EUROPEAN PROCUREMENT LAW SERIES

QUALIFICATION, SELECTION AND EXCLUSION IN EU PROCUREMENT

Martin Burgi
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Foreword

Foreword by the Editors of the European Procurement Law Series

We are proud to present the seventh volume in the Series. The qualification phase is one of the most relevant phases in the procurement award procedure. Economic operators may be disqualified from taking part in the procedure according to exclusion clauses in the relevant legislation, or by not being qualified enough to tender due to the minimum requirements laid out by contracting authorities.

The 2014 Directives have significantly changed the rules on qualification; on the one hand, in certain cases, they have made exclusion mandatory; on the other hand, they have offered discretion to the contracting authorities, although this has to be used in compliance with the general principles of the EU. The relevance of these principles for the qualification phase has been clarified in a long list of cases such as *Swm Costruzioni 2 and Mannocchi Luigino*, C-94/12, *Manova*, C-336/12, *Cartiera dell'Adda*, C-42/13, to mention but a few.

The contributions in this book present EU law and domestic rules and practice in a wide selection of Member States (Denmark, France, Germany, Italy, Portugal, Romania, Spain, and the UK), and also refer to domestic rules that implement the 2014 Directive when already in place. The value of the book is enhanced by comparative reports on exclusion and qualitative selection under public procurement procedures, self-cleaning and electronic qualitative selection. Taken together, the EU, national and comparative chapters provide an analytical picture of the law on qualification in public procurement as it is in Europe, highlighting the persistent divergences, the reasons for divergences, and an evaluation on whether the different solutions developed at domestic level are in line with EU law.

We thus stay true to our original idea. The European Procurement Law Group was born in 2008 when a small party of public contract law experts decided to meet regularly to discuss relevant aspects of the law and practice

in this area. Members of the Group held the comparative law approach both valuable and necessary to understand how public procurement law is developed and applied – or misapplied – in the EU and its Member States.

Both convergences and divergences send important signals to both EU and domestic law-makers, including the Court of Justice of the European Union. Comparative knowledge may inspire new approaches and help to avoid mistakes when applying what are ultimately the same principles and basic – and at times detailed – rules. Moreover, it is of value for practitioners in the member States to be aware of practices, regulations, case law and interpretations of public procurement law throughout the EU, as this can assist them both in understanding the rules as applied in their own jurisdiction, and in developing best practices.

Furthermore, as the same Court of Justice reminds us on its official website, the courts of the Member States are *courts* of the Member States, and therefore "are the ordinary courts in matters of European Union law". National courts and review bodies where present may, and in some cases *must*, refer questions to the Court of Justice. However, with more and more Member States having joined the EU in the past years and ensuing delays in the preliminary reference procedure under Article 267 TFEU, national courts and review bodies increasingly have to look elsewhere for best practices and possible guidance. Precedents of national courts and review bodies of other EU Member States giving application to the same common EU rules are a precious source of inspiration for those having to defend and decide upon public procurement cases.

The Court of Justice is aware of the comparative approach and developments and trends in the regulation or practice in some Member States influence some of its rulings. Increased comparative knowledge of the case law of the different Member States may alert the Court of Justice to the difficulties national courts and review bodies are facing in giving full effect to EU law. The reference to a decision by the Danish Complaints Board for Public Procurement in Advocate General Wathelet's opinion in *Ambisig* Case C-46/15 is an obvious example of the value of dialogue between the Court of Justice and national courts.

In the end, a comparative approach makes EU institutions aware of the possible developments of common trends in the Member States. This itself points to a spontaneous convergence towards workable solutions which may give rise to a *jus commune* which would be better guided than opposed or worse ignored.

Finally, we would like to thank Professors Martin Burgi and Martin Trybus for hosting us in Munich and Birmingham to discuss qualification in pub-

lic procurement and for accepting to co-edit the present volume. Our thanks also go to our publisher and to Daniel Wolff from Ludwig Maximilian University in Munich for their help in the production process.

June 2016

Roberto Caranta
Professor, University of Turin

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Professor, University of Copenhagen

Preface

This is the seventh volume of the European Procurement Law Series. After in-house provision, green and social procurement, enforcement, procurement outside the Directives, award criteria, and the 2014 Directives, we are now focussing on the qualification phase – exclusion, qualification and selection/shortlisting.

Qualification featured prominently in numerous public procurement disputes in the EU as it is of crucial importance to the outcome of EU tender procedures. This volume supplements volume 5 in the Series on the award phase. The book also considers the implications of the new Public Sector Directive 2014/24/EU with regard to the qualification phase, and provides an analysis of the implementation of the new Directive in a range of Member States.

The publication is unique as it is based on a comparative approach covering diversified national approaches to EU public procurement law. It provides the reader with an insight that cannot be found elsewhere and includes specific chapters on the state of law and practice in France, Germany, the United Kingdom, Spain, Italy, Portugal and Romania. In addition, it contains a number of comparative chapters on specific issues of particular theoretical and practical interest. The book can be a valuable tool in the development of public procurement regulation and practice in the EU and her Member States, and is also of a wider interest to practitioners, national law makers, complaints boards, national courts, the European Commission, the Court of Justice, and academia.

The Series is written by a cross-border research group consisting of academics from 10 Member States, and several of its members are considered leading researchers in the field of public procurement law at an international level.

A number of adjustments have been made to the “traditional” approach applied by the European Procurement Law Network in volumes 1 to 5 of their Series (volume 6 on Directive 2014/24/EU was not comparative anyway).

First, the previous timeframe of "one edited collection per year" was adapted by deliberately slowing down the research, writing and editing of this volume to a timeframe of just over two years. In this respect, both the July 2014 network meeting in Munich, and the July 2015 meeting in Birmingham, focused on the various aspects of the qualification phase and on the development and completion of this volume. Munich therefore took the form of a "kick-off" event, while Birmingham was a "wrap-up" meeting, with the most substantial work being conducted by the individual authors between these two meetings. The objective was to allow more time for both the completion of the individual chapters and the editing of the collection as a whole. Moreover, the longer timeframe allowed the individual country chapters to be completed before work on the comparative chapters started, the former thus providing the latter with the necessary national law input to produce a comparative analysis. This "country chapters first, comparative chapters second" approach had already been followed in volumes 1-4, but the additional time allowed the editors to mitigate the effect of delays.

Second, the individual country chapters – which were all submitted to the editors after the Munich meeting but before the Birmingham meeting – were subjected to a peer review process by procurement law experts outside the network-experts who (in line with the basic approach of this process) shall remain anonymous. Martin Trybus supervised this process for the editorial team, and the entire team would like to thank these unnamed reviewers for their valuable time and comments which all led to the suggested changes and amendments of the country chapters. Some of these changes were indeed considerable, leading to significantly shorter chapters, for example, or to the incorporation of entirely new aspects. In contrast, the comparative chapters were not subjected to this peer review process. However, these chapters were edited by the editorial team, which led to a comparable number of changes and amendments being made. We will discuss further adaptations to our approach during the 9th meeting of the Network in Turin (September 2016).

The editorial team would also like to thank Daniel Wolff from the Ludwig Maximilian University in Munich for his support in the editing and proofreading of this volume.

A particular challenge both the authors and editors had to face with this collection was the rather uneven level of transposition of the 2014 EU Reform Package, in particular the new Public Sector Directive 2014/24/EU in the EU Member States being investigated. While the United Kingdom (excluding Scotland) had already fully transposed the instrument in 2015 (more than a year ahead of the deadline in 2016), Spain, for example, had not yet transposed the Directive at the time of writing. This lack of uniformity is, of

course, not unusual for the transposition process of complex Directives, and the post-2004 transposition process was no better (See: M. Trybus, "The morning after the deadline: the state of implementation of the new EC Public Procurement Directives in the Member States on February 1, 2006" (2006) 15 *Public Procurement Law Review* NA 82-90). However, the variations did not undermine the analysis. The edition does cover both the pre-2014 legislation, case law and practice but could not yet address the post-2014 situation to the same extent, simply because practice and case law are only starting to evolve, and, as already mentioned, some Member States have not even transposed the Reform Package. However, while all the national jurisdictions investigated in this book and in our previous volumes derive from a common Treaty, Directives and ECJ case law, it is also specific to the differences we are interested in, and from which we, and our readers, can learn.

Munich, Copenhagen and Birmingham in June 2016

Martin Burgi, Martin Trybus & Steen Treumer

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Exclusion, Qualification and Selection of Candidates and Tenderers in EU Procurement

Steen Treumer

1. Introduction

The state of law and choices made by the contracting authorities on exclusion, qualification and selection, have crucial importance in practice as they normally lead to a limitation of the number of competitors in the tender procedures. It is an inherent risk that a contracting authority abuses its discretion in this respect in order to discriminate or favour certain participants or tenderers. Another phenomenon that is often seen in practice is that the stipulated conditions on exclusion, selection and qualification turn out to be unsuited or too restrictive and that the contracting authority therefore would like to dispense from these conditions. However, that will frequently be ruled out by the principles of equal treatment of tenderers and of transparency.

Due to its importance the topic of this book has been considered in numerous procurement cases in the Member States, in several cases before the European Court of Justice (hereafter called the Court of Justice) and it has already received scholarly attention in the countless books and articles on EU public procurement law. For this reason all authors contributing to this book have been forced to be highly selective in choosing case law and issues that are likely to be of greatest interest to the reader. Another challenge has been the timing of this book, as the public procurement regime is currently undergoing a fundamental change due to the new Public Procurement Directive. In such a time of transition, it is relevant to focus on consequences of the new Public Procurement Directive and on implementation of the Directive at a national level where this process has already started. Furthermore, the analysis

primarily addresses the state of law for contracts fully covered by the Public Sector Directive or the new Public Procurement Directive.[1]

Nevertheless, the public procurement Directives only establishes a frame for the regulation of exclusion, qualification and selection. The Member States and contracting authorities are granted a wide discretion when it comes to establishing the requirements in this respect. Therefore the approach, practices and experiences differ to a great extent throughout the Union, as illustrated by the chapters on the various Member States.

The analysis in this chapter starts with an overview of the most important changes of the law following from the new Public Procurement Directive in section 2. This includes an analysis of some systematic legislative shortcomings of the new Directive and of issues that have not been regulated even though they are highly relevant in practice. This is followed by a brief account of the correlation between the new Directive and the case law of the Court of Justice of the European Union in section 3. It should be noted that the new Public Procurement Directive doesn't only codify the case law, as there is at least one important example of "overruling" of the case law of the Court of Justice. The reader should also be aware that the Court of Justice has recently, on some points, clarified the state of law even further than what follows from the newly adopted Directive.

Finally, this chapter ends with concluding remarks in section 4.

2. The New Public Procurement Directive

The primary objective of the revision of the EU public procurement regime, including the new Public Procurement Directive,[2] has been simplification and so-called flexibilisation of the regime.[3] The intent was to give the regime an overhaul and to make significant changes of existing obligations and to introduce important new requirements

1. See D. Dragos and R. Caranta (eds), *Outside the EU Procurement Directives – Inside the Treaty?* (DJØF: Publishing, 2012) for a comparative analysis of this issue prior to the implementation of the new Directive.
2. Directive 2014/2/EU of 26 February 2014. For discussion of the main novelties of the 2014 Directive, see F. Lichère, R. Caranta and S. Treumer (eds), *Modernising Public Procurement, The New Directive* (DJØF: Publishing 2014).
3. See COM (2011) 896 final, 2011/0438 (COD). Proposed procurement directive. Explanatory Memorandum section 1.

It was predicted that simplification was a highly unlikely outcome of the legislative process, leading to the new Public Procurement Directive.[4] However, essentially the European legislator did not succeed in simplifying the regime.[5] The complexity and volume of the regulation has increased once again and the new Public Procurement Directive remains a lawyer's paradise. This general observation also applies to the rules on exclusion, qualification and selection. The number of Recitals has increased to 138, which take up numerous pages in the Official Journal of the European Union. The European Legislator has consistently inserted statements in the Recitals that ought to have been a part of the substantive provisions because they contain obligations and consider concepts or other issues of essence for the interpretation of the new public procurement regime (this will be explored in further detail in section 2.2.1).

Simplification of the legislation was absolutely unrealistic unless the approach of the legislator was completely changed. The background for this is that the regulation of a field tends to reflect its level of complexity. When a legislator has to balance fundamental and conflicting interests, this will typically call for a complex solution with a substantial number of provisions outlining numerous main rules, and most likely a plethora of exceptions. This is not per se a problem, as long as the regulation creates legal certainty and balances the involved interest in a reasonable manner. A better objective would be to ensure legal certainty, while at the same time doing justice to the involved interests at stake. The European legislator could instead have chosen to limit itself to outlining the essential concepts, procurement principles and their main consequences, thereby leaving the Member States a wide discretion as to how these principles should be interpreted at national level.[6] However, if this approach were adopted, this would lead to significant varia-

4. See S. Treumer, "Flexible Procedures or Ban on Negotiations? Will More Negotiation Limit the Access to the Procurement Market?" in G.S. Ølykke, C.R. Hansen and C.D. Tvarnø (eds), *EU Public Procurement – Modernisation, Growth and Innovation* (Jurist – og Økonomforbundets Forlag: København, 2012) at 135, 147.
5. See S. Arrowsmith, "Special Issue – The New EU procurement Directives: Part I; Editor's Note" (2014) *Public Procurement Law Review*, at 81, that emphasises the European legislator introduce many significant changes, and many new requirements, thereby again greatly complicating the system, despite the stated aim of simplification. See also S. Treumer, "Evolution of the EU Public Procurement Regime: The New Public Procurement Directive" in F. Lichère, R. Caranta and S. Treumer (eds), *supra* note 2.
6. Cf. S. Arrowsmith, "Modernising the European Union's public procurement regime: A blueprint for real simplicity and flexibility" (2012) *Public Procurement Law Review*, at 71.

tions in the level of protection in the Member States. Additionally, a homogeneous understanding of the consequences of the principles of equal treatment, and of transparency, would be remote.

The new Public Procurement Directive also contains a range of rules that clearly represents a move towards intensified regulation and harmonisation.[7] The grounds for both discretionary and mandatory exclusion of economic operators are extended as several new grounds are added in Article 57. Lack of payment of taxes or social security contributions becomes a mandatory ground for exclusion even though there are still exceptions to this rule.[8] It is also very important to be aware that the scope for exclusion based on corruption is extended beyond the EU definition of this offence as Article 57(b)(1) refers to the definition in the national law of the contracting authority or the economic operator. This can lead to extraterritoriality in the application if national laws cover instances in third countries. Particularly interesting is the creation of a new ground for exclusion based on infringement of competition law in Article 57(4)(d) and for exclusion of poor past performance by the economic operator in Article (4)(g). It now also follows from Article 57(4)(a) that contracting authorities can exclude – or can be required by Member States to exclude – economic operators that have not complied with social, labour and environmental law. This development increases focus on exclusion of economic operators, forcing the contracting entities to allocate more time on exclusion, and will be demanding in practice, as the issues to be considered are very complex. It is likely that this will lead to an increase of the court or complaints cases on exclusion both at national and European level.

The Directive also introduces new substantive requirements on economic and financial standing and on technical and professional ability. Article 58(3) focuses on requirements of minimum yearly turnover and introduces a cap on economic and financial standing requirements as the required turnover shall, in principle not exceed two times the estimated contact value.[9] This new requirement has been introduced in order to facilitate SME[10] participation.

7. See in further detail A. Sánchez-Graells, "Exclusion, Qualitative Selection and Shortlisting in the New Public Sector Procurement Directive 2014/24" in F. Lichère, R. Caranta and S. Treumer (eds), *supra* note 2.
8. See Article 57(3) that provides that Member States may provide for derogation from the mandatory exclusion for overriding reasons relating to the public interest such as public health or protection of the environment. The same provision authorizes Member States to make derogation where exclusion would be clearly disproportionate.
9. Except in duly justified cases such as those relating to the special risks attached to the works, services or supplies.
10. Small and Medium-sized Enterprises.

Nevertheless, the new Public Procurement Directive in many respects ensures a more flexible approach than under the current public procurement regime with regard to exclusion, qualification and selection. A range of examples will be outlined in the sub-section below.

2.1. Flexibilisation

Several of the examples below have previously caused academic discussion and have frequently been considered in public procurement case law in the Member States.

Contracting authorities are not free to negotiate with potential tenderers prior to the start of the procedure. The typical problem linked to dialogue *prior* to the start of the tender procedure relates to the so-called technical dialogue between the contracting authority and one or more of the tenderers. Technical dialogue can lead to a violation of the principle of equal treatment, and a tenderer that has been involved in technical dialogue may, or in some cases shall be, excluded as a consequence. The dialogue might have given these firms a clear advantage in the competition as they could have obtained additional information concerning the contract in question and an advantage in time compared to the competitors. The technical dialogue also implies an apparent risk of distortion of competition as the firm can seek to influence/affect the elaboration of the tender specification and arrangement of the tender procedures to its own advantage. The issue was not considered in the substantive provisions of the Public Sector Directive despite its practical relevance and fundamental importance. Instead the issue was considered in the Recitals to the Preamble to the Directive that is even misleading on two very important points.[11] The provisions in the new Public Procurement Directive now consider the implications of technical dialogue. Article 57 lists conflict of interest in the meaning of Article 24 on the list of reasons that can lead to exclusion of tenderers. Article 24 also covers the conflict of interest due to technical dialogue. The new Directive increases clearly flexibility in this regard as it follows from Articles 57 and 24 that exclusion of the tenderer should be a measure of last resort.[12]

One of the most relevant issues in practice is the reaction towards an applicant or tenderer that has not complied with the requirements for the documentation to be submitted in order for the contracting authority to exclude or

11. See S. Treumer, *supra* note 4, at 149.
12. See A. Sánchez-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), *supra* note 2, at 97.

select the potential tenderers. Article 51 in the Public Sector Directive briefly regulates the issue and supports a restrictive approach to such shortcomings. It appears to follow from this provision that it is not possible for a contracting authority to ask for subsequent submission of documentation in case this was originally not forwarded to the authority. The provision in Article 56(3) of the new Public Procurement Directive now ensures that contracting authorities can request the economic operators to submit documents that are missing provided that such requests are made in full compliance with the principles of equal treatment and transparency. It should be noted that the issue has recently been considered by the Court of Justice in C-336/12, *Manova*[13] and C-42/13, *Cartiera Dell'Adda SpA*[14] as will be commented upon further in section 3.1.

Separation of selection and award criteria, and in particular the possibility of considering experience and CVs in the award phase, is another highly relevant theme. It has been addressed in recent case law from the Court of Justice and is of relevance for the outcome of the competition for the contract. The case law of the Court of Justice could be interpreted as ruling out the use of award criteria relating to CVs and experience in the award phase.[15] The restrictive approach pursued by the Court of Justice has been criticized in legal literature.[16] Contracting authorities frequently consider consideration of experience and CVs of key personnel of crucial importance for the award of the contract. It is also notable that the approach of national courts and review boards prior to, and also *after*, the Lianakis ruling typically has been based on acceptance of the use of such criteria and evidence also in the award stage

13. C-336/12, *Ministeriet for Forskning, Innovation og Videregående Uddannelser v Manova A/S*, judgment of 10 October 2013 (not yet reported).
14. C-42/13, *Cartiera dell'Adda and Cartiera di Cologno*, judgment of 12 November 2014 (not yet reported).
15. See in particular C-532/06, *Lianakis and Others* [2008] ECR. I-251 and the Special Issue of the *Public Procurement Law Review* (2009), at 103-164 (edited by S. Treumer) with seven articles on the application and implications of the judgment in Lianakis on the separation of selection and award criteria. However, the recent ruling in C-601/13, Ambisig (not yet reported) clarified that the Court also accepts a flexible approach with regard to the Public Sector Directive.
16. See S. Treumer, "The Distinction between Selection and Award Criteria in EC Public Procurement Law: A Rule without Exception?" (2009) *Public Procurement Law Review*, at 103 and P. Lee, "Implications of the Lianakis decision" in G. Piga and S. Treumer (eds), *The Applied Law and Economics of Public Procurement* (Routledge: London, 2013), at 82. P. Lee was very blunt in his criticism and submitted that the Court of Justice in its recent case law on the issue "has made a fundamental mistake" and an error "that is causing great difficulty right across Member States".

under certain conditions.[17] The European Commission has traditionally not supported this flexible approach at national level and until recently insisted on a restrictive approach. It was therefore remarkable that the Commission's draft proposal for a new Procurement Directive[18] was based on a flexible approach, allowing contracting authorities to take into consideration "the organization, qualification and experience of the staff assigned to performing the contract in question" as award criteria under certain conditions.[19] Article 67(2)(b) of the new Procurement Directive establishes that the contracting authority in the award phase can consider the organization, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract.

Another issue of fundamental importance is so-called self-cleaning in order to avoid exclusion. This concept was supported in legal literature and in the practice of some Member States prior to the adoption of the new Public Procurement Directive.[20] The rationale behind this argument has been that an economic operator could regain the possibility of participating in competitions for public contracts by demonstrating that it has taken effective measures to ensure that wrongful acts will not occur in the future. The state of law on this issue has been uncertain but the European legislator has now explicitly stated that self-cleaning is indeed possible and specified the conditions. The relevant provision is Article 57(6) of the new Public Procurement Directive.[21]

Another example of increased flexibility[22] relates to the question of the timing of the decision of exclusion of the economic operator. It has essential-

17. S. Treumer, "The Distinction between Selection and Award Criteria in EC Public Procurement Law: A Rule without Exception?" (2009) *Public Procurement Law Review*, at 103.
18. Proposal for a Directive on public procurement COM (2011) 896 final.
19. See Article 66(2)(b) of the Draft.
20. See S. Arrowsmith, H.-J. Priess and P. Friton, "Self-cleaning as a Defence to Exclusions for Misconduct: An Emerging Concept in EC Public Procurement Law?", (2009) *Public Procurement Law Review*, at 257. See also section 2.1 of the chapter of M. Burgi and L. Wittschurky on Germany in the current publication. German courts introduced the possibility of self-cleaning before it was introduced into European procurement law. The courts based this on the principle of proportionality as well as the fundamental principles of the Treaties and namely the principle of competition.
21. See in further detail A. Sánchez Graells, *supra* note 12.
22. It can also be perceived that a consequence of this clarification is that mandatory exclusion grounds cannot be waived as an extension of the duty to exclude. Furthermore, contracting authorities should in principle make sure that the exclusion grounds are not present throughout the tender procedure.

ly been uncertain whether the contracting authority may or shall exclude the economic operators until the end of the tender procedure. Article 57(5) of the new Public Procurement Directive clarifies that the ground for exclusion may or shall be applied at any time during the tender procedure. The issue is considered in further detail in section 3.1 as this can be perceived as an "overruling" of the case law of the Court of Justice.

It will also be possible under the new Directive to examine tenders before verifying the absence of grounds for exclusion and the fulfilment of selection criteria. This follows from Article 56(2) of the new Public Procurement Directive. This will only be relevant with regard to open procedures as a reversal of the stages is not feasible in the other procedures. This is unlikely to be of importance in practice as the contracting authorities can reduce the cost and time linked to exclusion, qualification and selection using the European Single Procurement Document (hereafter ESPD) as outlined below.[23]

The ESPD was introduced in Article 59 of the new Public Procurement Directive in order to ease the documentary requirements. Under the new system the economic operators will be able to submit this updated self-declaration as preliminary evidence that exclusion grounds do not affect them, that they meet the selection and short-listing criteria, and that they will be able to produce hard documentary evidence of such circumstances without delay, upon request of the contracting authority. The contracting authority can request submission of such documentation at any point of the procedure and shall eventually require this prior to the awarding of the contract unless it already possesses these documents or can obtain them by accessing a national database. Economic operators shall not be required to submit documentary evidence where the contracting authority can obtain the relevant information by accessing a national database in any Member State that is available free of charge. The economic operators may reuse the ESPD provided that they can confirm that the information contained continues to be correct.

The consequences of failure to provide the required documentation in support of the self-declarations are of particular interest because the approach chosen by the European legislator appears far too lenient.[24] It follows from Article 57(4)(h) that failure to provide the documentation only is a discretion-

23. See also A. Sánchez-Graells, *supra* note 12, at 100.
24. See also A. Sánchez-Graells, *supra* note 12, at 121.

ary ground for exclusion.[25] It would have been preferable that the consequence instead had been mandatory exclusion.[26]

2.2. Important Shortcomings of the New Public Procurement Directive

In the adoption of the new Public Procurement Directive the European legislator has frequently confused substantive provisions and Recitals in the Preamble of the Directive. Furthermore, it appears frequently to have used the legal technique "constructive ambiguity" in order to strike compromises.[27] Finally, it has avoided regulation of some substantial issues. These issues will be considered in sections 2.2.1 and 2.2.2 below.

2.2.1. Confusion of substantive provisions and Recitals

The European Legislator has frequently inserted statements in the Recitals that ought to have been a part of the substantive provisions because they contain obligations, concepts or very clear-cut elements of relevance for the interpretation of substantive provisions in the new Public Procurement Directive. So, in other words, several considerations in the Recitals are provisions in disguise.

The manifest tendency to implicit regulation through the Recitals has allegedly been promoted by certain stakeholders in the legislative process. This approach seemed to have been considered as a tool that ensured that the substantive provisions did not become too long and thereby that the legislator lived up to the promised simplification. This is definitely a misunderstanding. It only makes the new Public Procurement Directive more difficult to apply and makes the state of law even more blurred. For instance, how are you supposed to handle obligations or other substantial elements contained in the Recitals? According the case law of the Court of Justice a Recital may cast light on the interpretation to be given to a legal rule but it cannot, in itself, constitute a legal rule, cf. Case C-215/88, *Casa Fleischhandels-Gmbh.*[28] The con-

25. It was an impediment to award under Article 68 of the proposal for a new Directive from the European Commission.
26. See also A. Sánchez-Graells, *supra* note 12, at 121 that states that "it is hard to understand why contracting authorities would be free to award the contract to an economic operator that cannot support its own self-declarations and how this would not infringe the principles of transparency, equal treatment and non-distortion of competition".
27. See in further detail in S. Treumer, "Evolution of the EU Public Procurement Regime: The New Public Procurement Directive" in F. Lichère, R. Caranta and S. Treumer (eds), *supra* note 12, at 9.
28. C-215/88, *Casa Fleischhandels-Gmbh v Bundesanstalt* [1989] ECR. I-2789. See para 31. The concrete case concerned a Regulation and not a Directive.

troversial approach of the European legislator will equally pose problems for the Member States in the transposition of the new Public Procurement Directive and for courts and complaints boards in the years to come.

A likely example of this phenomenon relates to exclusion where the economic operator is in breach of its obligations related to the payment of taxes or social security contributions. Mandatory exclusion is the rule in this situation according to Article 57(2). However, Article 57(3) allows – instead of *requiring* – the Member States to provide for derogation from the mandatory exclusion, where exclusion would be clearly disproportionate, in particular where only minor amounts of taxes or social security contributions are unpaid.[29] Nevertheless, it follows from Recital 101 that "minor irregularities should only in exceptional circumstances lead to the exclusion of an economic operator". Furthermore, it is stated in the same Recital that in applying facultative grounds for exclusion, contracting authorities should pay particular attention to the principle of proportionality.

It had been relevant that the substantive provisions of the new Public Procurement Directive had clarified that exclusion for breach of tax or social security contributions could not take place where this would be clearly disproportionate. Instead the question is left for the Member States to regulate, and they will no doubt have their difficulties in this respect. The Danish implementation of the new Directive on this point illustrates this.[30] This legislation operates with a threshold value (about 13.333 Euro/100.000 DKK) and if the debt is above this amount, exclusion is mandatory. However, at the same time the Danish legislation still allows contracting authorities to exclude when you are below the threshold. Where does this leave consideration of the principle of proportionality? It ultimately leaves it to future case law. Exclusion for breach of tax or social security contributions and the principle of proportionality was recently considered by the Court of Justice as considered in the end of section 3.1 below.

29. Or where the economic operator was informed of the exact amount due following its breach of its obligations relating to the payment of taxes or social security contributions at such time that it did not have the possibility of taking measures before expiration of the deadline for requesting participation or, in open procedures, the deadline for submitting its tender.
30. Udbudsloven, Act no. 1564 of 15 December 2015. See S. Treumer (ed.), *Udbudsloven* (Ex Tuto Publishing: Copenhagen, 2016) for detailed analysis of the main elements of the new Act.

