

6 Public procurement (Dimension 5b) in the Western Balkans and Turkey

This chapter assesses the system and procedures applied in the Western Balkans and Turkey to facilitate small and medium-sized enterprises' (SMEs) access to the public procurement market. It starts by outlining the assessment framework, then presents an analysis of Dimension 5b's three thematic blocks: 1) policy and regulatory framework for SMEs in public procurement; 2) implementation of public procurement provisions in practice; and 3) monitoring and evaluation of access to public procurement markets by SMEs. The chapter makes specific recommendations for improving SMEs' access to public procurement procedures in the Western Balkans and Turkey.

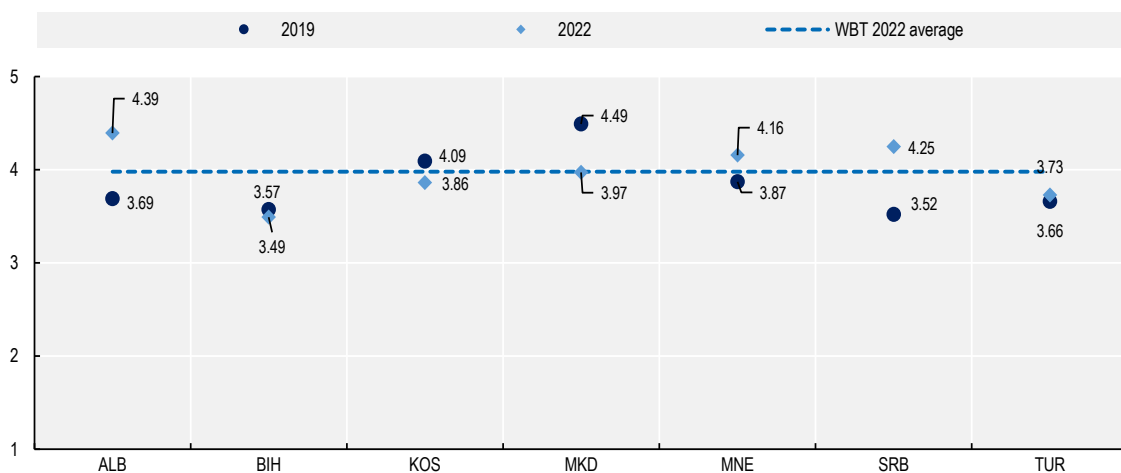
Key findings

- **Most of the assessed economies (Albania, Montenegro, North Macedonia and Serbia) have made important progress in improving their public procurement policies** and some progress in their implementation, monitoring and evaluation.
- **Most of the assessed economies (Albania, Montenegro, North Macedonia and Serbia) have significantly improved their public procurement legislation, especially provisions for enhancing the participation of SMEs.** Those economies have also simplified public procurement procedures by easing documentary evidence rules and other formal requirements, thereby reducing the administrative burden on SMEs.
- **More of the public procurement market is open to foreign companies on a level playing field than in 2019.** Domestic preferences are applied only in Turkey; they are present in the Public Procurement Law in Bosnia and Herzegovina, but at the time of writing are not applied in practice.
- **In most of the assessed economies, there has been an incremental shift in the right direction and more emphasis is put on selection of the most economically advantageous tenders.** In practice, however, the lowest-price criterion remains the dominant criterion for awarding contracts.
- **Although some progress has been made, there are still some restrictions applied as regards subcontracting** (such as the maximum value of the contract which can be subcontracted) **and joint bidding** (such as requirements that groups of economic operators adopt specific organisational forms).
- **Application of electronic procurement solutions has been significantly enhanced due to the establishment or improvement of central public procurement portals.** Submission of tenders by electronic means has become a default option with only a few exceptions.
- **Access of economic operators to legal protection measures has been facilitated by the introduction of the possibility to submit appeals electronically.** The overall transparency of the review process has been greatly improved due to the implementation of new electronic functionalities in independent procurement review bodies.
- **Not all economies provide sufficient advice, support and training to enhance SMEs' access to public contracts.** Such support should be increased, in particular as follow-up of the recent overhaul of procurement provisions.
- **There has been some improvement, but only in a few economies (North Macedonia, Serbia and Turkey), in the collection, analysis and publication of information about SMEs' participation in public procurement markets** due to improvements in electronic procurement portals.

Comparison with the 2019 assessment scores

Since the last assessment cycle, several economies have improved their scores as they adopted and implemented policy measures to ease SMEs' access to public procurement. Albania and Serbia witnessed the strongest increases, followed by Montenegro (Figure 6.1). As regards the policy and legal framework, North Macedonia has also made important improvements, although due to limited progress in implementation and a lack of collection and storage of information on economic operators by contracting authorities, its overall score is lower than in the previous cycle. The three remaining economies (Bosnia and Herzegovina, Kosovo, and Turkey), continue to score below the Western Balkans and Turkey (WBT) average of 3.98, highlighting the need for governments to step up their efforts, particularly in the area of implementation and monitoring and evaluation of public procurement measures specifically targeting SMEs.

Figure 6.1. Overall scores for Dimension 5b (2019 and 2022)



Notes: WBT: Western Balkans and Turkey. Despite the introduction of questions and expanded questions to better gauge the actual state of play and monitor new trends in respective policy areas, scores for 2022 remain largely comparable to those for 2019. For a detailed overview of policy changes and to compare performance over time, the reader should focus on the narrative parts of the report. See the Policy Framework and Assessment Process chapter and Annex A for information on the assessment methodology.

Implementation of the SME Policy Index's 2019 recommendations

Most of the recommendations made in the 2019 assessment have either been implemented or are currently being implemented (Table 6.1).

Table 6.1. Implementation of the SME Policy Index's 2019 recommendations for Dimension 5b: Public procurement in the Western Balkans and Turkey

Regional 2019 recommendation	SME Policy Index 2022	
	Main developments during the assessment period	Regional progress status
Further align national legislation with EU rules and international good practices	Four economies (Albania, Montenegro, North Macedonia and Serbia) have adopted new public procurement laws which are aligned, with only a few exceptions, to the 2014 EU Public Procurement Directive. Another two economies – Bosnia and Herzegovina and Kosovo– have prepared either draft amendments or new public procurement laws to harmonise or approximate public procurement rules with EU rules. There is no information available about any plans concerning the implementation of those directives by Turkey any time soon.	Strong
Reduce the administrative burden of participating in public procurement	Four economies (Albania, Montenegro, North Macedonia and Serbia) have adopted rules simplifying public procurement procedures and reducing administrative requirements. New rules also provide various solutions that are beneficial to small and medium-sized enterprises (SMEs), such as dividing procurement into smaller lots, more flexible evidence requirements, greater possibilities for joint bidding and reliance of third-party resources. Bosnia and Herzegovina and Kosovo launched activities leading to the adoption of legal provisions simplifying rules and improving the position of SMEs in public procurement. There is no information available about any plans concerning the implementation of such provisions in Turkey.	Strong
Increase the use of non-price criteria for awarding contracts to enable public buyers to receive the best value for money	New public procurement rules either give complete freedom to contracting authorities to choose between the lowest price and quality-price criteria (five economies) or reduce the possibility of applying the price-only criterion (Montenegro) and give clear preference to non-price criteria (Albania). In all economies, price-quality criteria are, however, rarely used in practice and the lowest price criterion remains the predominant factor for awarding contracts. More could be done to promote the use of non-price criteria by providing more guidance to contracting authorities in the form of consultation, advice, good practice examples and models.	Moderate
Focus on correctly implementing amended public procurement provisions by providing consultations, assistance and training, both to contracting authorities and economic operators, especially those representing SMEs	In all economies, the adoption of new public procurement rules has been followed by advice, training and assistance to contracting authorities and economic operators as well as the adoption of new operating tools such as new templates, models and standard forms. However, there is still room for improvement in all economies when it comes to increasing support provided to economic operators through the dissemination of new or updated guidelines, manuals, examples of good practice, and commentaries to new rules as well as dedicated training.	Moderate
Constantly monitor and analyse the obstacles hindering SMEs from accessing public procurement markets, including the costs of access to legal protection	Most economies have implemented new or improved electronic procurement solutions, including new public procurement portals, allowing the participation of SMEs in public procurement procedures to be better monitored.	Moderate

Introduction

Public procurement markets provide small and medium-sized enterprises (SMEs) with attractive business opportunities. In the European Union (EU), public procurement accounts for around 14% of gross domestic product (GDP) (European Commission, 2021^[1]). Among OECD member countries it accounts for approximately 12% of GDP and 29% of total government expenditures (OECD, 2018^[2]).

