirements by inviting tenders from economic operators admitted to the DPS. Unlike framework agreements, economic operators can apply to join the DPS at any time in the life of the DPS and they are not required to submit tenders in order to join the DPS. All economic operators who meet the selection criteria have to be admitted to the DPS, and a DPS permits contracting authorities to move straight to the tender phase when a contract opportunity arises.

74. The guidance notes that the DPS can streamline procurement for both suppliers and authorities, in that suppliers will not have to demonstrate suitability and capability every time they wish to compete for a public sector contract and the award of individual tenders can be quicker than under some other procedures. The DPS is more flexible in some respects than frameworks, particularly as suppliers may join it at any time during its period of validity, meaning that suppliers are not locked out for the duration as they are with traditional frameworks. However the DPS under the old rules was rather cumbersome, so it was little-used either in the UK or in other member States. The new rules provide additional flexibility.

75. The CCS explains the two stages under the new rules as follows:

Stage 1: Establishing the DPS and adding additional suppliers

*To set up a DPS, a contracting authority must place a call for competition in OJEU to make known the intention to establish a DPS, and suppliers must be allowed at least 30 days to respond. (As with other procedures, sub-central bodies may use a Prior Information Notice to make known their intention). This initial DPS set-up phase only covers the exclusion and selection criteria, as used in other procedures, and as set out in Regulations 57-64 of the PCR 2015. The OJEU contract notice should specify the nature of the requirements and the approximate quantities or values envisaged.*

*As with other procedures, the procurement documents should be made freely available electronically from the date of the advert. These procurement documents must remain available electronically throughout the duration of the DPS.*

*A DPS can be divided into categories of works services or goods, which are objectively defined on the basis of characteristics of the procurement to be undertaken under the category. The characteristics used to define a group may include size of contract or geographical area of contract delivery.*

*If the DPS is divided into categories, the selection requirements for each category should be appropriate to that category, and may vary between categories. In accordance with Regulation 59, suppliers should “self-certify” their compliance with the selection requirements, and confirm that none of the grounds for exclusion apply, in order to gain admittance to the DPS. Normally (subject to Regulation 59(8)), only suppliers who win contracts under the DPS should be expected to provide documentary evidence of their status (consistent with other procedures).*

*This is also subject to the requirement of Regulation 59(11), so authorities should not request supporting documents where they already hold them or can obtain relevant information from a national database. Where a supplier has already submitted documents under a previous contract (DPS or indeed otherwise) it should be asked to confirm these are still applicable, and only provide new documents as preceding ones expire, or circumstances change. Where CPBs set up DPSs it would be sensible for the CPB to hold information about the evidence submitted, and make this available to its own customers.*

*All suppliers who meet and pass the exclusion and selection criteria must be admitted to the DPS and/or the relevant categories within it.*

*Suppliers may join the DPS at any point during its validity if they satisfy the selection requirements, and none of the grounds for exclusion apply. The*

*authority is required to evaluate these suppliers' requests within 10 working days of receipt; this may be extended to 15 days if justified, for example, by the need to examine documents or to verify whether the selection criteria have been met (examination documents or other verification should not be the default, and only used if necessary for the proper conduct of the process; as noted as only the winning bidder should normally have to submit documents).*

*Contracting authorities may provide for award of contracts under a DPS on the basis of updated electronic catalogues, provided that the authority establishes the technical specification and format for the catalogue; supplier's requests to participate should be accompanied by a catalogue.*

### *Stage 2: Awarding specific contracts using the DPS*

*Once the DPS is set up, an authority may award specific contracts using a DPS that they are entitled to use by inviting all suppliers admitted to the relevant category to bid, in accordance with regulation 54. As with a framework, the award criteria to be used for the award of individual contracts are to be set out in the original contract notice<sup>2</sup>. These criteria may be "formulated more precisely" for specific contracts, as set out in the invitation to tender for the specific contract.*

*The award process and permissible award criteria are consistent with those for other procedures; the minimum timescale for return of tenders is 10 days. Where the contracting authority is a sub-central body, this time limit can be reduced by mutual agreement between the contracting authority and all suppliers in the relevant DPS / category.*

*The authority may choose to require that tenders for a specific contract comprise or include electronic catalogues, adapted to the specific requirement, in which case the authority should have asked the suppliers request to participate to be accompanied by a catalogue as mentioned above.*

*There is no obligation to undertake a "standstill" period, although there may be some benefits in doing so (see under FAQ section below).*

*The DPS is to be undertaken as a wholly electronic procedure, in accordance with Regulation 22 (1) to (7) and (11) to (20). Unlike other procedures there is no derogation to postpone the electronic requirements, so this requirement is in force from the date of the new Regulations. However where authorities already use an e-procurement solution it may well be that this can be used or adapted for a DPS; authorities may wish to discuss with their e-procurement solution or service provider. The requirement for an electronic procedure does not prevent "human" evaluation of tenders received under a DPS.*

*There is no requirement to submit any form of award notice to OJEU following the setting up of the DPS, or when new suppliers are added to the DPS. There is a requirement to publish contract award notices (which must be sent to the Publications Office within 30 days of award) for specific contracts awarded under the DPS. However, authorities can choose to group DPS contract award notices on a quarterly basis, which must be sent within 30 days (after) the end of each quarter. Authorities should also abide by the requirements for publication on Contracts Finder about contracts awarded, as explained under Procurement Policy Note 03/ 15.<sup>67</sup>*

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<sup>67</sup> <https://www.gov.uk/government/publications/procurement-policy-note-0315-reforms-to-make-public-procurement-more-accessible-to-smes>.

76. We have received limited evidence on DPSs across the British and Irish jurisdictions although it appears their use is growing. In Scotland, there has not been significant uptake of DPSs but general guidance on their use is set out in ‘Procurement Journey’, the online resource for procurement officers. Moreover, the PRSA (s.7) permits contracting authorities to use a DPS for regulated contracts beneath European thresholds at which the PCSR 2015 apply. Some DPS use is starting to emerge in the area of ‘light touch’ contracts, but currently on a small scale. We understand, anecdotally, that where they have been used, economic operators and contracting authorities have found the procedures less complicated.
77. In Ireland, there is also evidence of some use of DPSs starting to emerge. Two national dynamic purchasing systems have been put in place by a central purchasing body acting on behalf of local authorities for (a) plant hire; and (b) road markings. Other examples of DPSs recently established include a DPS for the provision of homecare services to children with complex care needs, a DPS for event services and a DPS for harvesting services. In addition, a number of national frameworks have now been converted into DPSs).

#### A2.4 Scaling Down and Up: Lots and Consortia

##### Breaking up contracts into lots

78. Contracting authorities are encouraged to break contracts into lots to facilitate SME participation. Recital (78) of the 2014 Directive thus states:

*“Public procurement should be adapted to the needs of SMEs. Contracting authorities should be encouraged to make use of the Code of Best Practices set out in the Commission Staff Working Document of 25 June 2008 entitled ‘European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts’,<sup>68</sup> providing guidance on how they may apply the public procurement framework in a way that facilitates SME participation. To that end and to enhance competition, contracting authorities should in particular be encouraged to divide large contracts into lots. 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.*

*The size and subject-matter of the lots should be determined freely by the contracting authority, which, in accordance with the relevant rules on the calculation of the estimated value of procurement, should also be allowed to award some of the lots without applying the procedures of this Directive. The contracting authority should have a duty to consider the appropriateness of dividing contracts into lots while remaining free to decide autonomously on the basis of any reason it deems relevant, without being subject to administrative or judicial supervision. Where the contracting authority decides that it would not be appropriate to divide the contract into lots, the individual report or the procurement documents should contain an indication of the main reasons for the contracting authority’s choice. Such reasons*

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A DPS may be set up by central purchasing bodies, to undertake centralised purchases by the CPB itself, and / or for the CPB’s “customers” to compete contracts.

<sup>68</sup> “The Code of Best Practice” is available here:

[http://ec.europa.eu/internal\\_market/publicprocurement/docs/sme\\_code\\_of\\_best\\_practices\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/sme_code_of_best_practices_en.pdf). The Code of Best Practice aims to (i) provide Member States and their contracting authorities with guidance on how they may apply the EC legal framework in a way which facilitates SMEs’ participation in contract award procedures, and (ii) highlight national rules and practices that enhance SMEs’ access to public contracts.



could for instance be that 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.

