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Qualification, Selection and  
Exclusion in EU Procurement

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While unfortunate in themselves, divergences in the application of Article 57 of Directive 2014/24/EU might, in some cases, lead to the suspicion that exclusion and self-cleaning are being used to discriminate or favour some market operator.<sup>133</sup>

At present, the risk of divergence and discrimination is not compensated by adequate procedural rules at EU level. Indeed, procedural safeguards seem quite limited when compared to some standards, such as those foreseen in the EU Financial regulation or those applied in the US.<sup>134</sup> True procedural safeguards are obviously all the more important the more severe the consequences of the exclusion. The severity of those consequences depends on the contracting authorities bound by the exclusion. As already recalled, the present default position is that the effects of exclusion, at least in case of non-EU mandatory grounds, and of self-cleaning, are very much confined to each individual authority having taken a decision. As a minimum, procedural safeguards will have to be adequately reinforced if it were otherwise.<sup>135</sup> Still, it might be the case that the procedural safeguards foreseen in some Member States are found to be insufficient to meet the standards laid down in Article 41 of the Charter of Fundamental Rights.<sup>136</sup>

In the end, having rules on self-cleaning only goes some way towards legal certainty, Member States and contracting authorities having been left with wide margins of discretion which might be abused – or appear to be abused.

133. Which will obviously be against the principles of EU public contract law: E. Hjelmeng and T. Søreide, “Debarment in public procurement”, *supra* note 4, at 218; however this will not be enough to eliminate the risk: *ibid.* at 219 and 231.

134. See also with reference to the World Bank F.F. Fariello and C.C. Daly, “Coordinating the Fight Against Corruption Among MDBs”, *supra* note 5, at 264, describing the introduction of an external Sanction Board Chair.

135. See F.F. Fariello and C.C. Daly, “Coordinating the Fight Against Corruption Among MDBs”, *supra* note 5, at 266 ff.

136. See also A. Sanchez Graells, “Exclusion of Economic Operators”, *supra* note 1, at 4.

## Electronic Qualitative Selection of Economic Operators: the challenge of the European Single Procurement Document (ESPD)

Gabriella M. Racca

1. Electronic tools for the qualitative selection of the economic operators: the challenge of the European Single Procurement Document (ESPD)

The 2014 Public Procurement Directive provides new rules on the criteria for the qualitative selection of economic operators with the aim to simplify and foster the participation, especially of Small- and Medium-size Enterprises – SMEs.<sup>1</sup> One of the main obstacles in participating in an award procedure consists in the administrative burdens deriving from the need to produce a substantial number of attestations, certificates or other documents evidencing the tenderer’s suitability.<sup>2</sup> A significant innovation in the 2014 Public Pro-

1. Directive 24/2014/EU, Artt. 57-64; Commission implementing Regulation (EU) 2016/7 of 5 January 2016 *establishing the standard form for the European Single Procurement Document*, recital 3. A. Sanchez Graells, “Exclusion, Qualitative Selection and Short-listing in the New Public Sector Procurement Directive 2014/24”, in F. Lichère, R. Caranta and S. Treumer (eds), *Modernising Public Procurement. The New Directive* (Djøf publishing: Copenhagen, 2014), at 99-129.
2. EU Commission, COM (2011) 15 final *Green Paper on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market*, 27 January 2011, at 16-17. The EU Commission uses red tape as one aspect to evaluate the performance of the public procurement sector in the EU Single Market, see EU Commission, Single Market Scoreboard. Performance per policy area. Public procurement (Reporting period: 01/2014 – 02/2014), at <http://ec.europa.eu/>

urement Directive concerns the means of proof for the qualitative selection of tenderers.

The European Single Procurement Document (ESPD) is “a self-declaration by economic operators providing preliminary evidence replacing the certificates issued by public authorities or third parties”.<sup>3</sup> It is a formal statement in which it is confirmed that the relevant ground for exclusion does not apply and that the relevant selection criteria are fulfilled.<sup>4</sup> The self-declaration applies only in replacement of certificates issued by public authorities as a “preliminary evidence”<sup>5</sup> of the mandatory and discretionary exclusion grounds (provided in the 2014 Public Procurement Directive).<sup>6</sup> The ESPD should be provided exclusively in electronic means on the basis of a standard form recently established by the EU Commission<sup>7</sup> and should be recognized by all contracting authorities.<sup>8</sup>

The Member States were obliged to transpose the ESPD by 18 April 2016.<sup>9</sup> Notwithstanding this deadline, Member States are allowed to postpone the application of the provision of the ESPD in electronic form until 18 April 2018<sup>10</sup> and, until 18 October 2018, the direct use of the supporting documents

internal\_market/scoreboard/performance\_per\_policy\_area/public\_procurement/ [accessed 23 June 2016]. See also EU Commission and D.G. Growth, “Commission further simplifies public procurement across the EU”, (5 January 2016), at [http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item\\_id=8611](http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8611) [accessed 23 June 2016].

3. Commission implementing Regulation (EU) 2016/7 of 5 January 2016 *establishing the standard form for the European Single Procurement Document*, Annex 1.
4. S. Arrowsmith *The Law of Public and Utilities Procurement. Regulation in the EU and UK* (Sweet & Maxwell: London, 2014), at 1304; A. Semple, *A practical guide to public procurement* (Oxford University Press: Oxford, 2015), at 102 et seq. Directive 24/2014/EU, Art. 58. See Commission implementing Regulation (EU) 2016/7 of 5 January 2016 *establishing the standard form for the European Single Procurement Document*, Annex II, Part IV.
5. EU Commission, Legal framework for the European Single Procurement Document (ESPD) as set out in the Directive 2014/24/EU, 11 February 2015.
6. Directive 24/2014/EU, Art. 57 (1) conviction by final judgment for: (a) participation in a criminal organisation, (b) corruption, (c) fraud, (d) terrorist offences, (e) money laundering, (f) child labour and other forms of trafficking in human beings.
7. *Ibid.*, Art. 59 (2). See Commission implementing Regulation (EU) 2016/7 of 5 January 2016 *establishing the standard form for the European Single Procurement Document*.
8. Directive 24/2014/EU, Art. 59 (1).
9. *Ibid.*, Art. 90 (1).
10. *Ibid.*, Artt. 59 (2) and 90 (3).

already possessed by the contracting authority without asking for to the economic operators.<sup>11</sup>

The EU Commission recently published an Implementing Regulation, which sets out a standard form for the ESPD, which each Member State should adopt.<sup>12</sup>

The standard form for the ESPD requires to indicate the general information on the award procedure<sup>13</sup> and of the subject involved in the award procedure: the contracting authority,<sup>14</sup> the economic operator<sup>15</sup> and their representatives,<sup>16</sup> the other entities on which the tenderer relies on in order to meet the selection criteria<sup>17</sup> and the subcontractors.<sup>18</sup>

Initially, the ESPD will be provided as a static PDF document. In order to reap the full benefits of ESPD “it is essential to provide an ESPD service to Member States as quickly as possible”.<sup>19</sup> The potential simplification of such a document is evident and could be achieved only through fully interoperable electronic solutions (usually accessible only by qualified subjects).<sup>20</sup> With