2.2.2. "Constructive ambiguity" and lack of regulation of substantial issues

In a number of instances legislation is adopted with an intended lack of clarity. The phenomenon is frequently referred to as "*constructive ambiguity*" and appears to be applied rather frequently in negotiations leading to EU legislation.[31] The background for this phenomenon is that stakeholders in the legislative process have disagreed about the regulation of the issue in question. Nevertheless, they did agree to regulate the issue and settled on an unclear provision/regulation in order to strike a compromise. The French Supreme Court – *Conseil d'Etat* – has phrased this elegantly with a remark along the following lines: Where the lawyers seek precision, diplomats practice the not-spoken and do not avoid ambiguity.[32]

The use of constructive ambiguity ensures that the issue is regulated despite disagreement, and the unclear legal sources can often lead to different interpretations. The latter is crucial as the legal source can therefore legitimize the upholding of a questionable national practice or regulation of the issue. It can also be interpreted as an implicit acceptance hereof from the European legislator. Furthermore, the outcome can also be presented as a diplomatic victory, even though the reality is that the issue remains unsettled.

In some instances the unclear wording will be part of a substantive provision. A variant that is also frequently seen is that the legislator deliberately avoids regulating the issue in the substantive provisions of the Directive, or it includes considerations in the Recitals that are very difficult to combine with the regulation in the substantive provisions of the Directive. It is possible to identify a broad range of issues where the European legislator in the adoption of the new Public Procurement Directive has presumably settled disagreement by application of constructive ambiguity.[33]

Related to the above is the lack of regulation of substantial issues that could have been expected for the European legislator to address because of their obvious importance. When that is the case, the consequence often is that the case law, or regulation at national level, point in opposite directions and

31. See S. Treumer, "Konstruktiv uklarhed – om tilsigtet uklar EU-lovgivning og dens negative konskvenser" in Jens Hartig Danielsen (ed.), *Max Sørensen 100 år* (Jurist- og Økonomforbundets Forlag: Copenhagen, 2013), at 347.
32. See Conseil d'Etat, Rapport Public 1992, Etudes no. 44 where it is stated "Là òu les jurists cherchent la precision, les diplomats pratiquent le non-dit et ne fuient pas l'ambiguité". See also N. Fenger, *Forvaltning & Fællesskab – Om EU-rettens betydning for den almindelige forvaltningsret: Konfrontation og frugtbar sameksistens* (Jurist- og Økonomforbundets Forlag: Copenhagen, 2004), at 439 that quotes the report from CE.
33. See the examples in section 5.2 of S. Treumer, *supra* note 27.

that there is substantial legal uncertainty with regard to the boundaries of EU procurement law. There are some examples of this, even though the trend in the new Procurement Directive towards intensified regulation and increased harmonisation of exclusion, selection and qualification is quite extensive.

The issue of consortia changes *prior* to the award or conclusion of the contract is an excellent illustration of this phenomenon.[34] The issue is not considered in the Public Sector Directive or in the new Procurement Directive despite its practical relevance. However, it is addressed in the public procurement regulation in several of the Member States.[35] It is clear from the Public Procurement Directive that tenders may be submitted by a group of contractors[36] and this possibility is frequently applied in practice. There will often be a need for changes in the composition of a group of contractors in a number of instances, for example due to a contractor's financial problems, problems with co-operation, or because a member of the consortia prefers to be engaged in other projects. If the identity of the group of contractors changes, it is necessary to consider whether the tenderer in question may or shall be excluded from further participation in the procedure. The question was first considered in C-57/01, *Makedoniko Metro*[37] where a contracting authority had allowed changes in a consortium until the deadline for submission of tenders. The Court held that the Directive in question, the Works Directive (now the Public Sector Directive), did not preclude national rules that prohibit a change in the composition of a group of contractors. The concept "national rules" must be interpreted as a reference to national legislation or a specific decision by the contracting authority; cf. also the argumentation of the European Commission before the Court. The Court did not directly consider the question that has greater practical relevance: whether a contracting authority or the national legislator can *permit* such changes. Changes can be problematic as they could breach the fundamental principles of equal treatment and of transparency.[38]

34. On consortia changes *after* the conclusion of the contract see section 2.2 of S. Treumer "Regulation of Contract Changes in the New Public Procurement Directive" in F. Lichère, R. Caranta and S. Treumer (eds), *supra* note 2.
35. See the chapters on the selected Member States in the current publication.
36. See Article 19(2) of the new Public Procurement Directive.
37. C-57/01, *Makedoniko Metro and Michaniki AE v Elliniko Dimosio* [2003] ECR. I-1091.
38. See section 2.3 of S. Treumer, "The Discretionary Powers of Contracting Entities – Towards a Flexible Approach in the Recent Case Law of the Court of Justice?" (2006) *Public Procurement Law Review*, at 71.

The Court of Justice subsequently rendered a landmark judgment in the Pressetext-case from 2008 on the consequences of changes *after* the conclusion of the contract.[39] In this case the Court stipulated that "as a rule, the substitution of a new contractual partner for the one to which the contracting authority had initially awarded the contract must be regarded as constituting a change to one of the essential terms of the public contract in question".[40] It could be argued that the Pressetext ruling should be perceived as an implicit overruling of the Makedoniko Metro case. However, the ruling in Pressetext concerned changes after the conclusion of the contract and therefore a different situation.

Recently the Court of Justice had the opportunity to rule on the issue again in the case C-396/14, *MT Højgaard and Züblin*.[41] The case was a preliminary ruling from the Danish Complaints Board for Public Procurement. As the undersigned took part in the reference to the Court, and will take part in ruling on the case in prolongation of judgment of the Court, you will not find any attempts of predicting the final outcome of this case. The case concerns a tender covered by the Utilities Directive where the contracting authority had applied the negotiated procedures. Two companies took part in a consortium and one of them went bankrupt the day before submission of the first round of tenders. The contracting authority subsequently allowed the other company to continue on its own and this company finally won the competition for the contract. Five companies had applied for qualification and all five were qualified. The relevant Danish public procurement regulation did not address the issue and the contracting authority had also not considered the issue in its tender conditions. The facts thereby differ substantially from the situation in Makedoniko Metro as in the Danish case there were no national rules and the change was permitted. It also differs from the ruling in the Pressetext-case that concerned changes after the conclusion of the contract. Two members of the Complaints Board considered in a ruling on interim measures that it was a violation of the public procurement rules to allow the remaining company to stay in the competition in a ruling on interim measures in the case.[42] Howev-

39. See C-454/06, *Pressetext Nachrichtenagentur GmbH v Republik Österreich (Bund) APA-OTS Originaltext-Service GmbH and APA Austria Presse Agentur registierte Genossenschaft mit beschränkter Haftung* [2008] ECR. I-4401.
40. See para 40 of the judgment.
41. Judgment of 24 May 2016 (not yet reported).
42. See Ruling of 28 January 2014, *MT Højgaard A/S og Züblin A/S v. Banedanmark*. The case will eventually be decided by four members of the Danish Complaints Board.

er, the European Commission considered that the contracting authority did not breach the public procurement regime. The Court of Justice essentially adopted a flexible approach. It outlined that a contracting authority is not in breach of the principle of equal treatment where it permits one of two economic operators, who formed part of a group of undertakings that had, as such, been invited to submit tenders by that contracting authority, to take the place of that group following the group's dissolution, and to take part, in its own name, in the negotiated procedure. It added that this presupposes that the economic operator by itself meets the requirements laid down by the contracting authority and that its participation does not mean that the other tenderers are placed at a competitive advantage. Furthermore the Court stated that it was for the referring court to consider whether the economic operator should have been excluded because of the irregularity when the group's first tender was lodged without the signature of the liquidator of the bankrupt company. The Complaints Board will now decide the case in light of the ruling of the Court of Justice.

As mentioned in section 2.1, one of the most relevant issues in practice is the reaction towards an applicant or tenderer that has not complied with the requirements for the documentation to be submitted in order for the contracting authority to exclude or select the potential tenderers. Article 56(3) of the new Public Procurement Directive now ensures that contracting authorities can request the economic operators to submit documents that are missing, provided that such requests are made in full compliance with the principles of equal treatment and transparency. However, the equally interesting question of when a contracting authority *shall* ask for clarification, if at all, was not touched upon by the European legislator. This will surely lead to several cases at national level and eventually a preliminary ruling on the issue. The Court of Justice considered the related issue with regard to clarification of tenders in the Slovensko case[43] where the Court held that a contracting authority is not obliged to ask for clarification.

The ruling in the Slovensko case should be read with reservation. As a rule a contracting authority does not have a duty to clarify a tender. However, it is submitted that in exceptional cases there will be such a duty. This would be the case where it is obvious that there is a need of clarification of price, equally obvious what the correct information should be, and it would not be disproportionate to ask for clarification. It can be added that the case law of the

43. See Case C-599/10, *SAG ELV Slovensko*, judgment of 29 March 2012 (not yet reported).

Court of First Instance (now the General Court) is in accordance with this point of view.[44]

The shortlisting of qualified firms is another example of a topic that is a grey area, even though it has been heavily debated.[45] It is relevant to make a distinction between qualification and so-called shortlisting.[46] The distinction is *not* made in express terms in the Public Procurement Directives, but there are two types of selection of economic operators to be invited to tender and also a specific legal basis for shortlisting in the Public Sector Directive and the new Public Procurement Directive.[47] The issue is of relevance for restricted procedures, competitive procedures with negotiation, competitive dialogue procedures and innovation partnerships. However, it is not relevant for the open procedures, as the tenders from the qualified, and those not excluded, have to be considered.

Qualification consists of selection of the qualified among the applying economic operators and is a pass/fail test. The aim is to cut off unqualified firms from further participation in the award procedures. On the other hand shortlisting consists of a selection between qualified firms and is therefore not based on a pass/fail test. The contracting authority might consider it appro-

44. See in particular T-19/95, *Adia Interim* [1996] ECR. II-321 and T-195/08, Antwerpse Bouwwerken NV [2009] ECR. II-4439.
45. The lack of clarity on this point has been criticized prior to the latest reform of the EU public procurement regime. See for instance P. Trepte, *Public Procurement in the EU. A Practitioners Guide*, 2. Ed. (Oxford University Press, 2007), at 381, where it is stated that "Critically, there was and continues to be no indication in the Directives as to how such a selection [shortlisting] will be made and there has been much debate about how an objective selection can be made at all. The lack of clarity is also mentioned by Peter Braun, "Selection of Bidders and Contract Award Criteria: The Compatibility of Practice in PFI Procurement with European Law" (2001) *Public Procurement Law Review*, at 1 (at p.3 in fn. 16).
46. See S. Treumer, "The Selection of Qualified Firms to be Invited to Tender under the E.C. Procurement Directives" (1998) *Public Procurement Law Review*, at 147. S. Arrowsmith originally also used this terminology in her scholarship but avoided it in her second edition of The Law of Public and Utilities Procurement since it is sometimes used in practice to refer to the process for reducing participants in the negotiated procedures through a first tendering or proposal stage, cf. S. Arrowsmith, *The Law of Public and Utilities Procurement* 2nd ed. (Sweet & Maxwell, 2005), at 468. The term shortlisting has also used by other authors. See for instance Peter Braun, "Selection of Bidders and Contract Award Criteria: The Compatibility of Practice in PFI Procurement with European Law" (2001) *Public Procurement Law Review*, at 1 (at p.3) and A. Sánchez-Graells, *supra* note 12, at 100.
47. See Article 44(3) of the Public Sector Directive and Article 65 of the new Public Procurement Directive.

priate to limit the number of firms participating in the final phase for various reasons, and it is clear from the Public Procurement Directives that the contracting authority can set a margin for the minimum and maximum number of firms it wishes to invite to bid.

However, it is remarkable that the Public Procurement Directives are not clear as to which criteria and methods may be applied in the process of shortlisting *qualified* firms despite the importance of this part of the procedure. Law and practice in the Member States therefore varies to a considerable degree.[48] Article 65 of the new Public Procurement Directive only states that the contracting authorities shall indicate, in the contract notice or in the invitation to confirm interest, the objective and non-discriminatory criteria or rules they intend to apply, the minimum number of candidates they intend to invite, and, where appropriate, the maximum number.[49] A selection among qualified firms could lead to the exclusion of one or several of the most competitive firms likely to submit the best bid. The purpose of shortlisting must be to find the potentially best bidders with as high certainty as possible, and this selection differs in nature from the qualification phase aiming at the exclusion of unqualified firms. The aim of the shortlisting process resembles the aim of the award of the contracts where the contracting authority must place the contract.

One interpretation is to consider that the criteria for qualification and shortlisting should be overlapping – in whole or in part – and that the contracting authority should consider the *relative* financial and technical status of the applicants when shortlisting.[50] An old ruling from the Court of Justice in

48. See A. Sánchez-Graells, L.R.A. Butler and P. Telles, "Exclusion and Qualitative Selection of Economic Operators under Procurement Procedures: A Comperative View on Selected Jurisdictions" in this publication.
49. See also Article 44(3) of the Public Sector Directive.
50. This has for instance been the interpretation of S. Arrowsmith contrary to the point of view of this author. See on the differences in perception in S. Arrowsmith and S. Treumer, "Competitive dialogue in EU law: a critical review" in S. Arrowsmith and S. Treumer (eds), *Competitive Dialogue in EU Procurement* (Cambridge University Press: Cambridge, 2012), at 68. The above-mentioned book is based on the state of law under the Public Sector Directive, but as the issue has been left untouched in the new Public Procurement Directive the points of view are presumably intact. See also M. Burgi, "Competitive dialogue in Germany" (section 5.5) in Arrowsmith and S. Treumer (eds), *Competitive Dialogue in EU Procurement* (Cambridge University Press: Cambridge, 2012), at 306 on the division of views among German scholars. Albert Sánchez-Graells, *Public Procurement and the EU Competition Rules*, 2nd. Ed (Hart Publishing: Oxford, 2015), at 313, argues that the contracting authorities can have recourse to additional and/or different criteria.

the case C-362/90, *Commission v. Italy* can be invoked in support of this point of view.[51]

Nevertheless, the provisions of the Public Sector Directive and the New Public Procurement Directive on shortlisting clearly open up an alternative interpretation based on acceptance of a difference between the criteria and methods for qualification and shortlisting as they refer to "objective and non-discriminatory criteria or rules". Furthermore, it is obvious that the relative method is likely to have significant negative consequences as it would obviously tend to favour larger companies and thereby work against the interests of the SME's that the European legislator is otherwise keen to assist.[52] Another method might therefore be "an overall estimation of which firms would create the optimum competition" as accepted in Danish practice for about twenty years after a ruling from the Danish Complaints Board for Public Procurement on the issue.[53] However, an important disadvantage of the application of the method of the overall assessment of the potentially best bidders is that it becomes easier for the contracting authority to discriminate between the applicants, and the shortlisting process becomes less transparent. If, through shortlisting, the contracting authority wishes to exclude a firm who poses a serious threat to a less competitive but favoured local firm, it can hardly be done with reference to the fact that this competitor is not qualified or not among the most qualified applicants. Instead the unwanted competitor can be excluded from the competition with ease if the contracting authority categorizes the competitor as qualified but not among the potentially best bidders according to the estimation of which firms are likely to create optimum competition. In practice it will be extremely difficult to establish that the contracting authority has discriminated, and should this happen then the competitor will normally lack an incentive for claiming damages. Nevertheless, it is submitted that this method should still be permitted,[54] since the pur-

51. C-362/90, *Commission of the European Communities v Italian Republic* [1992] ECR. I-2353. See for instance P. Trepte, *supra* note 45, at 381. The implications of the case is also considered in S. Treumer, *supra* note 46.
52. See S. Treumer, *supra* note 46, at 151 and P. Trepte, *supra* note 45, at 382.
53. See ruling of 9 October 1996, *Elinstallatørernes Landsforening v. Københavns Lufthavne A/S* analyzed in S. Treumer, *supra* note 46.
54. Compare with S. Arrowsmith, *The Law of Public and Utilities Procurement*, Vol. 1, 3. Ed. (Sweet & Maxwell: London, 2014), at 690-691, that maintains that this is not permitted but criticizes the narrowness of the criteria and emphasizes that the rules prevent entities from optimizing competition and obtaining the best value for money. Arrowsmith also emphasizes that that a narrow interpretation may also tend, in practice, to favour larger firms, contrary to EU's own policy of promoting SMEs.

pose of the shortlisting process is to find the firms who are likely to be the most competitive in carrying out the contracts, and because the main alternative, the relative use of qualification criteria, also has clear disadvantages. As mentioned above, the relative use of the ordinary selection criteria can very easily conflict with the policy of encouraging the participation of SMEs in public contracts by favouring large firms. A high number of technicians in a large firm do not necessarily imply a high level of productivity or specialization in a given product, but the relative use of the qualification criteria will tend to place the SMEs in a less competitive position.[55]

It can be added that it is debatable whether random selection can be applied as a method for shortlisting.[56] Random selection poses a problem with regard to the principle of transparency and equal treatment of tenderers. Random selection makes the procedure non-transparent, and the firms that are not selected will have great difficulties in any legal challenge to the selection. Random selection can also be seen as a method which does not ensure equal treatment, as the method does not ensure that the most qualified firms, or the firms likely to submit the best offers, are selected to bid. It is therefore submitted that it is normally not in accordance with the EU public procurement regime to replace the estimation with a method where the outcome is purely arbitrary. As a general rule the contracting authority will lack an objective justification for applying random selection but it can be relevant if an excessive number of firms have been invited to bid.[57] In such a case, a formalistic approach insisting that the usual methods be applied would seem out of place, since the benefits would be out of proportion with the efforts and costs involved.

55. For a similar line of reasoning see D. Triantafyllou and D. Mardas, "Criteria for Qualitative Selection in Public Procurement: A Legal and Economic Analysis" (1995) *Public Procurement Law Review*, at 145, 154.
56. See S. Treumer, *supra* note 46 and S. Arrowsmith, *supra* note 54, at 689 where she states that it is likely that methods not based on a positive "selection" process, such as drawing lots or rotation are prohibited. However, she submits at 691 that random and rotation methods should be permitted if subject to adequate monitoring and verification.
57. Compare with S.T. Poulsen, P.S. Jakobsen and S.E. Kalsmose-Hjelmborg, *EU Public Procurement Law*, 2nd ed. (DJØF Publishing: Copenhagen, 2012), at 469, where it is stated that drawing a lot presumably can be used as a second method for deciding the selection, if it is impossible to make a qualitative ranking.

3. Case Law of the Court of Justice

An introduction on the subject of this book would not be complete without an account of the case law of the Court of Justice. This is a consequence of the role of the Court in European integration as an important lawmaker whose activity supplements the ordinary legislative process.[58]

Until the late 1990s, the Court of Justice had only addressed relatively few cases in the field of public procurement. The cases mainly dealt with issues that were relatively simple such as late or incorrect implementation, illegal use of the negotiated and accelerated procedures and the definition of a contracting authority covered by the public procurement rules. However, this changed and the number of procurement cases have increased considerably, and several of the cases have clarified fundamental aspects of EU public procurement law. Thus, the case law of the Court of Justice has been the inspiration of some of the most fundamental and important novelties in the new Public Procurement Directive including exclusion, selection and qualification.

An important element in the tender procedure is the exclusion of applicants or tenderers. It follows from the Public Procurement Directives that the economic operators may or must be excluded from the tender procedures according to a list of reasons outlined in the Public Procurement Directives that relate to their professional qualities. The list must be read as exhaustively listing the grounds capable of justifying the exclusion based on professional qualities. However, it does not exclude the Member States from maintaining or adopting rules designed, in particular to ensure the observance of the principles of equal treatment and transparency, cf. C-213/07, *Michaniki*.[59] Therefore in principle it is very important to be aware that the Member States can extend and repeatedly have extended the reasons for exclusion. The reader should be aware that some textbooks and even also case law from the Court of Justice could be misleading on this point.[60] It is equally important to be

58. Cf. S. Treumer, "Recent Trends in the Case Law from the European Court of Justice" in R. Nielsen and S. Treumer (eds), *The New EU Pubic Procurement Directives* (DJØF Publishing: Copenhagen, 2005), at 17.
59. C-213/07, *Michaniki AE v Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias* [2008] ECR. I-9999.
60. See for instance Joined Cases C-226/04 and 228/04, *Cascina and Zilch* [2006] ECR. I-1347, in which it was stated that Article 29 of the Services Directive "lays down the only limits to the power of the Member States in the sense that they cannot provide for grounds of exclusion other than those mentioned therein". Article 29 was replaced by Article 45 of the Public Sector Directive.

aware that the Member States enjoy a *very* wide discretion when developing supplementary reasons for exclusion in the national legal order.[61] However, the Court of Justice has often held that these national rules of exclusion presuppose an individual assessment and that the economic operators in question should be given the opportunity to prove their participation unproblematic.[62]

3.1. Relationship between the new Public Procurement Directive and the case law of the Court of Justice

The new Public Procurement Directive codifies various elements of the case law. However, there are also elements "overruling" the case law of the Court of Justice and the Court has already developed the state of law even further than what follows from the new Directive.

The new provision on award criteria in Article 67(2)(b) that allows consideration of organization, qualification and experience of staff assigned to performing the contract – where the quality of the staff assigned can have a significant impact on the level of performance of the contract – is in reality an interesting "overruling" of the case law of the Court of Justice.[63] The new provision is better aligned with the general trend in the case law from national courts and review boards[64] and the need of consideration of these issues in many procedures, in particular concerning services contracts and public works.

Another interesting example of "overruling" of the case law relates to the fundamental uncertainty with regard to the possibility or duty to exclude economic operators at any moment during the procedure.[65] The ruling on exclu-

61. The rulings in C-213/07, *Michaniki* and in C-57/01, *Makedoniko Metro* mentioned earlier are good examples of this. See also section 2 of S. Treumer, *supra* note 38.
62. See for example Joined Cases C-21/03 &34/03, *Fabricom*.
63. See further on the issue section 3.1 above. See also R. Caranta, "Award criteria under EU law (old and new)" in M. Comba and S. Treumer (eds), *Award of Contracts in EU Procurements* (DJØF Publishing: Copenhagen, 2013), at 21, 37 where Caranta points out that "A long line of cases stretching from Beentjes to Lianakis has thus been shelved for good". Cf. P. Bordalo Faustino, "Award Criteria in the New EU Directive on Public Procurement" (2014) *Public Procurement Law Review*, at 124 that at p. 129 writes that it is now undoubtedly a part of the permissible award criteria.
64. See in particular C-532/06, *Lianakis and Others* [2008] ECR. I-251 and the Special Issue of the Public Procurement Law Review from 2009, at 103-164 (edited by S. Treumer) with seven articles on the application and implications of the judgment in Lianakis on the separation of selection and award criteria. See also the chapters on the approach of the Member States in the current publication.
65. See A. Sánchez-Graells, *supra* note 12, at 100.

sion based on prior technical dialogue in the Fabricom case[66] had contributed to this uncertainty. The Court had considered whether the Remedies Directives preclude a contracting authority from excluding "until the end of the procedure for the examination of tenders". The Court ruled that a delay of exclusion could deprive the undertaking in question of the opportunity to rely on public procurement rules and could give rise to an unjustified postponement until a time when the infringement can no longer be rectified. The Court concluded that the Remedies Directive preclude a contracting authority from being able to exclude an undertaking involved in technical dialogue "up to the end of the procedure for the examination of tenders".[67] However, it now follows from Article 57(5) of the new Public Procurement Directive that mandatory[68] exclusion grounds cannot be waived, and therefore contracting authorities should be aware of them and check for compliance throughout the tender procedure. It follows from the same provision that the discretionary grounds for exclusion can be applied at any time during the procedure. It is thus clear that in the future contracting authorities can exclude tenderers at late stages of the tender procedure.

The case law of the Court of Justice is very dynamic so it is possible to find recent examples where the case law of the Court has already developed the state of law further than outlined in the new Public Procurement Directive. This is the case with regard to the reaction towards an applicant or tenderer that has not complied with the requirements for the documentation to be submitted in order for the contracting authority to exclude or select the potential tenderers. Article 56(3) allows subsequent submission of documentation in case this was originally not forwarded to the authority, provided that such requests are made in full compliance with the principles of equal treatment and transparency. It follows from the ruling in C-336/12, *Manova*[69] that this entails the request relates to particulars or information, such as a published balance sheet, which can be shown objectively to pre-date the deadline for applying to take part in the tendering procedure concerned. In addition, the Court of Justice specified that this be ruled out if the contract documents required provision of the missing particulars or information, on pain of exclu-

66. Joined Cases C-21/03 and 34/03, *Fabricom*. See S.Treumer, "Technical Dialogue and the Principle of Equal Treatment-Dealing with Conflicts of Interests after *Fabricom*" (2007) *Public Procurement Law Review*, at 99.
67. This part of the ruling was analyzed and criticized in section 4 p. 105 of S.Treumer, *supra* note 65, at 99.
68. Mandatory due to EU law or national regulation.
69. *Supra* note 13.

sion. The background for this is that it falls to the contracting authority to comply strictly with the criteria that it has itself laid down. The Court clearly indicated in its ruling that it considered the contracting authority in its tender conditions had cut off the possibility of allowing subsequent submission[70] even though, strictly speaking, this assessment is the competence of the national court. Facing this assessment of the Court of Justice the plaintiff gave up and accepted that subsequent submission had not been possible in the national court proceedings.

The issue of subsequent submission of documentation also arose in the recent case C-42/13, *Cartiera Dell'Adda SpA*[71] where the contracting authority had excluded a tenderer on the grounds that a statement relating to the person designated as technical director was not submitted with the bid. The tender conditions set out a series of grounds on which a tenderer may be excluded from participation in the procurement procedure. Those grounds included the fact that one of the documents and/or one of the sworn statements was incomplete or irregular, except where any irregularity was of a purely formal nature and may be remedied, provided it was not decisive for the assessment of the tender. The Court held that exclusion was not precluded in particular, in so far as the contracting authority took the view that the omission was not a purely formal irregularity, and furthermore that subsequent submission could not be allowed in order to remedy the omission.

The relationship between the grounds of exclusion and the principle of proportionality is complex and, to some extent, the uncertain state of law (as outlined above in section 2.2.1. Article 57(3)) allows – instead of requiring – the Member States to provide for derogation from the mandatory exclusion, for instance where the economic operator is in breach of its obligations related to the payment of taxes or social security contributions. The European legislator has thereby abstained from clarifying that exclusion can be ruled out where it is disproportionate. The Court of Justice recently had the chance to remedy this shortcoming in the case C-358/12, *Consorzio Stabile Libor Lavori Pubblici*[72] that had to be decided under the current public procurement regime. The case concerned a tender procedure below the thresholds therefore falling outside the scope of the Public Sector Directive and exclusion on the basis of one of the grounds categorized as discretionary in Article 45(2) of the Directive. However, the Italian legislation had converted this

70. See para 40 of the judgment and compare with the wording of the tender conditions on the issue outlined in para 13 of the judgment.
71. *Supra* note 14.
72. Judgment of 10 July 2014 (not yet reported).

into a mandatory ground obliging contracting authorities to exclude where the economic operator had committed a "serious" breach of its social security obligations. A serious breach was defined in the Italian legislation and led to the obligatory exclusion in this case where the contract value was about €5 million and the debt in question only €278. For obvious reasons the firm that had been excluded on this basis questioned whether the legislation and exclusion was in conformity with the EU principle of proportionality. The Court of Justice – in the form of a Chamber consisting of three judges – considered that the Italian legislation could not be regarded as going beyond what is necessary. The Court emphasized that Article 45(2)(e) of the Public Sector Directive allows Member States to exclude any economic operator that has failed to fulfill its obligations relating to the payment of social security contributions without establishing any minimum amount. The logic being that the Italian legislation had tempered the ground for exclusion by establishing certain minimum limits and that this was all the more true with regard to contracts that fall below the threshold of the Public Sector Directive.[73]

The judgment is based on an extremely lenient interpretation of the principle of proportionality.[74] It is questionable whether the judgment is correct, even though the Court of Justice, as a matter of principle, is always right. As stressed by another author[75] the reasoning of the Court of Justice could justify that national law stipulate that a bidder must or may be excluded if it has been late in paying just one euro of its outstanding social security contributions. It is to be hoped that the approach in this case is not to be shared by national legislators when they implement the new Public Procurement Directive, and that national courts or complaints boards will question the approach, i.e. in the form of a preliminary ruling. The case can also be criti-

73. It appears that there had to be a difference between the sums owned in respect of social security contributions and those paid which exceeds €100 and is greater than 5 percent of the sums owed, cf. para 34 of the judgment.
74. Compare with Albert Sánchez-Graells, *supra* note 50, at 286 in fn. 26 where it is emphasized that the principle of proportionality imposes a very limited control on the design and application of this ground for exclusion and that the Italian rules were imposing very harsh treatment against minor delays in the payment of social security contributions.
75. See A. Brown, "Is a National Law Requiring the Exclusion of Bidders for Non-Payment of Social Security Contributions Exceeding €100 Compatible with the EU Treaty and the Principle of Proportionality? Case C-358/12 Consorzio Stabile Libor Lavori Pubblici v Comune di Milano" (2014) *Public Procurement Law Review* NA 165 (NA 168).

cized with regard to the acceptance of the conversion of a discretionary ground for exclusion into an absolute or automatic requirement for exclusion as even the mandatory grounds for exclusion remain subject to the overriding EU principle of proportionality.[76] It should be noted that in cases on ground of exclusion based on the principles of equal treatment and transparency the Court of Justice has consistently insisted that automatic exclusion rules are contrary to EU public procurement law and go beyond what is necessary.