Like elsewhere in the world, the COVID-19 pandemic has had an impact on public procurement in the Western Balkans and Turkey. The value of awarded contracts diminished as a result of postponing or reorienting planned purchases. The number of directly awarded contracts increased, due to urgent need, in particular to obtain medical equipment and personal protective equipment and tools. In Serbia, for instance, the value of the public procurement market shrank from 8% of GDP in 2019 to 6.88% in 2020 (European Commission, 2021^[3]). In North Macedonia, the government adopted a number of fiscal transparency measures and proscribed most non-essential procurement. In Montenegro, the total value of contracts awarded in 2020 fell from EUR 608 million in 2019 to EUR 545 million (Montenegrin Directorate for Public Procurement Policy, 2021^[4]). The government prohibited all new public procurement procedures with the exception of procurement necessary for the functioning of the health system and procurement justified by national security interests and other emergencies (Montenegrin Directorate for Public Procurement Policy, 2021^[4]). In Albania, the government introduced a series of measures and legislative changes related to public procurement contracts awarded as a result of the pandemic (OECD, 2021^[5]) and there was a significant increase in the value of contracts awarded through negotiated procedure without prior publication (15% of the value of contracts) (OECD, 2021^[6]).

The 2014 EU Public Procurement Directives, which were or are in the process of being implemented in most WBT economies, provide for new SME-friendly provisions and procedures. However, SME participation in public procurement remains limited compared to their role in the economy. SMEs face various barriers to being awarded more public tenders. Procedural rules are complex and the effort needed to take part seems too great, given the uncertain outcome. SMEs often lack the resources and know-how to deal with burdensome administrative requirements and cannot afford to spend time and money on a potentially fruitless exercise. Even when they are prepared to tender, SMEs are prevented from doing so by unfavourable conditions, such as, for example, a contract that is too large for a small company to implement, disproportionate qualification or financial requirements that are not justified by the nature and character of the contract in question, or late payments by contracting authorities.

Engaging more SMEs in public procurement could help governments better meet the procurement needs of the public sector (OECD, 2018^[2]). Increasing their participation would ensure a more competitive bidding process and affords access to a wider choice of available and innovative solutions. This, in turn, helps governments to fulfil the requirements of contracting authorities in a more responsive way and achieves better value for money. Recognising these benefits, governments have developed a series of strategies and policies to fully exploit the potential of engaging SMEs in public procurement (OECD, 2018^[2]). Their most commonly recognised objectives are facilitating SMEs' access to public contracts and ensuring a level playing field for all economic operators.

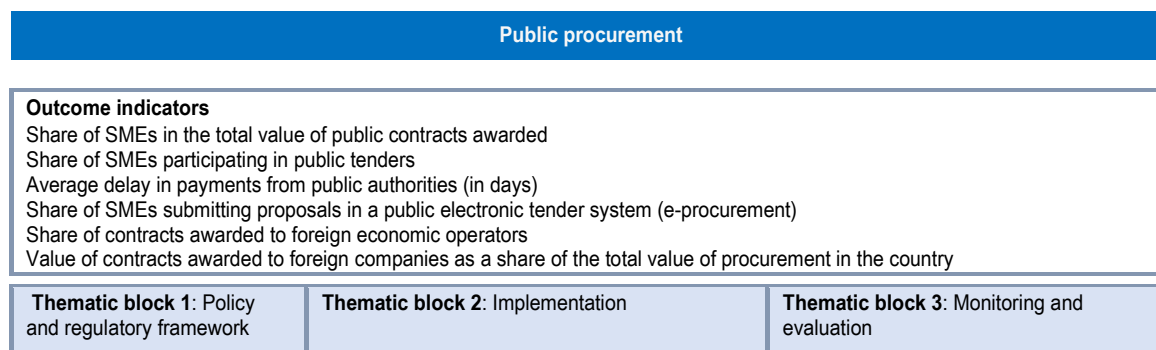
Assessment framework

Structure

This chapter analyses the policies and tools in place to improve SMEs' access to the public procurement market across the seven WBT economies. The assessment framework for this dimension includes 39 indicators, covering a number of questions gathered in 3 thematic blocks: 1) the policy and regulatory framework;

2) implementation; and 3) monitoring and evaluation. The final score is the sum of the scores obtained in these three blocks, weighed in accordance with the same formula as applied in the previous assessment.

Figure 6.2. Assessment framework for Dimension 5b: Public procurement in the Western Balkans and Turkey



Note: The outcome indicators serve to demonstrate the extent to which the policies implemented by the government bring about the intended results; they have not been taken into consideration in the scoring.

The indicators assess, among others, the extent to which governments take SMEs' needs into account in the procurement process, including the division of public procurement into lots, participation of groups of economic operators, qualification and selection requirements proportionate to and related to the object of procurement, and the possibility of subcontracting.

Other indicators measure whether:

- economies adopted strategies or action plans to support SMEs in public procurement
- relevant public procurement markets are open to foreign enterprises (either SMEs or large enterprises) and legal provisions ensure a fair level of competition
- information on public procurement is available centrally and free of charge to all participants
- public institutions offer information, training and advice to interested firms
- electronic tools are applied in public procurement procedures, from providing information on procurement opportunities through communication between contracting authorities and bidders, submission of tenders, seeking legal protection from independent procurement review bodies, and the possibility of proceeding with payment for delivered goods and performed services
- there is legislation in place imposing strict deadlines for payments from public authorities, and penalties for non-compliance.

This assessment, like the one conducted in 2019, is not a comprehensive assessment of public procurement systems in WBT economies. It only focuses on those elements in the legislative framework and practice in the field of public procurement that are relevant to SMEs. Issues such as the integrity and fairness of public procurement procedures, detecting and combating corruption, favouritism, and conflicts of interest are outside its scope. See the Policy Framework and Assessment Process chapter and Annex A for information on the assessment methodology.

No major changes have been made to the methodology since the previous assessment, but the assessment framework has evolved to capture more information on various issues related to SME participation in public procurement. For example, it includes new questions on horizontal issues such as the introduction of accessibility requirements on public procurement of ICT products and services in procurement legislation and the possibility for contracting authorities to take into account environmental or

social considerations in the qualification criteria or selection of best tenders. Questions on electronic procurement have been updated and reformulated to include more advanced forms of e-procurement, such as the submission of tenders by electronic means or the use of electronic tools to process invoices submitted by contractors and appeals to procurement review bodies.

Analysis

Performance in public procurement

Outcome indicators play a key role in examining the effects of policies, since they provide crucial information for policy makers to judge the effectiveness of existing policies and the need for new ones. The outcome indicators chosen for this dimension (see Figure 6.2) are designed to assess the performance of WBT economies in public procurement and particularly in enabling SMEs' participation in this key market. The analysis starts by drawing on these indicators to describe the economies' performance.