11. *Ibid.*, Artt. 59 (5) and 90 (4).
12. Commission implementing Regulation (EU) 2016/7 of 5 January 2016 *establishing the standard form for the European Single Procurement Document*. The Implementing Regulation states that the contracting authority in the OJEU/call for competition must define what information the ESPD should include and provides for the contracting authorities the possibility to choose to limit the information required on selection criteria to a single question whether, yes or no, economic operators meet all the required selection criteria.
13. *Ibid.*, Annex II, Part I.
14. *Ibid.*
15. *Ibid.*, Annex II, Part II (A).
16. *Ibid.*, Annex II, Part II (B).
17. *Ibid.*, Annex II, Part II (C).
18. *Ibid.*, Annex II, Part II (D).
19. D.G. Grow, “*European Single Procurement Document Service*”, at [http://ec.europa.eu/isa/documents/actions/more-about-action-2.16\\_en.pdf](http://ec.europa.eu/isa/documents/actions/more-about-action-2.16_en.pdf) [accessed 23 June 2016].
20. Directive 2014/24/EU, recital No. 52. The new EU Directive on public procurement aims to help Member States to achieve the switchover to e-procurement, enabling suppliers to take part in online procurement procedures across the Internal Market. According to the new EU Directive on public procurement (classical sectors), IT tools “*should become the standard means of communication and information exchange in procurement procedures, as they greatly enhance the possibilities of economic operators to participate in procurement procedures across the internal market*”. See the *Interoperability Solutions for European Public Administrations – ISA* program. The transmission of the relevant information “will be done through eTendering solutions. As the service correlates with eCertis, business registers and eTendering solutions great care will be given that the semantic data model is harmonized. Development

this purpose, the EU Commission “shall make available all language versions of the ESPD in e-Certis”.<sup>21</sup> The e-CERTIS, a free on-line information database,<sup>22</sup> managed by the EU Commission, provides details of the different certificates<sup>23</sup> and attestations frequently requested in procurement procedures across the 28 Member States.<sup>24</sup> It aims to help interested parties (contracting authorities and economic operators) to understand what information or certificate is being requested or provided and to identify mutually acceptable equivalents overcoming legal and language barriers. This kind of initiative also reveals how complicated and variable tenderer requirements can be within European Member States.

The up-dating of information introduced in e-Certis is a task assigned to the Member States to ensure that e-Certis delivers its full potential for simplification and facilitation of documentary exchanges.<sup>25</sup> Member States may postpone until 18 April 2018<sup>26</sup> the recourse to e-Certis by the contracting authorities,<sup>27</sup> while ensuring the up-dating of the “information concerning certificates and other forms of documentary evidence introduced in e-Certis” by 18 April 2016.<sup>28</sup>

This system must be reviewed by the EU Commission by 18 April 2017, taking into account the technical development of databases in the Member States, with a report to the EU Council and the Parliament.<sup>29</sup>

will be linked to eSENS, a currently ongoing large scale pilot, the standardisation initiative by CEN/BIL, ISA Core Business Vocabulary and solution providers”. See the schedule of the action at [http://ec.europa.eu/isa/documents/actions/more-about-action-2.16\\_en.pdf](http://ec.europa.eu/isa/documents/actions/more-about-action-2.16_en.pdf) [accessed 23 June 2016].

21. Directive 24/2014/EU, Art. 61 (3). EU Commission, Updated draft of the commission implementing an EU Regulation establishing the standard form for the European Single Procurement Document, cit., 3.
22. Available at <http://ec.europa.eu/markt/ecertis/searchDocument.do?clean=true> [accessed 23 June 2016].
23. Legal or official document required in eProcurement such as evidences, attestations, official letters and, for generalizing, lists of economic operators.
24. “Report on the “Uptake of pre-awarding phases in eProcurement” Workshop – Vienna”, (22 February 2010), [http://www.epractice.eu/files/eProc%20Ws%20Vienna%202010-%20Report\\_2010.pdf](http://www.epractice.eu/files/eProc%20Ws%20Vienna%202010-%20Report_2010.pdf) [accessed 23 June 2016]. The e-Certis it is also used in one Candidate Country (Turkey) and the three EEA countries (Iceland, Liechtenstein and Norway).
25. Directive 24/2014/EU, Art. 61.
26. Directive 24/2014/EU, Art. 90 (3), (4), (5).
27. Directive 24/2014/EU, Art. 61 (2).
28. Directive 24/2014/EU, Art. 61 (1).
29. Directive 24/2014/EU, Art. 59 (3).

The use of the ESPD should not be mandatory, but contracting authorities are obliged to accept this document if it is submitted by tenderers.<sup>30</sup> Such self-declarations apply only in replacement of “certificates issued by public authorities or third parties”<sup>31</sup> confirming that the relevant conditions are met and identifying the authority or the third party responsible for establishing the supporting documents.<sup>32</sup>

The provision of the ESPD limits the possibility for contracting authorities to require tenderers to give evidence of the requirement provided by the selection criteria until the awardee has been identified unless the contracting authority “consider[s] this to be necessary in view of the proper conduct of the procedure”.<sup>33</sup> The ESPD “may be followed up by requests for further information and/or documentation” avoiding to address excessive administrative on economic operators. Through “systematic requests of certificates or other forms of documentary evidence of all participants in a given procurement procedure or practices consisting in identifying in a discriminatory manner the economic operators to be requested such documentation”.<sup>34</sup> The ESPD specifies the national public authority responsible for establishing the supporting certificates.

Moreover, “contracting authorities should not ask for still up-to-date documents, which they already possess from earlier procurement procedures”. However, it should also be ensured that contracting authorities “will not be

30. Directive 24/2014/EU, Art. 59 (1).

31. *Ibid.*

32. EU Commission, Legal framework for the European Single Procurement Document (ESPD) as set out in the Directive 24/2014/EU.

33. Directive 24/2014/EU, recital 84. The 2011 proposal Directive, with the aims to reduce the existing red tape, provided the “European Procurement Passport” as a means of proof for the absence of grounds for exclusion that “shall not be questioned without justification”, cfr. EU Commission, Proposal Directive on Public Procurement, 20 December 2011, art. 59 and annex XIII, where it is highlighted that such “justification may be related to the fact that the passport was issued more than six months earlier”; A. Sanchez Graells, *supra* note 1, at 121. This rule was amended during the procedure for the approval of the new Directive on Public procurement and the document re-defined “European Single Procurement Document” – ESPD, cfr. Directive 24/2014/EU, Art. 59. The ESPD is one of the tools to enhance the EU policy to “end-to-end e-procurement” system (from the electronic publication of notices to electronic payment) overcoming the fully paper-based system or a parallel system (paper-IT based) used by EU Member States in the EU. End-to-end e-procurement is an opportunity to fundamentally re-think the way contracting authority is acting and can contribute to the sustainable growth objectives of the EU 2020 Strategy.