4. Conclusions

The law on exclusion, qualification and selection has crucial importance in practice as these steps in the tender procedures normally lead to a limitation of the number of competitors and often have been considered procurement cases both at national and European level. The latter tendency will presumably be enforced after the new Public Procurement Directive has been implemented in the Member States.

The background for this is in particular that the grounds for exclusion are extended and require that the contracting authorities use their discretionary powers with utmost care. The European legislator has also abstained from addressing a series of important issues with regard to exclusion, qualification and selection. Several of these issues relate to the implications of the principle of proportionality with regard to exclusion, and a recent ruling from the Court of Justice has increased legal uncertainty in this area.

The approach in the case law from the Member States has been a driver for a couple of important developments in the new Public Procurement Directive. This has been the case for the introduction of the new concept of self-cleaning, which, for example, was introduced by German courts and for the acceptance in principle of consideration of experience and CVs of key personal in the award stage. Article 67(2)(b) of the new Procurement Directive establishes that the contracting authority in the award phase can consider the organization, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract. It is likely that

76. See A. Brown, *supra* note 73 (NA 169) with reference to S. Arrowsmith, H.-J. Priess and P. Friton, "Self-cleaning as a Defence to Exclusions for Misconduct: An Emerging Concept in EC Public Procurement Law?" (2009) *Public Procurement Law Review*, at 257.

with regard to exclusion, qualification and selection after the implementation the approaches at national level will once again inspire new adjustments of the law in this area and probably, to a greater extent, because of the increased importance of the rules in this area. Debarment – which is a standard procurement practice in Germany – is a likely candidate for such a spill-over effect.[77]

77. See section 6 on debarment in the chapter of M. Burgi and L. Wittschurky on Germany and section 3.3 of A. Sánchez-Graells, L.R.A. Butler and P. Telles, "Exclusion and Qualitative Selection of Economic Operators under Procurement Procedures: A Comperative View on Selected Jurisdictions" in the current publication.

Qualification, Selection and Exclusion of Economic Operators under French Public Procurement Law

François Lichère[1]

1. Introduction

Under French law, qualification, selection (including short-listing) and exclusion of economic operators for the purposes of public procurement procedures are regulated in three sets of texts: the Code des marches publics, the ordinance of 17 June 2004 on public private partnerships contracts ("contrats de partenariat) and the ordinance of 6 June 2005. The latter was adopted in replacement of the law of 3 January 1991, which had implemented the European directives for contracting authorities and contracting entities not subject to the code des marches publics. In other words, the scope of EU public procurement being wider than the scope of the traditional public procurement code created in 1964 for most of the public body in the French meaning,[2] the parliament decided to adopt a separate text.

The official reason of this distinct text lies in some differences that existed between the two sets of rules enshrined in the code and in the ordinance of 6 June 2015, the ordinance strictly transposing the directives when the Code des marches publics goes further; for instance, there is a duty to divide the public procurement contracts into lots since 2006. The underlying reason may

1. Professor of law, University of Aix Marseille, GREDIAUC EA 3786
2. State, local authorities and most of the public establishments ("Etablissements publics") such as universities or hospitals but not the "Etablissements publics industriels et commerciaux de l'Etat" such as the SNCF which were excluded from the public procurement rules for the reason that they are assimilable to private companies as they do no use public money.

be found in the capacity of the government to regulate the code des marches publics without parliamentary intervention since a 1938 law – still in force[3] – gave competence to the government for public procurement contracts of the public authorities aimed by the Code des marches publics, i.e. for most of the public authorities in the French meaning. If the government were to decide to merge the two sets of rules in the same document, it could only do it by way of a law of the Parliament for constitutional reasons and by doing so it would lose its competence for the public procurement contracts of the public authorities subject to the Code des marches publics. Eventually that is likely to happen since The Ordinance of 23 July 2015 transpositing the 2014/24 and 2014/25 directives officialises the merger of the two texts and consequently the end of the exclusive competence of the government to regulate public procurement contracts of most of the public bodies in the French meaning.

As already noticed,[4] public procurement litigations are dealt with by ordinary courts in France as opposed to special bodies. However, most of these litigations go before specialized chambers on public contracts within administrative courts. There is no data regarding the different subtypes of public procurement litigations but the overall number of litigations being important, it is assumed that a significant number concerns qualification, exclusion and selection of economic operators. The number of cases quoted in this report may confirm this assumption. The possibilities to challenge any award decisions increased in the past eight years as not only the new remedies directive was transposed with the creation of a special contractual remedy for terminating a public contract in the circumstances set by the 2007/66/EC directive but also because the Conseil d'Etat created a new remedy called "Tropic" which offers to any third parties a remedy against any public contracts of an administrative character.[5] Although this remedy is not limited to the violation of public procurement rules, it enhances the possibility to enforce them. It must also be recalled that the success rate of complaints was high – about 50 percent when it comes to precontractual remedy, the main remedy adopted following the 89/665/EEC remedies directive – until 2008. Since then, the case

3. CE Ass. 5 March 2003 UNSPIC: the Conseil d'Etat decided that not only was this 1938 law still in force but it was also compatible with the constitutional rules applicable in 1938. Available as any of the case law quoted in this report at www.legifrance.gouv.fr [accessed 23 June 2016], "jurisprudence".
4. See our introduction regarding award criteria in France in Mario Comba and Steen Treumer (eds), *Award of contracts in EU procurements* (Djof publishing: Copenhagen, 2013), p. 69.
5. CE 16 July 2007, Société Tropic travaux signalisation.

law of the Conseil d'Etat evolved towards a more subjective approach requiring the plaintif to be personnaly harmed by the breach. Recently this subjective approach has been extended to the "Tropic" remedy.[6] Interestingly, the assessment of the ability of a firm is supervised by the courts even in the precontractual remedy ("référé précontractuel") both for decisions of exclusion or admission[7] in spite of the Conseil d'Etat ruling that excludes such a supervision in the precontratual remedy when it comes the assessment of the bid itself. In precontractual remedy, the review is not limited to the manifest error test but tends to be a serious look, both for decisions which reject a candidate on the ground of unsifficient ability and for decisions which admit candidates.[8]

Finally, it is worth recalling that in 1991 French law adopted a specific offence criminalizing favouritism of a firm that takes advantage of a breach, by a contracting authority, of public procurement or concession contracts award rules.[9]

The 2014 directives on public procurement contracts will affect the current rules on qualification, exclusion and selection. The changes will be analyzed through the Ordinance of 23 July 2015 in the course of the report. However, the Ordinance shall be completed by a decree for this implementation of other provisions and the decree is yet to be published or even known.

2. Criteria for qualitative selection

As with the EU directives, for a long time French law has been distinguishing the exclusion from the selection of economic operators, some authors dating

6. CE Ass. 4 April 2014, Département du Tarn-et-Garonne, n°358994.
7. CE 14 mars 2003, Société Air Lib, req. n° 251610.
8. CE 28 April 2006, Société Abraham BTP, n° 286443.
9. Article 432-14 of the criminal code: "An offence punished by two years" imprisonment and a fine of €200,000 which can be doubled is committed by any person holding public authority or discharging a public service mission or holding a public electoral mandate or acting as a representative, administrator or agent of the State, territorial bodies, public corporations, mixed economy companies of national interest discharging a public service mission and local mixed economy companies, or any person acting on behalf of any of the above-mentioned bodies, who obtains or attempts to obtain for others an unjustified advantage by an act breaching the statutory or regulatory provisions designed to ensure freedom of access and equality for candidates in respect of tenders for public service and delegated public services."

the concept of exclusion back from the "Roi Soleil" Louis XIV.[10] The former implies objective assessments, whereas the latter means the appreciation of the ability of an economic operator to perform the future contract which is a subjective task by essence. However, when it comes to exclusions based on the principle of equal treatment or on competition law principles, the exclusion phase may also imply subjective assessments; but both are applicable to any public procurement contracts under French law, whether above or below the European thresholds.[11]

2.1. Exclusion grounds

Art. 57 of the 2014/24/EU directive outlines the mandatory exclusion grounds and the optional exclusion grounds. There is no distinction between mandatory and optional exclusion ground under French law since all exclusion grounds are obligatory. One may challenge this as contrary to the principle of proportionality as it imposes exclusions in the Directive that are left to the contracting authorities to decide. However, the new Directive 2014/24 gives support to this approach as Article 57 states that "Contracting authorities may exclude or *may be required by Member States* to exclude from participation in a procurement procedure any economic operator in any of the following situations (…)", the following situations corresponding to optional exclusions. In any case the French Ordinance implementing the new Directive which is due to come into force in 2016 adopts the European approach in copying the distinction between mandatory and optional exclusions.[12]

The relevant distinction to be made deals with the listed exclusions and the exclusions based on the principle of equal treatment and on competition law principles.

10. M. de Louvois Minister of Louis XIV, in charge of the construction of the Château de Versailles, wrote to the famous ingeneer Vauban: "Écartez sans faiblesse les méchants entrepreneurs, il en est assez de bons pour construire nos bastions, nos quartiers, nos manufactures et nos bâtiments. N'ayez rapports qu'avec des gens de foi et d'honneur et parmi eux seulement cherchez le bon marché ...", quoted by S. Rampa, "Pathologie de la dévolution des marchés publics", *RMP* n° 260, septembre-octobre 1991, at 60.
11. For below the thresholds, see CE 29 avril 2011, Garde des sceaux, ministre de la justice et des libertés, req. n° 344617.
12. Ordonnance n° 2015-899 du 23 juillet 2015 relative aux marchés publics, to be found on www.legifrance.gouv.fr

A. Listed exclusions

The three sets of rules are identical since the Code des marches publics and the Ordinance of 17 June 2004 on PPP contracts refers to the ordinance of 6 June 2005 whose article 8 establishes seven causes of exclusion:

- Delay in paying tax and social contributions; the 2006 code nevertheless admits that the newly created firms that cannot fulfil the tax/social security contributions right after their creation must be accepted; it takes over the case law which had admitted that in the silence of the code it was possible only if it was allowed by the contracting authority[13]
- Bankruptcy or receivership not long enough for the economic operator to perform the contract
- Criminal offences related to labour law in the past five years
- Other criminal offences such as money laundering, fraud, corruption, terrorism, tax evasion etc. in the past five years
- Non complicance with the newly (Lay of 4 August 2014) obligation of negotiation within each firm to favour equality between men and women at work; although this exclusion is not clearly listed in the EU directives, it may however fall within the exclusion based on article 18.2 of the 2014/24/EU directive which reads "Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X"
- For defense and security contracts, economic operators who have experienced a termination of a public procurement contract for fault or have engaged their civil liability for breach of duty of security of information or security of supply
- For defence and security contracts, any person who are not sufficiently reliable so as to exclude risks to the security

Until now, French law does not offer the possibility of a derogation from these requirements for overriding requirements in the general interest, though the 2004/18/EC directive opens it. However, the Ordinance quoted offers such a possibility accepted by the European directives. Moreover, the Ordinance aligns French law with EU law by distinguishing between mandatory

13. CE 10 mai 2006, Société Bronzo, req. n° 281976.

and optional exclusions. In short, French law will not be stricter than EU law any more.

One may also add the possibility of being excluded for an economic operator when the contracting authority wishes to contract out on the basis of reserved contracts. Article 15 of the code des marches publics provides that certain contracts, or certain lots of a contract, may be reserved for the protected workshops where the majority of the workers are persons who, on account of the nature or seriousness of their disability, cannot work under normal conditions. In such a case, the publicity notice refers to this provision. This provision is in line with EU law since article 19 of the directive 2004/18/EC states that "Member States may reserve the right to participate in public contract award procedures to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programs where most of the employees concerned are disabled persons who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions".

The Ordinance extends it even more – which also may be seen as compatible with article 20.1 of the directive 2014/24/EU; it specifies that "Member States may reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons or may provide for such contracts to be performed in the context of sheltered employment programmes, provided that at least 30 percent of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers." However, some extensions to new forms of firms could be discussed as really having the aim of integrating disabled or disadvantaged people such as the "économie sociale et solidaire" enterprises. It is true, nonetheless, that this latter extension is under conditions and limited to social, cultural or health services.

2.1.1. Grounds of exclusions based on the principles of equal treatment and competition law

These grounds of exclusion may not be explicitly written in the official statutes but the case law often supplements the silence of the legislator where equality and competition are at stake.

The first issue deals with technical dialogue as addressed by the ECJ in the 2005 Fabricom case (C-21/03) and by Steen Treumer in the legal literature.[14] The latter criticizes French doctrine[15] as tending to focus on one case which ruled in 1998 that there was no breach instead of commenting the two Conseil d'Etat cases which recognize a breach in 1991 and 1995. The explanation may be found in the fact that the 1995 case was ambiguous since it may have been interpreted as forbidden by principle any participation of the award procedure of a firm which had taken part in the drafting of the future contract. Indeed, in the 1995 case, the Conseil d'Etat had implicitly admitted the legality of a context document clause which was excluding any participant in the drafting[16] but it may be the consequence of the absence of a challenge of the legality of the contract document clause at stake. The 1998 clearly rules that it cannot be the case.[17]

If the non exclusion of the participant to the drafting is nowadays the rule, both at national and European levels, it may become problematic when this participation alters the principle of equality. The case law illustrates this issue: it ruled out the participation of a firm which drafted the future contract in total or in a significant way.[18] Interestingly, the illegal participation may result in the annulment of the award or in damages when the contracting authority invited the initial participant to take part in the subsequent contract and then excluded it for reasons of risk of inequality.[19] However, these cases cannot be interpreted as forbidding the drafting of the future contract by an economic operator in any case but rather puts an assumption of breach. In one case, it even led the Cour de cassation to establish the existence of a criminal

14. Steen Treumer, "Technical dialogue and the principle of equal treatment – dealing with conflicts of interest after *Fabricom*" (2007) 2 *P.P.L.R.*, at 99-115.
15. Ibid.: "France the conflict is well known and has even been dealt with at Supreme Court level on various occasions where the leading case in France is Garde des Sceaux v Sté Genicorp, judgment of July 29, 1998 from Conseil d'État, which has been followed up by the cases OPHLM du department de l'Aisne, judgment of July 8, 1991 and Cne d'Évreux, judgment of September 8, 1995, which are both Conseil d'Etat decisions. In the two latter cases it was established that technical dialogue had distorted competition. It is therefore surprising that the majority of the many books on public procurement in France do not mention the relevant national case law, nor do they analyse the problem in any detail".
16. CE 8 sept. 1995, Commune d'Evreux, n°118010.
17. CE, 29 juillet 1998, "ministre de la Justice c./Société Génicorp", n°177952.
18. CE, 8 juillet 1991, "OPHLM du département de l'Aisne", n°95305; CAA, Lyon, 1er décembre 2005, "District Semine".
19. See the "OPHLM du département de l'Aisne" case, ibid.

offence of favouritism.[20] The breach of equality may also be present in less intrusive circumstances. For example, the Cour administrative d'appel de Paris found a breach where a contracting authority had not displayed surveys made by the previous concessionaire which had been awarded to new contract.[21] The position adopted here for a concession contract applies obviously *a fortiori* in a public procurement context.

The new directive codifies the European case law but in such a loose manner that the problem of implementation of the principles remains.[22] It may be that there is no other way to regulate it more precisely.

In relation to this issue, the case law of the Conseil d'Etat makes sure that the principle of impartiality is respected, both by the public authorities themselves and their private advisers. In an important case regarding the PPP contract of the French "ecotax", eventually awarded to the Italian company Autostrada and its French allies, the supreme administrative court applied the

20. Cassation, chambre criminelle, 28 janvier 2004
21. CAA, Paris, 13 novembre 2006, "*Société Soccram*". See Alexandre Vandepoorter and Blaise Eglie-Richters, "Marchés publics: Participation d'un candidat à la phase préparatoire du marché" (17 April 2008) *Le Moniteur des travaux publics et du bâtiment*.
22. Article 40 on Preliminary market consultations: "Before launching a procurement procedure, contracting authorities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements. For this purpose, contracting authorities may for example seek or accept advice from independent experts or authorities or from market participants. That advice may be used in the planning and conduct of the procurement procedure, provided that such advice does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency."

    Article 41 on Prior involvement of candidates or tenderers: "Where a candidate or tenderer or an undertaking related to a candidate or tenderer has advised the contracting authority, whether in the context of Article 40 or not, or has otherwise been involved in the preparation of the procurement procedure, the contracting authority shall take appropriate measures to ensure that competition is not distorted by the participation of that candidate or tenderer. Such measures shall include the communication to the other candidates and tenderers of relevant information exchanged in the context of or resulting from the involvement of the candidate or tenderer in the preparation of the procurement procedure and the fixing of adequate time-limits for the receipt of tenders. The candidate or tenderer concerned shall only be excluded from the procedure where there are no other means to ensure compliance with the duty to observe the principle of equal treatment. Prior to any such exclusion, candidates or tenderers shall be given the opportunity to prove that their involvement in preparing the procurement procedure is not capable of distorting competition. The measures taken shall be documented in the individual report required by Article 84."

principle of impartiality to the private advisor of the government but found no breach although the adviser was a subsidiary of a group which has been advising the awardee at the same time for the Polish equivalent project, which raised some concerns.[23]

The second issue concerns the existence of state aids. There has not been any case law in France comparable to the ECJ case Arge Gewässerschutz (C-94/99), i.e. to a public body which has effectively received public subsidies. However, in more general terms, the participation of public bodies in the award process – and more importantly the award of public procurement contracts to public bodies – have been subject to debates since their status may be seen to imply an anticompetitive advantage. The Conseil d'Etat ruled that this participation is not banned by principle, even with regard to the French principle of freedom of enterprise ("Liberté du commerce et de l'industrie") that goes back to the French revolution.[24] However, it went on by saying that the principle of free competition ("principe de libre concurrence") implies the duty to check if the bid does not reveal an anticompetitive advantage. For doing so it analyzed the status of public establishments and concluded that both tax law and labour law do not give any structural advantage. But it remains in the hand of the courts to check on a case by case basis if the bid does take into account all the relevant costs of the proposed contract and does not include public subsidies, a task which appears to be quite difficult in practice. This position may be challenged nowadays since the ECJ ruled that the status of French public bodies (which means the impossibility of bankruptcy) can be seen as a state aid[25]. Although adopted outside the context of public procurement, this case law poses the question of the possibility of public bodies to participate in the award of public contracts. Although it may be seen unfair to exclude them by principle, and contrary to the principle set in Article 345 Of the TFEU (ex-article 295), I think it is the only conclusion of the case law in spite of the absence of supportive arguments from the French doctrine. The changes of consortia may also challenge equal treatment. The code des marches publics bans the change of consortia by principle as a way to elude the risk of illicit collusion. This ban is compatible with the ECJ position in the Makedoniko Metro case (C-57/01) which ruled that the Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts does not preclude national rules which prohibit a change in the composition of a group consortium taking part in a pro-

23. CE 24 juin 2011, Ministre de l'écologie, n° 347720
24. CE 8 Nov. 2000, Société Jean-Louis Bernard Consultant, n° 222208
25. ECJ, Case C-559/12 P, *France c/ Commission*, 3 April 2014.

cedure for the award of a public works contract or a public works concession which occurs after submission of tenders. However, since 2006 the code des marches publics admits an exception in case of a failure of one member of the consortia either for reason of bankruptcy or for any impossibility to perform the contract; in such a case, the contracting authority must give its approval of this change and of the any newly proposed subcontractor.

Regarding PPP contracts, the ordinance of 17 June 2004 is silent on the possibility or impossibility of changes, but the governmental body in charge of PPP contracts advises estimates that it is the responsibility of each contracting authority to regulate this question, provided that any change does not put a risk upon the capacity of the consortium to perform the contract.[26] A Danish case similar to the latter French situation (i.e. when the procurement regime is silent) is currently pending before the Grand Chamber and there are questions about the possibility of banning or not banning the change of the consortium during the award process.[27] I personally favour a quite flexible approach, something between a complete ban of change and complete allowance. Because of the ways in which business takes place, there should be room for change. However, in order not to put to much burden on contracting authorities' shoulders, there should be objective reasons for such a change as when bankruptcy of one of the member of the consortium occurs. Since contracting authorities must reassess the ability of the new consortium, any reason (such as economical strategy) cannot justify such a change.

The possibility to participate in several consortia is forbidden per se by the code des marches publics only for the member who is in charge of representing the consortia, which makes sense regarding the firm that is primarily concerned with the award of the contract. The participation of other members in other consortia may be forbidden in two circumstances: if the contract notice or contract documents forbids it, or if it appears that such a participation triggers competition. The latter hypothesis belongs to the general issue of the risk that a consortium may limit competition to an extent that is contrary to competition law. Indeed, article 51 of the code des marches publics authorizes economic operators to submit their application or bid as a joint and several group or a joint group "without prejudice to compliance with the rules relating to free pricing and competition". The competition rules may be enforced by the competition authority which will assess whether there is a justification of the consortium (technically and/or financially) and whether there is still

26. http://www.economie.gouv.fr/files/directions_services/ppp/fiche_intangibilite.pdf [accessed 23 June 2016].
27. See Steen Treemer, introduction of the present book, p. 12.

enough competition on the relevant market.[28] But article 51 of the code des marches publics implies that any courts in charge of reviewing the award process shall control the potential breach of competition law due to a consortium and that it actually happens before administrative courts, though rarely.[29]

As far as prior authorizations are concerned, the Conseil d'Etat ruled that the contracting authority cannot demand those permissions at the award procedure stage nor it cannot demand a proof of the submission for obtaining the relevant authorization.[30] They may be given once the most economically offer is chosen.

Finally contracting authorities may limit the possibility to bid for several lots for security of supply reasons or to foster competition. The contracting authority may – so as to satisfy more efficiently its needs by building contacts with various partners, or to encourage the rise of higher competition – decide to limit the number of geographical lots which may be awarded to each bidder, provided that this number is specified in the contract notice. It is the case, according to the Conseil d'Etat, for a public contract of service provisions concerning DNA identification performed within the context of judicial or extrajudicial procedures for ensuring that the Ministry of Justice would be safely supplied in this area, enabling several corporations to perform competently in this field so that the State may have, on a long term basis, several partners.[31] The new directive enshrines this possibility in its article 46.2 which states that "Contracting authorities may, even where tenders may be submitted for several or all lots, limit the number of lots that may be awarded to one tenderer, provided that the maximum number of lots per tenderer is stated in the contract notice or in the invitation to confirm interest. Contracting authorities shall indicate in the procurement documents the objective and non-discriminatory criteria or rules they intend to apply for determining

28. Conseil de la concurrence, 18 jan. 2001, (2001) 2 *BOCCRF*, p. 109; (2001) *MTP*, Suppl. TO p. 378; *Contrats et marchés publics*, may 2001, n° 93: consortium justified by the technicity and the amount of the contract; CA Paris 5 décembre 2000, *SA Entreprise Industrielle*, (2001) 1 *BOCCRF*, p. 30; (04/2001) *LPA*, p. 14: illicit consortium due to the absence of complementarity of the firms and the weak competition that resulted from the consortium
29. TA Rouen 28 avril 2000, Entreprise Jean Lefebvre-Normandie (ord. Référée précontractuel) n° 000697, (2000) *AJDA*, at 842, note C. Bréchon-Moulènes; (12/2000) 40 *BJCP*, note F. Llorens; see our article "Règles de concurrence et marchés publics" (29 Octobre 2007) JCP A, n°2284.
30. CE 21 nov. 2007, *Département de l'Orne*, n° 291411.
31. CE 20 jan. 2013, *Société laboratoires Biomnis*, n° 363656.

which lots will be awarded where the application of the award criteria would result in one tenderer being awarded more lots than the maximum number."

2.2. Selection criteria

This phase implies quite subjective assessments since it relates to the appraisal of the suitability – i.e. ability – of an economic operator to perform the contract. Until 1994 this process was required for restricted procedures only, which at the time made a great deal of difference between open and restricted procedures. By application of the 1992 and 1993 directives,[32] the n° 94-334 decree of 27 avril 1994 also imposed the selection of candidates for open procedures and it is still the case.

As far as the competent authorities are concerned, one may notice that when it comes to open and restricted procedures – as opposed to negotiated procedures or competitive dialogue procedures – the assessment of the ability for local authorities falls in the hand of a special commission called "commission d'appel d'offres" which is an extension of the local council. In other words, this important assessment is made, as it is also the case for the assessment of the bids themselves, by a collective organism, which tends to objectivize the choices and is certainly the best way of preventing favoritism if not corruption.

First we will look at the way of implementing the set of criteria, and then distinguish between selection and award criteria.

2.2.1. Set of criteria: economic and financial standing, technical and professional ability

2.2.1.1. Technical and professional ability:

These two set of crieria are now clearly distinguished, the technical ability relates mainly to material means and experience in the field at stake, the profesional ability to requirements of certain professional diplomas or qualification of the employees.

The courts now adopt a serious look on the necessity of those requirements. For instance, the Conseil d'Etat annulled an award procedure on the motive that the requirement of having a geometrician diploma was not justified enough although the subject matter of the contract related to topographic surveys preparing the acquisition of land for the construction of public works.[33] On the other hand, the possession of a diploma or a qualification,

32. Directive n° 92-50 du 18 juin 1992 "Services", art. 27 – directive n° 93-36 du 14 juin 1993 "Fournitures", art. 19 – directive n° 93-37 du 14 juin 1993 "Travaux", art. 22.
33. CE 30 June 2004, Ministre de l'Equipement, n°261919.

when it is justified, is not sufficient to prove the technical ability to perform the contract. In other words, the presence of drastic conditions to obtain a given diploma does not prevent a contracting authority from searching for the technical ability.[34] Professional ability is often checked through the possession of certifications delivered by professional organisations. The case law insists that the contracting authorities must accept "equivalent" certifications but review this equivalence seriously. For instance, simple certificates of the nature of accomplished public works from architects cannot be deemed as equivalent of certifications.[35]

Regarding technical ability, the assessment of the material means is softened by the possibility for a candidate to present a signed contract of acquisition of the relevant material even if it is under the condition of obtaining the contract. But a simple quote is not sufficient.[36]

The main issue here lies in the question of the taking into consideration the experience of the economic operator in the relevant field. Since 2006, experience is expressly considered as a method for others to assess technical ability. It was already done in practice prior to the 2006 code since it was allowed by the ECJ in Bentjees in 1988, although the contracting authority can require proof of experience by demanding certificates from other contracting authorities.[37] But in order to favour SMEs, and especially newly created firms, the 2006 code added that one cannot be excluded from public procurement only by lack of experience. The paradoxical effect of this provision is that altough it is now officially admitted into the code, experience tends to be of less importance in practice since its lack does not prevent contracting authority from assessing technical ability on other bases, which may be problematic as it damands this ability is analysed in very concrete and detailed terms. Taking experience into account may also raise important issues when it has to be mixed with almost incompatible rules. For instance, the assessment of law firms requires the contracting authority to look at the past work of the law firm, but at the same time the statute law on lawyers imposes confidentiality. Indeed, the Conseil d'Etat ruled that lawyers cannot be asked to

34. CE 29 April 2011, Garde des Sceaux, ministre de la Justice et des Libertés, N° 344617.
35. CE 26 novembre 2001, Région Rhône-Alpes, req. n° 236099 (référé précontractuel), (2002) *Contrats et marchés public*, note 33, F. Olivier.
36. CE 12 January 2011, Département du Doubs, n°343324.
37. CAA Paris, 5 décembre 2006, Société Coved, req. n° 04PA02719, note F. Olivier, (02/2007) 2 *Contrats et marchés publics*, at 15.

infringe this requirement, which then poses the question of the veracity of the claimed experience.[38]

The second main issue takes into consideration the difficulties in performing a previous public procurement contract. Although the Conseil d'Etat first admitted that any previous difficulties in performing a public contract of said contracting authority may justify a non admission;[39] it then moved to a more pragmatic approach. If those difficulties are taken into account, they must not deprive the candidate from proving that his or her ability has improved since the past performance occurred. Therefore, bad performance is a grounds for selection but cannot be automatic. However, the absence of proof of improvement may result from the absence of new experience in the relevant field. For instance, the absence of meetings for a firm in charge of security of public works which ended up with a fire and the absence of new experience in the given field was considered as justifying an exclusion[40].