*Member States should remain free to go further in their efforts to facilitate the involvement of SMEs in the public procurement market, by extending the scope of the obligation to consider the appropriateness of dividing contracts into lots to smaller contracts, by requiring contracting authorities to provide a justification for a decision not to divide contracts into lots or by rendering a division into lots obligatory under certain conditions. With the same purpose, Member States should also be free to provide mechanisms for direct payments to subcontractors.”*

79. Recital (79) goes on to state:

*“Where contracts are divided into lots, contracting authorities should, for instance in order to preserve competition or to ensure reliability of supply, be allowed to limit the number of lots for which an economic operator may tender; they should also be allowed to limit the number of lots that may be awarded to any one tenderer.*

*However, the objective of facilitating greater access to public procurement by SMEs might be hampered if contracting authorities would be obliged to award the contract lot by lot even where this would entail having to accept substantially less advantageous solutions compared to an award grouping several or all of the lots. Where the possibility to apply such a method has been clearly indicated beforehand, it should therefore be possible for contracting authorities to conduct a comparative assessment of the tenders in order to establish whether the tenders submitted by a particular tenderer for a specific combination of lots would, taken as whole, fulfil the award criteria laid down in accordance with this Directive with regard to those lots better than the tenders for the individual lots concerned seen in isolation. If so, the contracting authority should be allowed to award a contract combining the lots in question to the tenderer concerned. It should be clarified that contracting authorities should conduct such a comparative assessment by first determining which tenders best fulfil the award criteria laid down for each individual lot and then comparing it with the tenders submitted by a particular tenderer for a specific combination of lots, taken as a whole.”*

#### England, Wales and Northern Ireland

80. In these jurisdictions, Regulation 46(1) of the PCR 2015 applies and provides that contracts may be divided into lots and that contracting authorities may determine the size and subject-matter of those lots. The provision is therefore not mandatory and the PCR 2015 therefore do not go beyond the minimum required under the 2014 Directive. However, Regulation 46(2) provides that *“Contracting authorities shall provide an indication of the main reasons for their decision not to subdivide into lots, which shall be included in the procurement documents or the report referred to in regulation 84(1).”*

#### Scotland

81. The power to divide up contracts into lots is embodied in Regulation 47 of the PCSR 2015. It is substantively identical to the provisions of Regulation 46 of PCR 2015.

## Ireland

82. In Circular 10/14, the guidance given to procurers states as follows (at para 4.2):

*“The sub-division of contracts into lots facilitates access by SMEs, both quantitatively (the size of the lots may better correspond to the productive capacity of the SME) and qualitatively (the content of the lots may correspond more closely to the specialised sector of the SME). Lots may be also decided on a geographic basis, a work package basis, an internal organisation structure basis, etc. Buyers should, where reasonable and without compromising efficiency and value for money, consider breaking contracts into lots, enabling smaller businesses to compete for these elements. Buyers must consider the aggregate value of the lots required to deliver a single national requirement when deciding whether a contract needs to be advertised on eTenders and in the Official Journal of the European Union (OJEU).”*

83. Furthermore, recital (78) of Directive 2014/24/EU suggests that a decision on dividing a contract into lots (and the relevance of the factors taken into account) ought not to be subject to any judicial supervision (which in these jurisdictions would preclude a challenge by way of judicial review).

### **The break-up of framework agreements**

84. In Ireland, similar provision is made for the break-up of frameworks as is made for the break-up of contracts into lots. Para 4.8 of Circular 10/14 states:

*“Breaking framework agreements into lots can be an effective way of opening up opportunities to SMEs. Depending upon requirements, framework agreements can be divided into lots on the basis of geography, specialism and/or value. This can encourage a range of SMEs to bid for business appropriate to their capacity, specialism and location.”*

85. In Northern Ireland, the Central Procurement Directive (“CPD”) advocates a range of measures for buyers to employ when using frameworks, including splitting frameworks into lots. Dividing contracts into lots is supported by Northern Irish Procurement Guidance and is advocated as a useful mechanism by which to include SMEs in procurement opportunities. The Northern Irish Assembly believes that this approach may be both quantitative, in that the size of lots may correspond better to productive capacity of SMEs, and qualitative, in that the lots may relate more closely to specialism of SMEs.<sup>69</sup>

### **The use of Consortium Bids**

86. The flip side of the sub-division of contracts (including frameworks) is to permit bids by consortia. In Ireland, para 4.3 of Circular 10/14 thus states:

*“SMEs are encouraged to consider using consortia where they are not of sufficient scale to tender in their own right. Template tender and contract documents allow for consortia to tender for public procurement opportunities. Suppliers considering forming a consortium to bid for public sector opportunities should seek legal advice in relation to the structure and operation of the consortium to ensure that it is fit for purpose and complies with their legal obligations particularly in relation to competition law.”*

87. The Irish Competition and Consumer Protection Commission has published guidance to assist SMEs in complying with competition law when tendering as part of a consortium<sup>70</sup>. The Guide notes that a consortium bid does not cause competition

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<sup>69</sup> Northern Ireland Assembly: Research Paper: Supporting SME access to public procurement opportunities, December 2011

<sup>70</sup> *Consortium Bidding, How to Comply with Competition Law when Tendering as Part of a Consortium*, December 2014, available at [http://ccpc.ie/sites/default/files/Consortium%20Bidding%20Guide\\_0.pdf](http://ccpc.ie/sites/default/files/Consortium%20Bidding%20Guide_0.pdf)

problems if the consortium members are not actual or potential competitors. Even if the members are actual or potential competitors, a consortium bid will not cause competition problems if (i) none of the consortium members (or no subset thereof) could fulfil the requirements of the tender competition of the contract on their own, (ii) only the minimum amount of information strictly necessary for the formulation of the consortium bid and the performance of the contract is shared and (iii) the consortium members ensure that they compete vigorously as normal in all other contexts.

88. In Northern Ireland, PGN 02/12 explains to suppliers that while the term is often used where formal legal and financial arrangements exist between the participants, this is not a necessary condition for the consortium to be able to bid for public contracts. *“Any informal grouping of suppliers can bid as a consortium and the EU Procurement Directives provide that a consortium bidding for a public contract can be assessed based on the collective capabilities of all of the participants in the consortium.”*<sup>71</sup> Suppliers are however, advised that the contracting authority needs to be *“confident that the consortium members can work together in the manner required and this can be tested through appropriate questions in the selection process.”*

89. In 2015, the Welsh Government has published the Joint Bidding Guide. The summary guide states that:

*“Joint bidding can take many different forms and, crucially, allows companies to pool their resources to increase their collective capacity or coverage in order to compete for contracts that may otherwise have been out of reach. With the right planning by both buyers and suppliers, consortia can be well-placed to deliver innovative solutions and responsive services.”*<sup>72</sup>

## A2.5 Residual Measures for Enhancing Participation

90. There are a number of residual measures that have been taken by—in different jurisdictions to enhance SME participation, including the following:

### Market Analysis

91. In Ireland, Circular 10/14 encourages contracting authorities to undertake market analysis prior to tendering in order to understand the relevant market, including the specific capabilities of SMEs in that market. The Office of Government Procurement routinely publishes Requests for Information in advance of establishing new national frameworks in order to gather market data.

92. In *Copymoore Limited and others v Commissioners for Public Works Ireland*<sup>73</sup>, a group of SMEs claimed, inter alia, that the National Procurement Service (“NPS” - the predecessor to the Office of Government Procurement) had failed to carry out an adequate market analysis as required by Circular 10/14 and as required by “good procurement practice” (in particular, in relation to setting the minimum financial turnover thresholds). However, the High Court found that the NPS had set the turnover requirement in accordance with then applicable guidelines in respect of SMEs. In particular, the Court held that the NPS were not obliged to reduce the financial threshold to a figure dependent upon an average individual contract price as this would likely defeat the purpose of the national framework agreement in question and undermine the reliability and security of the supply of goods and services required by the contracting authority.