34. *Ibid.*, Annex 1.

faced with disproportionate archiving and filing burdens in this context. Consequently, implementation of this duty should only be applicable once the use of electronic means of communication is obligatory, as electronic document management will render the task much easier for contracting authorities”.<sup>35</sup>

To simplify the qualitative selection of the economic operators, the 2014 Public Procurement Directive requires contracting authorities to obtain the information on the tenderers directly from a national database (if “available free of charge”) rather than to ask the economic operators for the information.<sup>36</sup> This provision does not seem to be limited to the documents related to the self-declaration<sup>37</sup> considering that the 2014 Directive on Public Procurement “ensures that databases which contain relevant information on economic operators and which may be consulted by their contracting authorities may also be consulted, under the same conditions, by contracting authorities of other Member States”.<sup>38</sup> According to the 2014 Public Procurement Directive, contracting authorities should be entitled to request all or part of the supporting documents or certificates “at any moment where they consider this to be necessary in view of the proper conduct of the procedure”.<sup>39</sup> This might happen only after the award (when the contracting authorities need to ensure that the economic operator meets the required conditions) in two-stage procedures (as the restricted procedures, the competitive procedures with negotiation, the competitive dialogues and innovation partnerships) in which it is possible to limit<sup>40</sup> the number of candidates invited to submit a tender. In such situations “requiring submission of the supporting documents at the moment of the selection of the candidates to be invited could be justified to avoid that contracting authorities invite candidates which later prove unable to submit the supporting documents at the award stage, depriving otherwise

35. Directive 24/2014/EU, Recital No. 85.

36. Directive 24/2014/EU, Art. 59 (5).

37. S. Arrowsmith, *supra* note 4, at 1309.

38. Directive 24/2014/EU, Art. 59 (5). See also EU Commission, Updated draft of the commission implementing an EU Regulation establishing the standard form for the European Single Procurement Document, *cit.*, Annex, where it is also clarified that “the obligations for the contracting authorities and contracting entities to obtain the documentation concerned directly by accessing a national database in any Member State that is available free of charge also applies where the information initially requested on selection criteria has been limited to a yes or no answer”.

39. Directive 24/2014/EU, recital 84.

40. *Ibid.*, recital 84. Commission implementing Regulation (EU) 2016/7 of 5 January 2016, *cit.* See A. Semple, *supra* note 4, at 103, where it is highlighted the possible problems of a multi-stage procedure.

qualified candidates from participation”.<sup>41</sup> In case of contracts based on framework agreements, the tenderer to whom it is intended to award the contract will have to provide up-to-date certificates and supporting documents.<sup>42</sup>

The ESPD and the use of electronic tools may help standardizing the qualitative selection of tenderers replacing the diverging national self-declarations with one standard form, established at the European level. Such standard form, available in the EU’s official languages, should also help “to reduce problems linked to the precise drafting of formal statements and declarations of consent as well as language issues”,<sup>43</sup> increasing cross-border participation in award procedures and all the forms of joint procurement.<sup>44</sup> With the aims to simplify the qualitative selection of tenderers, contracting authorities may also decide to use the ESPD in award procedures outside the scope of the EU Directives on Public Procurement, as for procurement below the relevant thresholds or procurement subject to the “light regime” applicable to social and other specific services.<sup>45</sup>

This provision reduces the burdens not only for tenderers, but also for the contracting authorities that no longer have to check documents for many different economic operators.<sup>46</sup> Indeed, the ESPD can be reused<sup>47</sup> provided that

41. Directive 24/2014/EU, recital 84.

42. *Ibid.*, recital 84.

43. Commission implementing Regulation (EU) 2016/7 of 5 January 2016, recital 4.

44. R. Cavallo Perin and G.M. Racca, “The Administrative Cooperation in the Public Contracts and Services Sectors for the Progress of European Integration”, *forthcoming*; Id. “Le centrali di committenza nelle nuove strategie di aggregazione dei contratti pubblici”, in *Italiadecide – Rapporto 2015*, (Il Mulino: Bologna, 2015), 491-497; R. Cavallo Perin and G.M. Racca, “Le modificazioni organizzative negli appalti e servizi pubblici delle pubbliche amministrazioni e l’ordinamento dell’Unione europea”, in *Scritti in Memoria del Professore Antonio Romano Tassone, forthcoming*; S. Ponzio, “Joint Procurement and Innovation in the new EU Directive and in some EU-funded projects” (2014) *Ius Publicum Network Review*, at [http://www.ius-publicum.com/repository/uploads/20\\_03\\_2015\\_13\\_12-Ponzio\\_IusPub\\_JointProc\\_def.pdf](http://www.ius-publicum.com/repository/uploads/20_03_2015_13_12-Ponzio_IusPub_JointProc_def.pdf) [accessed 23 June 2016].

45. Articles 74 to 77 and 91 to 94 of Directives 2014/24/EU and 2014/25/EU.

46. S. Arrowsmith, *supra* note 4, at 1304.

47. Directive 24/2014/EU, recital 85, where it is stated that “it should also be provided that contracting authorities should not ask for still up-to-date documents, which they already possess from earlier procurement procedures. However, it should also be ensured that contracting authorities will not be faced with disproportionate archiving and filing burdens in this context. Consequently, implementation of this duty should only be applicable once the use of electronic means of communication is obligatory, as electronic document management will render the task much easier for contracting authorities”.

the economic operator confirm that the information is still correct.<sup>48</sup> This document will be especially relevant for the central purchasing bodies and will favor the different models of joint cross-border procurement and of e-procurement.<sup>49</sup>

The innovation in the use of ESPD, together with the improvement of the use of interoperable electronic tools, might foster the qualitative selection of economic operators in an automatic phase overcoming the existing burdens and red tape (even within the Member States) and overcoming the need to submit paper documents; the first steps in national implementation of electronic systems for the qualitative selection of the economic operators.

The idea to reconsider the organisation and the sequence of the qualitative selection and award within the public procurement procedure,<sup>50</sup> and to establish a better mutual recognition of certificates<sup>51</sup> by improving the use of electronic tools to enhance efficiency and cross-border procurement, were clearly exposed in the 2011 Green Paper on the modernisation of EU public procurement policy.

Some Member States have already endorsed pre-qualification services to avoid repeated evaluations of participation requirements. For instance, in the UK specific websites for pre-qualification of tenderers have been created.<sup>52</sup> In the UK, the Public Contract Regulations 2015 implemented the ESPD with the “copy-out” method,<sup>53</sup> requiring contracting authorities to obtain the in-

48. Directive 24/2014/EU, Art. 59 (1). EU Commission, Legal framework for the European Single Procurement Document (ESPD) as set out in the Directive 2014/24/EU, cit., 2.
49. Directive 24/2014/EU, Art. 39. G.M. Racca *Appalti pubblici: innovazione e razionalizzazione. Le strategie di aggregazione e cooperazione europea nelle nuove Direttive*, conference held in Rome the 14<sup>th</sup> May 2014.
50. EU Commission, *Green Paper on the modernisation of EU public procurement policy*, supra note 2, at 17.
51. EU Commission, *Green Paper on the modernisation of EU public procurement policy*, supra note 2.
52. See L.R.A. Butler “Below Threshold and Annex II B Service Contracts in England, Wales and Northern Ireland: A Common Law Approach” in this volume. The obligation will not apply to Utilities running a procurement until the Utilities Contracts Regulations 2016 come into force (on 18 April 2016).
53. UK Public Contracts regulations 2015, Art. 59. See also UK Cabinet Office – consultation document “UK Transposition of new EU Procurement Directives. Public Contracts Regulations 2015”, 30 January 2015, at <https://www.gov.uk/government/consultations/transposing-the-2014-eu-procurement-directives> [accessed 23 June 2016], at 9, where is highlighted that the use of the copy-out method “limit the extent

formation needed for the qualification of the economic operators from national databases without providing any postponement (from 26 January 2016).<sup>54</sup> Contracting authorities “shall have recourse to e-Certis and shall require primarily such types of certificates or forms of documentary evidence as are covered by e-Certis” without postponing the use of such tools.<sup>55</sup>