In WBT economies, the value of awarded contracts amounts to 6-12% of GDP (OECD, 2022^[7]). In North Macedonia, for example, SMEs represented 83.74% of bidders who submitted their tenders through the mandatory e-procurement system in 2020 while they only represented 63% in terms of the value of contracts awarded.¹ In Serbia, in 2020, SMEs represented 85% of bidders in public procurement, but were only awarded slightly less than 50% of the procurement market.²

All seven economies guarantee a review for aggrieved economic operators by independent procurement review bodies. This is available to economic operators whose interests in specific public procurement contracts were breached by contracting authorities' omissions or actions that were not consistent with the law. Access to those bodies is not hindered by unrealistic time periods for submitting complaints or excessively high costs. Relevant public procurement rules also require review body decisions to be taken as quickly and smoothly as possible, and to be enforceable. Table 6.2 presents the scores for WBT economies for public procurement.

Table 6.2. Scores for Dimension 5b: Public procurement in the Western Balkans and Turkey

	ALB	BiH	KOS	MKD	MNE	SRB	TUR	WBT average
Policy and regulatory framework	4.56	3.76	3.94	4.44	4.13	4.69	3.63	4.16
Implementation	4.72	3.36	4.00	3.92	4.80	4.32	3.92	4.15
Monitoring and evaluation	3.32	3.40	3.40	3.40	2.60	3.40	3.40	3.27
Weighted average	4.39	3.49	3.86	3.97	4.16	4.25	3.73	3.98

Note: See the Policy Framework and Assessment Process chapter and Annex A for information on the assessment methodology..

Policy and regulatory framework (Thematic block 1)

The purpose of this section is to assess the policy and regulatory framework for public procurement, especially those activities and legal provisions that are the most relevant to SMEs. In particular, indicators measure whether WBT economies have adopted strategic documents on activities addressed specifically to SMEs and whether their public procurement regulations provide solutions that support the participation of SMEs.

Most economies have adopted new strategic policy instruments to increase SMEs' participation in public procurement

All the assessed economies have adopted multiannual national strategies or action plans for further developing their public procurement systems. Relevant documents deal with improvements to the legislative framework, strengthening administrative capacity, increasing the efficiency of legal protection measures, and combating corruption and conflicts of interest. As far as SMEs are concerned, those strategies address issues such as simplifying and streamlining procurement procedures, reducing administrative red tape, and providing training and consultation to contracting authorities and economic operators.

For example, in Montenegro, the new Public Procurement Strategy (Montenegrin Directorate for Public Procurement Policy, 2021^[8]) aims, among others, to increase the participation of SMEs in public procurement procedures through a forum of dialogue with the private sector, identifying obstacles and challenges for participation in the public procurement market, organising training for SMEs, analysing the ability of economic operators to fulfil the requirements of public tenders, and developing guidelines and documentation on how to do business with the public sector. In Serbia (Serbian Public Procurement Office, 2019^[9]), the new strategy aims to increase the efficiency and cost-effectiveness of public procurement procedures; strengthen competition; reduce the risk of irregularities; and promote and stimulate environmental, social and innovative aspects in public procurement. In North Macedonia, the Public Procurement Bureau prepared a draft strategy for the development of the public procurement system (Macedonian Public Procurement Bureau, 2021^[10]) which envisages a number of activities dedicated to strengthening the position of SMEs in public procurement, in particular publishing guidelines, organising training, and strengthening monitoring and reporting.

New legal procurement laws harmonised with EU requirements have been adopted across the region. All WBT economies have a solid legislative framework in the field of public procurement. Four economies (Albania, Montenegro, North Macedonia and Serbia) have recently adopted new public procurement laws (PPLs) implementing provisions of the 2014 EU Public Procurement Directive. New PPLs are characterised by a high level of EU compliance, with only a few cases of inconsistencies or shortcomings. Provisions that do not fully correspond to EU requirements concern, for example, some additional grounds for exclusion of economic operators and application of “blacklists” of economic operators (automatic exclusion for a certain period of time, due, for instance, to withdrawal by the winning bidder from signing the contract [Albania and North Macedonia], a lack of solutions concerning self-cleaning of economic operators [North Macedonia] or limitations concerning the share of contracts covered by subcontracting [Albania]). In some cases, however, this generally positive view concerning EU compliance of PPLs is affected by the adoption of, in addition to a general PPL, specific regulations addressing some types of procurement, usually major infrastructure linear constructions of big values (Serbia) or constructions executed in the aftermath of the earthquake in Albania. Those procurement rules provide for a number of exceptions from general public procurement rules that are not consistent with EU rules, concerning for example minimum time periods for submitting tenders (much shorter than those required by EU rules) or rules on procurement review (shorter time periods for appeals and a lack of a standstill period between notification of selection of the best tender and the conclusion of a contract).

Foreign bidders generally have the same rights as domestic bidders

One of the cornerstones of a public procurement system is the principle of equal treatment for all economic operators that have the capacity and resources to provide goods or perform services for the public administration, regardless of their origin or organisational form. In general, with a few exceptions, economic operators enjoy free access to public procurement procedures in WBT economies regardless of their origin and domestic suppliers do not receive privileged treatment.

At the time of writing, only Turkey applies domestic preferences, such as the right to exclude foreign suppliers from public procurement procedures under certain thresholds, a margin of price preference applied in favour of domestic suppliers for works or services and domestic goods, and the possibility (or obligation) of requiring that some or all products offered in public procurement are of Turkish origin. Serbia, which in the previous assessment period allowed domestic preferences, has adopted new public procurement provisions which require equal treatment of domestic and foreign operators. In Kosovo, an amendment to the Public Procurement Law adopted in December 2020, introduced, until 31 December 2021, preferential treatment of tenders submitted by domestic bidders or containing domestic products or services, which affected the principles of equal treatment and non-discrimination of economic operators. A level playing field has since been re-established in public procurement processes. In Bosnia and Herzegovina, the application of domestic preferences was supposed to be phased out on 1 June 2020. However, the Council of Ministers adopted a new temporary decision on preferential domestic treatment (with a 30% margin of preference) that was valid from 1 June 2020 to 1 June 2021. No new measures concerning domestic preferences have been adopted since the expiration of this temporary decision. Grounds for re-establishing domestic preferences in the future, however, still exist in the Public Procurement Law (Parliamentary Assembly of Bosnia and Herzegovina, 2014^[11]) and new preferences may be adopted by the government by means of implementing regulations (a government decision).

Large procurement contracts can be divided into smaller lots to facilitate SME access to the public procurement market

One of the instruments contracting authorities can use to improve SMEs' chances in public procurement is to divide large but heterogeneous contracts into smaller chunks, or lots, which are better suited to SMEs' capacities (OECD, 2016^[12]). This instrument is now explicitly provided for in the 2014 EU Public Procurement Directive. See Box 6.1 for some examples from the European Union.

Exclusion of economic operators is allowed in accordance with EU rules, but some economies allow automatic exclusion, which is contrary to EU law

Those WBT economies which adopted new PPLs have also adjusted the list of circumstances leading to exclusion of SMEs from public procurement to those provided for in the EU Public Procurement Directive. Some PPLs, though, allow for additional automatic exclusion of economic operators based on decisions of the public procurement office (or agency) in situations not explicitly allowed by EU law. For example, in Albania, an economic operator who withdraws from signing a contract is "blacklisted" and excluded from all procurement procedures for a period established by the public procurement agency (PPA). In such a case, contracting authorities conducting public procurement procedures are not allowed to conduct their own assessment of the reliability of the economic operator, but are bound by the PPA's decision. Such an "automatic" exclusion, without the possibility of the contracting authority carrying out a case-by-case assessment, is not consistent with the case law of the Court of Justice of the European Union. In North Macedonia, bidders who withdraw their tender before the expiration of its validity period, do not accept correction by the tender committee of any arithmetical errors in the tender, fail to sign the public contract in accordance with requirements of the tender documentation and the tender submitted, or do not provide the performance guarantee, if so required by the contracting authority, lose their tender security. In addition to their tender security being forfeited, such bidders receive negative references published on the electronic system of public procurement website. This results in them being automatically excluded from participating in procurement procedures for a period not shorter than six months (and not longer than one year) from the date of issuing of the negative reference, which is not compliant with the EU *acquis*. Box 6.2 provides a good practice example from Romania.