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<sup>71</sup> Ibid, para 5.8.2

<sup>72</sup> A series of guidance documents were published in relation to joint bidding. They can all be found here: <http://gov.wales/topics/improvingservices/better/vfm/publications/jointbidding/?lang=en>

<sup>73</sup> [2016] IEHC 709, judgment of McDermott J delivered on 11 November 2016

### Tender Advisory Service

93. In Ireland, the Office of Government Procurement established a Tender Advisory Service (“TAS”) with effect from 1 February 2015<sup>74</sup>. The TAS is aimed at assisting SMEs (and other tenderers) to raise concerns in relation to live tender processes by (a) answering general queries made by potential tenderers; (b) channelling more complex queries to the relevant contracting authority for direct reply to all interested parties; or (c) communicating with contracting authorities to suggest improvements/changes to information contained in tender documentation where it is considered appropriate and reasonable to do so. In order to avail of TAS, there are a number of conditions including that a Request for Tender has been published, the supplier has already raised a request for clarification in the tender process and there are at least 6 days to run before the closing date for receipt of tenders. The OGP aims to respond within 3 working days although it is acknowledged that certain concerns may take longer to address.
94. In its review of the operation of the TAS for 2015/2016, the OGP noted that 27 suppliers had engaged in the service but 23 of these were deemed ineligible as they had not engaged in a clarification process, had missed the deadline (i.e. 6 days before tender deadline) or were general procurement queries. Of the four cases deemed eligible, one contracting authority extended the tender deadline and broadened the tender specification, another reconsidered its lotting strategy and no action was considered necessary in the other two cases.<sup>75</sup>

### Supplier lists

95. In Northern Ireland, it has been recognised that some contractors may be resistant to advertising opportunities as they may already have their own supplier lists. PGN 06/12 recognises the benefit of regularly refreshing supplier lists which include (i) increasing cost effectiveness; (ii) receiving innovative ideas and suggestions from SMEs; and (iii) improved quality of service. PGN 06/12 states:

*“Generally, Departments should not stipulate which subcontractors should be employed by the contractor. However, they should require contractors to publish their processes by which new suppliers can apply to be included on their supplier lists.”<sup>76</sup>*

### Subcontractor conditions and their acceptance

96. In Northern Ireland PGN 06/12 states that contracting authorities should seek to ensure that contractors’ supply chain partners are treated equitably and that invoices are paid promptly. This can be achieved by stipulating contract conditions relating to performance to promote appropriate treatment of subcontractors. The guidance further states:

*“Contracts should also require the contractor to provide details of the proposed conditions of subcontract, for first tier subcontractors, to the [Contracting Authority] prior to signing those subcontracts. A subcontractor should only be accepted if the appointment will enable the contractor to deliver the work, goods or services in accordance with the contract, and with any undertakings given by the contractor in any quality submissions made during the tender process.”<sup>77</sup>*

97. PGN 06/12 also suggests that contractors should not pass on worse terms than those they agree with contracting authorities. Contracting authorities may call for and

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<sup>74</sup> Details of the scheme are available at <https://www.procurement.ie/news/2143>

<sup>75</sup> Available at [https://www.procurement.ie/sites/default/files/migr/news/tas\\_review\\_2015-2016.pdf](https://www.procurement.ie/sites/default/files/migr/news/tas_review_2015-2016.pdf)

<sup>76</sup> Ibid page 10

<sup>77</sup> Ibid, page 10

review proposed sub-contractor terms before the subcontract is entered into.<sup>78</sup> Similarly, contracting authorities are required to discourage contractors from underpricing bids and seeking to squeeze pre-agreed sub-contract prices with subcontractors.<sup>79</sup>

### Payment Terms

In England, Wales and Northern Ireland, prompt payment is now provided for in Regulation 113(2) of the PCR 2015<sup>80</sup>:

*“Contracting authorities shall ensure that every public contract which they award contains suitable provisions to require the following:—*

*(a) that any payment due from the contracting authority to the contractor under the contract is to be made no later than the end of a period of 30 days from the date on which the relevant invoice is regarded as valid and undisputed;*

*(b) that any invoices for payment submitted by the contractor are considered and verified by the contracting authority in a timely fashion and that undue delay in doing so is not to be sufficient justification for failing to regard an invoice as valid and undisputed; and*

*(c) that any subcontract awarded by the contractor contains suitable provisions to impose, as between the parties to the subcontract—*

*(i) requirements to the same effect as those which subparagraphs (a) and (b) require to be imposed as between the parties to the public contract; and*

*(ii) a requirement for the subcontractor to include in any subcontract which it in turn awards suitable provisions to impose, as between the parties to that subcontract, requirements to the same effect as those required by this subparagraph (c).”*

98. Regulation 113(1) provides that regulation 113 applies to all public contracts except:
- a. contracts for the procurement of health care services for the purposes of the NHS within the meaning and scope of the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013; and
  - b. contracts awarded by a contracting authority which is a maintained school, an Academy or a sixth form college corporation.
99. This requirement therefore applies to below threshold public contracts governed by Chapter 8 of the PCR 2015.<sup>81</sup>
100. In addition, in Northern Ireland, PGN 06/12 states that appropriate contract conditions should be used to prevent delays in payment and ensure that equally favourable payment terms, to those which the Contracting Authority provides for the contractor, are passed on by the contractor to subcontractors. Contract conditions should contain payment settlement terms of not more than 30 days,<sup>82</sup> both for the

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<sup>78</sup> Ibid, page 13

<sup>79</sup> Ibid, page 14

<sup>80</sup> Note extent of PCR 2015, see paragraphs 17 and 42 in respect of Wales and Northern Ireland

<sup>81</sup> Guidance on paying undisputed invoices in 30 days down the supply chain is available here:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/555393/Revisedstatutoryguidance26Sept.docx.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/555393/Revisedstatutoryguidance26Sept.docx.pdf)

<sup>82</sup> PGN 02/12 states that NI Departments will aim to pay suppliers, wherever possible, within 10 working days (para 11.5.3).

contractor by the Contracting Authority, and for subcontractors by the contractor.<sup>83</sup> Contracting Authorities are required to monitor contractors' compliance with these terms<sup>84</sup> and can demand payment reports and undertake audits to ensure such compliance.

101. In Scotland, a decision was taken (following consultation) not to include a specific regulation on prompt payment on the basis that success at a policy level pursuant to SPPN 08/2009 had been and was being achieved<sup>85</sup>. This SPPN states that *"Prompt payment of suppliers is a key element of the Scottish Government's Economic Recovery Programme. In support of this, the First Minister announced during the Business in Parliament conference in June that a new clause would be introduced into Scottish Government contracts to require payment of valid contractor and sub-contractor invoices within 30 days throughout the supply chain of public contracts. The First Minister commented that "the effect of late payment on small businesses, particularly in the current economic climate, is completely unacceptable and must be stopped. The Scottish Government is leading by example and I would encourage all other organisations to follow suit".*<sup>86</sup>
102. In Wales, the Welsh Assembly has stated that it will require its main contractors to pay SMEs within 30 days of receipt of a correct invoice.<sup>87</sup>

#### Proportionate Financial Capacity Requirements

103. In Ireland, Circular 10/14 seeks to enhance SME participation in two further material respects: (i) financial capacity requirements and (ii) turnover requirements:
  - a. Capacity requirements: the Circular states (para 4.5) that buyers should ensure that any capacity levels set for candidates / tenderers are relevant and proportionate to the circumstances of a particular contract. *"Documentary evidence of financial capacity to undertake a project should not be sought by buyers early on in the procurement process. Instead candidates/tenderers should declare that they meet the minimum standards required by the buyer and will produce the necessary documentation (e.g. bank statements, audited accounts, proof of professional indemnity, etc.) when provisionally short-listed in a restricted procedure or when chosen as the successful tenderer in an open procurement competition."* In addition, buyers should only require such types and levels of insurance which are proportionate and reasonable. Documentary evidence of the required insurance will only be required when a candidate has been identified as a successful tenderer in a procurement competition.<sup>88</sup>
  - b. Turnover requirements: Circular 10/14 further states that in assessing the financial capacity of a supplier to do a job, buyers, as a matter of general policy, should not for routine (e.g. low value, high volume) goods and services competitions set company turnover requirements at more than twice the

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<sup>83</sup> It provides, by way of suggested contract wording, the following clause: *"Where the Contractor enters into a subcontract for the provision of any part of the Services, the Contractor shall ensure that a term is included in the subcontract which requires the Contractor to pay all sums due to the subcontractor within a specified period, not exceeding 30 days from the date of receipt of a valid invoice as defined by the terms of that subcontract."* In construction, consideration should also be given to passing these conditions down the contract chain.

<sup>84</sup> Compliance with such terms may also be rendered an aspect of performance review by way of KPIs.