The ESPD should be available in an online format only, nonetheless the “online only” requirement is to be delayed until April 2017; until then, paper copies may be used.<sup>56</sup>

In UK this provision appears “of less importance (both for UK economic operators and for UK contracting authorities), since the UK does not operate many of the kinds of official certifications that are operated in some other Member States”.<sup>57</sup> This issue points out the complexity of the implementation of the Directive within national legal frameworks, which still remains an obstacle to the opening of the Internal Market. The ESPD appears relevant in a transnational and cross-border perspective. Moreover, to ensure a simpler and more consistent approach to selection and to remove red tape and barriers which make difficult for businesses (in particular SME), to access to public contracts, the UK Public Contracts Regulations 2015 confirms also the use of a “Pre Qualification Questionnaires” (PQQ)<sup>58</sup> for the qualitative selection of economic operators.<sup>59</sup> The PQQ contains a set of standardized selection questions the use of which is recommended by the Crown Commercial Service and seems to duplicate the ESPD.<sup>60</sup> A problem may concern how in practice

- to which we can deviate from the wording of the Directives when casting the national UK implementing regulations”.
54. Directive 24/2014/EU, Art. 59 (5), as implemented in UK Public Contracts regulations 2015, Art. 59(11).
55. UK Public Contracts Regulation 2015, Art. 61, where “e-Certis” is defined as “the online repository established by the Commission”.
56. UK Public Contracts regulations 2015, Art. 1 (4).
57. See the chapter of L.R.A. Butler in this book. S. Arrowsmith, supra note 4, at 1309-1310.
58. See L.R.A. Butler in this book. The requirements provided by the Public contracts regulation 2015 will apply to contracting authorities from 26 February 2015. The Pre Qualification Questionnaires is available at <https://www.gov.uk/government/publications/public-contracts-regulations-2015-requirements-on-pre-qualification-questionnaires>.
59. UK Public Contracts regulations 2015, Art. 107 and 111.
60. UK Crown Commercial Services, “Public Contracts Regulations 2015 New requirements relating to Pre Qualification Questionnaires to help businesses access Public Sector contracts” (27 February 2015), at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/417963/4279-](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/417963/4279-)

the use of the ESPD is meant to fit with the Crown Commercial Service's (CCS) standard PQQ. Both cover much of the same ground, and it would seem to defeat the object of the ESPD and to create more room for errors or ambiguity if tenderers are now required to complete two documents where previously only one was needed.<sup>61</sup>

In Italy, the self-declaration (from 1 July 2014) has been provided by law and the certificate proving the absence of exclusion grounds and the respect of the selection criteria should be acquired only through the Public Contract National Database<sup>62</sup> established at the Italian Anti-Corruption Authority (which assumed the functions of the Italian Authority for the Supervision of Public Contracts).<sup>63</sup> Through this database, the Italian contracting authorities should obtain (exclusively) the documentation proving the possession of the requirements related to the criteria for the qualitative selections of tenderers. The public and private entities that hold the data related to the selection requirements are asked to make them available on the Public Contract National Database and economic operators should update them in order to facilitate the award procedure.<sup>64</sup> To this end, the Italian Anti-corruption Authority has developed a computerized system known as AVCpass (Authority Virtual Company Passport).<sup>65</sup> Nonetheless, the system is not yet completely implemented

15\_GN\_PQQ\_Lord\_Young\_Guidance.pdf [accessed 23 June 2016], where it is highlighted that "these questions (or a selection of these questions) should be adopted across all procurement procedures (see below) and authorities should embed these into their own procurement processes (for example eProcurement systems)".

61. R. Smith "The European Single Procurement Document in force from 26 January 2016 – what do you need to do?" (20 January 2016), at <http://www.procurementportal.com/blog/blog.aspx?topic=3&>, [accessed 23 June 2016] where it is reported that "a PPN and accompanying guidance will be published shortly. In the interim the advice in PPN03/15, the supplier selection guidance and the standard PQQ template should continue to be used until the policy and guidance on the aligned ESPD/PQQ are published."
62. See d.lgs. 12 April 2006, No. 163, Italian Public Contracts Regulations, Art. 6 *bis*. See also: Italian Cons. St., ad plen, 30 July 2014, No. 16.
63. Italian D.l. 24 June 2014, No. 90 converted in Law 11 August 2014, No. 114.
64. Italian Public Contracts Code, d.lgs. 12 April 2006, No. 163, cit., Art. 6 *bis* (4).
65. Commission (EU), *End-to-end e-procurement to modernise public administration*, cit., 4. In Italy is estimated to lead to savings of up to € 1.2 billion per year for economic operators. Public Procurement Network "The transposition of the new EU public procurement directives in the Member States" 2014, at <http://www.publicprocurementnetwork.org/docs/ItalianPresidency/documento%206.pdf> [accessed 23 June 2016], the system is considered very similar to a Virtual Company Dossier that allows the online check of the absence of grounds for exclusion and the respect of the selection criteria for the participation in award procedures through the consultation

and the lack of data communicated by the contracting authorities and the regional observatories on public contracts were heightened.<sup>66</sup> Such limitation does not permit to get the expected result in terms of simplification as the tenderers and the contracting authorities still have to provide and evaluate a number of requirements. Other limits are indicated by the Italian Anti-Corruption Authority which noted the lack of the information reported and an implementation of the system that, until now, is not fully operative.<sup>67</sup> A recent Italian law for the implementation of the 2014 Directives provides for the revision and simplification of the AVCPass system, ensuring its interoperability and giving its management to the Italian Ministry of Infrastructure and Transport<sup>68</sup> together with the implementation of the ESPD.<sup>69</sup> The draft of the new Italian Public Contracts Code introduces in the Italian legal system<sup>70</sup> the ESPD and identifies the "national database of economic operator", managed by the Italian Ministry of Infrastructure and Transport, in which contracting authorities of other Member States should have to require the supporting documents.

In France, a recent decree requires that the candidates cannot be expected to provide documents and information that the contracting authorities can obtain by themselves by way of an official electronic system "if two conditions are met: the candidate must provide the relevant information regarding the said system and it must be in free access. The contracting authority can exempt the candidate to provide the relevant documents if it has them already on the condition that they are still valid and that it is announced in the contract notice or the contract documents".<sup>71</sup> Moreover, according to economic data, the use of e-certificates by UGAP, a French Central Purchasing Body, "reduced administrative costs by 35 percent and the awarding process was

from a single portal of the several databases that contain the different certificates. "In case there are only paper documents and they are related to the respect of the selection criteria (but not the causes of exclusion) the economic operator can scan them and put them into the computer system". See the chapter of M. Comba, in this book.