Box 6.1. Division of procurement subject into lots

Dividing procurement into lots is seen as one of the most important practices to facilitate small and medium-sized enterprises' (SME) participation in public procurement. Allegedly, it is also one of the most efficient tools to enhance their participation. The European Commission shows that the subdivision of contracts into lots increases SME participation rates from 62% for procurement without a division into lots to 65% where 10-19 lots have been created. As reports submitted by EU member states on public procurement show, it is one of the most often used tools applied in practice. There are many examples from EU member states on supporting contracting authorities in applying this tool.

In **Lithuania**, the Public Procurement Office issued Guidelines for Public Buyers on the application of “divide or explain” principle.

In **Belgium**, the Public Procurement Commission issued a document explaining how division into lots should be applied to increase the participation of SMEs. Accordingly, it explains the concept, its formal ramifications and requirements, and provides practical advice to contracting authorities on how to proceed at various stages of the procurement, from the preparation of tender documents and the procurement notice through the collection and evaluation of tenders up to the selection of the best tenders and response to participants.

Most economies in the Western Balkans and Turkey provide relevant rules for dividing bigger procurement into lots. For example, in Montenegro, a subject of public procurement may be divided into lots according to the type, characteristics, purpose, place or time of implementation, taking into account the possibility of SMEs participating. If contracting authorities have not divided the procurement into smaller lots, they should explain the main reasons for their decision. Similar rules exist in North Macedonia and Serbia. In Kosovo, according to the Public Procurement Law, public contracts may be divided into homogenous or heterogeneous lots. Operational guidelines suggest that, to encourage the participation of SMEs in public procurement, limiting the number of lots which may be applied for should be a preferred option if there are many SMEs potentially interested in a given procurement. Provisions concerning the division of procurement into lots also apply in other economies in the region, namely in Bosnia and Herzegovina and Turkey, even though they have not yet implemented the 2014 EU Public Procurement Directive. The difference with the first four economies mentioned above is that in the case of Bosnia and Herzegovina, Kosovo, and Turkey, contracting authorities which have decided to not divide procurement into smaller parts do not have to justify their decision.

Sources: European Commission (2021^[1]; n.d.^[13]); Belgian Commission des Marchés publics (2020^[14]).

Box 6.2. Court of Justice of the European Union case law concerning automatic exclusion of economic operators

The European Union's public provisions, as interpreted by the Court of Justice of the European Union, allow the exclusion of an economic operator due to "grave professional misconduct". However, national procurement rules cannot allow the automatic exclusion of an economic operator (C-465/11 "Forposta and ABC Direct Contact"). The Court of Justice of the European Union defines the concept of "grave misconduct" as conduct that denotes a wrongful intent or negligence of certain gravity on the part of the economic operator. Any incorrect, imprecise or defective performance of a contract or a part thereof could potentially demonstrate the limited professional competence of the economic operator concerned, but does not automatically amount to grave misconduct. To determine whether grave misconduct exists, a specific and individual assessment of the economic operator's conduct must, in principle, be carried out.

Example from Romania

Romania operated a central registry that contains information on both the positive and the negative contract performance of economic operators. After the completion of each contract, contracting authorities issued a document with information on how the economic operator had fulfilled its contractual obligations, which could be positive or negative depending on whether or not the economic operator had properly performed the contract. The document was issued to the contractor, and a copy was placed in the procurement file. A further copy was sent to the National Authority for Regulating and Monitoring Public Procurement (NARMP). The NARMP received copies of all positive and negative documents relating to contract performance from all contracting authorities across Romania. The NARMP created a database containing this information; it was not posted on the NARMPP website. During a procurement procedure, contracting authorities could ask the NARMP for information related to one or more participating economic operators. Following such a request, the NARMP sent that contracting authority all of the available documents (both "positive" and "negative"), without any comments or suggestions. The final decision – whether to exclude the economic operator or not – remained the responsibility of the contracting authority. The contracting authority could also contact other contracting authorities to obtain more information or evidence regarding cases where the tenderer concerned failed to fulfil its contractual obligations.

Public procurement rules should not provide for exclusion from procurement procedures on the basis of a decision of the public procurement office or agency. Such an "automatic" exclusion is not consistent with EU rules. Contracting authorities should be allowed to carry out a case-by-case assessment of whether or not in certain circumstances, in the light of the public procurement law's provisions, a given bidder should be excluded as not being reliable due to some wrongdoings committed in the past. However, if the authorities insist that their public procurement office or agency should play some role in verifying the reliability of an economic operator, it is still possible to do so in a way that complies with EU standards, as presented above.

Source: OECD (2016^[15]).

New public procurement rules have simplified evidence requirements to be fulfilled by bidders

Albania, Montenegro, North Macedonia and Serbia have introduced standard forms of self-declaration that include most of the relevant information used as preliminary proof of fulfilment of exclusion and qualification (selection) criteria by economic operators. In these economies, in principle, a self-declaration containing the relevant information on the economic operator is submitted by all bidders or candidates in public procurement procedures and documents or certificates issued by public institutions or third parties are only required from the best bidder. In Turkey, economic operators may submit their self-declarations with their bids when e-procurement is used. However, in addition to the best bidder, the second-best tenderer must also submit the relevant documents that cannot be verified on line prior to the contract award decision. Qualification (selection) requirements could still be simplified in Bosnia and Herzegovina and Kosovo.

Box 6.3. Self-declarations in the EU Public Procurement Directives: European Single Procurement Document

Economic operators participating in public procurement procedures in European Union member states can prove compliance with exclusion and qualification (selection) criteria by means of self-declarations. Self-declarations are submitted with tenders or requests to participate, in principle, instead of certificates issued by public authorities or third parties. Certificates, statements and other means of proof – supporting documents – are then required only from the bidder to whom the contracting authority has decided to award the contract.

In EU member states, at least above the thresholds of application of the Public Procurement Directive, this self-declaration takes the form of the European Single Procurement Document (ESPD). Contracting authorities are obliged to accept ESPDs from economic operators as preliminary proof that the economic operator fulfils the following conditions:

- a) is not in a situation in which economic operators should or may be excluded
- b) meets the relevant selection criteria that have been set by the contracting authority
- c) where applicable, fulfils the objective rules and criteria that have been set by the contracting authority for the purposes of short-listing (in the case of a multi-stage procedure).

The ESPD has a form established by the European Commission and is obligatory for EU member states in procurement covered by the EU Public Procurement Directive. The ESPD consists of a formal statement by the economic operator that relevant grounds for exclusion do not apply and/or that the relevant selection criterion is fulfilled and the economic operator should provide the relevant information as required by the contracting authority. The ESPD should also identify the public authority or third party responsible for establishing the supporting documents and contain a formal statement to the effect that the economic operator will be able, upon request and without delay, to provide those supporting documents.

The possibility of using self-declarations should encourage the participation of economic operators, and in particular SMEs, by reducing the costs related to their participation in public procurement. Instead of evaluating numerous documents, contracting authorities only need to verify that self-declarations are submitted by all of the participants of the procedure – bidders submitting tenders (in an open procedure) or candidates submitting requests for participation in two-stage procedures (for example, a restricted procedure) to decide whether they should be excluded or admitted to the procedure. Self-declarations and information included therein should be sufficient for the contracting

authority to decide whether a given bidder (candidate) should be excluded or admitted to the public procurement procedure.