2.2.2. Financial ability

As everybody knows, there is no equivalent of the American Small Business Act[41] in Europe, despite the eponymous communication of the European Commission,[42] which by the way constitutes a sort of reverse discrimination for European firms as they cannot penetrate certain American public procurement contracts for they are too big for them. There has been some attempts under French law to impose an equivalent, all of which were ruled out by the Conseil d'Etat. In a 1987 case, the latter annulled an exclusion of a big firm from a public procurement contract based on the excessive turnover of the candidate. The solution spread out since the Conseil d'Etat was making reference to a 1977 administrative circular whose aim was precisely to favour SMEs for small public procurement contracts.[43]

The 2006 code went even further by allowing contracting authorities to set a minimum number of SMEs to be admitted as candidates for restricted, ne-

38. CE 9 August 2006, Association des avocats conseils d'entreprises, req. n° 286316.
39. CE Section, 7 July 1967, Office Public d'HLM de la ville du Mans, p. 306; CE, 27 février. 1988, Hôpital départemental d'Esquirol, n° 61402.
40. CE 10 June 2009, Région Lorraine, n°324153**.**
41. https://www.sba.gov/sites/default/files/Small%20Business%20Act_0.pdf [accessed 23 June 2016], Section 15.
42. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – "Think Small First" – A "Small Business Act" for Europe {SEC(2008) 2101} {SEC(2008) 2102} /* COM/2008/0394 final */.
43. CE 13 May 1987, sté Wanner Isofi Isolation, n°39120.

gotiated and competitive dialogue procedures. The Conseil d'Etat ruled out this hard law provision in the name of the principle of equality.[44]

Financial ability assessment shall remain – and for this only reason – a way to exclude firms that have not "the shoulders" to perform the contract and not the other way round. The traditional aim of this requirement was to be found in the idea that it would prevent any failure to perform the public contract which would go against the general interest of completing a public contract. Such an aim is surely not taken over by EU law but the latter may have seen in this provision a way to fight dumping bids of small firms which are anticompetitive by nature. In any case, the courts review this exclusion ground with a serious, detailed look in order to make sure that it does not hide any form of discrimination. An administrative court found no reason to impose a yearly turnover of €5 million for a framework agreement of a maximum of €800,000 and with no real technicity.[45] In another case, the Conseil d'Etat ruled the need to have a turnover at least equal to the maximum amount of the contract instead of being related to each lot as being an excessive requirement, even though one lot was above half of it (18 M/32 M euros).[46]

In implementing a few provisions of Directive 2014/24/EU, the decree of 26 September 2014 transposed the rule enshrined in article 58.3 according to which the minimum yearly turnover that economic operators are required to have shall not exceed two times the estimated contract value, except in duly justified cases, such as relating to the special risks attached to the nature of the works, services or supplies. The French implementation added that it shall not exceed two times the estimated contract value "or the estimated lot value" in order to be in conformity with the above mentioned case law.

Finally, as in the 2004/18/EC directive, contracting authorities shall set a minimum number of candidates they will invite to tender which cannot be under three in negotiated procedures or in competitive dialogue and not under five in restricted procedure. If this minimum number is not reached, i.e. if there is not enough candidates that fullfill the selection conditions, the contracting authority may decide to continue the award process. The usefulness of this provisions results from the implicit possibility to stop the award process if the minimum number is not obtained for a general interest reason: the insufficient competition.

44. CE 9 July 2007, EGF-BTP, n°297711
45. CAA Versailles 25 mai 2010, Commune de Brunoy, n° 08VE02066, (2010) *Contrats marchés publics*, comm. 281, obs. F. Llorens.
46. CE 29 Nov. 2006, Agence nationale pour l'emploi, n°290712.

2.2.3. Selection and award criteria

This distinction was addressed in our French report in the book "Award Criteria",[47] and therefore we will limit ourselves to a few updates. Despite the necessary distinction between selection and award criteria, French case law already admitted that the means of a firm proposed for a given contract in the bid can be assessed at the award phase provided that they are analyzed in relation to the subject matter of the contract. It went further on by accepting that an award criterion can explicitly be based on the experience of a firm for a contract with high technicality: in other words, the experience and not only the means can be used per se at the award stage.[48]

The 2014/24/EU directive offers a flexible approach with regard to the distinction between selection and award stages. The selection phase can be preceded by the award phase contrary to what has been imposed at national and European so far. This more flexible approach is not present in the Ordinance of 23 July 2015 but it may be present in the future decree implementing the Ordinance.

3. Procedures for evaluating/Means of proof

The means of proof of the absence of grounds of exclusion and the ability to perform the contract evolved. Before 2001, contracting authorities were free to demand any documents in order to assess the capacity of the candidates.

The flexible approach was constrained by the 2001 code and onwards by setting an exhaustive list of documents that may be demanded. By doing so, the statutes reduces the possibility of indirect discriminations, and the Conseil d'Etat requires that the relevant documents must be mentioned in the contract notice.[49] It is also strict on the regularity of the competent agent to represent the candidate – including for simple declaration on oath – and rules that if the signature does not come from the person in charge, the candidate must be rejected.[50] On the other hand, the simple presence of a doc-

47. Op. cit.
48. CE 2 August 2011, Société Parc naturel regional des grands causses, n°348254.
49. CE 26 March 2008, Courly, n°303779.
50. CE 13 novembre 2002, Cne du Mans, req. n° 245354 – CE 13 novembre 2002, Communauté urbaine du Mans req. n° 245355 – CE 13 novembre 2002, OPHLM de la Communauté urbaine du Mans, req. n° 245303, note J.-D. Dreyfus, Recevabilité des candidatures et référé précontractuel, (13 January 2003) *AJDA*, p. 32 – F. Olivier, "Accès à la commande publique, candidatures: ce qu'il faut fournir, pas moins, pas

ument not listed and provided by the candidate cannot justify an exclusion.[51]

Flexibility comes with some practical aspects. In order to ease the access of SMEs – which might be discouraged by the burden of regularly seeking the official documents demanded by contracting authority – the 2004 decree (as it was the case before 1994) postpones the duty to present the required document proving the absence of grounds of exclusion: from now only the firm which has the most economically advantageous offer must provide them. A simple declaration on oath for exclusion grounds is required at the first stage.

Of course this postponement regards only the documents demanded for exclusion grounds and not selection. For the latter, since 2004, a lack of one document results in the rejection of the candidate unless the contracting authority asks the candidate to complete his or her file, but it has full discretion to decide to ask for completion or not. In the name of equality the 2006 code imposes that all the candidates shall be asked to complete their file even if no documents are missing from other candidates. The code also states that the period set by the contracting authority must be the same for all candidates and cannot exceed 10 days. French law seems to have anticipated article 56.3 of the new directive which reads that "Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous or where specific documents are missing, contracting authorities may, unless otherwise provided by the national law implementing this Directive, request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time-limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency". This provision appears to be

plus !" (01/2003) *Contrats et Marchés Publics*, at 12 – D.P. "Règlement de consultation et qualification des entreprises" (01/2003) *Droit administratif*, at 19 – A. Domanico, "Quand la jurisprudence restreint la possibilité d'agir de la personne publique", (03/2003) *CP-ACCP*, at 5.

51. CE 8 August 2008, Ville de Marseille, req. n° 312370, Lebon Tables, (2008) *Contrats et marchés publ.*, comm. n° 225, obs. W. Zimmer: "le code des marchés publics fixe précisément et limitativement les motifs pour lesquels des candidatures peuvent être écartées et les modalités de ce rejet; que par suite la ville de Marseille ne pouvait régulièrement rejeter la candidature de la société Librairie Maupetit au motif que figurait dans son dossier, outre les pièces prévues par les dispositions précitées, un document technique complémentaire; que la société Librairie Maupetit est donc fondée à demander l'annulation de la procédure pour les lots 1, 2, 3, 4, 6 et 8 sur lesquels elle s'était portée candidate".

somewhat a specification of article 51 of the 2004/18/EC directive according to which "The contracting authority may invite economic operators to supplement or clarify the certificates and documents submitted pursuant to Articles 45 to 50". However, initially this possibility regarded only the exclusion grounds and selection in a strict sense and but could not be used to sort out legal issues[52] before the code was changed to open it for the latter also.

The above mentioned decree of 26 septembre 2014 added two other provisions. The candidates cannot be required to provide documents and information the contracting authority 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 there are still valid and that it is announced in the contract notice or the contract documents.

Another way of evaluating the ability is based on the possibility for contracting authorities to require candidates and tenderers to meet minimum capacity levels. The 2006 code was a bit ambiguous as to whether they could or they should require minimum capacity before a 2008 case law clarified that it is a simple possibility, not an obligation.[53] But if doing so, these criteria must be transparent[54] on the condition that there are really minimum capacity levels and not only special requirements.[55]

There are no methods of past performance rating (e.g. via social media) under French law. The case law quoted above regarding the use of bad performance to assess the ability can even be interpreted as encompassing only bad performance observed by the contracting authority itself, i.e. on a previ-

52. Regarding the absence of an agency contract for a consortia, see CE 28 avril 2006, Syndicat mixte de gestion et de travaux pour l'élimination des déchets ménagers et assimilés de la zone ouest du département de l'Hérault, req. n° 283942, Lebon Tables, at 948; concl. D. Casas, (07/2006) *Contrats et Marchés publ.*, at 19
53. CE 8 août 2008, Région de Bourgogne, req. n° 307143
54. CE 23 décembre 2009, Établissement public du musée et du domaine nationale de Versailles, req. n° 328827, Lebon, at 502; (02/2010) 2 *Contrats et marchés publics*, at 33, note P. Rees et étude X. Mouriesse; (2010) 97 *CP-ACCP*, at 83, note P. Le Bouëdec; (2010) 9 *AJDA*, at 500, note J.-D. Dreyfus; (2010) 11-12 *JCP A*, at 25, note F. Dieu; (2010) 3 *DA*, at 27, note G. Eckert; (2010) 69 *BJCP*, at 103, concl. B. Dacosta; (2010) 3 *Constitutions*, at 410, note P. De Baecke
55. CE 24 juin 2011, Commune de Rouen, req. n° 347840, for the requirement of having experience for similar complex projects which are not "minimum capacity requirement".

ous contract of this contracting authority. Otherwise, it may not be seen as reliable enough.

4. Reliance on the capacities of other entities

Regarding groups of economic operators, i.e. consortia, the 2004 code and the 2006 code made obligatory the global appraisal of abilities. In other words, since 2004, French law applies the provision of article 48.4 of the 2004/18/EC directive which reads that "a group of economic operators as referred to Article 4 may rely on the abilities of participants in the group". Interestingly the solution applies whatever the form of the consortium, it being either several liable but also for the joint and several liability group in spite of the solidarity between the members of the group of the latter form. Until then, the case law had required that each member of the consortium had to be able for the whole contract when joint and several liability was at stake[56] and in case of several liability the requirement to be able for the whole contract was imposed only for the representative of the consortium.[57] If the new solution derived from EU law seems to open competition, especially towards SMEs, it may harm the good performance of the public contract in case of failure to perform from one member of the group. However, the previous position of French law may have been seen as incompatible with EU law since it reduced competition and the 2004 Code aligned French law to EU law in order to avoid any risk of incompatibility.

The same rule applies to subcontractors whose abilities may also be taken into consideration. The 2004 code had initially limited the possibility of reliance on the capacities of other entities to subcontractors in a strict French sense ("sous-traitants") but it was ruled as contrary to the European directive[58] and the 2006 code added "regardless of the legal nature of the links it has with them" as put by article 48.3 of the above mentioned directive.

However, French law sets an obligation of direct performance by the tenderer by principle. Therefore, if the tenderer wishes to call for a subcontractor, it needs to get the prior approval of the contracting authority. If the latter is a public body or a public enterprise in the French meaning, the tenderer must also obtain the approval of the conditions of payment of the subcontrac-

56. CE 9 décembre 1987, Chambre d'agriculture des Deux-Sèvres, *Lebon*, p. 403; Dalloz 1988, som. p. 252, obs. Ph. Terneyre; (1988) *MTP*, at 59.
57. CAA Paris 10 octobre 2000, Préfet de la Seine-Saint-Denis c/ Commune de Pantin.
58. CAA Versailles, 11 septembre 2007, SNC OTUS, req. n° 07VE00346.

tor since the law of 31 December 1975, aiming at protecting subcontractors, created for them a right for direct payment by those contracting authorities.

5. Reduction of number of candidates

The so-called shortlisting contains the possibility for contracting authorities in restricted, negotiated and competitive dialogue procedures, to set a maximum number of candidates which will be invited to tender. Therefore it may happen that economic operators which cannot be rejected for exclusion grounds, and that meet the ability requirements, may nevertheless not be invited to participate in the tender process. The reason of this flexibility (for contracting authority) lies in the burdensomeness of being obliged to analyze too many bids without being certain that quality and competition are better secured. Of course as it harms free access to public procurement contracts – a constitutional principle since 2003 in France[59] – it must be strictly applied.

This possibility has been offered to contracting authorities for a long time in France but the rules and criteria for choosing the happy few evolved over the past few years, especially in 2001. Until then, contracting authorities were asked to rank the firms from the most able to the least able. But it allows for some flexibility: if two firms were to be deemed as equivalent, the contracting authority would choose them by drawing lots. Since the 2001 Code, they can only be chosen on quality grounds, i.e. by ranking the candidates.

The ante 2001 appears to be the most sensible one: to decide upon the ability and non-ability of firms is already pretty subjective and therefore subject to challenges, but to decide that some firms are more able than others is even more subjective. In practice, contracting authorities became reluctant to use shortlisting since the 2001 came into force to avoid risk of litigations. This may nevertheless result in too many bids to assess, sometimes over 80 in practice we are told.

When shortlisting is decided, the code imposes to set selection criteria in a strict sense, i.e. criteria materializing the financial, professional and technical ability assessment. The case law demands those criteria be transparent[60] but, contrary to award criteria, does not impose the transparency of the way they

59. Conseil constitutionnel, 26 June 2003, http://www.conseil-constitutionnel.fr/decision/2003/2003-473-dc/decision-n-2003-473-dc-du-26-juin-2003.861.html [accessed 23 June 2016].
60. CE Sect., 30 jan. 2009, Agence nationale pour l'emploi, n° 290236, Lebon p. 3.

are implementing by contracting authorities.[61] They can weigh those criteria providing that it is transparent, and this requirement is also set by the courts for below the European thresholds contracts.[62]

6. Government-wide debarment

Government-wide debarment existed in French law until 2004: in case of false declaration and for this only reason, the competent minister or competent state representative for local authorities could temporarily (or definitively before the 2001) bar the accused firm from any public procurement contracts. The 2004 Code abolished this "administrative" blacklisting but authorized contracting authorities to terminate the contract in case of false declaration and the provisions is maintained in the 2006 code. The case law also admits that if the situation was dissimulated and that the contracting authority realized the situation before the award, it still can reject the offer since it results from fraud and choose the second best advantageous offer.[63]

But government-wide debarment was launched again with the law n°2011-672 of 16 June 2011 in order to fight dissimulated labour: not only can the firms at stake face criminal prosecution but they can also face administrative sanctions, such as the duty to reimburse public subsidies and the exclusion from public procurement or concession contracts. In the latter case, the exclusion of the firm and of the head of the firm is pronounced by the state representative once he is informed of an official report of breach. But the exclusion lasts a maximum of six months and is cleared if the charges are abandoned.[64] In determining the length of the exclusion, the state representative must take into consideration the gravity of the breach, the number of employees and the economic, social and financial situation of the firm.

61. CE 24 Feb. 2010, Communauté de commune de l'enclave des papes n°333569.
62. Ibid.
63. CE 8 décembre 1997, Sté A2IL, req. n° 154715, Lebon Tables p. 930; (1998) *Revue de droit immobilier,* at 242, obs. F. Llorens et P. Terneyre
64. See articles L. 8272-4, R. 8272-10 a,d R. 8272-11 of the labour code.

The Qualification, Selection and Exclusion of Economic Operators (Tenderers and Candidates) from a German Perspective

Martin Burgi and
Laura K. Wittschurky

1. Introduction

German Public Procurement Law is currently provided in a "cascade style" regulatory system.[1] The European Public Procurement Directives are implemented by ordinary law, the Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen – GWB). This refers to three different regulations: the Public Tender Regulation (Vergabeverordnung – VgV); the Regulation on Awarding Contracts in Transport, Drinking Water Supply and Energy Supply (Sektorenverordnung – SektVO); and the Regulation on Awarding Contracts in the Fields of Defence and Security (Vergabeverordnung Verteidigung und Sicherheit – VSVgV). These regulations in turn refer to the Procedures for the Award of Contracts for Construction Services (Vergabe- und Vertragsordnung für Bauleistungen – VOB/A), the Procedures for the Award of Public Supplies and Services (Vergabe- und Vertragsordnung für Leistungen – VOL/A), and the Procedures for Professional Services (Vergabeordnung für freiberufliche Dienstleistungen – VOF), which are neither ordinary law nor regulations but were developed by private professionals. They also apply to contracts awarded below the thresholds where the European Public Procurement Directives are not applicable. Special rules ap-

1. For further details see L. Horn, "*Public Procurement in Germany*" (C.H. Beck: München, 2001), passim.

ply to multistage procurement procedures that include a call for competition (see, for example, § 6 II Nr. 4 VOB/A-EC). In addition, the procurement law of the federal states contains distinct rules.

The terminology used in German Public Procurement Law concerning the qualification of economic operators differs from that used in the European Public Procurement Directives. It does not employ "qualification" as a generic term for (negatively formulated) exclusion criteria and (positively formulated) selection criteria, but it is pursuant to § 97 IV 1 GWB, requiring that economic operators are skilled, efficient, and reliable (especially law-abiding). The generic term used here is "suitability". Despite its varying terminology, the German implementation was effected in accordance with the European stipulations.[2] According to the draft bill of the regulations provided for in the Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen – GWB) implementing the new European Public Procurement Directives, this difference will be levelled out in the future – these regulations will also distinguish between exclusion grounds and selection criteria.

The stage of the verification of the economic operators' qualification gains more and more importance in German public procurement practice as well as in German public procurement judicature. The focal points here are the means of proof and self-cleaning.

As for the implementation of the new European Public Procurement Directives, Germany seems to enact a one-to-one implementation.[3] The draft bill aims at following the European model to a large extent. Additionally, for the first time the establishment of a nationwide corruption register is intended, in order to enable exclusion and debarment. Such a nationwide corruption register will allow them to generate a broader information base than the existing federal state corruption registers do.[4] With this in mind, the Conference of the Ministers of Justice – a regular meeting of the Ministers of Justice of the Federal States which serves coordination of justice affairs – approved the introduction of a nationwide corruption register.[5]

2. H. Summa, "Die Entscheidung über die Auftragsvergabe – Ein Ausblick auf das künftige Unionsrecht" (2012) *NZBau*, at 730.
3. See the report on the 15th Düsseldorfer Vergaberechtstag 2014 by F. Koch, "15. Düsseldorfer Vergaberechtstag" (2014) *NZBau*, at 618.
4. Burgi, "Ausschluss und Vergabesperre als Rechtsfolgen von Unzuverlässigkeit" (2014) *NZBau*, at 595.
5. See *service.mvnet.de/_php/download.php?datei_id=124458* [accessed 23 June 2016].

2. Criteria for Qualitative Selection

2.1. Grounds for Exclusion

2.1.1. The Verification of Exclusion Grounds

After the tenders have been verified for completeness as well as the accuracy of calculations and factual information, exclusion grounds are checked. This takes place before the actual evaluation of tenders.

The exclusion of economic operators takes up the requirement of reliability (including law-abidance) in § 97 IV GWB.[6] Only a reliable economic operator provides a guarantee for a satisfactory contract performance. In case there is a reason for exclusion, the economic operator is considered unreliable. The legal consequence is the – mandatory or facultative – exclusion of the economic operator. Pursuant to § 122 I of the draft bill of the new version of the GWB implementing the new European Public Procurement Directives, the economic operators' reliability is no longer an independent selection criterion but covered solely by the exclusion grounds – in line with the regulations provided in the new European Public Procurement Directives.

Grounds that lead to the mandatory exclusion of economic operators are of more serious nature. In case such an exclusion ground exists, the contracting authority has no discretion – the economic operator is to be excluded from the procurement procedure. Examples for mandatory exclusion grounds are to be found for instance in § 16 I Nr. 1 VOB/A-EC. According to the draft bill, the future § 123 GWB will contain mandatory exclusion grounds.

However, certain exemptions from the mandatory exclusion of the economic operators are provided for and result in an alleviation of this grave legal consequence. Namely, pursuant to § 6 IV VOB/A-EC (and, in the future, pursuant to § 123 V GWB according to the draft bill), the mandatory exclusion can be waived (1) on compelling grounds of general interest and if the service cannot be adequately rendered by other enterprises (this, for example, covers the case of the urgent necessity of the fulfillment of demand), or (2) if due to special circumstances of the individual case the violation covered by the exclusion ground does not cast doubt on the reliability of the economic operator – the principle of proportionality has an effect here: Tenderers must

6. M. Dreher, § 97 GWB, paragraph 135 in U. Immenga and E.-J. Mestmäcker (eds), *Wettbewerbsrecht*, 5th Edition (C.H. Beck: München, 2014); M. Dreher/J. Hoffman, "Die erfolgreiche zur Wiedererlangung der Kartellvergaberechtlichen Zuverlässigkeit und die vergaberechtliche Compliance – Teil 1 (2014) *NZBau*, at 67.

not be sanctioned excessively.[7] The first exemption was already provided for in Art. 45 I Subparagraph 2 of Directive 2004/18/EG, the Directive 2014/24/EU now addresses both exemptions expressly in Art. 57 III Subparagraphs 1 and 2.

Examples for grounds that, if met, lead to the facultative exclusion of economic operators, are to be found for instance in § 16 I Nr. 2 VOB/A-EC (and, in the future, in § 124 GWB according to the draft bill). This ground concerns minor cases. Perhaps the most important example is provided for in § 16 I Nr. 2 lit. c) VOB/A-EC (according to the draft bill, § 124 I Nr. 3 GWB will contain a similar regulation): An economic operator who has committed proven acts of grave misconduct casting doubt on their reliability can be optionally excluded from the procurement procedure. § 16 I Nr. 2 lit. c VOB/A-EC (respectively § 124 I Nr. 3 GWB according to the draft bill) forms a kind of "catch-all provision"[8] and includes, for example, antitrust violation.[9]

In the case that a facultative exclusion ground is met, the contracting authority has the discretionary power to exclude the corresponding economic operator. When exercising discretion, the contracting authority has to take into consideration whether the misbehaviour covered by the exclusion ground questions the economic operator's reliability. The discretion can be reduced to zero.[10] Generally, a reduction to zero of a contracting authority's discretion refers to a situation in which only one out of all possible decisions the contracting authority could make is lawful so that, although there is discretion, this one decision has to be chosen – the discretion is therefore reduced to this decision.[11] Far-reaching, it may be argued that such a reduction to zero is to be assumed whenever grave misconduct occurs and a poor prognosis with regard to the economic operator concerned is given.[12] However, this view is to be rejected as it would entail that in the rest of the cases covered by § 16 I

7. Burgi, "Ausschluss und Vergabesperre als Rechtsfolgen von Unzuverlässigkeit" (2014) *NZBau*, at 597.
8. Burgi, "Ausschluss und Vergabesperre als Rechtsfolgen von Unzuverlässigkeit", *supra* note 4, at 595; M. Fehling, GWB § 97, paragraph 121 in H. Pünder/M. Schellenberg (eds), *Vergaberecht* (Nomos: Baden-Baden, 2011).
9. See e.g. VK Lüneburg VgK-4/2011, (2011) *NZBau*, at 574.
10. OLG Koblenz 1 Verg 1/06 [2006], (2006) *IBR*, at 633; OLG Dresden WVerg 15/02 [2003], (2004) *VergabeR*, at 92.
11. H. Maurer, *Allgemeines Verwaltungsrecht*, 18th Edition (C.H. Beck: München, 2011), § 7, paragraph 24.
12. See e.g. OLG München Verg 22/12 [2012], (2013) *NZBau*, at 261; M. Dreher/J. Hoffmann, "Sachverhaltsaufklärung und Schadenswiedergutmachung bei der vergaberechtlichen Selbstreinigung" (2012) *NZBau*, at 265 et seq.

Nr. 2 VOB/A-EC (or, respectively, by § 124 I GWB according to the draft bill) an economic operator has to be excluded as soon as the exclusion ground is met, only because these cases are not provided for two-stage and thus require no prognosis with regard to the economic operator at the second stage. This in turn would not satisfy recital 101 of the new Directive 2014/24/EU requesting the principle of proportionality be taken into consideration by the contracting authorities when applying facultative grounds for exclusion.[13] However, neither proportionality aspects nor public interests could be taken into account when there is no discretion.[14] Therefore, it is to be assumed that § 16 I Nr. 2 lit. c VOB/A-EC (or, respectively, § 124 I Nr. 3 GWB according to the draft bill) includes discretion in terms of the question whether a grave misconduct occurs, in terms of the prognosis and as well in terms of the question whether the economic operator is to be excluded or not. On the basis of this view it is even possible not to exclude an economic operator which committed grave misconduct and whose prognosis is poor at the same time.

In terms of the timing at which an economic operator can be excluded, the contracting authority is under the obligation to verify the mandatory, as well as the facultative grounds, for exclusion and, if applicable, to react with the exclusion of the respective economic operator at any stage of the procurement procedure.[15] The Fabricom ruling in which the Court of Justice concluded that the Directive 2007/66/EG precludes a contracting authority from being able to exclude an economic operator involved in a technical dialogue up to the end of the procedure for the examination of tenderers[16] is not contradictory to this since this issue is not regulated within the framework of exclusion grounds, but dealt with separately in German procurement law (see, for example, § 6 VII VOB/A-EC, so-called project engineer regulation). In

13. Burgi, "Ausschluss und Vergabesperre als Rechtsfolgen von Unzuverlässigkeit", *supra* note 4, at 597.
14. Burgi, "Ausschluss und Vergabesperre als Rechtsfolgen von Unzuverlässigkeit", *supra* note 4, at 597.
15. M. Opitz, § 16 VOB/A, paragraphs 197 et seq. in M. Dreher/G. Motzke (eds), *Beck'scher Vergaberechtskommentar*, 2nd edition, (C.H. Beck: München, 2013); H.-J. Prieß, H. Pünder, R.M. Stein, "Self-Cleaning under National Jurisdictions of EU Member States – Germany", in H. Pünder, H.-J. Prieß, S. Arrowsmith (eds), *Self-Cleaning in Public Procurement Law* (Carl Heymanns: Köln, 2009), at 63; Burgi, "Ausschluss und Vergabesperre als Rechtsfolgen von Unzuverlässigkeit", *supra* note 4, at 597.
16. Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559; see also S. Treumer, "Technical Dialogue and the Principle of Equal Treatment – Dealing with Conflicts of Interests after *Fabricom*" (2007) *P.P.L.R.*, at 105.

the future, German procurement law will need to provide for the maximum permissible period of exclusion in accordance with Art. 57 VII of the Directive 2014/24/EU.