66. Italian Anti-Corruption Authority, 2014 Annual Report, 2 July 2015, 80 et seq.
67. Italian Anti-Corruption Authority, 2014 Annual Report, 2 July 2015, 7.
68. Law 28 January 2016, No. 11, art. 1, (q) and (z).
69. *Ibid.*, art. 1, (aa). See also the implementation of 2016 EU Directives: d. lgs 18 April 2016, no. 50, art. 85. See also the guidelines for the ESPD, 18 July 2016, No. 3.
70. Draft for the new Italian Public Contracts Code, 3 March 2016, art. 85.
71. See the chapter of F. Lichere. Decree of 26 September 2014 that implemented some provisions of Directive 2014/24/EU.

reduced by 10 days".<sup>72</sup> The French implementation of 2014 Public Procurement directives<sup>73</sup> aims at simplifying the award procedure to reduce costs, and the French Senate suggests a further simplification of the qualification stage and of the ESPD standard form.<sup>74</sup>

In Germany, contracting authorities will be able "to view the means of proofs submitted by the economic operator in the electronic database with the aid of the certification code". The procedure adopted in the German legal system "does not replace the entire procedure of the verification of the selection criteria, but does replace the verification of certain means of proofs".<sup>75</sup>

In Portugal, public procurement has been fully electronic since 1 November 2009, nonetheless "some certificate can be electronically consulted by public authorities and others don't. But digitalization are accepted".<sup>76</sup>

The Spanish implementation seems to require simplification, flexibility and reduction of red-tape that will be pursued through the use of EU standardized form (like the ESPD) and the use of electronic means.<sup>77</sup>

Most of other EU countries "do not currently use or have any plans for entirely digitalized systems in the evaluation of selection criteria or grounds for exclusion (Estonia, Lithuania, Norway, Portugal, Slovakia, United Kingdom). Cyprus and Poland are planning to develop it; in the Netherlands an entirely digitalized and automatized system is not possible".<sup>78</sup>

## 2. The electronic tools in the evaluation of the exclusion grounds

The 2014 Public Procurement Directive extends the exclusions grounds (both mandatory and discretionary) for the qualitative selection of tenderers providing an updated list of legislation for which exclusion following a conviction is required, especially in order to improve the fight against fraud and corrup-

72. EU Commission, End-to-end e-procurement to modernise public administration, COM (2013) 453 final, at 4.
73. Ordonnance n° 2015-899 du 23 juillet 2015 relative aux marchés publics.
74. "Sénat, Passer de la défiance à la confiance: pour une commande publique plus favorable aux PME", at <http://www.senat.fr/rap/r15-082-1/r15-082-122.html> [accessed 23 June 2016].
75. See M. Burgi and L. Wittschurky in this book.
76. Public Procurement Network "The transposition of the new EU public procurement directives in the Member States", at 130.
77. See the chapter of A. Sanchez Graells in this book.
78. Public Procurement Network "The transposition of the new EU public procurement directives in the Member States", cit.

tion.<sup>79</sup> In some EU countries, many such data are collected in national databases. This might facilitate the qualification of the economic operators with the use of electronic certificates archived in interoperable databases.<sup>80</sup>

As is well known, the mandatory exclusion grounds<sup>81</sup> refer to the participation in a criminal organisation,<sup>82</sup> corruption and bribery<sup>83</sup> as well as frauds affecting the European Communities' financial interests,<sup>84</sup> terrorism related offences,<sup>85</sup> the offence of money laundering,<sup>86</sup> forms of trafficking of human beings.<sup>87</sup> The breach of the obligations related to the payment of taxes and social security contributions can be considered by Member States as a discretionary or mandatory exclusion ground.<sup>88</sup>

The discretionary exclusion grounds<sup>89</sup> refer to violation of obligations "in the fields of environmental, social and labour law",<sup>90</sup> bankruptcy, insolvency or winding-up proceedings,<sup>91</sup> a grave professional misconduct,<sup>92</sup> an agreement among the economic operators<sup>93</sup> and the prior involvement of economic operators aimed at distorting competition,<sup>94</sup> conflict of interest,<sup>95</sup> significant or

79. Directive 24/2014/EU, Art. 57. See also H.-J. Priess "The rules on exclusion and self-cleaning under the 2014 Public Procurement Directive" (2014) in *Public Procurement Law Review*, at 114-117.
80. D.I. Gordon and G.M. Racca, "Integrity Challenges in the EU and U.S. Procurement systems", in G.M. Racca and C.R. Yukins (eds), *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally*, (Bruylant: Bruxelles, 2014), at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2419224](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2419224) [accessed 23 June 2016].
81. A. Semple, *supra* note 4, at 94-95.
82. Directive 2014/24/EU, *cit.*, Art. 57 (1) (a).
83. *Ibid.*, Art. 57 (1) (b).
84. *Ibid.*, Art. 57 (1) (c).
85. *Ibid.*, Art. 57 (1) (d).
86. *Ibid.*, Art. 57 (1) (e).
87. *Ibid.*, Art. 57 (2).
88. *Ibid.*, Art. 57 (2). See: Case C-358/12 *Consorzio Stabile Libor Lavori Pubblici v Comune di Milano*. In that case, national legislation provided for exclusion where more than €100 or 5 percent of the sums owned in respect of social security payments was outstanding.
89. A. Semple, *supra* note 4, at 96-97.
90. Directive 2014/24/EU, *cit.*, Art. 57 (4) (a) that refer to Art. 18 (2).
91. *Ibid.*, Art. 57 (4) (b).
92. *Ibid.*, Art. 57 (4) (c).
93. *Ibid.*, Art. 57 (4) (d).
94. *Ibid.*, Art. 57 (4) (f).
95. *Ibid.*, Art. 57 (4) (e).



persistent deficiencies in prior public contracts,<sup>96</sup> the misrepresentation in supplying information required to verify exclusion,<sup>97</sup> an undue influence or advantage in the procurement process.<sup>98</sup>

Many such data are collected electronically, but some are not, and it might be more difficult to collect and keep them updated in a database.

The ESPD standard form allows to collect the exclusion grounds “that may be foreseen in the national legislation of the contracting authority’s Member State”. The exclusion grounds include the grounds relating to criminal convictions<sup>99</sup> (e.g. participation in criminal organization, corruption, fraud, terrorist offences linked to terrorist activities, money laundering or terrorist financing, child labour and other forms of trafficking in human beings)<sup>100</sup> and the one related to the payment of taxes or social security contributions,<sup>101</sup> to insolvency, conflicts of interests or professional misconduct.<sup>102</sup>

All the information and the data about both exclusion grounds (mandatory and discretionary) may be collected in eArchives, fully accessible online, nonetheless the comparison among data of different Member States requires a standardisation of the evaluation of the exclusion grounds and in collecting the information about the economic operators.

