REFIT PLATFORM SUBMISSION

5 April 2019

Submission to the REFIT Platform

CONTEXT

BusinessEurope highly appreciates the European Commission's efforts to achieve further regulatory simplification. The opportunity for stakeholders to provide bottom-up suggestions to the REFIT Platform is an important tool to this end. By this submission, BusinessEurope wishes to highlight several areas where the legislative framework results in requirements that are unnecessarily complex, and to provide concrete proposals for improvement without undermining policy objectives. The submissions cover the following areas:

- Public procurement
- Value added tax
- Ecodesign Directive
- Industrial design protection

SIMPLIFICATION PROPOSALS

1. Public Procurement

Legislation concerned
Directives 2014/24/EU on public procurement; 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors; and Directive 2014/23/EU on the award of concession contracts.

Problem description
We fully subscribe to the aims of EU public procurement, which are open and transparent procedures in order to achieve better value for public money, cross-border participation in public tenders and reduction of corruption. BusinessEurope would however like to point out that there are problems regarding the application of the EU Directives in the area of public procurement, as also emerged from REFIT Platform opinion XII.19.b.

It is currently often difficult and therefore costly for suppliers to participate in public procurement, in particular (but not only) for SMEs. Suppliers make a cost-benefit analysis when participating in a public tender, but increasingly decide that the efforts to participate are not worth the efforts and risks. Statistics from the Commission even indicate that in half of EU Member States there is an unsatisfactory number of tenders concluded with a single bidder.[1] This is a worrying development, as in such cases there is no effective competition for a public bid. The Commission as well as public purchasers should be aware that there is a direct relation between an overly excessive use of very specific additional criteria and a lack of bidders in public procurement markets.

[1] European Commission 'Single Market Scoreboard' 2017 – public procurement.

Public tenders are increasingly overcharged with too far-reaching and in part very complex conditions apart from the core criteria regarding quality and price of goods of services. Especially demands for the fulfilment of very specific social aspects apart from already existing social law provisions often lead to severe legal uncertainties and risks for bidders. Examples are the payment of specific minimum wages for public procurement although similar overall mandatory minimum wages are already in place, or the demand for a diversity of labels, whereby sometimes it is not clear how far these labels are really suited to demonstrate the quality of a product, while obtaining and maintaining different labels may be very costly especially for SMEs.

BusinessEurope supports public procurement criteria going beyond the lowest price, for example taking into account the life-cycle cost of a product. BusinessEurope also supports the use of 'green' criteria in public procurement in view of concrete quality aspects of the product or service the public procurer wants to buy. As it may be true that this can make procedures less straightforward, we would like both the Commission and Member States to spend more work to facilitate procedures taking into account life cycle costs, ensuring effective supplier-friendly tendering. More specifically, the Commission and stakeholders might invest further work on studying some already existing guides and patterns for a consideration of life-cycle costs to facilitate processes.

A well-reflected demand for – strictly product related – green and social criteria may contribute to fight unfair competition by bidders from third countries. Nevertheless, public purchasers should not make excessive use of problematic conditions as mentioned above, apart from the concrete needs in view of the products and services purchased.

Suggested solution

The problem in problic procurement is mainly related to the application of the legislative framework, not to the framework itself. We therefore strongly suggest a focus on simplification without changing the current Directives, especially as these in our view do not preclude user-friendly tendering. Changing the Directives would result in instability and significant legal uncertainty. Instead, the Commission should focus on assessing problems regarding the application of EU procurement law in practice, also including area of problematic legal transpositon or practices at national or regional level.

We would also like to point out that while digital solutions offer significant possibilities for simplification and cross-border participation in public tenders, digitalisation does not automatically mean simplification. The European Single Procurement Document (ESPD), on which the REFIT platform issued an opinion (XII.19.a), has made procedures more digital but has not reduced complexity.

Specifically on the ESPD, we suggest that the Commission undertakes a revision of the implementing regulation behind the ESPD, which can be done without reopening the procurement directives. The ESPD must be simplified to the fullest possible extent. As an example the ESPD today contains the question: "Is the economic operator a SME?" even though the same economic operator also must report their size in terms of yearly turnover or other economic key-indicator. This and other parts of the ESPD should be deleted in a revised version. Furthermore the Commission must ensure the ESPD is implemented and handled more similarly in all Member States, which could be achieved with identical standard templates. Ideally the Commission should support an ESPD-solution that allows reuse of data from one procurement procedure to another,and has a similar, recognizable user-interface across and within Member States.