<sup>85</sup> At paragraph 29 above we noted the October 2013 'Review of Scottish Public Sector Procurement in Construction'. Issues around payment formed a considerable part of the review (section 6.8 in particular) and shaped its recommendations. The more recent area of focus in Scotland has been on requiring use of Project Bank Accounts for certain public bodies on projects above specified values (see SPPN/10/2016)

<sup>86</sup> SPPN 08/2009 is available here:

<http://www.gov.scot/Resource/Doc/1265/0088877.pdf>

<sup>87</sup> <http://www.assembly.wales/en/gethome/abt-procurement/Pages/sme.aspx>

<sup>88</sup> Circular 10/14, para 6.

estimated contract value. Similarly the turnover limit for Framework Agreements should be set in general in relation to the likely size of the individual contracts or the call-offs under the framework.<sup>89</sup>

104. In *Copymoore Limited and others v Commissioners for Public Works Ireland*<sup>90</sup>, the Irish High Court rejected a challenge by a group of SMEs in relation to the proportionality and reasonableness of the minimum turnover criteria for a national framework agreement for the supply of monochrome and colour multi-function devices (the "Framework Agreement").
105. The case is interesting in relation to the appropriate level of minimum financial turnover. In *Copymoore*, the Framework Agreement was divided into five separate lots with the service specifications for the devices varying slightly per lot. The NPS estimated that expenditure under the Framework Agreement would be €25 million over its initial two year term, divided evenly between the lots. Tenderers were required to demonstrate a minimum annual turnover of €2 million per lot. To tender for more than one lot, tenderers had to demonstrate a cumulative turnover.
106. The applicants claimed that the minimum turnover level was manifestly disproportionate to the relevant market. In making this claim the applicants valued the relevant market (for the supply of printers and multi-functional devices in the State) at approximately €75 million. The market was distributed between 200-250 undertakings and the applicants claimed that only 7 to 8 undertakings would be capable of meeting the minimum turnover requirement of €2 million. The minimum turnover levels were claimed to be disproportionate given that the average value of any contract likely to be made under the Framework Agreement was €26,000. The NPS rejected this claim arguing that that the turnover criteria had been set at a lower level than might otherwise have been set in accordance with official guidance and lower than previous framework agreements in the same area.
107. Applying the test of "manifest error", the Irish High Court concluded that the financial standing criteria were proportionate and reasonable. The Court held that the NPS was entitled to seek to ensure continuity of supply and this was a legitimate, reasonable and proportionate reason for the criteria. The spread of risk amongst seven tenderers was held to reduce the risk of damage arising if one or more of the framework participants were unable to deliver. The case demonstrates the difficulties SMEs face in seeking to challenge the level of the minimum financial turnover thresholds. The Court's conclusion on the facts however does seem to ignore Clause 4.6 of Circular 10/14 which states that the turnover limit for framework agreements should be set in general vis-à-vis the likely size of individual contracts or drawdowns under a framework agreement.

### **A3. Below Threshold Requirements**

#### Identifying a below threshold contract

108. Member States have a wide discretion in how to award public contracts that fall below the threshold values. The first issue will be whether to extend the same procurement regime that has been adopted to comply with public contracts above the minimum thresholds to those below those thresholds and if not, what approach should be taken instead. This matters to a greater extent to SMEs who will be much more likely to be seeking the award of contracts below the threshold levels. For contracts following below the thresholds, the CCS has observed:

*“Where the authority considers that a contract is likely to attract cross-border interest it is obliged to publish a sufficiently accessible advertisement to*

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<sup>89</sup> Circular 10/14, para 4.6

<sup>90</sup> [2016] IEHC 709, judgment of McDermott J delivered on 11 November 2016

*ensure that suppliers in other Member States can have access to appropriate information before awarding the contract. This is in line with the UK objective of achieving value for money in all public procurement - not just those covered by the Public Contracts Directives. Some degree of advertising, (appropriate to the scale of the contract), is likely to be necessary to achieve transparency where the contract is likely to attract cross-border interest.”<sup>91</sup>*

109. In Scotland, the PRSA seeks to distinguish between a regulated contract and an EU-regulated contract. A regulated contract is defined in s.3 of the PRSA as (i) a public contract; (ii) where the estimated value is equal to or greater than the estimated threshold;<sup>92</sup> and (iii) it is not an excluded contract, as defined. The PRSA introduces a significant change to below threshold procurement in Scotland and also puts in place a reasonably detailed regulatory regime for the procurement of such contracts, creating a significant difference between the approach in Scotland with that of other jurisdictions. In particular, without setting out detailed process requirements, it draws down the advertising and contract notice requirements from the above threshold regime and also draws down the requirement for processes that meet general principles (stated in section 8 as being equal treatment, non-discrimination and to act in a transparent and proportionate matter). These principles are applied to contracts above the financial thresholds in PRSA, without any requirement of potential cross-border interest. Importantly, and again distinct from other jurisdictions, the PRSA introduced a limited remedies regime.<sup>93</sup>

110. In England, Wales and Northern Ireland, chapter 8 applies to below-threshold procurements. Regulation 109(2) of PCR 2015<sup>94</sup> stipulates when chapter 8 will not apply and provides:

*“(a) where Part 2 would not have applied even if the estimated value of the procurement had been equal to or greater than the relevant threshold mentioned in regulation 5;*

*(b) where the contracting authority is a central government authority and the procurement has a value net of VAT estimated to be less than £10,000;*

*(c) where the contracting authority is—*

*(i) a sub-central contracting authority or an NHS Trust, and*

*(ii) the procurement has a value net of VAT estimated to be less than £25,000;*

*(d) the procurement of health care services for the purposes of the NHS within the meaning and scope of the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013.”*

111. Regulation 110 of the PCR 2015 is entitled ‘Publication of contract opportunities on Contracts Finder’ and requires any contracting opportunity falling within the scope of chapter 8 to be advertised on Contracts Finder. Regulation 112 makes similar provision for publication of contract awards to be published on contracts finder.

#### Use of PQQs/ESPD/Selection Processes

112. Regulation 111 of the PCR 2015 prohibits the use of a PQQ in below-threshold procurements above £10,000 (in the case of central authorities) or £25,000 (in the case of sub-central authorities and NHS trusts) in value.<sup>95</sup> Implementing Regulation

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<sup>91</sup> A Brief Guide to the 2014 EU Public Procurement Directives, October 2016 (“a Brief Guide”)

<sup>92</sup> £50,000 for a public contract (services and supplies) and £2m for works, i.e. much lower than the threshold for the application of the 2014 Directive.

<sup>93</sup> As at the date of preparation of this paper, the authors are unaware of any actions having been raised under the new regime.

<sup>94</sup> Note extent of PCR 2015, see paragraphs 17 and 42 in respect of Wales and Northern Ireland

<sup>95</sup> And see “Use of PQQs” in PPN 03/15 referring to Regulation 111 as follows:

*“A contracting authority may not include a pre-qualification stage in any procurement where the value of the procurement is below the EU threshold for goods and services, currently £111,676 in central government and £172,514 outside central*



2016/7 leaves it to the discretion of the Member State as to whether or not contracting authorities will be required to use the ESPD in a below-threshold procurement. In this regard, PPN 8/16 states:

*“You must not include a pre-qualification stage in any procurement below the EU thresholds for supplies and services. The standard Selection Questionnaire exclusion questions and standard selection questions may be used as a guide in developing appropriate and proportionate questions as part of a one-stage procurement process. In below threshold procurements questions may be asked to assess the suitability, capability, legal status, and financial standing of a potential supplier, provided that the questions are relevant and proportionate. For works contracts valued between the supplies and services threshold and the works threshold you may use a two stage process and make use of the PAS91 PQQ.”*

113. In Scotland, there are currently no provisions within the PRSA or the PCSR 2015 restricting the use of the ESPD in below threshold contracts. Indeed, the Statutory Guidance to which contracting authorities must have regard clearly recommends the ESPD be used for regulated procurements below the EU contract threshold values. As noted above, PPN 8/16 provides, in relation to in-scope PCR 2015 bodies<sup>96</sup> in England, Wales and Northern Ireland that “in below threshold procurements questions may be asked to assess the suitability, capability, legal status, and financial standing of a potential supplier, provided that the questions are relevant and proportionate.”<sup>97</sup>

114. In Ireland, Circular 10/14 states, in relation to goods and services contracts below the threshold, that buyers should use open tendering in the case of advertised contracts for general goods and services below €134,000 (exclusive of VAT).<sup>98</sup> In the case of works and works-related services contracts, the open procedure should be utilised for contracts with a value below €250,000 (exclusive of VAT).