In order to encourage economic operators having conducted misbehaviour to take suitable measures,[17] German courts introduced – based on the principle of proportionality as well as the fundamental principles of the treaties, particularly the principle of competition – the possibility of self-cleaning even before it was introduced into European procurement law.[18] The possibility of self-cleaning moderates the legal consequence in case an exclusion ground is met. Economic operators may demonstrate or rather restore their reliability by taking credible and promising measures and thus prevent their exclusion from the procurement procedure. The construct of self-cleaning is fully accepted among German scholars[19] and now also by the EU framework. German statute law contains no explicit regulation concerning self-cleaning so far. Self-cleaning in case of the fulfillment of a mandatory ground for exclusion is based on § 6 IV Nr. 3 VOB/A-EC, § 6 IV Nr. 3 VOB/A-VS,[20] insofar as these regulations provide for a derogation from the legal consequence of mandatory exclusion if due to special circumstances of the individual case the violation covered by the mandatory exclusion ground does not cast doubt on the reliability of the economic operator. The contracting authority has discretion referring to this. Self-cleaning in case of the fulfillment of a facultative ground for exclusion has to be taken into consideration by the contracting

17. Prieß, Pünder and Stein, *supra* note 15, at 100; H.-J. Prieß, "Exclusio corruptoris? – Die gemeinschaftsrechtlichen Grenzen des Ausschlusses vom Vergabeverfahren wegen Korruptionsdelikten" (2009) *NZBau*, at 591.
18. See for example OLG Frankfurt am Main 11 Verg 6/04 [2004], (2004) *VergabeR*, at 642; LG Berlin 23 O 118/04 [2006], (2006) *NZBau*, at 397; OLG Brandenburg Verg W 21/07 [2007], (2008) *NZBau*, at 277.
19. See for example, M. Dreher and J. Hoffmann, "Die erfolgreiche Selbstreinigung zur Wiedererlangung der kartellvergaberechtlichen Zuverlässigkeit und die vergaberechtliche Compliance – Teil 1" (2014) *NZBau*, at 68; F.J. Hölzl and L. Ritzenhoff, "Compliance leicht gemacht! Zu den Voraussetzungen des Verlustes, den Konsequenzen daraus und der Wiedererlangung der Zuverlässigkeit im Vergaberecht" (2012) *NZBau*, at 30; T. Haug, Comment on OLG Frankfurt am Main 11 Verg 6/04, (2004) *VergabeR*, at 648; R. Ricken, "*Beurteilungsspielräume und Ermessen im Vergaberecht*", p. 293 (Nomos: Baden-Baden, 2014).
20. Summa, "Die Entscheidung über die Auftragsvergabe – Ein Ausblick auf das künftige Unionsrecht", *supra* note 2, at 731; Prieß, Pünder and Stein, *supra* note 15, p. 81.

authority within its discretion given in this respect.[21] Since the contracting authority is given discretion regarding self-cleaning in case of the fulfillment of mandatory grounds for exclusion, as well as in case of the fulfillment of facultative grounds for exclusion, public procurement review bodies can review decisions with which contracting authorities affirm or reject self-cleaning requirements only to a limited extent.

By now, Art. 57 VI of the new Directive 2014/24/EU explicitly provides for the restoration of reliability qua self-cleaning. The requirements given insofar have unquestionably to be deemed determined for German law; however, the findings and results concerning the requirements of self-cleaning made so far can still be brought to fruition.[22]

Self-cleaning requires first the economic operator pay, or at least undertake to pay, compensation for damage. This prerequisite is not without problems (and thus not without controversy[23]), since it may entail that economic operators find themselves constrained to agree to pay a compensation for damage which is unjustified from their or even from an objective point of view, only to prevent exclusion from the procurement procedure.[24] What is more, highly complex questions of law or fact can rise in certain situations.[25]

It seems to be pertinent to distinguish between different cases:

– In case the compensation of damage is undisputed with regard to reason and amount, self-cleaning requires that the economic operator pay the claim.[26]

21. Prieß, Pünder and Stein, *supra* note 15, p. 82; Burgi, "Ausschluss und Vergabesperre als Rechtsfolgen von Unzuverlässigkeit", *supra* note4, at 598.
22. Burgi, "Ausschluss und Vergabesperre als Rechtsfolgen von Unzuverlässigkeit", *supra* note4, at 598.
23. See especially the dispute between Dreher/Hoffmann, "Sachverhaltsaufklärung und Schadenswiedergutmachung bei der vergaberechtlichen Selbstreinigung" supra note 12, at 265; H.-J. Prieß, "Warum die Schadenswiedergutmachung Teil der vergaberechtlichen Selbstreinigung ist und bleiben muss" (2012) *NZBau*, at 425; M. Dreher/J. Hoffmann, "Schlusswort: Vergaberechtliche Fremdreinigung zur Schadenwiedergutmachting. (2012) *NZBau*, at 426.
24. Dreher/ Hoffmann, "Sachverhaltsaufklärung und Schadenswiedergutmachung bei der vergaberechtlichen Selbstreinigung", *supra* note12, at 270.
25. Burgi, "Ausschluss und Vergabesperre als Rechtsfolgen von Unzuverlässigkeit", *supra* note4, at 598.
26. Undisputed; see e.g. KG 2 U 4/06 [2011], (2012) *NZBau*, at 56; Dreher and Hoffmann, "Sachverhaltsaufklärung und Schadenswiedergutmachung bei der vergaberechtlichen Selbstreinigung", *supra* note 12, at 270; Burgi, "Ausschluss und Vergabesperre als Rechtsfolgen von Unzuverlässigkeit", *supra* note 4, at 598.

- In case the compensation of damage is undisputed with regard to reason, but disputed with regard to amount, self-cleaning requires that the economic operator allow the claim. It should be discussed whether it is also required that the economic operator contribute to the clarification of the facts.[27]
- In case the compensation of damage is disputed with regard to reason and amount, allowing the claim or even paying the claim must not be necessary for self-cleaning. However, it is at least required that the economic operator contribute to the clarification of facts. The economic operator benefits from the possibility of self-cleaning after all.[28]

Furthermore, self-cleaning requires that the concerned economic operator cooperate closely and actively with the investigating authorities; that is: contribute to the clarification of facts and circumstances. This cooperation must be based on respect for the legal framework,[29] e.g. the employee data protection law provides for a limit.[30] However, the principle of *nemo tenetur se ipsum accusare* (i.e. the right to avoid self-incrimination) is not applicable here, because no penalty is imposed on the economic operator that contributes to the clarification against himself, but merely the economic operator might lose the opportunity to win the award.[31]

It is also necessary for self-cleaning that the economic operator takes concrete future-oriented measures that are appropriate to prevent further misconduct.[32] Conceivable are personnel measures at the associate and/or employee level. In addition technical or organisational measures might be requested, for instance the setting-up of a compliance regime.

27. Burgi, "Ausschluss und Vergabesperre als Rechtsfolgen von Unzuverlässigkeit", *supra* note 4, at 599.
28. Burgi, "Ausschluss und Vergabesperre als Rechtsfolgen von Unzuverlässigkeit", *supra* note 4, at 599.
29. Dreher and Hoffmann, "Sachverhaltsaufklärung und Schadenswiedergutmachung bei der vergaberechtlichen Selbstreinigung", *supra* note 23, at 272.
30. Burgi, "Ausschluss und Vergabesperre als Rechtsfolgen von Unzuverlässigkeit", *supra* note 4, at 598.
31. Burgi, "Ausschluss und Vergabesperre als Rechtsfolgen von Unzuverlässigkeit", *supra* note 4, at 598.
32. S. Arrowsmith, H.-J. Prieß, P. Friton, "Self-cleaning as a Defence to Exclusions for Misconduct: An Emerging Concept in EC Public Procurement Law?" (2009) *P.P.L.R.*, at 257.

Finally, an economic operator who is subject to a debarment[33] is not eligible for self-cleaning.

A one-to-one implementation of these self-cleaning requirements seemed appropriate; and, since it is not apparent why implementation should be effected separately per type of contract, it seemed best to implement them into the Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen – GWB) and not into the Procedures.[34] So it is to be welcomed that, according to the draft bill, § 125 GWB takes up Art. 57 VI of Directive 2014/24/EU.

2.1.2. Further Grounds for Exclusion That Go Beyond the Grounds for Exclusion Provided for in the European Public Procurement Directives

According to the case law of the Court of Justice, notably to the *Michaniki* ruling,[35] the grounds for exclusion provided for in the European Public Procurement Directives are not exhaustive in principle, but rather the Member States may lay down further grounds for exclusion based on the principles of equal treatment and transparency. Germany has so far decided not to lay down further grounds for exclusion.[36]

2.2. Selection Criteria

2.2.1. The Verification of Selection Criteria

§ 97 IV 1 GWB enumerates the economic operators' skills, efficiency and reliability as selection criteria (§ 122 I GWB will, pursuant to the draft bill, only name the economic operators' skills and efficiency). As mentioned, terminology varies from that used in the European Public Procurement Directives, which hampers comparability, but is compatible as regards content. What the European Public Procurement Directives refer to as the "actual" selection criteria is adopted under "skills" and "efficiency" pursuant to the German implementation.

33. See section 6.
34. Burgi, "Ausschluss und Vergabesperre als Rechtsfolgen von Unzuverlässigkeit", *supra* note 4, at 601.
35. Case C-213/07 *Michaniki* [2008] ECR I-9999; see also H.-J. Prieß and P. Friton, "Ausschluss bleibt Ausnahme" (2009) *NZBau*, at 300 et seq.
36. Following the *Fabricom* ruling of the Court of Justice (Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559), the German legislator has adopted so-called project engineer regulations (see, for example, § 6 VII VOB/A-EC) – however, not within the framework of exclusion grounds.

Skilled are economic operators who have the knowledge, capabilities and experience necessary for the performance of the contract.[37] This criterion relates markedly to the person[38] and includes, for instance, the economic operators' vocational qualification.[39]

Efficient are economic operators who have the economic, financial, professional and technical resources necessary for the performance of the contract at their disposal.[40] This criterion in turn is more related to the company[41] and includes, for instance, the economic operators' technical equipment.[42]

No major difficulties occurred in terms of the interpretation of the selection criteria by German jurisdiction and practise, the interpretation can be deemed established to a large extent.

However, it has not been completely clarified yet which kind of discretion the contracting authorities have when verifying the selection criteria. There are several options in German law: Contracting authorities may have discretion with regard to the requirements that the selection criteria lay down[43] or with regard to the legal consequences[44] or even in both cases.[45] It seems most convincing to deem that the contracting authorities' decision whether the *respective* economic operator meets the selection criteria or not falls within the contracting authorities' discretion and can thus be reviewed by public procurement review bodies only to a limited extent – but that there is no discretion beyond that.

37. B. Harr, 9 § 5 VOF, paragraph 30 in K. Willenbruch and K. Wieddekind (eds), *Vergaberecht*, 3rd Edition (Wolters Kluwer: Köln, 2014); P. Braun, "Eignungsprüfung (zweite Wertungsstufe)", paragraph 8, in M. Gabriel/W. Krohn/A. Neun (eds), *Handbuch des Vergaberechts* (C.H. Beck: München, 2014).
38. M. Bungenberg, § 97 GWB, paragraph 46 in U. Loewenheim/K.M. Meessen/A. Riesenkampff (eds), *Kartellrecht*, 2nd Edition (C.H. Beck: München, 2009).
39. Opitz, § 97 Abs. 4 GWB, paragraph 30 in *supra* note 15.
40. M. Werner, § 7 VOL/A-EG paragraph 13, in *supra* note 37; Braun, *supra* note 37.
41. M. Bungenberg, § 97 GWB, paragraph 47 in Dreher and Motzke (eds), *supra* note 15.
42. Bungenberg, § 97 GWB, paragraph 48 in Dreher and Motzke (eds), *supra* note 15.
43. See e.g. Dreher, § 97 GWB, paragraph 173 in Immenga and Mestmäcker (eds), *supra* note 6; Ricken, "Beurteilungsspielräume *und Ermessen im Vergaberecht*" *supra* note 19, p. 299.
44. See e.g. OLG Düsseldorf VII-Verg 83/05.
45. See e.g. D. Soudry, § 2 VOB/A, paragraph 36 in Dreher and Motzke (eds), *supra* note15; H. Glahs § 6 VOB/A, paragraph 54 in K.D. Kapellmann and B. Messerschmidt (eds), *VOB*, 4th Edition (C.H. Beck: München, 2013).

2.2.2. Selection Criteria in Relation to Award Criteria

Basically, the strict separation between selection criteria and award criteria set mainly by the Court of Justice is followed in Germany. Only from time to time there are initiatives in practice, and also by courts, to circumvent this.[46]

Since 2013 §§ 4 and 5 VgV provide for the possibility to take the organisation, qualification and experience of the staff assigned to performing the contract – classical selection criteria per se – into consideration when awarding the contract.

However, this possibility is only related to the so-called services under Annex IB that did not fall respectively but only fell to a limited extent within the scope of the former Directive 2004/18/EC. Therefore the case law of the Court of Justice with regard to the strict separation between selection criteria and award criteria, that is related to the provisions of the European Public Procurement Directives,[47] was not applicable and was not in conflict with §§ 4 and 5 VgV. The national lawmaker was thus free to provide for this breakthrough of the strict separation. The provision was suitable for the strongly person-related services under Annex IB in particular – the particular person performing a service under Annex IB plays a more important role than, for example, the particular person performing a construction contract. The person takes centre stage, rather than the end result.[48] Also for this reason, the strict separation between selection criteria and award criteria was criticised in the field of services under Annex IB in particular. The new provision met with approval in German legal literature.

§§ 4 and 5 VgV are largely consistent with the regulation now provided for in Art. 67 II 2 b) of the Directive 2014/24/EU. It is required that there be factual indications that the organisation, qualification and experience of staff assigned to performing the contract can have a significant impact on the level of performance. What is more, the German provision stipulates that especially the success and the quality of extant services can be taken into consideration within the assessment of the quality of the staff. Finally it is also provided for that the weighting of the quality of the staff shall not exceed 25 percent of the weighting of all award criteria.

46. See A. Rubach-Larsen, "Selection and Award Criteria from a German Public Procurement Law Perspective", (2009) *P.P.L.R.*, at 112; M. Burgi, "Awarding of Contracts in German Procurement Law", p. 93, in M. Comba and S. Treumer (eds), *Award of Contracts in EU Procurements* (DJØF Publishing: Copenhagen, 2013).
47. Especially Case C-31/87 *Beentjes* [1988] ECR I-4635 and Case C-532/06 *Lianakis* [2009] ECR I-251.
48. See the deliberations in the German Bundestag, BT-PlPr 17/222, p. 27615.

The amendment of the VgV anticipated the regulation now provided for in Art. 67 II 2 b) of the Directive 2014/24/EU. Pursuant to this regulation, the organisation, qualification and experience of staff can be taken into consideration when awarding any kind of contract, not only when awarding particular service contracts. It remains to be seen whether the German lawmaker will take over this possibility and thus expand the present German regulation, though the draft bill contains no provision. With regard to the wording of Art. 67 II 2 b) as well as of recital 94, it appears convincing to take the view that it is left to the Member States (and not to the contracting authorities) whether they open the possibility to consider the organisation, qualification and experience of staff at the award stage or not. However, in this context it should be noted that pursuant to Art. 67 II 2 b) it is required that organisation, qualification and experience of staff can have a significant – that is not only minor – impact on the level of performance. It seems questionable whether such a significant impact can actually be affirmed with regard to a lot of other kinds of contracts than the service contracts already covered by §§ 4 and 5 VgV and thus whether there exists potential to expand the regulation.[49]

3. Evaluation and Means of Proof

With regard to the procedure of the verification of the selection criteria, as well as the means of proof, German law contains many detailed and comprehensive provisions, which are (often criticised[50]) bureaucratic barriers prone to error to both the contracting authorities and the economic operators. Against the background of bureaucracy and to the objective of a quick and inexpensive procurement (traditional economic approach of German public procurement law), German courts have – with reference to the *SECAP* ruling of the Court of Justice[51] – established a limit of what can reasonably be required as a means of proof for the benefit of the contracting authorities.[52] Pursuant to this, contracting authorities are not obliged to use all sources of

49. S. Conrad, "Eignung als Merkmal für Qualität: Zur Neuregelung der Wahl der Zuschlagskriterien durch die Siebte VgV-Änderungsverordnung" (2014) *DVBl*, at 958.
50. See e.g. M. Martini, § 5 VOF, paragraph 23 in Pünder and Schellenberg (eds), *supra* note 8.
51. Cases C-147/06 and C-148/06 *SECAP* [2008] ECR I-3565.
52. BGH X ZR 78/07 [2008], (2008) *VergabeR*, at 787; OLG Düsseldorf VII-Verg 39/09 [2009], (2010) *NZBau*, at 393.

information available to them – instead, it is sufficient that they take their decisions whether or not an economic operator meets the selection criteria on the basis of a satisfactory level of knowledge gained in a methodologically justifiable way. Anyway, the contracting authorities' decision whether an economic operator meets the selection criteria or not can, pursuant to German law, due to the contracting authorities' discretion, be reviewed by public procurement review bodies only to a limited extent, so that the contracting authorities are also subject to a certain amount of protection against inappropriately complex evaluation procedures. Likewise to the aim of the dismantling of bureaucratic barriers and in order to facilitate evaluation procedures for contracting authorities as well as economic operators, the German legislator has implemented the possibility to introduce and to use prequalification systems that were provided for in the European Public Procurement Directives via § 97 IVa GWB (and in the future, according to the draft bill, via § 122 III GWB) in a comprehensive way and at statutory level for the first time in 2009. As early as 2002, the possibility to introduce and to use prequalification systems in the utilities sector was provided for at regulatory level; in 2006 this possibility was extended to the construction sector, likewise at regulatory level. Pursuant to § 97 IVa GWB all contracting authorities are now authorized to introduce prequalification systems themselves or at least to use already introduced – also by private entities – prequalification systems,[53] which allow them to verify the economic operators skills and efficiency in general, and detached from a particular procurement procedure. It is sufficient if the economic operators submit current means of proof to the prequalification system once a year. In case the verification of these means of proof is developing positively, the economic operators will receive a certificate and a certification code; furthermore, their prequalification will be recorded in an electronic database. The contracting authority will thereupon be able to view the means of proof submitted by the economic operator in the electronic database with the aid of the certification code. This procedure does not replace the entire procedure of the verification of the selection criteria, but does replace the verification of certain means of proof.[54]

53. It is disputed who exactly is entitled to introduce prequalification systems and who has to refer to already introduced prequalification systems, see B. Tugendreich, "Der Anwendungsbereich von Präqualifikationsverfahren im deutschen Vergaberecht" (2011) *NZBau*, at 469 et seq.
54. Summa, "Die Entscheidung über die Auftragsvergabe – Ein Ausblick auf das künftige Unionsrecht", *supra* note 2, at 734.

Problems are raised by the question whether the contracting authorities are always obliged to decide that a prequalified economic operator meets the selection criteria, or whether discretion remains.[55]

There are now several well established prequalification systems, for instance the construction sector prequalification system (www.pq-verein.de). According to a study ordered by the Federal Ministry of Economic Affairs, prequalification systems lead to significant savings for both the contracting authorities and the economic operators.[56]

Not only do prequalification systems play a role in the verification of selection criteria, but corruption registers do also, since the problem arises that economic operators who have been involved in economic crime are classified as skilled and efficient just because the economic operators have no knowledge thereof.[57] The introduction of a central corruption register at national level has been discussed since the beginning of the new millennium, but initiatives have not succeeded yet.[58] The draft bill, too, does not provide for a regulation, although its introduction remains an objective. However, at least at federal state level corruption registers were introduced. For example North Rhine-Westphalia established a corruption register in the interim.[59] Through this, courts on the one hand are obliged to report certain crimes (classical corruption crimes, but also offences like illegal employment) to the corruption register, and contracting authorities on the other hand are obliged to inspect the corruption register within the verification of the selection criteria.[60] The intention is for this to facilitate the verification of the selection cri-

55. See Tugendreich, "Der Anwendungsbereich von Präqualifikationsverfahren im deutschen Vergaberecht", *supra* note 53, at 471.
56. M. Plewnia/C. Antweiler, Final Report on the Study "*Öffentliches Vergabewesen – Bürokratieabbau durch Präqualifikation?*" (2004).
57. C. Lantermann, "Einrichtung eines Korruptionsregisters auf Bundesebene" (2013) *ZRP*, at 107.
58. Lantermann, "Einrichtung eines Korruptionsregisters auf Bundesebene", *supra* note 57, at 107 et seq.; U. Battis, P.F. Bultmann, "Rechtsprobleme eines Korruptionsregisters, Die Sperre bei der Vergabe öffentlicher Aufträge" (2003) *ZRP*, 152 et seq.
59. Gesetz zur Verbesserung der Korruptionsbekämpfung und zur Errichtung und Führung eines Vergaberegisters in Nordrhein-Westfalen, GV. NRW. 2005, p. 8; see also M. Dann and R. Dann, "Vergaberegister – viel Bewegung, wenig Fortschritt?" (2010) *ZRP*, at 256; M.H. Wiehen, "Ensuring Compliance with Anticorruption Laws Through Sanctioning or Voluntary Self-Regulation", p. 277 in OECD, *Fighting Corruption and Promoting Integrity in Public Procurement* (OECD Publishing: Paris, 2005).
60. J. Stoye, "Korruptionsregistergesetz, der zweite Versuch – Besser, aber nicht gut genug" (2005) *ZRP*, at 265.

teria for the benefit of the contracting authorities – however, the verification shall obviously not be replaced. The federal states have seen good results in terms of the corruption registers.[61] Against this background, and against the background of the new European Public Procurement Directives, the discussion about the introduction of a central corruption register at national level was revived.[62] Such a nationwide corruption register would as a matter of course be significantly more efficient and far-reaching than are corruption registers at federal state level,[63] especially because not all federal states chose to introduce corruption registers.

With regard to the partially proposed inclusion of evaluations of economic operators in the social media into the procedure of the verification of the selection criteria, serious legal objections arise; such an inclusion thus seems to be unrealistic in Germany.

A lack of proof – which is not uncommon in the light of the difficulties and bureaucratic barriers mentioned above – does not lead, according to the explicit German provisions, to an immediate exclusion of the respective economic operator from the procurement procedure, but the contracting authority is obliged to request the missing proofs. The economic operator has the possibility to submit the corresponding documents within 6 days. Not until this period expires without the economic operator having submitted the documents, the economic operator is excluded (see e.g. § 16 I Nr. 3 VOB/A-EC, § 16 I Nr. 3 VOB/A-VS). However, these German provisions have to be interpreted in conformity with the strict jurisdiction of the Court of Justice concerning Art. 56 III of the Directive 2014/24/EU.[64]

With regard to self-declarations, different regulations are provided for different kinds of contracts. In the field of construction services, § 6 III Nr. 2 VOB/A, § 6 III Nr. 2 VOB/A-EC, § 6 III Nr. 2 VOB/A-VS stipulate that the contracting authorities can accept self-declarations as a proof for particular data; in other words they are free to accept self-declarations or not. However, if accepted, self-declarations are regarded as fully adequate. The German lawmaker needs to implement the new Directive 2014/24/EU insofar as Art. 59 I leaves no discretion for the contracting authorities with regard to the

61. See e.g. Landeskriminalamt Nordrhein-Westfalen, "*Korruptionskriminalität – Lagebild Nordrhein-Westfalen 2009*", p. 4.
62. See Lantermann, "Einrichtung eines Korruptionsregisters auf Bundesebene", *supra* note 57, at 107.
63. Lantermann, "Einrichtung eines Korruptionsregisters auf Bundesebene", *supra* note 57, at 110.
64. See Case C-336/12 *Manova* [2013].

question whether to accept self-declarations or not; furthermore there is no restriction to particular data that can only be proved via self-declaration. On the contrary, the new Directive 2014/24/EU classifies self-declaration as only preliminary proof; pursuant to Art. 59 IV contracting authorities may request all or part of the supporting documents from the economic operator at any stage of the procurement procedure where this is necessary to ensure the proper conduct of the procurement procedure.[65]

In the field of professional services, § 5 II VOF stipulates that the contracting authorities have to request self-declarations for particular data. In case they request self-declarations beyond that, they are obliged to state reasons. What applies in this regard, too, is that Art. 53 I of the Directive 2014/24/EU includes no restrictions to only particular data that can be proved via self-declaration, and furthermore, that the contracting authorities may request all or part of the supporting documents pursuant to Art. 59 IV – though only where this is necessary to ensure the proper conduct of the procurement procedure, which seems to align with the obligation to state reasons pursuant to § 5 II VOF.

Finally, in the field of public supplies and services, § 7 III VOL/A, § 7 I VOL/A-EC stipulate that the contracting authorities have to request self-declarations in priority and for all data in principle. In case they request self-declarations beyond that, they are obliged to state reasons. The implementation of Directive 2014/24/EU requires the amendment of § 7 III VOL/A, § 7 I VOL/A-EC insofar as Art. 59 I regards self-declaration as preliminary, not as fully adequate means of proof.[66]

The implementation of the new Directive 2014/24/EU will strengthen the role of self-declarations in German public procurement law. Especially the implementation of Art. 63 I Subparagraph 2 will probably lead to a regulation that provides for self-declaration in the case of subcontracting.

4. Reliance on the capacities of other entities

Obviously, the deployment of subcontractors has an impact on the economic operators' skills and efficiency; that is why an intended deployment of subcontractors has to be taken into consideration by the contracting authorities

65. See Summa, "Die Entscheidung über die Auftragsvergabe – Ein Ausblick auf das künftige Unionsrecht", *supra* note 2, at 733 et seq.
66. See Summa, "Die Entscheidung über die Auftragsvergabe – Ein Ausblick auf das künftige Unionsrecht", *supra* note 2, at 734.

when verifying whether the economic contractors meet the selection criteria. The principle of competition and the principle of transparency play an important role in this context. The principle of competition plays an important role because the deployment of subcontractors, and its impact on the economic operators' skills and efficiency, reduces the comparability across the economic operators and their skills and efficiency. The principle of transparency plays an important role accordingly because the bureaucratic and complex verification of selection criteria threatens to be even more nested anyway.[67]

In German public procurement law, it is provided that the contracting authorities may require the economic operators to report an intended deployment of subcontractors and to prove that the necessary resources are available (the contracting authorities may, for example, request a formal obligation by the subcontractor). Whether the contracting authorities may require the economic operator to prove the subcontractors' skills and efficiency, or also require the subcontractors to prove their skills and efficiency, is not expressly regulated. It can be assumed that the contracting authorities have the right to request those proofs, and that the economic operators in turn are obliged to submit them – if they have the right to deploy subcontractors, they shall have the obligation to prove the subcontractors' skills and efficiency in exchange.[68] This assumption is accepted in German jurisdiction, legal literature and practice. The stage at which the contracting authorities may request those proofs is, however, disputed.[69]

Pursuant to German public procurement law, groups of economic operators equate individual economic operators (see e.g. § 6 I Nr. 2 VOB/A). Beyond that, the verification of the skills and efficiency of groups of economic operators is not expressly regulated. But precisely because groups of economic operators equate individual economic operators, skills and efficiency have to be assessed with view to the group. Not every member of the group itself has to be skilled and efficient, but the group as a whole.[70] It follows that deficits may be mutually compensated. However, this does not apply with regard

67. M. Burgi, "Nachunternehmerschaft und wettbewerbliche Untervergabe" (2010) *NZBau*, at 596.
68. Burgi, "Nachunternehmerschaft und wettbewerbliche Untervergabe", *supra* note 67, at 597.
69. See H. Wirner, "Die Eignung von Bewerbern und Bietern bei der Vergabe öffentlicher Bauaufträge" (2003) *ZfBR*, at 549; S. Amelung, "Ausgewählte Fragen im Zusammenhang mit der Benennung von Nachunternehmern im Vergabeverfahren" (2013) *ZfBR*, at 338.
70. S. Tomerius, § 6 VOB/A, paragraph 11 in Pünder and Schellenberg (eds), *supra* note 8; M. Opitz, § 16 VOB/A, paragraph 241 in Dreher and Motzke (eds), *supra* note 15.

to the economic operators' reliability, pursuant to German public procurement law a selection criterion that is covered by the grounds for exclusion. Every member of the group of economic operators itself has to be reliable. If only one member is classified as unreliable, the whole group has to be classified as unreliable.[71]

In terms of the means of proof, there are no peculiarities with regard to groups of economic operators in comparison with individual economic operators in principle – here, too, groups of economic operators equate individual economic operators.[72] Particular attention should, however, be paid in the event that members of the groups of economic operators change during the procurement procedure.[73]

5. Reduction of Numbers of Candidates

Multistage procurement procedures are initiated with a call for competition. Within this call for competition, the contracting authorities verify the participants' qualification. Unqualified participants are eliminated. The contracting authorities then have the option to invite all qualified participants to submit a tender. In case the contracting authorities have decided in advance only to invite a limited number of participants to submit a tender, they diminish the numbers of participants after having verified their qualification. The diminishment is made by means of previously announced, objective, non-discriminatory and contract-related criteria (see, for example, § 6 II Nr. 4 VOB/A-EC). The contracting authorities are given a wide discretion in this context by German jurisdiction – even the diminishment by means of "more qualification" is deemed permissible.[74] This is approved by some legal writers which are of the opinion that the criteria for the diminishment are the same as for the assessment of suitability, so that economic operators that are "more suitable"

71. OLG Düsseldorf, VII-Verg 25/07; OLG Düsseldorf VII-Verg 48/04, (2005) *VergabeR*, at 207.
72. Opitz, § 16 VOB/A, paragraph 241 in Dreher and Motzke (eds), *supra* note 15; OLG Düsseldorf VII-Verg 25/07; partially disputed, see e.g. KG 2 Verg 11/09, (2010) *VergabeR*, at 501.
73. See S. Tomerius, § 6 VOB/A, paragraph 50 in Pünder and Schellenberg (eds), *supra* note 8.
74. See for example OLG Düsseldorf Verg 43/03, (2004) *VergabeR*, at 100.