2. Value added tax (VAT): Rules regarding bad debt

Legislation concerned
Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (specifically Article 90)

Problem description
As a tax on consumption, it is crucial that the VAT burden is not borne by the taxable persons. The system must therefore ensure that cases of bad debt entitle a corresponding reduction of the taxable amount. Member States apply different criteria regarding bad debt under Article 90 of the VAT Directive. This results in a disproportionate burden for businesses active in multiple Member States and fragmentation on the single market where businesses active in different Member States are subject to diverging rules. The lack of appropriate rules on bad debt means that the fundamental purpose of VAT as a tax on consumption is not achieved. Furthermore, the current rules on bad debt are a major concern in relation to the MOSS-regime, with an increasing amount of low value transactions in both physical and digital transactions.

Suggested simplification
A general, simple and clear definition of bad debt is needed at the EU-level in order to enhance the Single Market, facilitate digitization and reduce the administrative cost for business. The Commission should ensure that rules on the reduction of the taxable amounts in the case of total or partial non-payment are clear and simple, programmable, and compatible with an enterprise resource planning system. The rules should be implemented uniformly across the EU.

3. Value added tax: Rules on intra-Community transfers of own goods

Legislation concerned
Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (specifically Articles 17 and 21).

Problem description
In 1993, internal EU-borders where removed for customs purposes, while for VAT, the simple intra-EU movement of goods was ‘temporarily’ subjected to new and more burdensome formalities for taxpayers. By default, a company transferring its own goods to another Member State must be VAT registered in the Member State of dispatch and of arrival to declare both the dispatch and arrival of its own goods. For this purpose, special VAT “transfer documents” must be drafted, booked and reported. Smaller companies are often unaware of this unusual additional obligation, and by forgetting it expose themselves unintentionally to penalties. For the bigger companies, complying with such obligations, is a serious additional administrative effort. BusinessEurope would like to point out that when the taxpayer has a full right to deduct VAT, this rule does not bring any additional revenue for Member States. Besides, information on cross-border transfer of own goods can be derived from other sources such as intrastat reporting. It is considered that these VAT rules go beyond what is needed for proper management of the VAT system, placing an unnecessary burden on businesses.

Suggested simplification
Limiting the scope of the obligation to report such intra-community transfers of own goods to cases where there is extra revenue for the Member State of arrival. This can easily be done by a quick fix in the wording of Article 17(1) and 21 of the VAT Directive

by limiting the scope of those provisions to situations where the acquisition VAT cannot be fully deducted.

4. Value added tax: Rules on processing in another Member State just before exporting

Legislation concerned
Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (specifically Article 17 and 21).

Problem description
The making of products in a more and more globalized world often involves different steps of the value chain being executed in different countries. Since 1993, under the 'temporary' VAT system, the sending of goods for a last production step in another Member State before exporting them outside the EU by default requires additional VAT registration in the Member State of this production step. The only way to avoid this additional VAT registration, as explicitly foreseen in the VAT Directive, is to first return the finished products back to the Member State where the raw materials originated from prior to exporting outside the EU. Such detours lead to unnecessary inefficiencies in EU value chains, resulting in higher costs damaging EU competitiveness, and an increased burden on the environment. It also deters the use of EU subcontractors in other Member States.

Since the nineties, at least one of the more industrialized Member States has already provided for simplification measures which remedy this likely unintended shortcoming of the VAT Directive. This has improved the situation for its businesses. However, attempts to spread such best practices to other Member States via the EU VAT Forum or via a cross-border ruling have been unsuccessful so far. The VAT Directive needs to introduce similar best practice in their national VAT practice. The more than two decades long sustained positive experiences in the Member States where it has been applied may justify improving the VAT Directive itself on that point via a quick fix.

Suggested simplification.

Article 17(2) of the VAT Directive provides some exceptions for the taxable self-supply of goods to another Member State under Article 17(1). Slightly extending the scope of the exception in Article 17(2)(f) could remedy the need to return goods to the Member State of origin prior to export to avoid the additional VAT registration. As a quick fix, Article 17(2)(f) could include the following wording: "or the goods are shipped to a place outside the EU".

5. Value added tax: Rules on service exemptions dependent on inclusion in the taxable amount at import or not

Legislation concerned
Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (specifically Article 144).

Problem description
Article 144 of the VAT Directive states: "Member States shall exempt the supply of services relating to the importation of goods where the value of such services is included in the taxable amount in accordance with Article 86(1)(b)."

In practice, it is often very difficult to assess on the basis of the invoice only whether or not this service is included in the taxable amount at import or not. Since 2010, the place of supply of services is the place where the recipient is established. This has made it easier for non-EU based service recipients only. However, for EU-based service recipients in other Member States than that of import, the issue of having to find out what has and what has not been included in the import taxable amount remains difficult to determine. Forgetting to apply a reverse charge, or applying a reverse charge too much may in some Member States lead to severe penalties. It is also difficult for transport companies to know whether or not their transport service has been included in the taxable amount at import.

Suggested simplification
Insofar the party liable for the VAT on the service is not resident in the Member State of import, he should have the choice between applying the exemption or actually applying the reverse charge without risking any penalties.