A first issue may concern the legal meaning used in each Member State. The EU Directive on public procurement usually refers to a definition provided by the EU law (i.e. for “criminal organisation”,<sup>103</sup> “fraud”,<sup>104</sup> “terrorist offences”,<sup>105</sup> “money laundering”,<sup>106</sup> “trafficking of human beings”<sup>107</sup>) but

these terms can be specified in the national legal system differentiating their extent. The same EU definition will assume different contents. In such cases, the standardization given by IT tools and databases does not seem to be able to clearly point out the differences among the national legal systems. The harmonisation of national rules permits only to compare and specify national requirements merely recognizing the certifications contained in the databases of other Member States.

Moreover, in case of “corruption”, the EU directive refers not only to an EU definition,<sup>108</sup> but also specifies the application of the definition provided by “the national law of the contracting authority or the economic operator”.<sup>109</sup> The application of this rule, although in compliance with EU<sup>110</sup> and international provisions,<sup>111</sup> may be influenced by the different provisions given by

106. Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 “on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing”, Art. 1.
107. Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 “on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA”.
108. Council Act of 26 May 1997 drawing up the “Convention made on the basis of Article K.3 (2)(c) of the Treaty on European Union, on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union”, Art. 3 (1), “for the purposes of this Convention, the deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties shall constitute active corruption”; Council Framework Decision 2003/568/JHA of 22 July 2003 on “combating corruption in the private sector”, Art. 2(1), “Member States shall take the necessary measures to ensure that the following intentional conduct constitutes a criminal offence, when it is carried out in the course of business activities: (a) promising, offering or giving, directly or through an intermediary, to a person who in any capacity directs or works for a private-sector entity an undue advantage of any kind, for that person or for a third party, in order that that person should perform or refrain from performing any act, in breach of that person’s duties; (b) directly or through an intermediary, requesting or receiving an undue advantage of any kind, or accepting the promise of such an advantage, for oneself or for a third party, while in any capacity directing or working for a private-sector entity, in order to perform or refrain from performing any act, in breach of one’s duties”.
109. Directive 2014/24/EU, Art. 57 (1) (b).
110. EU Commission, “Anti-Corruption report” 3 February 2014, 21.
111. WTO agreement – GPA, 2011, Art. 4, 4 (c). G.M. Racca and C.R. Yukins (eds), *Integrity and Efficiency in sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally* (Bruylant: Bruxelles, 2014).

96. *Ibid.*, Art. 57 (4) (g).

97. *Ibid.*, Art. 57 (4) (h).

98. *Ibid.*, Art. 57 (4) (i).

99. *Ibid.*, Annex II, Part III.

100. Directive 24/2014/EU, Art. 57 (1).

101. Commission implementing Regulation (EU) 2016/7 of 5 January 2016 *establishing the standard form for the European Single Procurement Document*, Annex II, Part III (B). Directive 24/2014/EU, Art. 57 (2).

102. *Ibid.*, Annex II, Part III (C). Directive 24/2014/EU, Art. 57 (4).

103. Council Framework Decision 2008/841/JHA, 24 October 2008 “on the fight against organised crime”, Art. 1, “criminal organization” means a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit”.

104. Council Act of 26 July 1995 drawing up the “Convention on the protection of the European Communities’ financial interests”, Art. 1.

105. Council Framework Decision of 13 June 2002 “on combating terrorism” 2002/475/JHA, Art. 1 and 3.

national legal systems and can be an obstacle for cross-border and transnational participation.<sup>112</sup> The juridical content of an eCertificate issued under the national law of the economic operator may not match with the requirements provided by the legal system of the contracting authority. One example can be the Italian “*antimafia*” certificate.<sup>113</sup>

In some cases, the evaluation of the exclusion grounds may be done in an automatic way through a certificate. Differently the exclusion grounds may require a discretionary evaluation carried out by the contracting authority. If the violation of the obligations “in the fields of environmental, social and labour law”,<sup>114</sup> the bankruptcy, insolvency or winding-up proceedings of an economic operator<sup>115</sup> and the misrepresentation of information<sup>116</sup> may be proved by a conviction of the professional misconduct of the tenderer an assessment of the contracting authority is required.

The evaluation of the “seriousness” of the misconduct refers to the reliability and integrity of the tenderer according to the requirements of the contracting authority and needs a subjective analysis of the activity of the previous economic operator’s conduct. In some countries, this exclusion ground is applicable only where the previous “grave professional misconduct” was made against the same contracting authority that noticed the award procedure (and not any contracting authority).<sup>117</sup> In other situations, the evaluation of the gravity of the conduct is conferred to another public entity (the evaluation for the exclusion is conferred to the Prefect in case of the application of penalties connected to mafia crimes in Italy).<sup>118</sup>

The establishment of an agreement among economic operators requires an evaluation on the symptoms of an undue conduct aimed to distort competition in the award procedure (e.g. as in case of several tenders attributable to a sin-

112. A. Sanchez Graells, *supra* note 1, at 105.

113. Warning on Crime project, report on the Italian legal rules and procedures on public procurement and prevention of organised crime infiltration, 2015, at [http://www.warningoncrime.eu/wp-content/uploads/2016/01/w2\\_Italian-legal\\_rules.pdf](http://www.warningoncrime.eu/wp-content/uploads/2016/01/w2_Italian-legal_rules.pdf), 8-9 [accessed 23 June 2016].

114. Directive 2014/24/EU, *cit.*, Art. 57 (4) (a) that refer to Art. 18 (2).

115. *Ibid.*, Art. 57 (4) (b).

116. *Ibid.*, Art. 57 (4) (h).

117. E.g. in Italy: d.lgs. No. 163 of 2006, Art. 38 (1) (f); see also the implementation of 2014 EU Directives: d. lgs 18 April 2016, No. 50, art. 80. This exclusion ground is not available for different contracting authorities: Italian Cons. St., III, 22 January 2016, No. 210; Italian Cons. St., V, 27 March 2015, No. 1619; Italian Cons. St., III, 14 January 2013, No. 149; Italian Cons. St., V, 21 June 2012, No. 3666.

118. See M. Comba, in this book.

gle decision-making centre). Similarly, the standardisation of the means of proof related to the involvement of an economic operator in the drafting of the procurement documents, and an undue influence of the decision-making process of the contracting authority, have to be verified case by case.

A self-declaration may favour the participation in the award procedures, but, especially for cross-border procurement, the exclusion grounds that involve an evaluation of the contracting authorities require standardized models, electronic archives and a further cooperation among Member States. If a Member State does not provide such evaluation, the related certificates will not be available for the other Member States. The contracting authorities of other Member States will not apply the discretionary exclusion grounds. Conversely, it might be more difficult to apply the simplification tools introduced by Directive 2014.<sup>119</sup>

Moreover, differences among the national legal systems may also concern the legal relevance of the exclusion grounds. A breach of the obligation relating to the payment of taxes can be detected in a different way in different Member States.<sup>120</sup>

The integrity of the economic operator related to serious professional misconduct,<sup>121</sup> to a conflict of interest<sup>122</sup> and the provision of an exclusion ground in case of “persistent deficiencies in the performance (...) under a prior public contract”<sup>123</sup> are related to the rules on self-cleaning provided in the 2014 Public Procurement Directive. Such rules allow the tenderer “to provide evidence” of its reliability; also, with the adoption of a corporate compliance program to prevent illegal behavior,<sup>124</sup> and to compensate for the poor past performance, with the evidence “that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion”.<sup>125</sup>

119. Directive 2014/24/EU, Art. 60.

120. *Ibid.*, Art. 57 (2).