#### Unsuccessful bids

115. In Northern Ireland, PGN 02/12 states that for contracts below the EU thresholds, Centre of Procurement Expertise “*should be able to provide general advice and feedback on the tendering process on request.*”<sup>99</sup> The Welsh Assembly has committed to debrief all tenderers on request to help them improve their tendering performance.<sup>100</sup>

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*government. In practical terms, this means that PQQs used as part of a pre-qualification stage are not permitted. However contracting authorities may ask questions relating to a potential supplier provided that the questions are relevant to the subject matter of the procurement and proportionate.*

*Regulation 111 does not apply to procurements where the estimated value net of VAT is less than £10,000 (central contracting authorities), or £25,000 (for sub central contracting authorities and NHS Trusts). However, a PQQ is unlikely to be necessary or proportionate for contracts below these thresholds.”*

<sup>96</sup> Note extent of PCR 2015, see paragraphs 17 and 42 in respect of Wales and Northern Ireland

<sup>97</sup> Ibid, para 27

<sup>98</sup> Circular 10/14, para 4.4

<sup>99</sup> Ibid, para 9.1

<sup>100</sup> <http://www.assembly.wales/en/gethome/abt-procurement/Pages/sme.aspx>

## PART B: PURSUING SOCIAL ENDS THROUGH PROCUREMENT

116. Two elements of the 2014 Directive with which the PLA have been particularly concerned relate to:
- a. The permissibility of social and environmental objects within procurement and approaches to scoring and costing tailored accordingly; and
  - b. The attempt to reserve a greater proportion of public contracts to mutuals/ social enterprise.

### **B1 PROMOTING SOCIAL VALUE**

117. In 2010 the European Commission published “*Buying Social: A Guide to taking account of social considerations in public procurement*” (“*Buying Social*”). That document states (at section 1.2) that to support their social policies, contracting authorities have many ways of taking account of social considerations in public procurement. However, it states that many social considerations, depending on their nature, can be included only at certain stages of the procurement procedure.<sup>101</sup> In addition, contracting authorities should decide case by case which social considerations are relevant to their procurement, depending on the subject-matter of their contract and on their objectives.
118. The 2014 Directive seeks to use procurement as a means of ensuring compliance with other social ends. Procurement has been a tool used for wider ends of social justice in other jurisdictions and the 2014 Directive enables public procurement to take account and pursue a wider range of social, labour and environmental ends than before. And so recital (37) observes:

*“With a view to an appropriate integration of environmental, social and labour requirements into public procurement procedures it is of particular importance that Member States and contracting authorities take relevant measures to ensure compliance with obligations in the fields of environmental, social and labour law that apply at the place where the works are executed or the services provided and result from laws, regulations, decrees and decisions, at both national and Union level, as well as from collective agreements, provided that such rules, and their application, comply with Union law. Equally, obligations stemming from international agreements ratified by all Member States and listed in Annex X should apply during contract performance. However, this should in no way prevent the application of terms and conditions of employment which are more favourable to workers.”*

119. Recital (40) goes on to state that control of the observance of the environmental, social and labour law provisions should be performed at the relevant stages of the procurement procedure, when applying the general principles governing the choice of participants and the award of contracts, when applying the exclusion criteria and when applying the provisions concerning abnormally low tenders. It is thus envisaged that:

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<sup>101</sup> For example, social considerations regarding labour conditions are generally more appropriate to be included in the contract performance clauses, as in general they do not qualify as technical specifications or selection criteria, within the meaning of the Procurement Directives. On the other hand, it is generally more appropriate to include accessibility considerations in the technical specifications.

- a. Negotiations within the competitive procedure may concern all characteristics of the purchased works, supplies and services including social and environmental aspects, in so far as they do not constitute minimum requirements.<sup>102</sup>
  - b. In the context of assessing the best price-quality ratio, a non-exhaustive list of possible award criteria may include environmental and social aspects as set out in the 2014 Directive.<sup>103</sup>
120. The 2014 Directive also envisages that contracting authorities can require certification/labels or other equivalent evidence of social/environmental characteristics, such as to further facilitate the procurement of contracts with social/environmental objectives (see Recitals (75) and (88)). Contracting authorities can also refer to factors directly linked to the production process, including the sustainability and health and safety aspects thereof (see Recitals (74), (98) and (99)).
121. Full life-cycle costing can be taken into account when awarding contracts; this could encourage more sustainable and/or better value procurements which might save money over the long term despite appearing on initial examination to be more costly (see Article 67(2) of the 2014 Directive).

### England

122. Regulation 107 of the PCR 2015 imposes an obligation on contracting authorities to have regard to Cabinet Office guidance on qualitative selection of economic operators. The CCS has issued guidance on awarding contracts under Regulation 107.<sup>104</sup> The guidance indicates that there is now more flexibility to take account of a wider range of characteristics of tenders and states:

*“The new rules make clear that contracting authorities, when evaluating the most economically advantageous tender, can take account of the best price-quality ratio. The concept of “best price-quality ratio” (BPQR) is synonymous with the old definition of MEAT - in essence, BPQR means price or cost plus other criteria and equates to value for money. So although there are superficial changes in terminology, contracting authorities may be reassured that longstanding flexibilities can prevail in practice. An example of what might be included in a BPQR assessment is given in the Q&A. As set out in the companion guidance on the Light Touch Regime, using BPQR is likely to be particularly important when service quality is paramount.*

*It should also be noted that Government policy is to secure value for money. This is set out in Annex 4.6 of HM Treasury’s Managing Public Money. Value for money means securing the best mix of quality and effectiveness for the least outlay over the period of the use of the goods or services bought. It is not about minimising up front prices.*

#### Taking account of social aspects

*BPQR means price or cost plus other criteria. As set out in Regulation 67(2) of the 2015 Regulations, ‘such other criteria’ can include qualitative, environmental and/or social aspects, linked to the subject matter of the*

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<sup>102</sup> See recital (45)

<sup>103</sup> Recital (92)

<sup>104</sup> The Guidance is here:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/560263/Guidance\\_on\\_Awarding\\_Contracts\\_-\\_Oct\\_16.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/560263/Guidance_on_Awarding_Contracts_-_Oct_16.pdf)

*contract. The inclusion of social aspects is a new feature and a change for which the UK Government lobbied in the EU negotiations.”<sup>105</sup>*

123. In addition to the implementation of the 2014 Directive by way of the PCR 2015, Parliament has passed the Public Services Social Value Act 2012, section 1 of which relevantly provides:

*“(1) If a relevant authority proposes to procure or make arrangements for procuring the provision of services, or the provision of services together with the purchase or hire of goods or the carrying out of works, by–*

*(a) entering into a public services contract that is not a contract based on a framework agreement, or*

*(b) concluding a framework agreement as regards which public services contracts are likely to constitute the greater part by value of the contracts based on the agreement,*

*it must comply with the requirements in subsections (3), (6) and (7) before starting the process of procurement.*

*(3) The authority must consider–*

*(a) how what is proposed to be procured might improve the economic, social and environmental well-being of the relevant area, and*

*(b) how, in conducting the process of procurement, it might act with a view to securing that improvement.*

*(6) The authority must consider under subsection (3)(b) only matters that are relevant to what is proposed to be procured and, in doing so, must consider the extent to which it is proportionate in all the circumstances to take those matters into account.*

*(7) The authority must consider whether to undertake any consultation as to the matters that fall to be considered under subsection (3).”*

124. The scope of the category of public services contracts to which the Public Services Social Value Act 2012 applies is set out in section 1(16).

125. The Cabinet Office published the ‘Social Value Act Review’ in February 2015.<sup>106</sup> Its purpose was to consider how the Act had fared in its first two years of operation. More particularly, the review examined the issues affecting the awareness and adoption of social value, as well as the overall impact the Act has had not only on public bodies and their commissioning practice, but also on the providers and ultimately the end users of these services. As part of the process, the review sought to assess the grounds for recommending an extension to the Act and to consider how this might work in the future. The review found that the Act was, thus far, having a positive impact, finding:

*“The review found that, where it is being taken up, the Act is having a positive effect. The review team was struck by the range of benefits being delivered by the Act (not just to local areas but also delivering nationally accrued savings), and the breadth of organisations - albeit across a relatively*

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<sup>105</sup> The guidance also addresses life-cycle costing at section 5.

<sup>106</sup> The review is here:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/403748/Social\\_Value\\_Act\\_review\\_report\\_150212.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/403748/Social_Value_Act_review_report_150212.pdf)

*small sample size - that can see its potential (not just the voluntary sector but also commissioners and businesses big and small). Perhaps most notable was the emerging trend of commissioners using the Act to tackle the cost pressures they are facing, reflecting the very real potential for the Act to secure value for money, if implemented well.”<sup>107</sup>*

126. It was therefore determined that the Act’s threshold for many service contracts would not be increased to €750,000 to align it with the threshold under the PCR 2015. The authors found mixed awareness of the Act so made recommendations to improve awareness, with a focus on SMEs in relation to whom:
- a. Cross-departmental SME champions would work with SMEs to help them understand the potential of the Act;
  - b. Guidance would be produced and targeted to SMEs to promote the concept of social value and understanding of how SMEs may become involved in the process.
127. The review looked specifically at extending the legislation beyond its existing boundaries to:
- a. Cover contracts for goods or works (or other types of contracts such as asset disposal or planning);<sup>108</sup>
  - b. Cover contracts with a value below the OJEU threshold;
  - c. Ensure that commissioners would have to consider it at later stages of the procurement process;
  - d. To mandate that commissioners would have to include social value.
128. The review produces best practice guidance (Annex A of the review) as a well as a framework and principles to assist in the measurement of social value (Annex B to the review).