than others can be invited to submit a tender.[75] Others view this more critically, since "more qualification" is not contract-related.[76]

6. Debarment

The classification of an economic operator as unreliable can not only entail that the economic operator is excluded from the particular procurement procedure or does not meet the selection criteria, but rather can be imposed a debarment as a more serious sanction. The term "debarment" is used when the economic operators' unreliability is so severe that it has impact not only on the particular procurement procedure, but beyond that, on procurement procedures in the future, so that the economic operators shall not only be excluded from the particular procurement procedure but also from procurement procedures in the future.[77] It is conceivable, on the one hand, to impose the debarment in the context of a particular procurement procedure, and on the other hand, to impose the debarment detached from a particular procurement procedure.[78]

In Germany, the imposition of debarments is standard procurement practice, however, the imposition takes place not entirely consistent or even accidentally.[79] In order to provide clarity, a distinction has to be made between a simple debarment which is imposed by only one body for all procurement procedures conducted by subordinated contracting authorities, and a coordi-

75. J. Ruthig, "Vergaberechtsnovelle ohne Gesetzgeber – Zum deutschen Vergaberecht nach Ablauf der Umsetzungsfrist – Teil I" (2006) *NZBau*, at 141; T.H. Schneider, *Der Wettbewerbliche Dialog im Spannungsverhältnis der Grundsätze des Vergaberechts* (Duncker & Humblot: Berlin, 2009), at 140; R. Leinemann, *Das neue Vergaberecht* (Werner Verlag: Köln, 2010), paragraph 329; see also M. Burgi, "Competitive dialogue in Germany" p. 325 in S. Arrowsmith/S. Treumer (eds), *Competitive Dialogue in EU Procurement* (CUP: Cambridge, 2012).
76. C. Schwabe, *Wettbewerblicher Dialog, Verhandlungsverfahren, Interessenbekundungsverfahren* (Nomos: Baden-Baden, 2009), at 188; H. Kaelble, paragraph 69 in M. Müller-Wrede/C. Benz (eds), *ÖPP-Beschleunigungsgesetz* (Bundesanzeiger Verlag: Cologne, 2006); Glahs, § 6 VOB/A-EG, paragraph 32 in Kapellmann and Messerschmidt (eds), *supra* note 45; see also Burgi, *supra* note 75, p. 325.
77. M. Fehling, § 97 GWB, paragraph 128 in Pünder and Schellenberg (eds), *supra* note 8.
78. Burgi, "Ausschluss und Vergabesperre als Rechtsfolgen von Unzuverlässigkeit", *supra* note 4, at 599.
79. Burgi, "Ausschluss und Vergabesperre als Rechtsfolgen von Unzuverlässigkeit", *supra* note 4, at 599.

nate debarment which is imposed by at least two bodies for all procurement procedures conducted by subordinated contracting authorities.[80]

Problematic is the legal basis for debarments. A legal basis is necessary, because European public procurement law requires that the reliability of economic operators be verified at any stage of the procurement procedure. The contracting authorities' freedom of contract cannot be invoked as a legal basis, since it is overlapped by the public procurement law provisions and does only take effect where these public procurement law provisions leave gaps. European public procurement law does not provide for a legal basis, even though debarment is at least referred to in Art. 57 of the Directive 2014/24/EU. German public procurement law contains no expressive legal basis either. German courts partially refer to the "catch-all provision" in § 16 I Nr. 2 lit. c VOB/A-EC which allows a facultative exclusion where the economic operator committed grave misconduct questioning his or her reliability.[81] This is viewed rather critically in legal literature.[82] At least it cannot be assumed that § 16 I Nr. 2 lit. c VOB/A-EC provides a legal basis for coordinate debarments, since it only refers to the relationship between the particular contracting authority and the economic operator. In general, it seems more meaningful to allow debarment only if a mandatory exclusion ground is fulfilled. So § 16 I Nr. 2 lit. c VOB/A-EC should not be considered as a legal basis for debarment. Neither can it be assumed that administrative regulations, which in certain cases stipulate that the contracting authorities have to exercise their discretion by imposing a debarment, reach their limits here.[83] However, there are regulations that provide an expressive legal basis in ancillary statutes at federal, as well as at federal state, level. A debarment is regulated, for instance, in the Act to Combat Clandestine Employment and in the Working Conditions Act as a sanction for corresponding violations. They cover, due to their scope, only a limited field of unreliability. It therefore seems reasonable that the German legislator regulates debarment, at least coordinate debarment which cannot be based on § 16 I Nr. 2 lit. c VOB/A-EC, uniformly in the Act against Restraints of Competition. It should be regulated in particular when unreliability that may entail a debarment can be assumed

80. Burgi, "Ausschluss und Vergabesperre als Rechtsfolgen von Unzuverlässigkeit", *supra* note 4, at 599.
81. See especially KG 2 U 11/11, (2012) *NZBau*, at 389.
82. See e.g. Fehling, § 97 GWB, paragraph 128 in Pünder and Schellenberg (eds), *supra* note 8.
83. Burgi, "Ausschluss und Vergabesperre als Rechtsfolgen von Unzuverlässigkeit", *supra* note 4, at 600.

and whether the imposition falls within discretion. Furthermore, the possibility of self-cleaning should be provided for, too. In terms of formal requirements aspects like hearings, the obligation to state reasons and competence should be clarified. Finally, legal protection against debarments has to be regulated, too.[84] However, the draft bill still does not address debarment at all.

7. Conclusion

The structure of the German provisions on the qualification, selection and exclusion of economic operators varies from those in the European Public Procurement Directives but is nevertheless compatible with the latter. This difference in structure will be levelled out according to the draft bill of the implementing Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen – GWB). The concept of self-cleaning was established by German courts even before it was provided for in the European Public Procurement Directives, the results found insofar can still be brought to fruition with regard to the provision now included. The selection criteria required by German public procurement law – in the narrow sense – are the economic operators' "skills" and "efficiency". These selection criteria are to be strictly separated from award criteria in principle, but a 2013 provision in the Public Tender Regulation (VgV) allows consideration of the qualification of the personnel assigned to perform the contract when awarding a contract concerning services under Annex IB. What has often been criticised is the detailed, and thus bureaucratic, stipulation regarding the means of proof. Against this background, prequalification systems are well established in Germany now, the introduction of a nationwide corruption register is discussed again, and self-declarations play an important role. With regard to the reliance on the capacities of other entities, subcontracting is possible only above the thresholds pursuant to German public procurement law. When it comes to subcontracting, the general contractor has to prove the subcontractor's qualification. However, disputed is the stage at which the contracting authority may request the corresponding proofs. Groups of economic operators equate individual economic operators, and so they do with regard to their qualification. Not every member of the group has to be skilled and efficient itself, but the group

84. Burgi, "Ausschluss und Vergabesperre als Rechtsfolgen von Unzuverlässigkeit", *supra* note 4, at 600.

as a whole; however, this shall not apply for the reliability – every member has to be reliable itself. Multistage procurement procedures include a call for competition. Here, it is widely accepted that the contracting authority reduces the number of candidates on the basis of their qualification which breaks the strict ban of considering "more qualification". Although there is no express provision, German contracting authorities actually impose debarments on economic operators. In order to clarify this practice, it seems appropriate to provide for a legal basis.

Qualification, Selection and Exclusion of Economic Operators (Tenderers and Candidates) in Italy

Mario Comba

1. Introduction

The Italian code for public procurements (hereafter called the PP code) was approved with Legislative Decree n. 163 of 12 April 2006 and subsequently modified many times, until the most recent (as of 30 September 2015) amendments introduced with Decree Law n. 90 of 24 June 2014, which, inter alia, consistently modifies criteria and procedures for qualitative selection. Chapter II (articles 34 to 52) of PP code regulates the qualification criteria and procedures, including reliance on capacity of other economic operators (art. 49-50), but also change of the contractor in the execution phase (art. 51) and reserved contracts (art. 52), which are considered – oddly enough – part of the qualification phase. Therefore, only articles 34 to 48 can be considered to tackle criteria and procedures with proper qualification.

In this paper we will concentrate on articles 38-39, which regulate the personal situation of the candidate or tenderer (art. 45-46 directive 2004/18/CE) and articles 41-44, which contain the core regulation on selection criteria and can be matched with articles 47-50 of directive 2004/18/CE.

Decree of the President of the Republic n. 207 of 5 October 2010 (hereafter called the PP regulation) entails the provisions for the execution of PP code, with particular regard to works procurement. Articles 60 and ff. relates to the qualification of candidates and will thus be cited in the course of the present paragraph.

Selection and qualification of tenderers and candidates is a very delicate phase in Italian public procurement procedures as it is shown by the analysis of public procurement litigation, which is often grounded on these reasons.[1]

Given the tendency of Italian administrative tribunals to interpret the requisites for qualifications strictly and formally, recent legislative interventions have been approved with the scope to exclude the possibility to eliminate candidates only for formal or procedural reasons. Leaving to the following paragraphs the more accurate analysis of specific rules, it is here possible to anticipate two important principles which have been introduced by recent legislation and which are now subject to most comments and litigation in the sector of admission and qualification of candidates in Italian public procurements.

The first (introduced by Decree law 70/2011, converted with law 106/11, modifying art. 46, § 1bis PP code) is the so called principle of "closed number" for clauses of exclusion according to which contracting authorities cannot introduce in public bids any cause of exclusion other than those provided for by the code itself, or those necessary to guarantee that the offer is genuine and attributable to the candidate and that the offer was kept secret until the public meeting for its opening.

The second (introduced by Decree Law 90/2014, converted by Law 114/14, modifying art. 38, § 2bis PP code)[2] consists of a great expansion of the principle of clarification of documentation. It states than when the contracting authority verifies the necessity to integrate, correct or admit new documentation from a candidate, it is forced to do so, against the payment of a fine.

On 14 January 2016, a law was approved (not yet published) authorizing the Government to issue a decree for the transposition of Directives 2014/23/EU, 2014/24/EU and 2014/25/EU, within the deadline of 18 April

1. The Adunanza Plenaria of Consiglio di Stato, which is the highest Italian administrative Court in its plenary session, with jursidiction on all administrative law questions and not only public procurements, tackles selection litigation in public procurements in a surprising high number of cases. In 2012, four decisions out of 36 (11 percent) and in 2013, four out of 28 (14 percent): see for 2012 R. De Nictolis, *Rassegna di giurisprudenza monotematica – L'adunanza plenaria e i pubblici appalti dopo l'entrata in vigore del codice del processo amministrativo*; for 2013: V. Lopilato, *Giurisprudenza del Consiglio di Stato* 2013, www.giustizia-amministrativa.it [accessed 23 June 2016].
2. For a general comment about the innovations introduced by Decree-law 90/2014 in the field of public procurements, see S. Foà, "Le novità del D.L. 90/2014 in materia di appalti" (2014), 11 *Urbanistica e appalti*, at 1147.

2016. The law, according to art. 76 of the Constitution, contains a list of general principles which must be followed by the Government in the preparation of the decree. Principle "r" deals with qualification, but seems to be a simple repetition of general principles in the subject, thus leaving a great space to the discretion of Government in the implementation of directives. Principles "z" and "aa" insist on the need to simplify self-declaration handling and control on self-declaration.

2. Criteria for qualitative selection

2.1. Exclusion grounds (personal situation of the candidate/tenderer)

As seen in the previous paragraph, the Italian PP code follows the scheme of Directive 2004/18/EC, articles 45-52 in regulating exclusions grounds, but with some substantial differences. In Italian law there are no optional exclusion grounds, when personal situation of the tenderer is concerned.

First of all, art. 38 PP code, in dealing with exclusion clauses deriving from the personal situation of the candidate or tenderer, lists 14 situations of mandatory exclusion, without leaving to the contracting authority any possibility to decide whether to apply it or not: all of them are compulsory.[3] Nor is left any discretion to the contracting authority in introducing additional exclusion grounds:[4] in conclusion, the grounds for exclusion listed in art. 38 are all, and the only grounds, for exclusion in Italian public procurements. They are applicable also to public procurements under the threshold, according to art. 121 PP code for work procurements, and to service and supply procurements under the threshold according to art. 124.7 PP code and to D.P.R. 207/2010 (regulation for the execution of the PP code).

According to ANAC,[5] the ground for exclusion of the candidate or the tenderer is applicable from the moment when the offer (or the manifestation of interest) is submitted, till the moment when the contract it signed. If at any moment between these two periods the candidate or the tenderer happens to be in a situation of exclusion ex art. 38 PP code, he will be excluded from the procedure, even if he can demonstrate to have eliminated the situation before the signature of the contract, (with the exception of the limited possibility of self-cleaning; see infra).

3. AVCP-ANAC. Determina n. 1/2010, point. 2
4. E. Garuzzo, commento all'art. 38, in Ferrari and Morbidelli, *Commentario al codice dei contratti pubblici*, (Egea: Milano, 2013), vol I of III, p. 536-537.
5. AVC_ANAC, Determina n. 1/20101, point 2.

This long list relates to situations of high legal complexity, especially when criminal and particularly anti-mafia legislation is concerned, and takes a great deal of responsibility for the high level of litigation on these grounds.

Even if the 14 cases listed in art, 38 PP code, from 38.1.a to 38.1.m-ter, are all related to reliability of the economic operator, they are however rather heterogeneous. The underlying reason for this is that they are often the result of a statutory layering, with a continuous adding of new exclusion grounds following judicial decisions or new constellations which the legislature regarded as requiring regulation. Despite the difficulties gathering them in subcategories, the following paragraphs try to offer a broad categorisation of the exclusion grounds in Italian procurement law.

Main grounds for exclusion

Some of the exclusion grounds are the simple translation of those set out in art. 45. This is particularly the case for the most important of them: bankruptcy related grounds for exclusion (art. 38.1.a) and "professional" crimes related causes (38.1.c), that is all crimes referred to in art. 45 of the Directive, plus crimes affecting the "professional morality" of the economic operator. A particular list of clauses of exclusion, which of course is not of European origin, is provided for mafia related crimes (art. 38.1.b): in this case art. 38 requires the exclusion of economic operators who are subject to procedures for the application of penalties connected to mafia crimes, even if they are not yet convicted. It is up to the Prefect (the local representative of the central Government) to decide if the situation is so grave to entail the exclusion of the economic operator from the possibility to participate in public procurements. The Prefect can also extend the exclusion to cohabitant relatives of the person which is under mafia investigation. According to the anti-mafia legislation (now under the anti-mafia code, Decree n. 159 of 2011), the Prefect can issue an information report ("Informativa antimafia") by which the general behaviour of the economic operator is taken into account, even if it does not entail any criminal offence nor an ongoing investigation. Under this informative report, the Prefect can forbid the participation of a certain company to the public procurement procedure, due to the presence of "infiltrazioni mafiose", which is an expression very difficult to be translated but, in general terms, means the danger of a possible collusion with mafia, even if not (yet) entailing a conviction nor a formal investigation. The whole anti-mafia legislation is very strict in the field of exclusion to the participation to public procurement, because public procurements are, as everyone knows, a field where the mafia is very active. In particular, the discretion of Prefects is considered ra-

ther high, even if the administrative judge can verify it and in certain cases has annulled the decision of the Prefect.[6]

A second group of grounds for exclusion relates to the professional activity of the economic operator. He can be excluded, if he was convicted for violation of labour laws with particular reference to security in constriction sites (art. 38.1.e) or, if he was responsible for a serious breach of contract with the contracting authority (art. 38.1.f). In addition, art. 38.1.h provides for the exclusion of an economic operator who submitted false declarations of false documents during another public procurement procedure.

Another reason for exclusion – always related to the reliability of the economic operator – is that provided for in art 38.1.g and 38.1.i: the first is triggered when the economic operator is convicted for having omitted tax payments, while the latter is related to omitted payments to the social security agency of the economic operator's employees.

Finally, there are some miscellaneous provisions related to specific Italian laws: it is a mandatory ground for the exclusion of a candidate who is owned by a trust unless the beneficiary of the trust is disclosed (art. 38.1.d). Other mandatory grounds concern the violation of the Italian law on compulsory assumption of disabled personnel (art. 38.1.l) or a case, in which the operator was a victim of a bribery but did not denounce it to the judicial authority (art. 38.1.m-ter).

A general comment on the various causes of exclusion set in art. 38 PP code can be found in the Determination of the Authority for Pubic procurements (now Authority anti-corruption) n. 1 of 12 January 2010, then updated by Determination n. 1 of 16 May 2012 and now updated with the last Decree laws 90/2014 through Determination n. 1/2015.[7] Every single cause of exclusion has produced a wide amount of case law, which cannot be presented here in detail.

6. For example, Council of State, dec. 16 September 2015, n. 4340, annulled an interdiction of the Prefect of Caserta based solely on the familiar relation between a known "mafioso" and another person. According to the Council of Stato, the simple presence of a familiar relation, without any other element or at least common interest, is not enough in order to apply the antimafia legislation to a person.
7. ANAC, determinazione n. 1 del 12 gennaio 2010; determinazione n. 1 del 16 maggio 2012, determinazione n. 1 del 15 gennaio 2015, all in www.anticorruzione.it.

An example: failed payment of taxes and of social securities contributions

It is, however, interesting to examine one of the most common causes of exclusion, that is the file payment of taxes (art. 38.1.g) and of social security contributions (art. 38.1.g).

Until the legislative modification introduced by Decree Law 70/2011, art. 38 of PP code did not specify if the violations of fiscal legislation and of labour security payments were to be considered a ground for exclusion notwithstanding the amount due, or whether the violation had to be serious.[8] Case law was initially for the more restrictive interpretation, stating than any missed tax payment or any missed payment of labour security duty was a cause for exclusion, even if it was of trivial amount. In most recent decisions, however, the Council of State has favoured a more flexible approach, for example reverting a decision of the administrative Tribunal of Lombardia-Milano on the basis that a fiscal debt of €36,000 was not enough for excluding the Intesa Sanpaolo Bank, which is one of the largest Italian banks.[9] According to the *Consiglio di Stato*, the *ratio* of the exclusion for violation of fiscal legislation relates to the reliability of the candidate and thus the threshold must vary in relation to the financial soundness of the candidate itself. It follows that a fiscal debt of €36,000 was not relevant for a bank with a financial activity of several billions of euros.

Decree Law 70/2011 introduced some thresholds under which the violation should be considered irrelevant. It modified art. 38 of PP code requesting that the violation of fiscal or social security legislation to be "serious" ("grave" in Italian). According to art. 38, § 2, PP code (referring to the threshold set by D.P.R. 602/1973) a fiscal violation is serious when in excess of €10,000, while a violation of social security payments is serious after art. 38, § 2, PP code (referring to the threshold set by Decree-Law 201/2002) when it exceeds 5 percent of the total amount due and is however not serious in case of an amount lower than €100. The Administrative tribunal of Lombardia-Milano submitted the question to the European Court of Justice whether these provisions are compatible with Union law, in particular with

8. For a general review of case law on the cause of exclusion consisting in violation of fiscal discipline prior to Decree law 70/2010, see F. Gasparino and F. Tosco, "Regolarità fiscale e contributiva ai fini della partecipazione agli appalti pubblii" (2010) *Fisco*, p. 5818.
9. Consiglio di Stato, dec. 4854/2014. The decision of the Consiglio di Stato is following to the approval of decree law 70/2011, but the case which was under decision dates back to 2009, when the bank was excluded from the contracting authority.

regard to the principle of proportionality, but the Court denied a violation of EU law.[10]

No specific ground of exclusion is provided by the PP code for equal treatment and transparency like in the *Fabricom* case, but case law has recognized the principle set out by the European Court of Justice in that case, stating that it is necessary for the petitioner to give evidence of the advantages achieved in a case of a potential conflict of interest.[11] In the specific case, the Council of State decided that it was not contrary to equal treatment to award the contract of construction supervision as well as the building contract to the same economic operator, because no reserved information was provided by the first contract which could affect the adjudication of the latter.

2.1.1. Changes of consortia

Changes of consortia are dealt with in art. 37 PP code which, in § 9, states that they are not admitted after the offer and that a violation of this prohibition leads to the exclusion of the consortium. However, §§ 18 and 19 of art. 37 permit some exceptions, but only in case of bankruptcy (or death, in case of a physical person) of one member of the consortium or in cases in which one member of the consortium was sentenced for mafia crime. The compatibility of this rigid rule with European Union law has already been confirmed by the European Court of Justice.[12] However, Italian case law began to develop some mitigations to the rule, stating, for example, that it relates only to the increase, but not the reduction, in the number of members of the consortium, so that a member of the consortium can retreat from the consortium if the consortium keeps the necessary requisites for qualification.[13] This case law was finally adopted by the *Adunanza plenaria* of the Council of State, in the name of the principle that consortia aim to facilitate the participation of economic operators and must consequently be as flexible as possible, respecting equal treatment.[14] In particular, the *Adunanza plenaria* specified that changes of consortia are not admitted if they are aimed at rectifying the situation of a consortium which did not have the necessary qualification criteria. An exam-

10. European Court of Justice, dec. 10 July 2014, case n. 358/12, Consorzio stabile libor Lavori pubblici c. Comune di Milano. For a critical comment, see: P. Patrito, "La disciplina italiana sulla regolarità contributiva è compatibile con il diritto UE" (2014) 11 *Urbanistica e appalti*, at 1170.
11. Council of State, dec. 28 April 2014, n. 2190.
12. European Court of justice, dec. 23 January 2003, Case C-57/2001.
13. Council of State, dec. 13 May 2009, n. 2964; dec, 10 September 2010, n. 6546.
14. Council of State, Adunanza plenaria dec. 4 May 2012, n. 8.

ple would be the case of a consortium, which was admitted without the necessary requisites, and which wants to introduce a new partner in order to meet the criteria. More recently, the Council of State seems to have changed its opinion, returning to a more restrictive interpretation of art. 37, stating that no modifications of consortia are admitted outside the scope of art. 37. In particular, the recent case law insists on the need to preserve the contracting authority from the danger of having new co-contractors, which it has not verified, and, at the same time, on the need to admit only modifications of consortia which are necessary because of external causes and not on a voluntary basis.[15]

2.1.2. Submission of more bids

The possibility of submitting more bids is excluded by art. 38, lett. m-quater, which obviously also excludes all the cases where a candidate is part of the same group of another candidate. The exact wording of the law is to forbid two or more candidates who are connected to the same "decision centre" ("centro decisionale") to participate in one award procedure. However, the difficulty does not arise when a company is owned by another, or two companies are owned by a common parent company, but when the collaborating companies are owned by different shareholders. For such cases, the Italian case law has defined some indicators from which the contracting authority can deduct the existence of the same decision centre and thus exclude the involved companies. For example, a common decision centre is presumed when two companies have the same registered address, insurance policies with consecutive numbers, managing directors who are married and in cases in which the companies have presented offers simultaneously or with the same characteristics.[16]

2.1.3. State aid

The PP code does not provide rules for an exclusion of tenderers, which have received illegal State aids. The only reference to staid aid can be found in art. 87, which states that in the case of an abnormally low tender, the tenderer can justify the abnormality declaring the award of a legitimate State aid.

15. Council of State, dec. 3 july 2014, n. 3344; dec. 14 December 2012, n. 6446 in www.giustizia-amministrativa.it. The evolution of case law in the matter of change of conosrtia is well explained by A. Ruffini, "L'evoluzione giurisprudenziale del principio di immodificabilità soggettiva del RTI" (2014) *Urbanistica e appalti*, p. 1327.
16. Council of State, dec. 2 May 2013, n. 2397.

2.1.4. Self cleaning

Self cleaning is provided only for the exclusion grounds of art. 38.1.c, which includes all the criminal offences of art. 45, par. 1 Directive. In this case, the exclusion is not applicable if (i) the sentenced director of the company is not in charge any more and (i) the company has demonstrated "effective dissociation" from its conduct, for which it is usually required to bring a civil action for damages against the director.[17] However, in a recent case, the *Consiglio di Stato* decided that a civil action for damages brought by the company against its former director (who was convicted for a crime), was not enough for self-cleaning, if the former director was still the owner of 95 percent of the shares of the company.[18]

Loss of qualification requisites after the signature of the contract

The PP code does not impose that the contractor must keep all requisites for qualification during the execution phase of the contract: art. 135 PP code lists the cases in which the contracting authority is entitled to terminate the contract for subsequent loss of admission requisites after the signature of the contract. This concerns mainly exclusions because of criminal convictions (art. 38 PP code) and exclusions on the basis of violations of security rules on the construction site (art. 38.1.e).

However, even if bankruptcy is not listed in art. 135 PP code, in the case of subsequent bankruptcy, the public procurement contract has to be terminated by law and must be retendered, without any possibility for the contracting authority to continue it.[19] The question is, however, debated[20] because the rule seems to be too rigid and does not take into account the interest of the contracting authority to continue the contract. In addition, one has to consider the public interest of the judicial administrator for the bankrupt company to sell the contract in order to recover money for the payment of debts of the bankrupt company. In conclusion, the public interests here at stake are: (i) the public interest for a public administration not to continue a contract with a bankrupt company; (ii) the public interest of the same public administration

17. Council of State, dec. 30 January 2012, n. 447; CGA, dec. 14 March 2011, n. 201.
18. Council of State, dec. 30 April 2014, n. 2271.
19. Council of State, advice of 22 January 2008, n. 4574/07, in *Urbanistica e appalti*, 2008, p. 619-624, with a note of M.L. Beccaria.
20. See M. Comba, "Retendering or sale of contract in case of bankruptcy of the contractor? Different solutions in an EU and comparative perspective", in G. Piga – S. Treumer (eds), *The Applied Law and Economics of Public Procurement* (Routledge: London, 2012), at 201-211.

to continue the contract, if the bankrupt company can do it and (iii) the public interest of the judicial administrator of the bankrupt company to give value to the assets of the bankrupt company, included the public procurement contract. In Italy it seems that only public interest under (i) is considered, while also public interests under (ii) and (iii) should perhaps be taken into account.

2.2. Selection criteria

Articles 41-43 of Italian PP code are the almost literal translation of articles 46-48 of the Directive. Subsequently there are only few legislative specialities in Italy on this issue, in contrast to the personal qualification. However, case law is very rich in this field, which makes it difficult to provide a complete picture by presenting just selected decisions, out of the large number of cases.

As for *economic capacity*, a recent legislative modification (DL 95/2012) forbids contracting authorities to demand criteria of financial standing expressed in turnover terms without adequate motivation, while it is possible to ask for a "specific turnover", that is: the turnover for the area covered by the contract. That could be in contrast with art. 47 par. 1.c of Directive, but there is currently no case law on this point. In effect, the possession of a certain annual turnover – over a span of the last three years – for a certain amount of money which was usually calculated in relation to the amount of the contract, was commonly required in the bid as a financial standing criterion. Case law stated that the determination of the amount required is up to the discretion of the contracting authority. It can only be annulled by a Court if the amount is manifestly disproportionate, illogical and contradictory.[21] However, the Authority on public contracts stated that requiring net turnout, which is twice as high as the amount of the contract, is disproportionate.[22]

Appropriate statements from banks can be required by the contracting authority, but it can happen that the text of the statement is contested by the contracting authority because of its vagueness.[23] It has, however, been decided that in a case in which the economic operator was lacking the two required statements from banks, he could demonstrate his financial stability by other similar documents, like for example the declaration of his chartered accountant.[24]

21. Council of State, dec. 31 May 2012, n. 3251; dec. 20 April 2012, n. 2339.
22. AVCP, now ANAC, parere 7 may 2009, n. 59, in www.anticorruzione.it [accessed 23 June 2016].
23. Council of State, decision 21 November 2007, n. 5909.
24. TAR Veneto, decision 23 March 2015, n. 331.

Additional criteria for demonstrating economic capacity are admitted, but subject to the principles of reasonableness and proportionality. For example, the requests of having financial statements with a net profit in the last three years[25] or of net assets for a third of the amount of the contract,[26] have been considered proportionate and logical.

As for *technical capacity* (art. 42 PP code), the same principle of proportionality applies in the evaluation of specific criteria required. For example, the request of an ISO 14001 certification as a technical requisite for a bid of public illumination of a municipality was considered not to be proportional, since in that case the environmental considerations were not particularly relevant.[27]

One important question in the case law of Italian courts concerning the admission of candidates is the distinction between requisites for technical qualification and those for the execution of the contract.[28] Contracting authorities frequently ask for technical requirements of admission, which are in reality elements for the execution of the contract: for example, in the case of a service for public transportation, the requirement for technical qualification consisting in the demonstration of the actual property of a certain number of buses was deemed illegitimate, because it was discriminatory against economic operators different from the incumbent supplier. In that situation, according to the Council of State, the simple declaration of availability of buses – for example through a contract of purchase or leasing under the condition that the economic operator is awarded the public contract – should be considered sufficient for the demonstration of technical capacity.[29]

As for the distinction between selection and award criteria, the Authority on public contracts has recently recalled the rule for this distinction,[30] in relation to a service of water metering. The Authority considered criteria as illegal those which are related to the company organization and not to the offer.