Sources: (European Commission, 2017^[16]); (European Commission, n.d.^[17]); (European Commission, n.d.^[18])

Joint bidding in general is allowed, though in some cases additional burdens are imposed on companies willing to jointly participate

One instrument that increases SMEs' chances in public procurement is joint bidding. This allows a number of suppliers who do not individually meet the contracting authority's requirements to combine their resources and capacities to fulfil them. According to EU rules, tenders or requests for participation may be submitted by groups of economic operators (consortia) and contracting authorities may not require such groups to take a specific organisational form for that purpose. Contracting authorities may only require it from the winning bidder if it is necessary for the successful delivery of supplies or performance of services. Some economies, however, even if they in principle comply with the EU rules, require groups of bidders or candidates to fulfil additional requirements. For example, in Montenegro, tenders or requests for participation may be submitted by groups of economic operators. However, the PPL imposes some formal requirements concerning such groups. Bidders submitting joint tenders should conclude in advance a contract on joint participation which regulates mutual rights and obligations, determines which member of the joint bid is the holder of the bid, which part of the procurement subject each of the members of the joint bid is in charge of, as well as their percentage share in the total value of the bid. In Albania, the new PPL, unlike the previous one, does not allow contracting authorities to request that groups of economic operators assume a specific legal form to submit a tender or request to participate. However, implementing regulations impose additional obligations on jointly participating bidders and require submission, together with a tender, as in the case of Montenegro, of a co-operation agreement regulating the details of the co-operation of members of the group.

Box 6.4. Rules concerning the submission of joint tenders

In accordance with EU rules, tenders or requests for participation may be submitted by groups of economic operators (consortia) and contracting authorities may not require that such groups take a specific organisational form for that purpose. They may only require it from the winning bidder if it is necessary for successfully carrying out the contract.

In **Poland**, the Public Procurement Law stipulates that economic operators may compete for a contract jointly. In such a case, they should appoint a plenipotentiary to represent them in the procurement procedure or to represent them in the procedure and to conclude the contract.

Similarly, in **France**, public procurement rules limit themselves to stating that one of the members of the consortium be indicated in the request for participation or in a tender to represent its members in contacts with the contracting authority and to co-ordinate the performance of the whole group.

Western Balkans and Turkey (WBT) economies which have already implemented EU procurement rules prohibit contracting authorities from requiring that groups of economic operators assume a specific legal form. However, in some cases, procurement rules require that such groups submit with their tender or request for participation a text of their internal agreement, including a minimum of specific information. This seems to go beyond what is permitted by the EU *acquis* and may imply certain restrictions on the organisation of such a group. In accordance with good practice, it should suffice to require that all economic operators who decide to participate jointly appoint one economic operator to represent the whole group.

WBT economies could build on the good practices from Poland and France, where it suffices to require that all economic operators who decide to participate jointly appoint one of the participating economic operators to represent the whole group in the procedure in contacts with contracting authorities during the procedure.

Sources: Polish Public Procurement Office (2019^[19]); French Ministry of the Economy, Finance and the Recovery (2019^[20]).

Subcontracting is permitted, though in some cases the share may be limited

Another instrument that favours SMEs is subcontracting: the winning bidder who signs the contract allows a part or parts of it to be performed by third parties (subcontractors). In this way, SMEs which are not able to carry out the whole contract can provide their services for smaller parts of a bigger project that is better adjusted to their capacities. All WBT economies provide for the general possibility of subcontracting a part or parts of a contract to third parties. Some economies even underline that subcontracting should be allowed to permit SMEs to participate. Two economies removed previously applicable limitations from their procurement rules concerning the maximum share of the contract that may be subcontracted (Montenegro and Serbia). Elsewhere, some limitations still exist. In Albania, for instance, the subcontracted part of the contract must be proportionate to the value of the contract and may not exceed 50% of the overall contract value³. This upper limit has been raised, though, from 40% in the previous rules. In Kosovo, while the PPL does not set limits on the share of subcontracting, the operational guidelines set a limit of 40% of the contract value.⁴ In Turkey, contractors can choose their subcontractors freely; however, they must give the subcontractors' names to the contracting authority for confirmation. According to the general procurement specifications, subcontractors cannot undertake the whole work covered by the contract (subcontractors cannot perform 100% of the contract).

Rules on contract award criteria were modified to put more emphasis on selection of the most economically advantageous tender

The use of the best price-quality criterion instead of the lowest price is often recommended as a tool to help SMEs gain an equal footing to public contracts (European Commission, 2019^[21]). It is assumed that while SMEs may be disadvantaged in delivering off-the-shelf mass products at the cheapest possible purchase price, they may be able to offer customised, innovative goods or services that perform better in terms of quality, and broader economic, social and environmental impacts. Such products may be more cost-effective in the longer term when the full life-cycle cost is considered.

Across the WBT region, modified public procurement rules either give complete freedom to contracting authorities to choose between the lowest price or quality-price criteria or limit the possibility of applying the price-only criterion. For example, in Montenegro, selection of the best tender must be based on the most economically advantageous tender criterion and price as the only criterion may only be applied exceptionally. In particular, it is allowed in a negotiated procedure without prior publication; to award contracts on the basis of the framework agreement; in an electronic auction or a dynamic purchasing system; in procedures for social and other specific services; and in the case of public procurement for the needs of defence and security or for the needs of diplomatic missions, consular offices, and military and diplomatic representatives abroad. In North Macedonia, public contracts are awarded based on the most economically advantageous tender and e-auctions are no longer mandatory. In addition, the price cannot be used as the sole award criterion for the procurement of services for software development, architecture or engineering services; translation services; or consultancy services. In Albania, in principle, the PPL provides for free choice between the lowest price and the best price-quality ratio and it does not recommend or oblige the use of the best price-quality ratio, except in the consulting services procedure. However, a preference for price-quality is clearly expressed in the implementing rules of the PPL.

Accordingly, the price as the only evaluation factor can be used in the case of works, goods or services which have simple specifications, well-known technical standards and are easily available on the market. Serbia has introduced an EU-compliant definition of the most economically advantageous tender in its PPL.

Notwithstanding changes in legal provisions, in practice, the lowest-price criterion remains the dominant criterion for awarding contracts.⁵ In cases where the PPL gives contracting authorities the freedom to choose between the price-only criterion and the best price-quality ratio, the price criterion is predominantly applied, from 86% in Bosnia and Herzegovina to 99.63% of all procurement procedures in Kosovo (Lemke et al., 2020^[22]). Only in Montenegro, where the PPL gives preference to price-quality criterion, does the share of the price criterion fall to 72% (OECD, 2022^[7]) (however, in 2020, the new PPL was only applied for half the year, so this share should fall in the coming years when it will apply for an entire year).

There appear to be a number of reasons for the very limited use of criteria other than lowest price, including: fear of change and preference for sticking with well-understood routine procedures and a lack of practical training, guidance and resources needed to increase knowledge, understanding and confidence on the part of contracting authorities who may be concerned about the consequences of selecting and applying qualitative criteria incorrectly. Economies should do more to promote the application of quality criteria by providing consultation and advice, good practice examples, and models.

Participation conditions in all economies are non-discriminatory and proportionate

In accordance with EU procurement rules and good international practice, any requirements imposed by contracting authorities on economic operators who would like to apply for public contracts should be non-discriminatory, transparent and related to the object of the public procurement in question. Excessive requirements, especially if not justified by the complexity of the object of procurement, would deprive SMEs of the chance to participate in the public procurement market. Accordingly, all the assessed economies require that any conditions applied are non-discriminatory, related to and proportionate to the object and value of procurement.