## Wales

129. As regards Wales, the Social Value Act applies but in respect of a limited number of bodies only<sup>109</sup> (and that Act does not extend to Northern Ireland). In Wales, the Well-being of Future Generations (Wales) Act 2015 came into force in April 2015 and imposes a ‘sustainable development and well-being’ duty on public bodies.<sup>110</sup> For the purposes of that Act, s.2 provides that “*sustainable development*” means the “*process of improving the economic, social, environmental and cultural well-being of Wales by taking action, in accordance with the sustainable development principle (see section 5), aimed at achieving the well-being goals (see section 4).*” S.3 of the Act is entitled ‘well-being duty on public bodies’ and provides:

*(1) Each public body must carry out sustainable development.*

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<sup>107</sup> Ibid, page 9.

<sup>108</sup> Commissioners are already permitted to consider social value as widely as they wish and it is considered good practice to consider social value, where relevant, across the OJEU threshold.

<sup>109</sup> A significant proportion of public bodies in Wales do not require to comply with the Act, i.e. the Welsh Ministers; the First Minister for Wales; the Counsel General to the Welsh Assembly Government; the National Assembly for Wales Commission; and a relevant authority whose functions are wholly or mainly Welsh devolved functions.

<sup>110</sup> The Wales Procurement Policy Statement 2015 observes: “*The recent passing of the Well-being of Future Generations (Wales) Act 2015 gives us a new opportunity to advance the principles of public procurement in Wales, building on the good work since 2012. Putting this into practice in the public service means we must continue to look toward our future generations and deliver more sustainable outcomes from our procurements so that our expenditure can help achieve the seven well-being goals set out in the Act.*”

*(2) The action a public body takes in carrying out sustainable development must include—*

*(a) setting and publishing objectives (“well-being objectives”) that are designed to maximise its contribution to achieving each of the well-being goals, and*

*(b) taking all reasonable steps (in exercising its functions) to meet those objectives.*

*(3) A public body that exercises functions in relation to the whole of Wales may set objectives relating to Wales or any part of Wales.*

*(4) A public body that exercises functions in relation only to a part of Wales may set objectives relating to that part or any part of it.*

130. Although not stated expressly, public functions include conduct of procurements.<sup>111</sup> The well-being goals are set out in table 1 in s.4 while the sustainable development principle in s.5 provides as follows:

*“(1) In this Act, any reference to a public body doing something “in accordance with the sustainable development principle” means that the body must act in a manner which seeks to ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs.*

*(2) In order to act in that manner, a public body must take account of the following things—*

*(a) the importance of balancing short term needs with the need to safeguard the ability to meet long term needs, especially where things done to meet short term needs may have detrimental long term effect;*

*(b) the need to take an integrated approach, by considering how—*  
*(i) the body’s well-being objectives may impact upon each of the well-being goals;*  
*(ii) the body’s well-being objectives impact upon each other or upon other public bodies’ objectives, in particular where steps taken by the body may contribute to meeting one objective but may be detrimental to meeting another;*

*(c) the importance of involving other persons with an interest in achieving the well-being goals and of ensuring those persons reflect the diversity of the population of?—*

*(i) Wales (where the body exercises functions in relation to the whole of Wales), or*

*(ii) the part of Wales in relation to which the body exercises functions;*

*(d) how acting in collaboration with any other person (or how different parts of the body acting together) could assist the body to meet its well-being objectives, or assist another body to meet its objectives;*

*(e) how deploying resources to prevent problems occurring or getting worse may contribute to meeting the body’s well-being objectives, or another body’s objectives.”*

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<sup>111</sup> Draft guidance was put out to consultation on 7 September 2015. Guidance was published on 25 February 2016

## Scotland<sup>112</sup>

131. In Scotland, there has been a long established policy interest in incorporating social considerations in procurement, with policy notes issued in both 2008<sup>113</sup> and 2014<sup>114</sup> on use of community benefits (social considerations) in procurement. An aim of the PRSA was to seek to embed, through legislation, practices that would see further achievement of social, economic and environmental outcomes through procurement. This is most apparent in S.9(1) of the PRSA which is entitled the sustainable procurement duty. It provides:

*“(1) For the purposes of this Act, the sustainable procurement duty is the duty of a contracting authority -*

*(a) before carrying out a regulated procurement, to consider how in conducting the procurement process it can -*

*i. improve the economic, social and environmental wellbeing of the authority’s area,*

*ii. facilitate the involvement of small and medium enterprises, third sector bodies and supported businesses in the process, and*

*iii. promote innovation, and*

*(a) In carrying out the procurement, to act with a view to securing such improvements identified as a result of paragraph (a)(i).”*

132. For each and every regulated contract, (£50,000 and above for supplies and services and £2m for works), spanning contracts above and below EU thresholds, a contracting authority therefore requires, at the very least, to have considered whether it can look to promote or pursue the matters set out above.

133. The sustainable procurement duty in turn links to the earlier mentioned obligation on contracting authorities with spend of £5 million plus to publish Procurement Strategies covering a number of aspects of what they are seeking to achieve through their overall procurement activities (as distinct from on a specific regulated procurement for a particular contract).

134. The Statutory Guidance has a full chapter on the Sustainable Procurement duty which includes reference to further tools for contracting authorities potentially to use in discharging the sustainable procurement duty<sup>115</sup>.

135. More specific social duties relevant to ‘Community Benefits’ are provided for in ss. 24-25 of the PRSA.

136. S.24, entitled ‘Community benefit requirements’, provides:

*“(1) For the purposes of this Act, a community benefit requirement is a contractual requirement imposed by a contracting authority—*

*(a) relating to—*

*(i) training and recruitment, or*

*(ii) the availability of sub-contracting opportunities, or*

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<sup>112</sup> Prior to the PRSA, the Scottish Government produced (i) a report on Community Benefits in Procurement in February 2008 <http://www.gov.scot/Resource/Doc/1265/0056632.pdf> and

<sup>113</sup> SPPN/3/2008

<sup>114</sup> SPPN/6/2014

<sup>115</sup> Guidance under the Procurement Reform (Scotland) Act 2014, chapter 3.

*(b) which is otherwise intended to improve the economic, social or environmental wellbeing of the authority's area in a way additional to the main purpose of the contract in which the requirement is included.”*

137. S.25 PRSA is entitled ‘Community benefit requirements in major contracts’ and provides:

*“(1) This section applies where a contracting authority proposes to carry out a regulated procurement in relation to which the estimated value of the contract is equal to or greater than £4,000,000.*

*(2) The contracting authority must, before carrying out the procurement, consider whether to impose community benefit requirements as part of the procurement.*

*(3) The contracting authority must, in the contract notice relating to the procurement, include—*

*(a) a summary of the community benefit requirements it intends to include in the contract, or*

*(b) where it does not intend to include any such requirements, a statement of its reasons for not including any requirements.*

*(4) Where community benefit requirements are included in a contract, the contracting authority must include in the award notice a statement of the benefits it considers will be derived from those requirements.*

*(5) The Scottish Ministers may by order modify subsection (1) so as to substitute for the figure specified there for the time being such other figure as they consider appropriate.”<sup>116</sup>*

138. In short, pursuant to the above provisions, a contracting authority is required to consider use of a community benefit clause in contracts valued over £4m. In practice, many authorities are incorporating social considerations / community benefits to contracts with much lower financial values and there are significant practice resources to support the same<sup>117</sup>.

139. It is also notable that s.18 of the PRSA requires contracting authorities with £5million plus spend to produce an Annual Procurement Report on how they have performed. This is to include, at s18(2)(c), “*a summary of any community benefit requirements imposed as part of a regulated procurement that were fulfilled during the year covered by the report*”. A chapter of the Statutory Guidance<sup>118</sup> is devoted to ‘Community benefit requirements in procurement’.

140. Finally, further Statutory Guidance was issued in October 2015 entitled ‘*Statutory Guidance on the Selection of Tenderers and Award of Contracts - Addressing Fair Work Practices, including the Living Wage, in procurement*’ which is relevant to many of the issues discussed in this paper. This guidance links to the Sustainable Procurement Duty (s.9) and Procurement Strategy (s.15) requirements under the PRSA. Contracting Authorities are required by the PRSA to ‘have regard to’ the contents of this guidance in when seeking to improve social considerations through fair work practices.