25. Council of State, dec. 21 January 2011, n. 426.
26. Council of State, 2 February 2009, n. 295.
27. TAR Puglia-Lecce, dec. 6 October 2009, n. 2247.
28. European Court of Justice, Case C-234/03, *Contse SA.*
29. Council of State, dec. 9 November 2010, n. 7963; dec. 23 December 2005, n. 7376; TAR Campania-Napoli, dec. 7 March 2012, n. 1159.
30. AVCP, now ANAC, parere 23 april 2014, n. 86, in www.anticorruzione.it [accessed 23 June 2016].

However, for services with a higher intellectual content, the Council of State continues to admit a limited overlapping between the two criteria.[31]

3. Procedures for evaluating/Means of proof

According to art. 38, par. 2 of the Italian PP code, candidates and tenderers can certify the possession of qualification criteria related to their personal situation by self-declarations, with formalities stated in DPR 445/2000, art. 46-49, which can lead to a criminal liability in the case of a false declaration. The same applies for economic capacity (art. 41) and technical and professional capacity (art. 42). Hence, according to existing Italian law, contracting authorities are obliged to accept self-declarations as means of proof for personal situation, economic capacity and technical capacity.

However, self-declaration must be verified. Art. 48 deals with the controls over self-declarations, which imply two different steps:

The first step of control takes place before the opening of the bids and concerns only 10 percent of all tenders, selected by lot;

The second step concerns only the economic operator that is awarded the contract, who must demonstrate to possess all the required requisites (obviously only when he has not done that in the first phase).

Administrative procedures in order to get all the documents necessary to verify the effective possession of requisites is time consuming for the contracting authority, especially when anti-mafia declarations are concerned. Considering that the contract cannot be signed without that certificate, and that after the signature of the contract the standstill provision requires another 35 days before the contract can be executed, one can imagine the possible delays to the very commencement of the execution of the contract.

It is widely debated in case law at which time the awarded economic operator must possess the qualification: at the moment of the filing of the bid, or at the moment of the conclusion of the contract? The *Adunanza Plenaria* of the Council of State opted for the stricter, but also more logical, interpretation, pretending that such criteria have to be verified by the contracting authority at both points in time.[32]

31. M. Comba and S. Treumer (eds), *Award of contracts in EU procurements*, (djoef publishing: Copenhagen, 2013); Mario E. Comba, "Selection and Award Criteria in Italian Public Procurement Law" (2009) 3 *PPLR*, p. 122.
32. Council of State, Adunanza plenaria, dec. 7 April 2011, n. 4.

The exclusion of a candidate or tenderer on the basis of the lack of requisites can be performed, according to art. 46 as modified in 2011, only in cases determined by the law or in the case of a lack of essential elements related to the integrity of the bid and of signatures: this is the so-called principle of "closed number". Any other exclusion provided for by the contracting authority must be considered as invalid by the Court. This rule was inserted by Decree law n. 70/2011 in order to prevent contracting authorities from developing exclusion grounds which were merely formal and not substantial. Until that amendment, case law admitted the possibility for the contracting authority to ask for clarification of documents, but was very strict in distinguishing between regularization or integration of an existing document on the one hand and presentation of a new document on the other, ruling out the sole legitimacy of the latter cases.[33] For example, it was considered possible to deposit the original of a document, which was presented only in photocopy,[34] but not to deposit the photocopy of an identity document which was not deposited with the original offer.[35] This rule already lost large parts of its significance when the principle of "close number" was introduced by the Decree Law 70/2011, because a candidate could no longer be excluded for a lack of presentation of a document, which was not required by law or in the case of a lack of essential elements related to the integrity of the bid and of signatures.

After the entry into force of the Decree law n. 90/2014 the situation has now completely changed. In fact, the new art. 38.2bis states that if it comes out that a candidate or tenderer provided an incomplete documentation, even if the fault is essential, the contracting authority must define a deadline for the presentation of the complete documentation, including a financial penalty between one percent and one per thousand of the amount of the contract but in any case not more than €50,000. On its turn, the new art. 46 § 1ter states that art. 38 § 2 bist is applicable to any case of lack, incompleteness or irregularity of documents and declarations to be presented by candidates or tenderers. The new rule seems thus to exclude the possibility for the contracting authority to exclude a candidate even for a lack of documents, since it is obliged to

33. Council of State, Adunanza Plenaria, dec. 25 February 2014, n. 9.
34. Council of State, dec. 3 September 2014, n. 4494, commented by C. Pasquale, "Il soccorso istruttorio tra "mere" irregolarità, irregolarità sanabili ed errori irrimediabili" (2014) *Urbanistica e appalti*, at 1288.
35. Council of State, dec. 23 July 2008, n. 3651. For a general comment on case law about the presentation of Identity documents in public procurement procedures, see: M.G.Vivarelli, "Gare d'appalto: il documento d'identità nelle autocertificazioni tra l'elemento essenziale e il formalimo senza scopo" (2013), *Corriere merito*, at 587.

admit also new documents, under the payment of a fine. The question is, however, controversial, since the application of the rule without limitation will limit the principle of equal treatment and could result to be, in certain cases, in conflict with European law, which forbids the modification of the offer.[36] A further question concerns the option for the bidder to waive the possibility to deposit the failing document, in order not to pay the fine. After a few decisions that opted for the stricter interpretation, imposing the payment of the fine independently from the intention of the bidder to go on with the procedure, a recent decision acknowledges his right to choose.[37]

The Anticorruption Authority tackles all the problems arising from the new rules introduced by Decree law 90/14 with a long document issued in January 2015.[38] In this document, the Authority states that the new rules have the scope to simplify the participation to public procurement procedures and to eliminate all the causes of exclusion, which are only formal and not substantial. In other words, the candidate can be excluded only if he does not have the necessary requisites, and not if he simply failed to demonstrate them by lack of presentation on time of the required documents. The failure of the timely presentation of the needed documents is punished with a fine (which satisfies the equal treatment principle), and not with the exclusion.

Consequently, the bidder has the right to produce new documents, which were not presented with the original offer, but he cannot modify the offer. For example, according to the Authority, the bidder can deposit the copy of an identity document, which was failing in the original offer, or he is even allowed to sign the offer with was presented without signature, but which was nevertheless attributable to him, for example because of its letterhead or because all other documents were signed by him.[39]

The situation in which the bidder has not simply failed to present a declaration, but has presented a false declaration, is not covered by the new rule, with the consequence that, according to the Authority, the false declaration cannot be recovered and entails the exclusion of the candidate.

36. See Pasquale, *supra* note 34.
37. TAR Emilia Romagna – Parma, ordonance 10 July 2015, n. 142.
38. ANAC, determinazione 8 gennaio2015, n. 1, in www.anticorruzione.it [accessed 23 June 2016].
39. But the TAR Lombardia, decision 13 July 2015, n. 1269, in www.giustizia-amministrativa.it, does not share the position of the Authority, expressely stating the the lack of signature always entails the exclusion of the bid, without any possibility for the bidder to sign afterwords.

This can help to answer a highly controversial question of Italian Administrative law: what happens when a candidate or bidder fails to declare a previous conviction, which would not have led to an exclusion of the candidate anyway, because, for example, the candidate failed to declare his conviction for a crime not included among those which imply the exclusion. In some cases, administrative judges decided that he is to be excluded because his declaration was incomplete or false, while in other cases it was decided that the incomplete or false declaration was moot and therefore the candidate or bidder could be admitted, under the doctrine of "*falso innocuo*" (harmless false).

Another debated question relates to the possibility for a company to "inherit" exclusion grounds after a merger: in a specific case, one director of the absorbed company was convicted for crimes listed in art. 38 PP code and, though he was not confirmed as director of the new company, that was considered by the Council of State as a reason for exclusion, in application of the rule by which a company is excluded if its past directors for the last year were convicted for crimes concerning their professional conduct.[40]

Concerning work procurements, the PP code provides for a special mechanism of selection and qualification, which is committed to private qualification agencies, subject to strict public control, called "SOA". Any economic operator must go to a qualified SOA in order to get a certificate attesting the possession of requirements for participation (art. 39 PP code) and qualification (art. 41-43 PP code). As for technical capacity qualification, any economic operator in the field of public works can require the SOA to be admitted to one or more categories, according to the kind, and to the quantity, of the public works he is able to perform. Art. 61.4 D.P.R. 107/2010 sets 10 different categories for works, from the smallest (up to €258,000) to the largest one (more than €15,494,000): any economic operator in the field of work procurements can require a SOA to be included in one of these quantitative categories and is therefore authorized to participate in public procurements for the equivalent value.

Due to the difficulty for contracting authorities – especially the smaller ones – to verify all the documents for requirements of participation and qualification, the law committed to ANAC (the national Authority against corruption, the former National Authority for public procurements) the creation of a data bank to which any economic operator can transmit all the documents necessary to prove his position for participation and qualification require-

40. Council of State, Adumaza plenaria, dec. 7 june 2012, n. 21.

ments. After having transmitted all the documents, the economic operator gets an "AVC Pass" which he can then communicate to the contracting authority in order for the latter to verify the requisites. The mechanism is not yet fully working, since a great part of the documents has to be released by national authorities (for example tax Authorities, or Social securities contribution Authorities, of Criminal Courts) who are not completely connected with ANAC. However, the process in on its way to be fully implemented.

As for the anti-mafia requisites, the recent legislation has introduced a mechanism of white listing, prepared and updated by the Prefects. Art. 1.52 to 1.57 of Law 190/2012 states that in certain particular fields of public procurements, considered the most dangerous for mafia reasons, any economic operator can ask the Prefect having jurisdiction over the place where the company has his headquarters, to be inserted in the white list. If it is a foreign company, without any office in Italy, the request can be filed with any Italian Prefect. Once inserted in the white list, the economic operator will be subject to continuous controls by the Prefect and, in any case, after 12 months the request has to be renewed. Due to the voluntary nature of the registration in the white list, it is not asked as a necessary requirement for the participation to public procurement procedures, but it is an efficient instrument for companies in order to speed the preparation of documents for the participation to public procurements procedures.

4. Reliance on the capacity of other entities

Articles 49 and 50 of the PP code deal with reliance on the capacity of other entities, in application of articles 47.2 and 48.3 of Directive 2004/18/CE. The Italian regulation on the subject is highly accurate and was modifed several times, besides being the object of many decisions, among which included the ECJ, which means that the topic has been, and still is, highly controversial. Article 49 regulates the "normal" reliance on the capacity of other entities, while art. 50 tackles the specific situation in which the private agencies system for qualifying public works economic operators (SOA) are involved (see par. 3). In both cases, the auxiliary entity is deemed jointly liable towards the contracting authority.

Art. 49 admits reliance only for financial and technical capacity and excludes it for personal qualifications. The main problem faced by art. 49 is to list the documents that must be provided by the economic operator in order to demonstrate the existence of a reliance relationship. In fact art. 49.10 provides that the auxiliary entity *can* be a subcontractor, which means that the

reliance relationship is not necessarily shaped as sub-contract, but can be considered as a specific "reliance contract", as qualified by case law.[41]

The original text of art. 49 forbid "multiple" reliance, i.e. the case where the same economic operator relied on more than one entity for the same kind of capacity; for exemple, an economic operator, in order to prove the turnover of €100,000 per year, could not rely on company A for €50,000 and on company B for the other €50,000, but only on one single company. The ECJ[42] decided that the provision was contrary to European law and subsequently art. 49.6 was modified in order to admit the "multiple" reliance.

Article 50 regulates reliance on the capacity of another entity when capacity is certied by official lists of approved economic operators or bodies established under public law (the so called "SOA": see par. 3). In this case, admission of reliance is stricter, because it is required that the auxiliary company be a parent or a daughter of the company requiring their reliance, or be however owned by the same mother-company.

5. Reduction of number of candidates

Art. 62 PP code regulates the reduction of candidates in case of restricted procedure, not always admitting it, but only when it is so required by the difficulty or complexity of the procurement and avoiding that the reduction of the number of participants results in a limitation of competition. However, the number of candidates admitted cannot be lower than 10, and, in case of works procurements (worth more than €40 million), it must be at least 20.

Criteria for selection of candidates must be published in the public bid and must be proportionate and objective.

The reduction of number of candidates is very rarely applied in Italy; the reason lies perhaps in the consideration that PP code does not provide for an accurate indication of the criteria to be used for the reduction. One of the few decisions on this matter admits as a criterion of reduction the chronological order of presentation of the manifestation of interest, or even selection by lot.[43]

41. ex multis, Council of State, dec. 17 December 2015, n. 5045; C. Commandatore, "L'avvalimento. un alieno collegamento tra contratto e procedimento amministrativo" (2015) *Nuova Giur. Civ.*, 7-8, 10588. Art. 88 PP regulation specifies what are the necessary elements of the reliance contract.
42. C-94/12, ECLI:EU:C:2013:646.
43. TAR Lazio, decision 20 November 2002, n. 10252.

The restricted procedure is, however, often used, but not with the scope of reducing the candidates between the manifestaztion of interest and the presentation of the offer; rather for splitting the procedure into two steps, and, sometimes, for having more time in order to prepare the letter of invitation.

6. Debarment

Art. 38.1ter of PP code states that if a participant has presented a false declaration or a false documentation in order to get qualification of personal situation, the contracting authority must inform ANAC, which will then assess the gravity of the situation and, if malice or grave negligence are found, will include the economic operator in the black list. The presence in the black list debars the economic operator from all public procurements for a period of time up to one year.

The same procedure is followed, according to art. 48.1 PP code, in case of false delcaration or false documents for getting economic or techincal qualification, but in this case ANAC can also apply an economic penalty.

In both cases, ANAC has to follow a due process before deciding the debarment, which is regulated by determination n. 1/2010 in case of personal qualification (art. 38.1.ter) and by determination 1/2014 in case of economic and techincal qualification (art. 48.1). In both cases, the final decision of ANAC can be challenged in front of the administrative tribunal of Rome (because ANAC is based in Rome) and, in case of appeal, in front of the Council of State.

7. Conclusion: towards a more flexible approach to the rules on qualification and selection of candidates?

As we have seen in the previous paragraphs, Italian case law on public procurements is often very busy with litigation about qualification and selection criteria, mostly because of the very formalistic style of bids prepared by contracting authorities. In order to reduce this litigation, some reforms were introduced, like data banks certified by ANAC (AVC Pass system) or the private agencies system for qualifying public works economic operators (SOA).

Most recently, reforms introduced by Decree law 70/2011 and 90/2014 have introduced two strong instruments in order to limit this kind of litigation: first, contracting authorities are forbidden from inserting in public bids requisites which are not essential for the regular execution of the awarding

procedure, and, if they do, such requisites are to be considered null; second, if a bidder fails to present an essential document or declaration, the contracting authority is forbidden from excluding him from the procedure but must give him a term for the presentation of the document and apply to him the payment of a fine.

The result of this profound modification of the Italian rules on the selection procedure of the public procurement code is not yet well established because case law is just beginning to "react" to the legislative innovation, but it seems that the trend will inevitably entail a severe reduction of cases of exclusion of candidates in the name of the prevalence of substance over formalism.

Among the most recent applications of the new rules are the decisions according to which a participant cannot be excluded, even if he has not declared the name of the subcontractor, or if he has not declared the subdivision of the work among the members of the group of economic operators.[44] It is inevitable that a lot of uncertainty still remains, such as in the case when there is a lack of signature on the bid, which can be overcome by a subsequent intervention of the bidder, because the ANAC thinks it is possible,[45] if the bid is attributable to the bidder, while a recent decision of the administrative Tribunal of Milano agrees with the stricter interpretation.[46]

It is not clear if this new approach will be better than the old one in terms of efficiency and smoothness for administrative procedures, but the trouble with the Italian legal system is that often statutory reforms – even if some evident malfunctioning is in dire need of eliminating – place emphasis on the opposing direction, thus creating the premise for the following reform.

44. TAR Piemonte, decision 4 August 2015, n. 1335.
45. ANAC, determinazione n. 1/2015.
46. TAR Lombardia, decision 13 July 2015, n. 1269.

Qualitative selection and exclusion of economic operators in Portugal

Pedro Telles[1]

1. Introduction

The Public Contracts Code 2008 establishes a set of rules applicable to all public procurement in Portugal. Its scope includes contracts covered by Directive 2004/18/EC, Directive 2004/17/EC, contracts with a value below the thresholds,[2] concessions, and public-private partnerships. This is a monolithic law which in addition to covering public procurement in the more traditional sense (pre-award), also includes extensive substantive rules on contract performance (post-award).[3] It does not, however, deal in detail with how contracting authorities take their decisions[4] or with remedies.[5]

The Portuguese legislator adopted a very detailed and prescriptive approach towards the transposition of Directive 2004/18/EC into national law.[6] It had no issues in departing from the blueprint or model set by the Directive where it felt convenient or appropriate. The underlying theme of the changes

1. The author is grateful for comments received from colleagues at the European Procurement Law Group meetings in Munich (2014) and Birmingham (2015), and particularly to Dr. Albert Sanchez-Graells and Pedro Cerqueira Gomes.
2. Regulation 1336/2013/EU.
3. Contained in Articles 278 to 454 Public Contracts Code 2008.
4. Those are regulated by the Administrative Procedure Code (Decree-Law no 4/2015) instead.
5. Regulated by the Administrative Court Procedural Code (Law no 15/2002, as amended by Law no 4-A/2003) and the Administrative & Tax Jurisdiction Statute (Law no 13/2002, as amended by Law no 4-A/2003 and Law 20/2012).
6. Regarding transposition details, please see P. Telles, "Competitive Dialogue in Portugal" (2010) 1 *Public Procurement Law Review*, at 2-3.

introduced is one of simplification and transaction cost-reduction. For example, electronic procurement has been mandatory in the country since 2009.

The conscious simplification policy influence can clearly be seen in the exclusion and selection rules discussed here. In this area the Public Contracts Code 2008 is very different from Directive 2004/18/EC. For example, in Portugal open procedures are single stage procedures whereby both selection/qualification information and the actual tender are submitted at the same time. Under Directive 2004/18/EC, the open procedure was conceived as a two stage procedure where selection/qualification information would be analysed separately and before tenders are submitted. In a sense, by not having a separate selection stage for the open procedure, the Public Contracts Code 2008 anticipated changes introduced only in Directive 2014/24/EU, as under this Directive it is now possible to run single stage open procedures.[7] Another example of the similarity of the Public Contracts Code 2008 with Directive 2014/24/EU, only successful economic operators have to provide documentary evidence of compliance with grounds for exclusion or selection criteria when the contract is being awarded, not before and not by all bidders.[8] This simplifying effect is prevalent as well in the format in which economic operators are to provide the necessary information for qualitative selection and exclusion: all of which can be done online, preferentially with copies of documents and not necessarily with originals.

The Public Contracts Code 2008 rules on procedures are structured in a very peculiar way. Perhaps the best analogy is that the rules for procedures look like a set of lego bricks. There are general rules applicable to all procedures, such as the rules on exclusion of candidates. From this base set of "legal bricks," each procedure, and its specific procedural rules, is then bolted on in sequence. There is no repetition of provisions, but as no procedure chapter contains all the rules relevant to that procedure, practitioners are forced constantly to cross-reference to other areas of the code to discover the full scope of the legal rules applicable to a procedure.

The most complete set of procedural rules is to be found in the open procedure chapter.[9] These rules are applicable to the open procedure directly,

7. Directive 2014/24/EU, Article 27(1) and 56(2).
8. Furthermore, if the grounds of exclusion (Article 55) are found, the jury of the procedure shall exclude the tender (Article 146(2)(c)). Although it should be said that the average duration of an open procedure in Portugal is still one of the longest in Europe, according to TED data collated by SpendNetworks, available at: http://tt.spendnetwork.com/.
9. Articles 130 to 164 Public Contracts Code 2008.

and to all other procedures, in a subsidiary way; that is, if there are no specific rules in each of the other procedure's chapters.[10] But not all procedural rules are to be found in the open procedure. A good example of this is the rules on the selection stage. As the open procedure does not have a traditional selection stage prior to the tender stage, the rules on selection are found in Chapter III (restricted procedure) instead.[11] For the remaining procedures (competitive dialogue and the negotiated procedure with prior publication of a notice) the restricted procedure rules function as subsidiary rules suitably well, unless specific rules are present on the respective chapters.[12] Another way to describe this structure is that the section applicable to each procedure contains only the rules that are specific for that procedure. This structure avoids duplication of provisions but at the cost of forcing anyone applying the Public Contracts Code 2008 to jump through multiple sections to have access to all procedural rules relevant for the procedure they want to use.

In the following sections, we will explore in further detail the changes mentioned above, starting with qualitative selection and procedure, before analysing the grounds and procedure for exclusion. Finally, we will address some specific issues related to performance bonds, reliance on third party capacity, and temporary consortia.

2. Criteria for qualitative selection

2.1. Grounds for exclusion

As mentioned in the introduction, the grounds for exclusion are general rules and common to all procedures in Portugal. The Public Contracts Code 2008 regulates grounds for exclusion of economic operators in Article 55, transposing Article 45 of Directive 2004/18/EC. Most of the content included in Article 55 Public Contracts Code 2008 closely follows the text of Article 45 Directive 2004/18/EC, but the Portuguese law introduces some novelties.[13]

Article 55 Public Contracts Code 2008 states that an economic operator falling foul of any of its rules cannot take part in a public procurement procedure either on its own or or as part of a consortium. No margin of discretion

10. Article 162 of the Public Contracts Code 2008.
11. Articles 162 to 192 of the Public Contracts Code 2008.
12. Articles 193 (negotiated procedure with prior notice) and 204 (competitive dialogue) of the Public Contracts Code 2008.
13. On this topic, Mario Esteves de Oliveira and Rodrigo Esteves de Oliveira, *Concursos e outros procedimentos de contratacao publica* (Almedina: 2011), at 820-830.

is given to contracting authorities as they are forced to exclude any relevant economic operators. This constitutes a deviation from Directive 2004/18/EC as only the grounds listed in Article 45(1) lead to a mandatory exclusion, whereas Article 55 Public Contracts Code 2008 also includes the causes contained in Article 45(2) of the Directive. Furthermore, there are no specific provisions in the Portuguese law allowing for self-cleaning[14] other than the passage of time.

a) Grounds for exclusion transposing Article 45 (1)(2) Directive 2004/18/EC

The first five paragraphs of Article 55 Public Contracts Code 2008, effectively transpose Article 45(2)(a) to (f) using a "copy paste" approach that does not warrant comments other than the lack the aforementioned automatic exclusion. The same can be said of Article 55 paragraph (i), which transposes Article 45(1) on criminal organisations, corruption, fraud and money laundering. Article 55(i) allows for the rehabilitation of affected economic operators without providing any clues on how this is supposed to operate, which may lead to the conclusion that the Directive has been wrongly transposed in this regard and that Portugal needs to provide clear means for self-cleaning or rehabilitation of economic operators.[15] Having said that, Article 55 (b) and (c) Public Contracts Code 2008, transposing Article 45 (2)(c) and (d), do include a limitation on the extension of the grounds for exclusion. These are valid only while the individual has not been rehabilitated yet or, if a legal person, while the administrators convicted of the crime[16] or the professional misconduct[17] remain in post. In consequence, as far as economic operators who are legal persons go, it would appear that self-cleaning may occur by simply changing the administration, at least for the grounds of Article 55(b) and 55(c) Public Contracts Code 2008.

14. On the concept of self-cleaning in general, see Arrowsmith, Priess and Friton, "Self-cleaning – An emerging concept in EC public procurement law", in Herman Punder, Hans-Joachim Priess and Sue Arrowsmith (eds), *Self-cleaning in public procurement law* (Carl Heymanns: Cologne, 2009), at 1-32.
15. Cerqueira Gomes, "The Portuguese debarment system of those convicted of corruption" (2013) 7, *Revista de Contratos Publics*, at 111-126. The author further argues that Article 30 of the Portuguese Constitution imposes a time-limit on criminal sanctions and, as such, at least the debarment due to criminal convictions will need to be time-limited. The argument then becomes that if this is the case for the more serious offences (criminal offences), then for the lesser ones the principle of proportionality would require at least a similar treatment.
16. Public Contracts Code 2008 Article 55(b).
17. Public Contracts Code 2008 Article 55(c).

2.1.1. National grounds for exclusion

The Public Contracts Code 2008 departs significantly from Directive 2004/18/EC in the remaining paragraphs of its Article 55 by adding national grounds for exclusions in paragraphs f), g), h) and j). Whereas the first three provide for exclusions based on debarment orders and similar administrative sanctions, paragraph j) excludes suppliers involved in drafting technical specifications or tender documents.

Paragraph f) debars from public procurement any supplier subject to debarment orders under Article 460 Public Contracts Code, or other similar administrative sanctions found in Article 21(1)(e) of Decree-Law 433/82 and Article 45(1)(b) of Law 18/2003. Paragraph g) establishes a similar exclusion for suppliers found guilty of serious wrongdoing in labour law matters under Portuguese law.[18]

For the debarment sanction under Articles 55(i) and Article 460 Public Contracts Code 2008 to be imposed, the economic operator must be found guilty of infringement as set out in Articles 455 to 459 Public Contracts Code 2008. For example, falling under any of the reasons for exclusion of Article 55 when submitting a tender, request for participation, accepting a contract award, or signing the contract, is deemed to constitute a gross misconduct punishable with a fine between €2,000 and €44,800[19] in addition to the potential debarment under Article 460 which amounts to an administrative sanction. Both the fine and the debarment are decided not in a court of law but via an administrative procedure, led and decided by a public body which varies depending on the object of the contract.[20] The maximum debarment period under Article 460 Public Contracts Code 2008 is two years. Although an appeal to the Courts is possible, there are no provisions for self-cleaning which may reduce the duration of the debarment. It is interesting that the provisions of Article 55 paragraph f) do not refer to any equivalent measures applied to economic operators for violation of laws from other Member States, leaving the question if debarments in other Member States have a similar effect in Portugal unanswered.

18. The procedure applicable will be discussed in the following section.
19. Public Contracts Code 2008 Article 456(a).
20. Public Contracts Code 2008 Article 461(1). For public works and public works concessions contracts, the process is led by the *Instituto da Construcao e do Imobiliario, I.P.*, whereas the *Autoridade de Seguranca Alimentar e Economica* is responsible for processes arising from any other contracts.

Paragraph g) states that any economic operator falling in the situation set forth in Article 562(2)(b) of the Labour Code[21] may be debarred from participating in subsequent public procurement procedures. The Article from the Labour Code allows the ancillary sanction of debarment from public procurement procedures[22] to be imposed only in situations where the economic operator is relapsing in labour law infringements and dependant on the impact the wrongdoing had on the employee or the economic benefit obtained with the action. If declared, the debarment may last up to two years. As in the situation described in the previous paragraph, the infringement procedure is administrative in nature, led and decided by an administrative body as defined by Law 107/2009.[23] However, appeals to the Courts are once more permissible and as with paragraph f) it would appear that only infringements in Portugal would trigger the debarment.

Under paragraph h), economic operators subject to either a judicial decision or administrative sanction for the non-payment of taxes and social security contributions related to their workforce[24] are also barred for two years from taking part in public procurement procedures. Contrary to paragraphs f) and g), however, paragraph h) extends the debarment to infringements in other countries, even if these are not EU Member States.

Finally paragraph j) excludes economic operators from a public procurement procedure if they were involved in its preparation, such as drafting

21. Approved by Law no 07/2009 and amended by Law no 53/2011, Law no 3/2012, Law no 23/2012, Law no 48-A/2014, Law no 47/2012, Law no 69/2013, Law no 76/2013, Law no 27/2014, Law no 55/2014, Law no 28/2015 and Decree-Law no 59/2015.
22. Technically, the Article mentions only the participation on "open procedures", although this should be read as applying to any public procurement procedure for two reasons: i) first, "open procedure" is commonly used in the country as shorthand for "public procurement" and this is probably what the Labour Code lawmaker meant. Second, Article 55 applies to all procedures, so any debarment applies across the board for public procurement, irrespective of the actual procedure adopted by the contracting authority.
23. For social security related matters, the competent body is the Instituto da Seguranca Social IP, and for all other matters the Autoridade para as Conducoes do Trabalho, Article 2 Law no 107/2009, as amended by Law no 63/2013.
24. This paragraph is slightly different from Article 45(2)(e) and (f) of Directive 2004/18/EC as it refers to obligations arising from workforce commitments only. Those two paragraphs are transposed instead in the Public Contracts Code Article 55(e) instead.

technical specifications or the tender documents.[25] Until 2012, the original draft of this paragraph imposed an automatic exclusion for any sort of involvement with the procedure, and the Administrative Supreme Court saw no issue with it,[26] ignoring the *Fabricom*[27] ruling. The provision was revised in 2012[28] in accordance with *Fabricom* and now the exclusion is no longer automatic. As such, economic operators are only excluded now if the involvement provides them with an advantage which affects competition. The current wording is more in line with Directive 2014/24/EU Article 57(i).