For example, in Albania, economic operators participating in a procurement procedure should fulfil the criteria deemed necessary by the contracting authority, provided that those criteria are proportionate to the nature and size of the contract, and non-discriminatory. In Bosnia and Herzegovina, the minimum criteria required for candidates/bidders and the documents required to prove their fulfilment thereof must be proportionate, relevant to the procurement subject matter, clear and precise. Similarly, in North Macedonia, contracting authorities are not allowed to apply requirements related to suppliers' economic and financial standing, or their professional or technical ability that are not proportionate to the contract's subject matter. In Kosovo, a contracting authority may require that economic operators submit evidence demonstrating that they meet the minimum economic and financial requirements specified in the tender dossier and the contract notice. The minimum annual turnover required from the economic operators should not exceed twice the estimated contract value.

In Turkey, the PPL specifies that economic operators must submit their economic, financial, professional and technical qualifications to prove they are able to perform the contract in question. The PPL also defines the conditions under which economic operators are deemed ineligible and should be excluded from public procurement procedures. The contracting authorities' tender documents and notices in invitations for procurement or pre-qualification should specify which documents are required for evaluating economic operators' qualifications, in accordance with the procurement subject matter.

Tender and performance securities are all regulated

All the assessed economies have rules regulating the amounts of tender and performance securities, the form they take, and the cases in which they should be either returned or retained. However, in some cases,

those provisions may act as a barrier to access to public procurement. For example, in Albania, a bid security (at 2% of the estimated value of procurement) is obligatory for contracting authorities in all public procurement procedures above the low monetary thresholds. It was optional in the previous law, allowed in procedures for contracts above high thresholds. Bid securities are forfeited if the winning tenderer decides not to sign the contract. This is understandable, since the role of the bid security is to ensure that the bid is serious and binding for the bidder. However, the PPL obliges the contracting authority to exclude a bidder who withdraws from signing the contract with this contracting authority for a period of one year, which seems to be a disproportionately harsh penalty as the bidder also loses their bid security. Additionally, bidders who decline more than five times to sign a contract within a year are excluded from participation in all public procurement procedures on the basis of a decision of the PPA for a period ranging from three months to three years. Similar solutions exist in North Macedonia, where economic operators must submit a tender security (in the form of a bank guarantee) up to a maximum of 3% of the tender value. They will lose this security if they withdraw the tender before the expiration of its validity period, do not accept correction by the tender committee of any arithmetical errors in the tender, fail to sign the public contract in accordance with the requirements of the tender documentation and the tender submitted, or do not provide the performance guarantee, if so required by the contracting authority.

Late payments and advance payments are appropriately addressed

One of the problems economic operators face in public procurement is late payments by public institutions for services performed or supplies delivered. Payments which are not made promptly pose an additional risk for SMEs and affect them more than they do larger enterprises; it can severely affect their liquidity and in extreme cases force them out of the public procurement market. All economies set maximum time periods for payments in public procurement and impose penalties for late payments. In Albania, contracting authorities are required by law to pay their contractors within 30 days unless a given contract or other legal provisions envisage a different time period. The law gives the creditor the right to interest if payment is delayed. In Serbia, the Law on Payment Terms in Commercial Transactions states that public authorities or public undertakings cannot exceed the 45-day payment period, with an exemption for the National Healthcare Fund and public healthcare providers when the 90-day period applies. In Bosnia and Herzegovina, legal provisions in both entities also require contracting authorities to pay their contractors within certain time limits – 60 days. If this period is not respected, economic operators can claim financial penalties or other comparable sanctions. In Montenegro, the time period for payment is 30 days from the day that goods are delivered or services performed. A contract may allow a longer period, but not more than 60 days. Economic operators who have fulfilled their obligations to the contracting authority are entitled to statutory interest rates in the event of late payment.

Advance payments by contracting authorities – i.e. payments made while the contract is being executed – are especially beneficial to economic operators, particularly SMEs. Some economies explicitly allow for this. For example, in North Macedonia, contractors can receive remuneration partially in advance, but for contracting authorities in the public sector, only up to a maximum of 20% of the value of the contract. The amendment of the PPL adopted in April 2020 allowed such contracting authorities to provide even higher advance payments, without a need to request a bank guarantee from the contractor, but only for products related to fighting the COVID-19 pandemic.

Implementation (Thematic block 2)

Even the best-conceived legal provisions will not be enough to ensure that SMEs have access to public procurement if they are not implemented and (correctly) applied. The purpose of this thematic block is to assess how public procurement provisions are implemented in practice, focusing especially on disseminating information, the support and training provided by public institutions, and the use of electronic procurement.

The institutional set-up is solid and offers support to both contracting authorities and economic operators, but more practical advice is needed

All of the assessed economies have a solid institutional set-up at the central level with public procurement offices or agencies (PPOs/PPAs), either as separate institutions (Albania, Bosnia and Herzegovina, Kosovo, Serbia, and Turkey) or within the framework of Ministries of Finance (Montenegro and North Macedonia). PPOs/PPAs discharge all central procurement functions required by EU rules, related to legislation, monitoring and reporting of the functioning of public procurement systems, control of legal compliance with rules and advice, training, and other support to contracting authorities and, to a certain degree, also to economic operators. Support takes the form of telephone help desks organised by central procurement institutions, providing advice to questions raised by economic operators, publishing guidance or manuals for contracting authorities, advising them on how to enhance SME participation in public procurement procedures, and direct support dedicated to economic operators.

Professional support offered by PPO/PPAs to contracting authorities and economic operators is, however, still insufficient as regards, in particular, complex procurement and the capacity of contracting authorities needs to be strengthened. In those cases where public procurement provisions have been recently modified (new PPLs were adopted), only basic information about the new rules has been provided and new operational tools such as manuals, guidelines and other practical tools are not yet generally available.

Box 6.5. Advice on how to involve SMEs offered by public procurement offices

Public procurement offices in many EU member states provide information to contracting authorities on how to best engage small and medium-sized enterprises (SMEs) in public procurement procedures. They also provide information and advice to economic operators on how to successfully compete for public contracts.

In the **Slovak Republic**, in April and May 2020, the Public Procurement Office prepared two comprehensive documents: “What do you need to know about doing business with the state?” and “How to do business with SMEs”. The purpose of the first document was to provide guidance to SMEs to help them improve and strengthen their position in the public procurement process. It is a comprehensive document that provides answers to basic questions about how to do business with the state and seeks to motivate SMEs to participate in public procurement, thus contributing to wider competition. The second document focuses on contracting authorities, encouraging them to use all legal institutes and opportunities to facilitate SME access to public procurement and increase their participation in public procurement. Among those, for example, pre-market consultations, the division of contracts into lots or the method of setting selection criteria, for example, will apply. In addition, the Public Procurement Office provided various interpretative opinions on the topic of SME participation.

Training of representatives of the business

In some economies, central purchasing bodies (CPBs) play an important role in the professionalisation of public procurement. They go beyond the traditional role of conducting centralised purchasing by also providing training for public officials in charge of public procurement or even establishing policies for contracting authorities. In such cases, CPBs are usually considered to be procurement knowledge hubs. In **Italy**, CONSIP has recently strengthened its co-operation with suppliers by setting up supplier training desks at the level of enterprises associations territorial units. The main objective of this initiative is to facilitate the participation of SMEs in public procurement and improve their familiarity with ICT tools, provide training on the use of e-procurement tools, support to qualify for operating on the electronic public procurement market MePA. CONSIP trains people from associations who in turn train the local SMEs. Today, 380 training desks in Italy support this training. CONSIP, in turn, provides the desks with

free assistance and disseminates information about the advantages of a fair and transparent public procurement system.

In other economies, training of economic operators is organised by public procurement offices. For example, in North Macedonia, the Public Procurement Bureau organised two one-day training sessions in February 2021 for suppliers in co-operation with a twinning project with the Croatian administration.