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<sup>116</sup> Guidance under the PRSA was published by the Scottish Government in March 2016 and is available here: <http://www.gov.scot/Resource/0049/00496919.pdf>

<sup>117</sup> See for example: Scottish Futures Trust ‘Community Benefits Toolkit for Construction’ and “Scottish Government ‘Community Benefits in Procurement’ (2008)

<sup>118</sup> See “Guidance under the Procurement Reform (Scotland) Act 2014, chapter 4



## Northern Ireland

141. The Northern Ireland Executive believes that social benefit is fundamentally linked to the enhancement of opportunities for SMEs within procurement. In particular, equal opportunity and sustainable development are integrated into the Executive's Programme for Government 2011-2016 which provides a commitment to include social clauses in all works, supplies and services contracts and to invest in social enterprise growth to increase sustainability in the broad community sector.<sup>119</sup> Further, all nine Centres of Procurement Expertise in Northern Ireland have produced their own Sustainable Action Plans.

142. Social value is intrinsically linked to value for money. The Procurement Board in Northern Ireland redefined value for money following the Committee's inquiry in 2010, which has been endorsed by the Executive and provides as follows:

*"[best value for money] is the most advantageous combination of cost, quality and sustainability to meet customer requirements... in this context, cost means consideration of the whole life cost; quality means meeting a specification which is fit for purpose and sufficient to meet the customer's requirements; and sustainability means economic, social and environmental benefits, considered in the business case, in support of the Programme for Government."*<sup>120</sup>

143. The Procurement Board issued an Action Plan in response to the recommendations made by the Committee for Finance and Personnel Inquiry into Public Procurement.<sup>121</sup> Subsequent updates were then published in March 2011 and June 2011 showing progress, particularly with regards to ensuring that there is a clear policy direction regarding social benefit.

144. The approach taken by the Procurement Board is that it requires Departments:

- a. To set targets for the implementation of social clauses to meet the Programme for Government commitment on the inclusion of social clauses in public procurement;
- b. To monitor compliance with the social clauses as an aspect of general contract management and to improve data capture systems; and
- c. To report quarterly to CPD, details of the opportunities delivered by social clauses.

145. PGN 01/13 is entitled '*Integrating social considerations in Contracts*'.<sup>89</sup><sup>122</sup> Section 4 explains how to integrate social considerations into public procurement and identifies two methods: (i) using award criteria linked to the subject matter of the contract; and/or (ii) using contract performance clauses linked to the subject matter of the contract. Section 6 of PGN 01/13 addresses the specification of social considerations and states:

*"6.1 Having identified the need which the procurement will address, completed the business case and obtained expenditure approval, Departments should work with a CoPE to agree a specification<sup>6</sup> for the procurement. This is*

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<sup>119</sup> Northern Ireland Executive, Programme for Government 2011-2015

<sup>120</sup> [www.dfpni.gov.uk/vfm\\_-\\_concepts\\_and\\_definitions.docx](http://www.dfpni.gov.uk/vfm_-_concepts_and_definitions.docx)

<sup>121</sup> Procurement Board Action Plan in Response to the Committee for Finance and Personnel Inquiry into Public Procurement in Northern Ireland, Department for Finance and Personnel, DF1/10/256806

<sup>122</sup> PGN 01/13 (as amended); Integrating Social Considerations into Contracts (2 February 2015, re-issued on 14 September 2016). It is here:

<https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/PGN-01-13-Integrating-Social-Considerations.PDF>

*the appropriate time to begin considering in detail what social clauses to include in the contract, bearing in mind the PfG commitment to “include social clauses in all public procurement contracts for supplies, services and construction”.*

*6.2 Specifications must clearly describe the procurement requirements so that Contractors can decide whether they wish to bid or not. Therefore, the specification impacts on the level of competition. Departments can only evaluate bids against the published award criteria which will be linked to the requirements of the specification. The Procurement Regulations stipulate that specifications must be transparent, and must not reduce competition, nor discriminate.*

*6.3 Social and environmental labels are permitted as part of specification, award criteria or terms and conditions as proof of compliance with a requirement with specific characteristics that are linked to the subject matter of the contract (see para 4.1) e.g. working conditions of the employees producing coffee to be supplied to the authority. However, suppliers must be allowed to offer compliance with equivalent labels or offer other proofs (e.g. technical dossiers) where the label cannot be obtained within the relevant time limits. Labels must also, meet certain conditions such as being based on transparent and non-discriminatory criteria and awarded by a body independent of the supplier applying for the label.”*

146. The delivery of social considerations is not yet well established, and as such, the CPD suggests that to select contractors based on their previous experience of delivering social considerations will likely limit competition. Such a selection process may be subject to further review in the future dependent upon how social considerations evolve within procurement law in Northern Ireland.
147. The Northern Ireland Council for Voluntary Action (“NICVA”) recommended that a Social Value Strategy is developed, setting out how procurement officials should use social clauses to further the social environmental and economic goals of the Executive. The strategy should promote new types of apprenticeships and placements. Procurement officials should set up monitoring and evaluations systems to measure the outcomes achieved through the inclusion of social clauses, in addition to activities and outputs.<sup>123</sup>

#### Ireland

148. In Circular 10/14 , as regards life-cycle costs, para 7 states:

*“The EU public procurement directives offer the possibility to award contracts either on the basis of the lowest price or on the basis of the most economically advantageous tender (MEAT). Where the award of contract is based on MEAT, the buyer, where appropriate, should take into account not just the current but the whole life-cycle costs. This allows buyers to take account of various elements relating to the subject-matter of the contract, including, for example quality, technical merit, functional characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, etc. Where appropriate buyers should seek full life-cycle costing solutions in their tender documents.”*

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<sup>123</sup> <http://www.nicva.org/resource/social-clauses-northern-ireland>

## B2. RESERVED CONTRACTS

### B2.1 The 2014 Directive

149. Contracting authorities will, under the new procurement regime, be able to reserve the award of certain service contracts to mutuals / social enterprises for a time-limited period. Recital (36) had identified the problem as follows:

*“Employment and occupation contribute to integration in society and are key elements in guaranteeing equal opportunities for all. In this context, sheltered workshops can play a significant role. The same is true for other social businesses whose main aim is to support the social and professional integration or reintegration of disabled and disadvantaged persons, such as the unemployed, members of disadvantaged minorities or otherwise socially marginalised groups. However, such workshops or businesses might not be able to obtain contracts under normal conditions of competition. Consequently, it is appropriate to provide that Member States should be able to reserve the right to participate in award procedures for public contracts or for certain lots thereof to such workshops or businesses or reserve performance of contracts to the context of sheltered employment programmes.”*

150. Article 20 addresses reserved contracts and provides:

- 1. Member States may reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons or may provide for such contracts to be performed in the context of sheltered employment programmes, provided that at least 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.*
- 2. The call for competition shall make reference to this Article.*

In this way the 2014 Directive expands the scope of the existing reservation for sheltered workshops / employment programmes by allowing reservation of any contract for disadvantaged as well as disabled workers, and reducing the minimum proportion of those workers in the supplier's workforce required for a supplier to be eligible to bid for a reserved contract. Although an OJEU competition will have to be run, bids will only be permitted from organisations meeting the new criteria.

151. Article 77 of the 2014 Directive relates to ‘reserved contracts for certain services’ and provides that Member States may provide that contracting authorities may reserve the right for organisations to participate in procedures for the award of public contracts exclusively for those health, social and cultural services referred to in Article 74, which are covered by the CPV codes listed in Article 77(1), subject to the organisation in question fulfilling the conditions in Article 77(2). An OJEU competition is required but again, in practice, bids will only be permitted from organisations meeting the criteria in Article 77(2).

### B2.2 Domestic Implementation

#### England Wales and Northern Ireland

152. Regulations 20 and 77 of the PCR 2015 implement Articles 20 and 77 of the 2014 Directive in England, Wales and Northern Ireland.<sup>124</sup>

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<sup>124</sup> Discussed in Northern Ireland in PGN 02/12 para 7.9.