6. Ecodesign Directive

Legislation concerned
Directive 2009/125/EC establishing a framework for the setting of ecodesign requirements for energy-related products.

Problem description
The Ecodesign Directive empowers the Commission to adopt product-specific ecodesign requirements by means of implementing measures. The Directive aims to ensure the free movement of such products within the internal market while at the same time increasing energy efficiency and protect the environment. BusinessEurope supports the Directive's policy objectives – but is concerned that its implementation is not following applicable procedures.

The Commission and the Ecodesign and Energy Labelling Committee recently introduced a ban a group of chemicals (halogenated flame retardants) via an implementing measure establishing ecodesign requirements for electronic displays.[2]

In doing so, the Commission by-passed applicable procedures and substantive discussions under the Regulation on the Registration, Evaluation, Restriction and Authorization of chemicals (REACH), and the Restriction of Hazardous Substances in Electrical and Electronic Equipment Directive (RoHS).

For business, clarity of law-making processes and foreseeability of upcoming regulatory measures are key to manage compliance under the regulatory framework.

In the area of chemicals, the REACH Regulation is together with the Regulation on Classification and Labelling of Chemicals (CLP), the centerpiece of EU chemicals law. These regulations establish central EU processes for managing the risks of chemicals on their own, in mixtures and in products. Those processes ensure chemicals are assessed and managed in a holistic manner, looking both a hazards and risks,

[2] Draft Regulation voted and approved by the Regulatory Committee on Ecodesign and Energy Labelling of Energy–related Products on 19 December 2018:
http://ec.europa.eu/transparency/regcomitology/index.cfm?do=search.documentdetail&Dos_ID=16995&ds_id=59740&version=2&page=1

environmental, public health and socio-economic impacts and on the basis of all existing evidence and science.

Since the first REACH Review, the Commission has been working to improve the interface between REACH and other EU acts to ensure consistent implementation and regulatory certainty. 155 legal acts have been screened to that effect and several Common Understanding papers have been developed since then.[3] The RoHS Directive was part of that assessment, but the Ecodesign Directive was not. Moreover, the Commission is currently undertaking a broader initiative on the interface between chemicals product and waste legislation, the conclusions of which could provide useful guidance in terms of strategy or concept.

If the Ecodesign Directive is to be used to circumvent the above-mentioned procedures, i.e. restricting classes of chemicals without undergoing the REACH and RoHS assessment process and without having regard to the impacts, this would create considerable uncertainty – and burden – for entire value chains.

The proposed ecodesign requirements were based on an impact assessment prepared in 2014, but the report was not publicly available at the time where the Commission put the implementing measure for Committee vote.

Suggested solution

BusinessEurope recommends the Commission to:

1. Clarify the interface between the Ecodesign Directive, the REACH Regulation and the RoHS Directive via a Common Understanding, so as to ensure coherence in relation risk management measures on chemicals and ensure duty holders can anticipate new requirements.
2. Publish impact assessments supporting product-specific ecodesign requirements when the draft measure is published for stakeholder feedback on the better regulation portal.

7. Industrial design protection

Legislation concerned

Directive 98/71/EC on the legal protection of designs.

Problem description

Design protection is an important tool for industry to get a better level of protection against counterfeiting and copying. In general, the harmonization of national rules and the creation of Community design system was very important and extremely helpful as it has, among other things, provided the same protection of designs everywhere in the EU, contributed to preventing counterfeiting and copying of Community designs, and introduced harmonised rules for registration.

However, the framework for industrial design protection continues to pose challenges, in particular for Small and Medium-Sized Enterprises. According to the recent “Economic Review of Industrial Design in Europe” (2015) only a minority of designs are formally protected.

[3] https://ec.europa.eu/growth/sectors/chemicals/reach/special-cases_en

There is not sufficient awareness and understanding among designers and entrepreneurs (including SMEs) of the availability, benefits and ways for protecting designs in the EU. The lack of awareness concerns in particular the scope of protection, the subject-matter that can be protected, and how design protection can contribute to businesses' growth and innovation. Companies are also not sufficiently familiar with differences between the protection provided by trademark law, copyright law and rules on unfair competition.

The open consultation aiming to identify the existing problems is a welcome initiative, yet a holistic approach through REFIT methodology towards simplification is also needed.

Suggested solution

- Increasing companies' awareness and understanding is a joint exercise of the Commission, the European Union Intellectual Property Office (EUIPO), national offices and stakeholders. Informative campaigns and specific trainings on the design protection system could be the first step to be undertaken.
- Although we stress that amendments to definitions of essential concepts (e.g. "design") or the wording relating to the scope and protection should be avoided, some clarifications may be useful. For instance, a legal definition of "visible" (i.e. requirements for protection related to the need of being visible) would enhance legal certainty.

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