Considering the relatively low level of competition in public procurement, measured in terms of the average number of bids per procurement procedure, economies in the Western Balkans and Turkey should do more to encourage economic operators, and in particular SMEs, to participate in public tenders. Apart from complex procedural rules, one reason for which suppliers shy from participation may be a lack of information about relevant rules.

Sources: Lemke et al. (2020^[22]); CONSIP (n.d.^[23]); Italian Ministry of Economy and Finance (n.d.^[24]); OECD (OECD, 2022^[7]).

Electronic procurement has been significantly enhanced and submission of tenders by electronic means has become, with few exceptions, a general requirement

Use of digital technologies in the tendering process (e-procurement) to overcome lengthy paper-based procedures is regarded as being convenient for all kinds of enterprises, and particularly for SMEs, as it contributes to the simplification of the public procurement process and to the reduction of transaction costs (OECD, 2018^[2]).

Electronic procurement is well advanced in all WBT economies, with new or significantly improved central public procurement portals, managed by PPO/PPAs, enabling fully electronic communication between contracting authorities and bidders, including also the electronic submission of tenders. In particular, in this assessment period, new public procurement portals have recently been established in Montenegro and Serbia, thanks to support from EU funds through technical assistance projects.

In Montenegro, the new e-procurement system, the National System of Electronic Public Procurement (Montenegrin Directorate for Public Procurement Policy, n.d.^[25]), is obligatory for all contracting authorities and bidders. It has functionalities from the publication of procurement plans and tender documents up to the submission of tenders and their evaluation. In Serbia, the transparency of the procurement system is ensured by the new Public Procurement Portal (Serbian Public Procurement Office, n.d.^[26]). The portal is comprehensive, and designed to support the entire public procurement process by enabling electronic communication among all parties involved at all the stages of the procedure. Access to the Public Procurement Portal is free of charge and allows users to conduct only those public procurement activities allowed under the PPL. In North Macedonia, the public procurement system benefits from an advanced Electronic System for Public Procurement (ESPP, n.d.^[27]), which is efficient and highly appreciated by users. All communication and exchange of information, requests to participate and submission of tenders must be conducted through the ESPP, from which procurement documents can be downloaded. The ESPP has been upgraded and started using “red flags” for irregularities; it has also started using electronic archives and electronic complaints mechanisms. The ESPP’s E-appeals function became fully operational with effect from 1 April 2019. Electronic procurement systems have also been enhanced in Albania, Kosovo and Turkey. Only in Bosnia and Herzegovina does the PPL not foresee the electronic submission of requests to participate and tenders. They are still handled, in principle, in the traditional paper manner, although there are examples of electronic submissions where the contracting authority requests or indicates such a possibility and uses electronic auctions in specific cases.

Existing electronic procurement tools are being upgraded in Albania, Kosovo and North Macedonia. In some cases, works are very much advanced to introduce solutions enabling the application of electronic measures in legal protection procedures (submission of appeals to review bodies in Albania) as well as monitoring and management of contracts (also in Albania).

Monitoring and evaluation (Thematic block 3)

Monitoring and evaluation of public procurement rules and practices allows the relevant institutions to intervene and make any necessary adjustments. This section assesses whether, in practice, access to public procurement markets by economic operators, especially SMEs, is monitored and evaluated.

Most economies collect data on participation in public procurement, but not enough on SMEs specifically

Although all assessed economies collect and process various statistical data on public procurement, only a handful apparently dispose of specific information on the participation of SMEs, such as their participation or success rates. Only North Macedonia and Serbia were able to provide any useful statistical information in that regard. Other economies replied that such information was not available. Collecting information on SMEs in public procurement enables procurement offices and other relevant institutions to remove or lower barriers to their participation.

Monitoring SMEs' participation in public procurement in Serbia has been improved through the introduction of an obligation for contracting authorities to provide as a part of contract award notices information on whether the awarded economic operator is an SME or not. Such data allow further activities to be defined to help improve SMEs' level of participation. The new Public Procurement Portal should allow the PPO to collect data on the participation of micro and SMEs in public procurement procedures, the number and value of contracts awarded to them, as well as other parameters in accordance with the new features of the portal. The PPO is obliged to provide, in its annual reports, information about the level of participation of SMEs in the public procurement market. However, the PPO does not monitor or gather data on procurement conducted in accordance with the special law mentioned above (OECD, 2021[6]). Such contracts and their values are not included in the annual reports and their importance and influence on the procurement system cannot be properly assessed. The same is true for contracts concluded on the basis of international agreements (OECD, 2021[6]). The lack of this information does not allow the impact of those rules on the public procurement market to be properly assessed, in particular how it affects SME participation. In North Macedonia, the Public Procurement Bureau publishes annual reports on the functioning of the public procurement system, which include some statistical information on SMEs. All the economies collect information on the share of contracts awarded to foreign economic operators.

Independent review mechanisms and offices exist and transparency of the review process, timeliness of review and quality of review bodies' ruling have improved

Even the most transparent, competitive and fair public procurement rules and procedures would be toothless without instruments to enforce them. To trust the public procurement process, suppliers need to know that if public institutions do not respect the rules there are special mechanisms in place to enforce them. This is why access to review procedures and bodies is so important for aggrieved suppliers. In accordance with the respective EU rules and good international practice, the appeals of economic operators whose rights have been breached by public bodies' illegal actions and omissions should be reviewed by independent institutions.

All the assessed economies enable economic operators to have their complaints reviewed by procurement review bodies that are independent both from procuring entities and economic operators. In Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia, and Serbia, economic operators' appeals are heard by review bodies whose members are appointed for a given term by parliament or the government.

In Turkey, a separate department in the Public Procurement Authority (PPA) deals with "appeal applications". To secure the independence and integrity of the PPA as the review body and avoid conflicts with other functions of the PPA (regulatory, monitoring and advisory), elaborate administrative routines are

in place. Decisions on appeal applications are adopted by the nine members of the PPA's board, supported by public procurement experts and assistants.

Review procedures mostly comply with minimum time periods and other EU requirements

In all the assessed economies, economic operators having or having had an interest in obtaining a contract, irrespective of the value of the procurement and type of the procedure, have the legal right to challenge the decisions taken by the contracting authority if they infringe the legal provisions. In most economies, appeals are submitted first to contracting authorities (entities) then to independent procurement review bodies or directly to procurement review bodies and then to administrative courts. Review procedures are thus composed of two or three stages. The time limits for challenging the decisions, the standstill period, and the mechanism for ensuring the ineffectiveness of the contracts are in line with the requirements of the *acquis*.

All the economies have time-efficient review procedures

All the assessed economies regulate the maximum time period in which procurement review bodies should reach decisions on complaints submitted by economic operators. In Montenegro, rulings of the procurement review body should be adopted within a statutory time limit of 30 days from the receipt of the complete documentation. In Albania, the PPC must conclude its review with a decision adopted within 30 days of receiving information or documentation from the contracting authority (entity), in case of procurement above the high monetary threshold, and 20 days below this threshold. A 30-day period is also applied in Serbia. The review procedure is shorter in North Macedonia, where the procurement review body is required to decide on an appeal within 15 days, counted, though, from receipt of the complete documentation related to the reviewed case.

All the economies require appeal fees, but they are low enough so as not to hinder access to legal protection

Public procurement rules should also provide effective remedies for aggrieved tenderers applied by independent review bodies. One of the functions of appeal fees is to reduce the submission of frivolous, vexatious complaints. An appeal fee works, especially if it is set at a relatively high level, as a deterrent against such practice – parties who will risk losing a given amount of money in the event they lose a case will probably refrain from submitting an appeal if they do not think they have a good chance of succeeding. On the other hand, excessively high fees may act as a barrier to access to justice and may discourage bidders from complaining of an infringement of rules by contracting authorities, especially if they risk losing significant funds if their claim is unsuccessful.