153. Guidance on the new light touch regime for health, social, education and certain other service contracts has been published.<sup>125</sup> The light touch regime is explained as *“a specific set of rules for certain service contracts that tend to be of lower interest to cross-border competition. Those service contracts include certain social, health and education services, defined by Common Procurement Vocabulary (CPV) codes. The list of services to which the Light-Touch Regime applies is set out in Schedule 3 of the Public Contracts Regulations 2015 (Annex A).”* The guide continues:

*“The European Commission was concerned that some Part B Service contracts would be of cross-border interest, but were not being exposed to EU wide competition, which led to the Commission proposing to abolish the Part B Services rules and replace them with a new regime. Although the UK preferred to preserve the existing Part B rules, for simplicity and convenience, the Commission gained enough support to implement the change, albeit subject to certain concessions for those Member States who opposed including the UK.*

***What has changed?***

*The former distinction between Part A and Part B service contracts has been abolished, and a new rules regime has been introduced for certain health, social and other services. This is a significant and fundamental change that all procurement staff and many other stakeholders will need to understand.”*

154. In Northern Ireland, the definition of a Social Economy Enterprise (SEE) includes *“those organisations that have a social, community or ethical purpose, operate using a commercial business model and have a legal form appropriate to a not for profit status”*.<sup>126</sup> NICVA has suggested that there has been a lack of investment in preparing voluntary and community organisations to bid for contracts. It has been suggested that buyers also lack an understanding of how SEEs work and what they can bring to the trade<sup>127</sup>.
155. CPD has produced a PGN aimed at assisting SEEs into public procurement. It largely reflects the content of the SME Guidance Note and as such is focused on ensuring visibility and accessibility to procurement opportunities for the social/charitable sectors. This dovetails with the overall aim of the Northern Ireland Executive to ensure socially responsible procurement. In Northern Ireland PGN 02/12 refers to those provisions of the PCR 2015 which gives effect to Articles 20 and 77 of the 2014 Directive.

Scotland

156. Alongside implementing the ability to reserve to supported businesses and giving effect to Article 20 of the 2014 Directive, the sustainable procurement duty under s9 of the PRSA requires contracting authorities to consider (amongst other matters), for each regulated contract over £50,000 (for services and supplies) or £2m (for works), whether it can facilitate the involvement of a supported business.<sup>128</sup> Again, prior to the PRSA this had been an area of policy focus.<sup>129</sup>

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<sup>125</sup> Available here (updated as of October 2016)

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/560272/Guidance\\_on\\_Light\\_Touch\\_Regime\\_-\\_Oct\\_16.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/560272/Guidance_on_Light_Touch_Regime_-_Oct_16.pdf)

<sup>126</sup> Social Economy Enterprise Strategy 2010-2011, DETI

<sup>127</sup> Northern Ireland Assembly; Committee for Finance and Personnel, Report on the Inquiry into Public Procurement in Northern Ireland, published 10 February 2010

<sup>128</sup> See paragraph 54 above where the sustainable procurement duty is set out.

<sup>129</sup> See for example SPPN/10/2010

157. The ability to reserve contacts under the 2014 Directive is replicated for the below EU threshold tranche of regulated contracts covered only by the PRSA. S.11 PRSA addresses supported business and provides:

*“(1) Despite section 8, a contracting authority may restrict participation in a regulated procurement (other than an EU-regulated procurement) to supported businesses only.*

*“(2) Where a contracting authority restricts participation under subsection (1), it must state that fact in the contract notice.”*

158. Article 77 has not been given effect to in Scotland. Therefore there is no “public service mission” reservation in Scotland. At the time of the consultation, contracting authorities were not reserving contracts. The PLA in its own response to the consultation suggested that while that might be said, it would be preferable to retain the ability to reserve if desirable. That suggestion was not adopted.

*“(3) For the purposes of his Act, a “supported business” is an economic operator who operates a supported business or supported employment programme within the meaning of regulation 21 of the Public Contracts Regulations.”<sup>130</sup>*

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<sup>130</sup> Regulation 21 is the Reserved Contracts provision in the Scottish PCR 2015.

**C1.1 Brexit**

159. The potential impact of Brexit on SME access to a greater share of public contracts is not yet clear. The Government has indicated that legislation in the form of a Great Repeal Bill will transpose all applicable EU law into domestic law. It is also likely that there will be a transition period where at least some if not all of that directly transposed law will continue to apply without repeal or amendment. The period of that transition and the extent to which, if at all, the UK Government might diverge from the ‘acquis’ remains to be seen. Please see the Procurement Lawyers Association’s Paper on Public Procurement and Brexit for further comment.

160. The Regulations implementing the 2014 Directives are already part of domestic law. They will continue in force until further repeal, subject to the provisions set out in the withdrawal agreement and subject to any terms applicable to the transition period likely to follow the UK’s formal exit from the EU in March 2019.

161. Although the Government has not produced substantive and detailed proposals for what the post-Brexit landscape will look like but in the sphere of procurement, it can at least point to the chapter on ‘Improving Procurement’ in its Green Paper of January of this year entitled ***Building Our Industrial Strategy***.

162. That chapter in fact highlighted the role of SMEs in procurement post Brexit: the paper says this:

*“The public sector spends £268 billion per year, equivalent to 14% of GDP. Taking a strategic approach to government procurement presents the opportunity to support investment in innovation and skills; strengthen UK supply chains and increase competition, in particular by creating more opportunities for SMEs.”*

163. In that latter regard it goes on to state:

*“We have committed to raise SME’s share of central government procurement to one third and to ensure all major government suppliers sign up to the Prompt payment Code, promising to pay suppliers, including small businesses promptly and fairly.”*

164. As at 2010 when the coalition government came into office, SME market share in the award of public contracts was 6.5%; the coalition set the ambitious target of 25% SME market share by 2015 while the Green Paper of January 2017 aims to boost SME share to 33%. The target is extremely ambitious.

165. The Green Paper also makes mention of social value by referring to the use of the balanced scorecard. Again to quote the text:

*“The government is building on good practice adopted in major infrastructure programmes such as Crossrail by encouraging those buying goods and services to take account of social and economic factors when designing their procurements.”*

166. Finally on Brexit, the Green Paper perhaps unsurprisingly focusses a lot of attention on the supplier opportunities within the defence and health sectors, and seeks to trumpet the progress made as regards digital procurement by way of the G Cloud, noting that SMEs now make up 91% of all suppliers in the digital marketplace.

167. It might be thought that if tariff free access to the single market is at all possible, particularly if the UK is not going to be required to comply in full with the four freedoms, that the EU would insist that if UK businesses are to benefit from such access then reciprocity would require that businesses from other EU states will be granted continuing and equal access to the UK market which would require the continuation of competition law, state aid law, the maintenance of indirect taxes and the same opportunities for access to public contracts by way of procurement law. If tariff free access to the single market cannot be achieved without the EU extracting some other price, then it might be much less likely that reciprocal access to public contracts is a condition of any such deal. In those circumstances, we consider that there will be significant appetite for streamlining public procurement in the UK.
168. As with so much else relating to Brexit at this early stage of the withdrawal negotiations, much remains to be seen.

## C1.2 Emerging Themes

169. It remains rather early to fully compare and contrast the different approaches taken to implementation of the 2014 Directive as regards promoting access of SMEs and social value through procurement. The headline themes from this paper however are as follows:
- a. There are big differences in the regimes adopted for below threshold contracts with Scotland the only jurisdiction with stand-alone legislative regulation of such contracts. This includes a remedies regime.
  - b. The Implementation Regulation 2016/7 should bring the jurisdictions into harmony over the substantive use of the ESPD albeit that it remains too early to comment on whether the problems experienced following early adoption in Scotland have allowed other jurisdictions to avoid similar problems. Generally it is noteworthy that for below threshold procurements, as outlined above the Young Report recommended elimination of PQQs for England, and in Scotland there has been reluctance to use bespoke (in terms of shortened) forms of ESPDs. This leads to differences between jurisdictions, in the level of pre-qualification resources demanded from economic operators.
  - c. The role of DPSs seems to be limited but growing. We consider that this represents a missed opportunity for reducing complexity for SMEs. There appears to be more appetite for and use of lots and consortia / joint bidding, albeit that the latter is now giving rise to various competition law concerns that are the subject of further guidance from competition regulators.
  - d. The promotion of social ends is being pursued across the jurisdictions. In Scotland there is no 'lowest price only' MEAT assessment and an emphasis - as there is in Wales - on using procurement to secure compliance with social environmental and labour law. There is a more sui generis approach to social value across the jurisdictions, the most obvious contrast being the sustainability duties imposed on contracting authorities in Scotland and Wales as compared to the duties to consider embedded in the Social Value Act which applies in England.
170. If members wish to provide feedback of their experience on the use of any of the new powers or tools discussed in this Paper, we would encourage them to do so via the members only sections of the PLA's website.
171. The PLA would welcome comment on the points made in this Paper.