121. *Ibid.*, Art. 57 (4) (c). La previsione consegue a quanto previsto nelle direttive del 2004: art. 45 (2) (c) e art. 45 (2) (d). See: H.-J. Priess “The rules on exclusion and self-cleaning under the 2014 Public Procurement Directive”, *cit.*, at 117-118.

122. Directive 2014/24/EU, *cit.*, Art. 57, (4).

123. *Ibid.*, Art. 57 (4) (g), “where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions”.

124. *Ibid.*, recital No. 102. See Albert, *supra* note 1, at 112-113.

125. *Ibid.*, Art. 57 (6).

Electronic tools allow automatic evaluation of the data entered in the database, but this assessment follows the differences of the national legal systems (for example in Italy, the breach related to the payment of taxes becomes relevant in case of omission of taxes payment for an amount of more than €10,000 ).<sup>126</sup> In similar cases, electronic tools might favour the standardisation of the requirements, but not necessarily the related evaluations, according to each legal system.

The use of electronic tools enables also the collection of data of economic operators operating in different relevant markets to simplify the evaluation of the qualification requirements to analyse and elaborate data related to the previous award procedures on the basis of the value, of the territory and type of contract and the contracting authority. These data allow to monitor and to contrast collusion and illegality in public procurement, improving accountability. These in turn reduce the opportunity for corruption and tax fraud and increase security of data and maybe reduce litigation.

Situations when conflict of interest<sup>127</sup> arise might be detected with the use of interoperable database that compare the information and elaborate them. The availability of the data will also favour the external audit from third parties (civil society, NGO, media) to ensure the accuracy of the evaluations of tenderers.<sup>128</sup>

### 3. The electronic tools in the evaluation of the selection criteria

The selection criteria are related to the suitability to pursue the professional activity and to ensure that a candidate, or tenderer, has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded.<sup>129</sup>

Such criteria must respect the principle of proportionality to the subject matter of the contract to be concluded and its value. Whilst the enrollment in

126. D.P.R 29 September 1973, No. 602, Art. 48 bis, (1) and (2-bis)

127. Directive 2014/24/EU, Art. 24.

128. D.I. Gordon and G.M. Racca "Integrity Challenges in the EU and U.S. Procurement Systems", in G.M. Racca and C.R. Yukins (eds) *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally* (Bruylant: Bruxelles 2014), at 132-133.

129. Directive 2014/24/E, *cit.*, Art. 58. All requirements shall be related and proportionate to the subject matter of the contract.

### 3. The electronic tools in the evaluation of the selection criteria

a professional or trade register<sup>130</sup> is easily verifiable through a database, like a particular authorization, the membership in an organization or the minimum yearly turnover,<sup>131</sup> the possibility for the contracting authority to specify methods and criteria to consider a ratio between assets and liabilities<sup>132</sup> similar to the evaluation of the criteria required for ensuring the possession of the "necessary human and technical resources and experience to perform the contract to an appropriate quality standard" may not require a standardized activity.<sup>133</sup>

The level of experience might be assessed by using databases containing the evaluation of past performances related to different kinds of contracts, if available. This seems a simple way to evaluate the "skills, efficiency, experience and reliability" in practice, taking into account the degree of satisfaction of a contracting authority that has already awarded a contract to the same economic operator.

The contracting authorities should limit the requirements to the ones appropriate to ensure that a candidate or tenderer "has the legal and financial capacities and the technical and professional abilities" to perform the contract to be awarded.<sup>134</sup> All requirements should be related and proportionate to the subject matter of the contract in order to prevent a distortion of the competition.

The data collected through the electronic tools are a useful element in the assessment of the reliability of economic operators and the quality of its performance for the definition of white lists also supplemented by requirements of reputation. Factors likely to affect the subsequent award procedure.<sup>135</sup>

National official lists of approved economic operators can be very useful, and a network should be created between Member States and the EU Commission in order to increase cross-border participation. Moreover, such instruments could also favour the implementation of the mandatory exclusions

130. *Ibid.*, Art. 58(2).

131. *Ibid.*, Art. 58(3).

132. *Ibid.*, Art. 58(3).

133. *Ibid.*, Art. 58(4).

134. *Ibid.*, Art. 58(1).

135. D.I. Gordon and G.M. Racca, "Integrity Challenges in the EU and U.S. Procurement systems", in G.M. Racca and C.R. Yukins (eds), *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally*, *cit.*

of contractors convicted for corruption, providing lists of offences falling within the definition of the Directive.<sup>136</sup>

In Italy, a partnership between the Anti-Corruption Authority and the Antitrust Authority has been established for the use of data with the aim to promote the integrity and efficiency of public contracts.<sup>137</sup> The Public Contracts National Database should permit to look for the relevant information on economic operators according to the ESPD provisions.<sup>138</sup>

The German Government will examine whether to introduce a nationwide central “corruption register”.<sup>139</sup> This register would facilitate the decision of a contracting authority whether to exclude an economic operator due to an exclusion ground and could replace registers already existing in some of the Länders.

The UK Anti-Corruption Plan provides that the UK Cabinet Office considers “what further steps are required to make information available on suppliers excluded from public contracts, including the feasibility, potential advantages, and disadvantages of a register of excluded suppliers” by August 2015.<sup>140</sup>

When the use of electronic tools is possible, the availability of eCertificates or eDocuments in eArchives or databases can simplify the verification of the selection criteria, and also in case of reliance on the capacities of other entities by the tenderer. The data and information collected will also be useful to facilitate the monitoring activity in the execution phase.

The implementation of electronic tools (according to existing EU programs) and the cooperation among Member States, will favor cross-border participation and the development of eProcurement in Europe for the pursuit of the primary and secondary goals of public procurement.

136. S. Williams-Elegbe, “The mandatory exclusion for corruption in the new EC Procurement directives” (2007), at [http://www.nottingham.ac.uk/pprg/documentsarchive/fulltextarticles/sope\\_exclusions\\_in\\_proc.pdf](http://www.nottingham.ac.uk/pprg/documentsarchive/fulltextarticles/sope_exclusions_in_proc.pdf) [accessed 23 June 2016], at 38.

137. Protocollo d’intesa Anac-Agem contro la corruzione firmato da Cantone e Pitruzzella: nuovi criteri per il rating di legalità alle imprese (11 December 2014).

138. Protocollo d’intesa Anac-Agem contro la corruzione firmato da Cantone e Pitruzzella: nuovi criteri per il rating di legalità alle imprese, *supra* note 124, Art. 3.

139. B. Von Engelhardt, “The transposition of the new EU Public Procurement Directives in Germany”, at the *Single Market Forum* in Rome, 1 December 2014.