Most EU member states apply fees for filing complaints to reduce the risk of abuse through fraudulent claims. In WBT economies, submitting an appeal is also subject to a fee, but they are not excessively high. In Albania, the fee for submitting an appeal amounts to 0.5% of the estimated procurement value (without a maximum ceiling). In Bosnia and Herzegovina, entry fees are also defined according to the entire public procurement value. Fees range from BAM 500 to BAM 25 000 (about EUR 256-12 780). In North Macedonia, fees for an economic operator filing an appeal vary between EUR 100 and EUR 400, in addition to an administrative fee. In Kosovo, 2016 amendments to the PPL increased fees to 1% of the value of the estimated contract value, or in some cases of the bid, but to no less than EUR 100 and no more than EUR 5 000. In Montenegro, fees are 1% of the estimated value of the public procurement, but cannot exceed EUR 20 000.

In general, economic operators' access to review procedures has greatly improved due to the introduction of e-appeals functionalities. In Albania and North Macedonia, appeals can be submitted, mandatory fees paid and processed by contracting authorities and procurement review bodies electronically.

Box 6.6. E-complaints and the Public Procurement Commission's new website in Albania

Through the system of E-complaints, all appeals in Albania are submitted electronically through the unique government platform E-Albania. The new electronic system allegedly has halved the time limit for reviewing complaints, increasing the efficiency of procurement procedures and the of the Public Procurement Commission (PPC) in its decision making. Economic operators can electronically submit their complaints and arguments, as two separate services, eliminating any extra costs and any direct contact with any state institution, including the PPC.

Data contained in the complaints regarding the economic operator are automatically generated by the system, which is interconnected and interacts with the PPA's system, the National Business Center and the tax administration. The electronic complaints system also interacts with the electronic procurement system of the PPA, from which data migrates automatically after the economic operator has filled in the reference number of the procurement procedure in the relevant space.

Other data are then automatically generated in the complaints system through data interoperability with the PPA's system. Economic operators can submit their claims in an exhaustive manner in relation to the alleged infringement committed by the contracting authority. The system allows documents or written evidence to be uploaded with attachments in PDF as well as the complaint. With just one click, economic operators can simultaneously submit their complaint to the contracting authority and the PPC, saving time and money. In 2022, the PPC intends to upgrade the system by linking it to the court system and government financial system. If the complaint is accepted through this integration automatically, the complaint fee is refunded to the economic operator. By the end of 2022, the system should also provide an audio recording functionality of the minutes of the meetings of the commission in the case of open meetings and hearing panels.

In addition to the establishment of the E-complaints system, the PPC's new website has also been launched, which enables full access to three public registers: the Register of Complaints, the Register of Decisions and the History of Decisions.

Sources: Government of Albania (n.d.^[28]); (PPC, n.d.^[29]).

The way forward for public procurement

- **Complete the implementation of the 2014 EU Public Procurement Directive** in those economies which have not yet implemented new or modified provisions and remove remaining inconsistencies in those economies which have adopted new public procurement laws, concerning domestic preferences, participation of consortia, exclusion of economic operators, self-cleaning and subcontracting:
 - Economies where PPLs still contain provisions on domestic preferences should ensure that all economic operators have access to public procurement on an equal footing, regardless of their origin. This means abolishing provisions on domestic preferences.
 - Economies which have not yet implemented the 2014 EU Public Procurement Directive should introduce solutions and instruments beneficial for SMEs, such as greater possibilities of using self-declarations as preliminary proof of fulfilment of requirements concerning exclusion and qualification (selection) criteria and so-called self-cleaning as well as provisions concerning sustainable procurement.
- **Support the application of non-price criteria for awarding contracts**, in particular related to sustainable public procurement. This should include informing public purchasers about the shortcomings and limitations of applying the price-only criterion; presenting the advantages of

quality criteria; and providing practical advice through good practice examples, standard models and evaluation formula. Finally, application of quality criteria should be a prominent topic of training of procurement officers.

Box 6.7. Support to contracting authorities for applying non-price criteria

The EU Public Procurement Directive requires that contracts be awarded to the most economically advantageous tender from the point of view of the contracting authority.¹ The most economically advantageous tender can be chosen based on price or cost alone, or on the basis of the price-quality ratio when non-price criteria are also taken into account. According to EU rules, preference between these two options is left to the discretion of the contracting authority. EU member states may, however, decide that contracting authorities may not use solely price (cost) or restrict it to certain categories of contracting authorities or certain types of contracts.² Indeed, some economies use this option by introducing, for example, the maximum weight the price factor can have among the evaluation criteria.³ Other economies recommend plurality of criteria to assess other elements of the offer than just the price.

Application of the price-quality criterion enables contracting authorities to obtain customised, innovative goods or services that perform better in terms of quality, with broader economic, social and environmental impacts.⁴ Although more expensive when simply comparing the purchase price, procurement based on price quality criteria may be more cost-effective in the longer term, when the full life cycle cost is considered. The use of the best price-quality criteria instead of the lowest price is often recommended as a tool to help small and medium-sized enterprises (SMEs) gain an equal footing to public contracts. It is assumed that while SMEs may be at a disadvantage in delivering off-the-shelf mass products, they may be able to offer higher quality products or services, or better adjust to the needs of the contracting authorities. However, application of non-price criteria is not simple. Contracting authorities often have difficulty formulating proper and meaningful quality criteria, including those involving strategic public procurement (green, socially responsible and innovative) and establishing a relevant link with the subject matter of the procurement. Central procurement institutions should help contracting authorities apply price-quality criteria by training them and providing examples of good practice or models.

In the Slovak Republic, the Public Procurement Office (PPO) is aware that non-price criteria are rarely used by contracting authorities due a lack of knowledge for correctly applying it and for setting this type of award criteria. The Slovak PPO therefore established a Responsible Public Procurement project, financed by the European Economic Area and Norway Funds. The project's main goal is to increase awareness of price-quality criteria through methodologies and training to help contracting authorities set conditions correctly and thus increase value for money.

In Poland, the Public Procurement Office's website contains a section dedicated to disseminating good practices in the field of public procurement. Contracting authorities that are more experienced in applying quality criteria may share their experience with other procurement practitioners by participating in a contest organised by the PPO on the best examples of quality criteria. Winning submissions, chosen by the PPO, are published on the PPO's website with practical comments.

To increase the application of quality-price criteria, the public procurement office or agencies in the Western Balkans and Turkey should provide contracting authorities with

training as well as examples of good practices or models.

1. Data provided by the Macedonian Public Procurement Bureau
2. Data provided by the Serbian Public Procurement Office.
3. PPL, Article 126 (2).
4. Rules and operational guideline for public procurement, Article 18.1.

Sources: Bas (2019^[30]); Slovak Public Procurement Office (n.d.^[31]); European Commission (2021^[32]); OEAP (2019^[33]); Polish Public Procurement Office (n.d.^[34]).

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Note

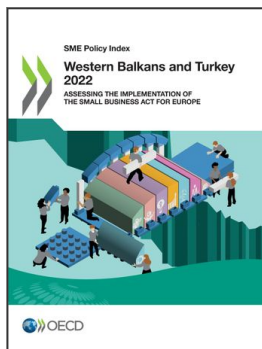
¹ Data provided by the Macedonian Public Procurement Bureau.

² Data provided by the Serbian Public Procurement Office.

³ Data provided by the Albanian Public Procurement Agency.

⁴ Data provided by the Public Procurement Office of Kosovo.

⁵ Rather than only taking into account the lowest cost, governments should assess "value for money".



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