140. HM Government UK Anti-Corruption Plan (December 2014), at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/388894/UKantiCorruptionPlan.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/388894/UKantiCorruptionPlan.pdf) [accessed 23 June 2016].

## 4. Conclusions

The electronic implementation of the “European Single Procurement Document” (ESPD) for the qualification of the economic operators offers a strategic advantage in public procurement and sets the basis for the creation of a network among the relevant national databases.

The provisions of simplified forms of participation with a fully electronic submission, and management of the criteria for the qualitative selection of economic operators, should eliminate burdens for both the tenderers and the contracting authorities, and will favour a transparent and adequate evaluation of the requirements.

The qualification of the economic operators seems to be the first step, possibly reached together with a further development of a full electronic management of the whole public procurement cycle (from the needs analysis to the execution of the contract). A deep control on the quality and capacity of the economic operators should also assure a better quality in the execution phase.

The availability of such information provides the opportunity to assess the quality of the economic operators and also permits to better define EU procurement strategies.

Further challenges based on the ESPD should concern the creation of EU pre-qualification systems of the economic operators, in which Member States will be responsible for the activity, and for the updating, of the data. Each economic operator will be pre-qualified for precise categories of contracts (also specifying the value) throughout the EU, also allowing a cross-border rating of economic operators, taking into account the performance in the execution phase. This could help to overcome the difficulties encountered in some experiences of implementation of the qualification system based on private companies (“SOA”),<sup>141</sup> with the high risk of conflict of interests.

The challenge is to develop a stronger political commitment and adequate professional skills to implement the changes that electronic procurement requires. The EU Commission supports the use of interoperable electronic solu-

141. See M. Comba in this book. See also: T. Titomanlio, “Il sistema di qualificazione nei lavori pubblici”, in C. Franchini (eds) *I contratti di appalto pubblico* (UTET: Turin, 2010), at 461; the Italian Anti-Corruption Authority, *2014 Annual Report* (2 July 2015), at 115 et s.; Italian Anticorruption Authority, Determinazione 23 April 2014, No. 4, *Procedure da utilizzare dalle S.O.A. (Società Organismi di Attestazione) per l'esercizio della loro attività di attestazione* (art. 68, comma 2 lettera f) D.P.R. 5 ottobre 2010 n. 207).

tions for ESPD for the exchange of data among Member States. Recently, the EU Commission has launched a pilot project to encourage the use of *Internal Market Information* (IMI) system in EU public procurement sector.<sup>142</sup> The IMI system is an online European cooperation tool that facilitates the exchange of information among EU countries' public authorities.<sup>143</sup> The *Interoperability Solutions for European Public Administrations* (ISA) programs, supported by the EU Commission,<sup>144</sup> are strictly related to the EU public procurement policy<sup>145</sup> and two of them are aimed to simplify the use of the ESPD with a "web-based system provided to end users (buyers and suppliers)<sup>146</sup> to create, edit and reuse existing ESPD documents".<sup>147</sup> All this

142. About IMI see: [http://ec.europa.eu/internal\\_market/imi-net/about/index\\_en.htm](http://ec.europa.eu/internal_market/imi-net/about/index_en.htm) [accessed 23 June 2016].

143. See the Communication of the D.G. Growth at [http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item\\_id=8235&lang=en&title=European-Commission-launches-IMI-public-procurement-pilot-project](http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8235&lang=en&title=European-Commission-launches-IMI-public-procurement-pilot-project) (20 April 2015) [accessed 23 June 2016]. "Once registered in the system and depending on the national organisation of the use of IMI, they can: remove doubts surrounding the authenticity of a document or certificate provided by a tenderer; check that a company has the required technical specifications (fulfills national standards, labels, conformity assessments, etc.) or is suitable for carrying out the contract in question; verify that a company does not fall under any grounds for exclusion such as having been convicted for fraud; confirm the information from a previously submitted European standardised self-declaration of a tender".

144. The EU Commission supports the project through more than 40 actions with a budget of €160 million. For an overview of the ISA program see [http://ec.europa.eu/isa/actions/index\\_en.htm](http://ec.europa.eu/isa/actions/index_en.htm) [accessed 23 June 2016].

145. See: "Supporting cross-border accessibility and interoperability in eProcurement", at [http://ec.europa.eu/isa/actions/02-interoperability-architecture/2-11action\\_en.htm](http://ec.europa.eu/isa/actions/02-interoperability-architecture/2-11action_en.htm) [accessed 23 June 2016].

146. The EU Commission will establish "a service available for both suppliers and buyers": D.G. Grow, European Single Procurement Document Service, at [http://ec.europa.eu/isa/documents/actions/more-about-action-2.16\\_en.pdf](http://ec.europa.eu/isa/documents/actions/more-about-action-2.16_en.pdf) [accessed 23 June 2016].

147. The action "*Towards a simple procurement eligibility assessment*" is available at [http://ec.europa.eu/isa/actions/02-interoperability-architecture/2-16action\\_en.htm](http://ec.europa.eu/isa/actions/02-interoperability-architecture/2-16action_en.htm) [accessed 23 June 2016]. The action aims to create an online tool that will start to be developed in December 2015. The ESPD service will be provided on *Joinup* (the collaborative platform created by the European Commission and funded by the European Union via the Interoperability Solutions for European Public Administrations – ISA Program). "The semantic data model will be aligned with CEN/BII and e-SENS. Solution providers can re-use the code and extend it according to their needs in order to provide additional value to the users". These programs are also strictly related to other actions like the Common Infrastructure for Public Administrations Sustainability (in-

is required to overcome the lack of clarity, especially in cross-border procurement, on the evidence that can, or must be used, to demonstrate compliance with certain criteria.<sup>148</sup>

Electronic cooperation among contracting authorities can make award procedures "quicker, simpler and cheaper" for all parties concerned, in particular when transactions are cross-border and/or cross-sector, and seems the only way to develop an effective Internal Market in the public procurement sector.

cluding the Pan-European Public Procurement Online – PEPPOL project and Open PEPPOL) created with the aims of solve interoperability issues for electronic public procurement. See [http://ec.europa.eu/isa/actions/02-interoperability-architecture/2-11action\\_en.htm](http://ec.europa.eu/isa/actions/02-interoperability-architecture/2-11action_en.htm) [accessed 23 June 2016]. G.M. Racca "The electronic award and execution of public procurement" (2012) *Ius Publicum Network Review*, at [http://www.ius-publicum.com/repository/uploads/17\\_05\\_2013\\_19\\_31-Racca\\_IT\\_IUS-PUBLICUM\\_EN.pdf](http://www.ius-publicum.com/repository/uploads/17_05_2013_19_31-Racca_IT_IUS-PUBLICUM_EN.pdf), [accessed 23 June 2016], at 54 et s.

148. The action "Greater clarity of evidence requirements in the EU public procurement" with the development of a generic system which will allow the mapping of evidence to criteria regarding the required documents in any given business domain with a mechanism for compliance definition. See [http://ec.europa.eu/isa/actions/02-interoperability-architecture/2-17action\\_en.htm](http://ec.europa.eu/isa/actions/02-interoperability-architecture/2-17action_en.htm) [accessed 23 June 2016].