In addition to the exclusion grounds provided in Article 55, the Public Contracts Code 2008 also includes some additional grounds for automatic exclusion in other areas of the law. These are related to formal requirements[29] during the selection stage that, if unobserved by the economic operator, lead to an automatic exclusion by the contracting authority. For example, if the application to participate or tender is submitted after the deadline,[30] without containing the required documents[31] or in a foreign language[32] without a legalised translation into Portuguese,[33] the contracting authority has to exclude the application for participation or the bid.[34]

2.2. Selection criteria

As a consequence of the structure adopted by the Public Contracts Code 2008, as mentioned in the introduction, the specific rules on selection criteria are contained in its Article 165, within the restricted procedure Chapter. Article 165 establishes minimum technical[35] and financial[36] capacity requirements contracting authorities may adopt. As for the technical requirements,

25. On this topic, see Olazabal Cabral, "O artigo 55 al. j) do CCP: mais vale ser que parecer" (2011) 1 *Revista dos Contratos Publicos*, at 128.
26. Case 01469/14, available at: http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/e8899bdf908942d580257e0c004e4912?OpenDocument&ExpandSection=1 [accessed 23 June 2016].
27. Case C-21/03 *Fabricom SA v Belgian State*, ECLI:EU:C:2005:127.
28. Decree-Law no 149/2012.
29. Public Contracts Code Article 184(2).
30. Public Contracts Code Article 184(2)(a).
31. Public Contracts Code Articles 86 and 184(2)(e)
32. Public Contracts Code Article 184(2)(g).
33. Public Contracts Code, Article 82(2).
34. For additional exclusion grounds due to conflicts of interest such as public managers ("gestor publico") see, Costa Goncalves, *Direito dos Contratos Públicos* (Almedina: 2015), at 243.
35. Article 165(1) of the Public Contracts Code 2008.
36. Article 165(2) of the Public Contracts Code 2008.

Portuguese law states that they need to be *adequate,*[37] taking into consideration the context of the contract to be performed.

Article 165(1) Public Contracts Code 2008 includes a list of examples that can be taken into account by contracting authorities as long as they are adequate: experience, CV or organisational models/organograms are all included, for instance. This list is not exhaustive and contracting authorities are free to set different requirements as long as they comply with the adequacy test and are not discriminatory. This was not entirely needed as for contracts above EU thresholds, the general EU principle of non-discrimination would apply in any event and for all contracts below-thresholds similar guarantees exist in Portuguese law as well.[38]

The Public Contracts Code 2008 departs significantly from Directive 2004/18/EC financial criteria rules by imposing the use of a specific mathematical formula to calculate financial ratios.[39] The actual formula is not contained in Article 165(2) but in Annex IV to the Public Contracts Code 2008 instead. It may be argued that mandating the use of a specific mathematical formula for selection[40] improves procurement decision-making by replacing cognitive heuristics with more precise decision mechanisms.[41]

To compute the financial score for each economic operator, the Annex IV formula takes into account the following elements: i) expected contract value; ii) six month *Euribor* rates; iii) three year EBITDA[42] provided by the economic operator; iv) and a multiplying factor defined by the contracting authority. The output of the formula will then be checked against the minimum

37. Under Portuguese law, the administration is subject to the principle of proportionality and adequacy is one of its three components. The other two are strict proportionality and necessity.
38. Namely, in Article 6 of the Administrative Procedure Code.
39. Article 165(2) of the Public Contracts Code 2008.
40. And also for tender analysis, as the formula is identical, Public Contracts Code 2008 Article 132. On the mathematical formula selected by the Portuguese law maker for tender evaluation, Ricardo Mateus, J.A. Ferreira & Joao Carreira, "Full disclosure of tender evaluation models: Background, and application in Portuguese public procurement" (2010) 16 *Journal of Purchasing & Supply Management,* at 206-215.
41. Mark Crowder, Public procurement: the role of cognitive heuristics, (2015) 35:2 *Public Money & Management,* at 127-134, DOI: 10.1080/09540962.2015.1007707; C. Snijders, F. Tazelaar and R.S. Batenburg, "Electronic decision support for procurement management" (2003) 9 *Journal of Purchasing and Supply Management,* at 191-198 and A. Tversky and D. Kahneman, "Judgment under uncertainty" in D. Kahneman, et al. (eds), *Judgment under Uncertainty* (Cambridge University Press: Cambridge, 1982), at 3-22.
42. Earnings Before Interest, Taxes, Deductions and Amortizations.

financial requirement set by the contracting authority. If the complex selection process is being used, then the formula output will be compared against the results from the other economic operators.[43]

The expected contract value and multiplying factor of the formula have to be disclosed by the contracting authority at the start of the procedure.[44] Providing this information up front allows economic operators to compute the formula themselves and make an informed decision whether to take part in the procedure based on their prospective chances of making it to the award stage. As a consequence, there is a small reduction in the discretion of contracting authorities on selection in Portugal, which may also be explained with a desire to reduce litigation at this stage, as in Portugal judicial review is very accessible.[45]

The Public Contracts Code 2008 still grants contracting authorities the possibility of establishing further financial requirements in addition to the baseline achieved by the mathematical formula,[46] but with the restriction that said additional minimum requirements need to be connected with the economic operators' ability to fulfil the contract. These additional requirements need to be disclosed in the procurement documents at the start of the procedure, similar to the components of the mathematical formula[47] and have to comply with the principle of proportionality.[48]

43. For a detailed discussion of the simple and complex selection processes, please see section 3.
44. Public Contracts Code 2008 Article 164 1(i).
45. And with a short limitation of statute, any excluded economic operator has to apply for judicial review fairly quickly, well before the award decision has been taken. On the public procurement judicial review system in Portugal see, OECD, "Public Procurement Review and Remedies Systems in the European Union", SIGMA Papers, No. 41 (OECD Publishing: 2007). http://dx.doi.org/10.1787/5kml60q9vklt-en [accessed 23 June 2016], at 94-96. Furthermore, the cost to file a judicial review process is quite low in Portugal, at around €200 at the time of writing (2015), Court Fees Regulations, approved by Decree Law 34/2008, and amended by Law 43/2008, Decree Law 181/2008, Law 64-A/2008, Law 38/2010, Decree Law 52/2011, Law 7/2012, Law 66-b/2012, Decree-Law 126/2013 and Law 72/2014, Article 7 and Table II.
46. Public Contracts Code 2008 Article 165(3).
47. Public Contracts Code 2008 Article 164(3).
48. This view was upheld by the Administrative Appeal Court in Case 01257/09.7 BEPRT from 2010, where a turnover requirement of €15 million was considered disproportionate in a contract valued at only €131,000. However, judicial decisions do not generate precedent or case law in Portugal, so other courts may dissent in the future.

The Public Contracts Code 2008 contains some specific rules regarding consortia participation in public procurement procedures. In accordance with Article 54(2), consortia members are barred from participate in another tender within the same procedure.[49] This limitation applies from the moment the consortia member becomes a candidate[50] or a tenderer.[51] As tenderers are bound by their tenders for at least 66 days,[52] once they have been submitted the consortium is stable and no changes to its composition may occur, in line with the flexibility provided to Member States in *Makedoniko Metro*[53] to introduce further exclusion grounds. However, there are no explicit references in Portuguese law to the possibility of changes to a consortium between the selection and tender stage, but this author would probably consider that contracting authorities would take a conservative approach to such requirement as a means to reduce the likelihood of challenges during the procedure. The situation involving sub-contractors is slightly more complex. There is one explicit provision about sub-contracting in a restricted procedure, competitive dialogue and negotiated procedure with prior notice.[54] If the sub-contractor's capacity is being used for the purposes of achieving technical capacity requirements by the main economic operator(s), then a statement from the sub-contractor assuming its obligations if successful needs to be included when submitting the request to participate in the procedure. In this scenario, the sub-contractor is technically a "candidate" for the purposes of Article 54 and cannot be included in another request to participate. In the open procedure, the technical capacity is only checked at the end of the procedure, after the contract has been awarded but before its conclusion. As such, if a main contractor or grouping wishes to rely on the technical capacity of a sub-contractor, as the information is only provided after the award,[55] technically there is nothing preventing a participant in another bid from becoming a sub-contractor at this stage. As for the actual delivery of the contract, the use of sub-contractors not disclosed in the tender is not explicitly forbidden.

49. With the same view, R. Esteves de Oliveira, "Empresas em relacao de grupo e contratacao publica" (2011) 2 *Revista de Contratos Publicos*, at 91.
50. Public Contracts Code 2008 Article 52.
51. Public Contracts Code 2008 Article 53.
52. Public Contracts Code Article 65.
53. Case C-57/01 *Makedoniko Metro v Elliniko Dimosio*, ECLI:EU:C:2003:47.
54. Article 168(3) of the Public Contracts Code 2008.
55. Article 81(3) and (5) of the Public Contracts Code 2008.

On a vaguely related note, the issue of related undertakings as discussed in the *Assitur*[56] and *Michaniki*[57] cases, it has been argued in Portugal that it is possible for Member States to create their own exclusions as long as they are proportionate and comply with the requirements set by equal treatment and non-discrimination and competition principles. In consequence, related undertakings are to be excluded only when their participation will actually contradict one of these principles.[58]

3. Procedures for evaluation and means of proof

There are Portugal-specific procedures for both exclusion and selection. As mentioned in the introduction above, the grounds for exclusion apply to all procedures and as such the process of exclusion is identical for all the procedures contained in the Public Contracts Code 2008. As candidates can only be selected in the restricted procedure, competitive dialogue, and negotiated procedure with prior notice, the procedural rules for candidate selection are only applicable to these procedures.

3.1. Procedure for exclusion

The exclusion process under the Public Contracts Code 2008, is set out in Articles 81 to 93 and its rules are applicable to all public procurement procedures.[59] The rules contained in these articles constitute yet another major departure from Directive 2004/18/EC, as instead of all participants providing evidence at the start of the procedure, only those actually awarded the contract need to do so at the end. The approach taken by the Portuguese legislator is akin to the new "simplified style" open procedure contained in Article 56(2) Directive 2014/24/EU, whereby contracting authorities are allowed to check only the documentation of the successful bidder rather than that of all participants. The logic of the system adopted in Portugal is to reduce the transaction and opportunity costs of procurement, which is laudable and

56. Case C-538/07 *Assitur Srl v Camera di Commercio, Industria, Artigianato e Agricoltura di Milano*, ECLI:EU:C:2009:317.
57. Case C-213/07 *Michaniki AE v Ethniko Simvoulio Radiotileorasis Ipourgos Epikratias Elliniki Technodomiki (TEVAE)*, ECLI:EU:C:2008:731
58. R. Esteves de Oliveira, "Empresas em relacao de grupo e contratacao publica" (2011) 2 *Revista de Contratos Publicos*, at 103-109.
59. On this topic, Mario Esteves de Oliveira and Rodrigo Esteves de Oliveira, *Concursos e outros procedimentos de contratacao publica* (Almedina: 2011), at 834-843.

should be taken into account more often by law makers in other jurisdictions.[60]

3.1.1. Process

In every public procurement procedure, the successful tenderer has to provide a statement[61] and documentary evidence guaranteeing its compliance with some of the requirements of Article 55,[62] namely not being convicted of a crime offending professional honour,[63] having fulfilled with all social security[64] and tax obligations,[65] and not taking part in a criminal organisation.[66]

The actual documents the economic operator needs to provide depends upon the type of contract. For public works contracts, economic operators will need to provide a certificate ("*alvara*") from a Portuguese public body (INCI – Instituto da Construccao e do Imobiliario), which vouches for their ability to undertake public works.[67] The purpose of this approach is to reduce the workload for contracting authorities by effectively outsourcing the certification work to a specialised public body. Foreign economic operators are also bound by a similar requirement: they are to present a declaration or statement from the same Portuguese public authority but not an "alvara" certificate. In any case, economic operators will always have to go obtain prior "authorisation" from that public authority after being awarded the contract and before concluding it.[68] The obvious question arising from this approach is the impact on foreign economic operators and the fact that this is effectively a non-tariff trade barrier which may be incompatible with TFEU principles by not offer-

60. On this topic of transaction and opportunity costs, Telles, "The good, the bad and the ugly" (2013) 43 1 *Public Contracts Law Journal*, at 3-27.
61. Public Contracts Code 2008 Article 81(1)(a). The form under which the statement needs to be presented is included as Annex II to the Code. If the same information were to presented under a different format, it would constitute a non-compliance by the economic operator.
62. Public Contracts Code 2008, Article 81(1)(b) and 83-A.
63. Public Contracts Code 2008 Article 55(b).
64. Public Contracts Code 2008 Article 55(d).
65. Public Contracts Code 2008 Article 55(e).
66. Public Contracts Code 2008 Article 55(i).
67. Public Contracts Code 2008 Article 81(2).
68. Public Contracts Code 2008 Article 81(5). Part of the process can be done online, but the form needs to be printed and sent by email which seems odd in a country which moved the entirety of procurement online. The actual webpage is: http://www.inci.pt/Portugues/EngVrs/Paginas/English.aspx [accessed 23 June 2016].

ing economic operators an alternative, such as an equivalent certificate from the national register of the Member State where they are based.[69]

The situation is different for supply and service contracts. For such contracts there is no Portuguese central entity or registry where a certificate or declaration has to be obtained. However, Portuguese law requires all economic suppliers to provide evidence of registration in official supplier lists that can provide contracting authorities with a similar degree of confidence that the economic operator meets the necessary experience or expertise requirements.[70] The law makes reference to Annex IX B and C of Directive 2004/18/EC as potential sources of said certificates in other Member States.[71] But entities such as the Companies Registrar in the UK or the *Registro Mercantil* in Spain do not necessarily contain that information. In fact, in England and Wales, companies incorporated under the current Companies Act 2006 are under no obligation of even having an object, so it is unlikely a certificate of incorporation would provide the information being requested by the Public Contracts Code 2008. Article 81(5)(b) Public Contracts Code 2008 provides a solution to the quandary: in case no such official document can be produced in another Member State, economic operators can simply provide an "honour statement", self-declaring that they have the necessary capacity to fulfil the contract. As this provision is only applicable to goods and services contracts, one has to wonder why a similar solution was not provided for works contracts.

Contracting authorities may set additional requirements for economic operators, such as legal requirements/certificates imposed by the underlying service or supply contract.[72] However, these do not constitute discretionary levels of capacity but more of a pass/fail assessment of compliance with said legal requirements. As with Article 81(5)(b), the Public Contracts Code 2008 provides an escape valve for foreign economic operators whose country may not have similar certification bodies or legal requirements.[73]

69. As per Annex IX A of Directive 2004/18/EC.
70. Public Contracts Code 2008, Article 81(4).
71. Public Contracts Code 2008, Article 81(5). The extent of this provision covers economic operators based in any Member State, EEA states or signatories to the World Trade Organisation's Government Procurement Agreement (GPA). As for the latter category, the provision is only applicable in situations of reciprocity, i.e., if the other signatory would provide access to EU economic operators on an identical contract opportunity.
72. Public Contracts Code 2008 Article 81(6) and (8).
73. Public Contracts Code 2008 Article 81(7). In terms of country and economic operator coverage, this provision is identical to Article 81(5).

If the successful bidder is a grouping of economic operators – for example a consortium – all tenderers in that bid need to provide the statement and documentary evidence required by Article 81(1) Public Contracts Code 2008.[74] The Code provides some flexibility in what concerns other documentary requirements, namely the certificates required by Article 81(2) in the case of public works or public works contracts or the requirements set forth in paragraphs (4), (6), (7) and (8) of that Article. For the latter, only the consortia members responsible for delivering the appropriate parts of the contract are subject to the obligation of providing required documentary evidence.

3.1.2. Means of proof

Concerning the means of proof, Portuguese law is once more designed to make life easy for economic operators. As such, only the successful bidder will have to provide documentary evidence and even then only on very simple and straightforward terms.

After the award and before the contract is concluded, the successful bidder is to provide the necessary documents proving its compliance with the exclusion criteria set on Article 55 Public Contracts Code. The general rule, according to Article 83(1)(2), is that copies or reproductions of the documents can either be submitted to the electronic platform where the procedure took place, or the economic operator can point the contracting authority to where those can be found "on the Internet."[75] As with qualitative selection for the restricted procedure, the same caveats apply here: what is meant by "on the Internet" is not clear. It is possible for economic operators to give authorisation to the contracting authority to directly check its situation online. For example, the supplier may allow the contracting authority to have access to its tax or social security records.[76] In that case, no documents need to be provided. There were recently reports in the national press of high ranking social security civil servants being arrested on corruption charges for allegedly manipulating data in the Social Security databases, so that any reports would wrongly output a certificate of compliance. At the time of writing, a final judicial decision is yet to be reached, but this indicates an unintended conse-

74. Public Contracts Code 2008 Article 84(1).
75. Public Contracts Code, Article 83(3).
76. Public Contracts Code, Article 83(4). For social security, this authorisation is done via the "Portal da Empresa" (Companies Portal) here: http://www.portaldaempresa.pt/CVE/services/balcaodoempreendedor/Licenca.aspx?CodLicenca=1730&Parametro=estabelecimento+-+mera+comunicação+prévia [accessed 23 June 2016].

quence arising from the fact that the exclusion grounds are now checked at the end of the procedure and only for the successful tenderer. It gives the latter a very strong incentive to manipulate its records (in the alleged case, via corruption) as it has already been awarded the contract and these certificates are the only obstacle standing between them and the conclusion of the contract.

Although the rule is for the successful tenderer to provide copies of the relevant documents, an exception is in place for contracting authorities to request the originals in case of reasonable doubt about the authenticity of the copies provided. This is not automatic, however, as the contracting authority will need to justify the reasons for requiring the originals.[77]

The definition of what constitutes "documentary evidence" depends on the requirement it refers to. For example, regarding bankruptcy, conviction of serious misconduct or corruption as requested in Article 55(a)(b)(i) Public Contracts Code 2008, a simple certificate from the criminal registry is required.[78] A similar requirement for a certificate from a public body applies for showing compliance with tax and social security contributions requested by Article 55(d)(e).[79] Once more Portuguese law offers economic operators a solution in case they cannot source the needed certificate. Both can be replaced with a "honour statement" signed by the economic operator, a solution which may be of particular benefit for economic operators based in other Member States. For the remaining requirements set forth by Article 55,[80] the general means of proof rules mentioned above apply.

If an economic operator does not provide the requested documentary evidence, the contracting authority is under the obligation of annulling the contract award (after providing an additional deadline for compliance). The contract is then to be awarded to the next best tender,[81] which will be subject to the same documentary evidence requirements as the first. The solution of going immediately to the next best tender without an explicit possibility of aborting the procedure[82] is debatable. Doing so fosters non-compliance with

77. Public Contracts Code, Article 83(5).
78. Public Contracts Code Article 83-A(1).
79. Public Contracts Code, Article 83-A(2).
80. Please see previous section for detailed discussion.
81. Public Contracts Code Article 86(1)-(4).
82. Article 76(1) of the Public Contracts Code 2008 establishes a duty to award for the contracting authority which can only be set aside only under the specific circumstances contained in Article 79(1). In consequence, a provision in the tender documentation that the contracting authority could abort the procedure at any time would be illegal and could give rise to damages under pre-contractual liability rules.

the obligation of maintaining tenders for 66 working days[83] in the case of collusion as it provides economic operators with a way to get out of a contract without immediate consequences.[84] It can be counter-argued, however, that Portuguese law includes some serious consequences for economic operators that can affect their ability to take part in future public procurement procedures. The price to be paid by the economic operator for not providing the required information, or not backing up the self-declaration with documentary evidence which confirms it, is the debarment under Article 460 Public Contracts Code 2008. Additionally, for public works and public works concession contracts, these facts are to be reported to the certifying body mentioned above. This constitutes an additional layer of protection for the system as it increases the likelihood of non-compliant economic operators being debarred from future public procurement procedures as they will not be able to secure the required certificate.[85]

In the case of fake documents or false statements, the contracting authority will inform the Public Prosecutors Office of the fact. False statements constitute a criminal offence in Portugal and carry a jail sentence of up to one year.[86]

3.2. Qualitative selection procedure(s)

The Portuguese Public Contracts Code offers contracting authorities two different ways to undertake the qualitative selection of economic operators in public procurement procedures: a complex system and simple one.[87] In the earlier case, a detailed analysis of each economic operator is undertaken, allowing for their ranking from best to worst, whereas in the second only a pass/fail analysis is carried out. In consequence, it is only possible to limit the number of participants in a procedure when using the earlier system. As mentioned in the introduction, it is only possible to undertake qualitative selection

83. Public Contracts Code, Article 65.
84. The exception being in the case of public works or public works concessions, as this will be reported to the certifying public body mentioned above in section 3.1 and has an impact on the ability of said economic operator being able to obtain a certificate in the future, Public Contracts Code, Article 86(5).
85. Public Contracts Code 2008, Article 86(5).
86. Portuguese Penal Code, Article 348-A. This offense was introduced in 2013 by means of Law no 60/2013, as previously only false statements before the court would constitute a crime.
87. With a detailed analysis, Mario Esteves de Oliveira and Rodrigo Esteves de Oliveira, *Concursos e outros procedimentos de contratacao publica* (Almedina: 2011), at 830-833 and 846-851.

via a selection stage in the restricted procedure, competitive dialogue,[88] or negotiated procedure with prior notice. It is entirely possible in Portugal to run any of these procedures without any limitation on numbers of candidates, in case the simple selection system is used. A restricted procedure with a simple selection stage (where candidate numbers cannot be restricted) is not functionally different to a traditional two-stage open procedure in other Member States.[89]

The contracting authority can choose freely between the complex and simple systems of qualitative selection. The choice between the one or the other is dictated by the objective the contracting authority wants to achieve. If it wants to rank the economic operator from best to worst, then it needs to use the complex system. If it only wants to assess economic operators on a pass/fail basis, then the simple model is the appropriate one. It can be said the complex model constitutes what one would expect a selection stage to be, particularly for procedures where the number of candidates making it to the next stage can be limited. The simple system with its pass/fail analysis is more of a qualification stage instead, and in fact Portuguese law only considers the complex selection as a true selection.[90]

The rules for both selection systems can be found between Articles 167 and 188 Public Contracts Code 2008. In addition to these articles, some others are relevant elsewhere in the law. The selection stage is expected to last a maximum of 44 days[91] upon receipt of applications by economic operators, but there is no immediate consequence for the contracting authority if the deadline is not met.

Both models share a number of rules and steps to be undertaken and diverge mostly in the objectives of the selection stage as mentioned above. They also diverge in the detail of analysis the submissions are subjected to.

88. On selection in the competitive dialogue procedure, Pedro Telles, "Competitive Dialogue in Portugal" (2010) 1 *Public Procurement Law Review*, at 18-22.
89. Although there are no numbers disclosing what selection system is being used under the restricted procedure, this procedure is less commonly used in Portugal than the open procedure (3830 vs 4749 procedures in 2013) and involving much smaller values (€269 million vs €1.568 billion in 2013), INCI, (2015) "Contratacao Publica em Portugal 2013", p.28.
90. Public Contracts Code 2008, Article 179(1).
91. Public Contracts Code 2008 Article 187 (1).

3.2.1. Common elements to both selection systems

The selection stage for either qualitative selection system starts with the remittal of the documentation by the economic operator in accordance with Article 168 Public Contracts Code 2008.[92] This submission is to be made in Portuguese,[93] unless the contracting authority allowed submissions of specific documents in a foreign language.[94] It shall include the documents required for the selection as well as the statement for the purposes of exclusion, in the format requested by Annex V to the Public Contracts Code 2008.

The default rule for submitting selection documents is that these are to be uploaded by the economic operator to the online platform adopted by the contracting authority. As a concession to the need for flexibility, if the document to be submitted is available "on the Internet,"[95] the economic operator may point the contracting authority towards that site instead. It is unclear what "on the Internet" means as, for example, most if not all of Portuguese public services are online and well integrated with one another, but certificates are still subject to a fee. As there is no cost-related qualifier on the original provision, does this count as being "on the Internet"? Furthermore, what if the required document is on a private database available online, again subject to a fee? Even if the answer is affirmative, the fact is that this option pushes the transaction cost of finding this information to the contracting authority. It would have been preferable to include some sort of qualifier in this provision, such as "free and unrestricted access on the Internet".

Upon expiration of the deadline, for economic operators to submit their request for participation, the jury[96] publishes a list of participants on the electronic platform used.[97] It is questionable if this solution is the most adequate as it facilitates collusion between economic operators or the enforcement of existing cartel agreements.[98] The names of participating economic operators

92. Public Contracts Code 2008 Article 168 (1).
93. Public Contracts Code 2008 Article 169 (1), although according to paragraph 3, in specific circumstances related with complexity the contracting authority may authorise the submission of documents drafted in foreign language.
94. Public Contracts Code 2008 Article 169(3) and 164 (1)(j)
95. Public Contracts Code Article 170(4).
96. Under Portuguese law the jury is the body composed of at least three members and tasked with *running* public procurement procedures, Public Contracts Code Articles 177(1) and 67. This body runs the procedure on behalf of the contracting authority.
97. Public Contracts Code Article 177(1).
98. It may even foster tacit collusion, for example. On this topic, Carmen Estevan de Quesada, "Competition and transparency in public procurement markets" (2014) 5 *P.P.L.R.*, at 229-244.

are not disclosed to the general public, or any other entity not taking part in the procedure[99] as the information will be made available on a password protected website.

The actual selection process is done by the jury via the application of the selection criteria that were adopted, once the requests for participation are in. After undertaking the selection, the jury issues a preliminary report with its proposed selection decision.[100] In this report, the jury also analyses the grounds for exclusion analysed in section 2.1 above. Participating economic operators are then given a minimum of five days to either accept the decision or contest it before the jury. It is important to note that economic operators can oppose at this moment a selection decision pertaining to another candidate. In case the proposed decision is changed, a new preliminary report is issued, together with a new deadline for economic operators to express their views.[101] Only after all comments have been dealt with is the final report issued by the jury. The final selection decision is undertaken by the contracting authority[102] which is free to accept or refuse the suggestions of the jury. Participating economic operators are notified of the final decision[103] and invited to participate in the next stage of the procedure.

3.2.2. Complex system

The complex selection method discussed above aims to evaluate the technical and financial capacity of economic operators in detail.[104] The evaluation should be done with recourse to an evaluation model similar to the one that needs to be adopted for the tendering stage[105] and the financial components of which were described above on section 2.1. The contracting authority has to disclose the evaluation model at the start of the procedure, including criteria and sub criteria additional to the mathematical formula. If it wishes to classify economic operators in accordance with different levels, information about these classifications needs to be disclosed as well, allowing economic operators to get an idea of their likely final score.[106]

99. Public Contracts Code Article 177(2).
100. Public Contracts Code Article 184(1).
101. Public Contracts Article 186(2).
102. Public Contracts Code 2008, Article 186(4), although, there may be the same people but in different roles, Public Contracts Code Article 67(2).
103. Public Contracts Code 2008, Article 188.
104. Public Contracts Code 2008, Article 181(1).
105. Public Contracts Code 2008, Articles 181(1)(2) and 139.
106. Public Contracts Code 2008, Article 165(1)(m)(i).

The adoption of this complex system allows contracting authorities to limit the number of participants in the award stage and ranking them from best to worst. Under this system, the contracting authority establishes the minimum set of requirements economic operators need to comply with and the number of candidates it will take forward in the procedure. In the case of a restricted procedure, the minimum number is five[107] and for the competitive dialogue it would be three.[108] The contracting authority is bound to select the economic operators best ranked up to (at least) the minimum number it set forth at the beginning of the procedure. In a scenario of a restricted procedure where the contracting authority declared that it would restrict the tendering stage to five candidates and whereby 20 candidates are good enough to qualify (i.e., their technical and financial capacity meets the minimum requirements), then the best five of the 20 will have to be taken forward.[109] There is no discretion whatsoever for the contracting authority to choose from the pool of qualified candidates which is not to be treated as a shortlist. As a consequence, it is possible to conclude that shortlisting in Portugal is restricted to the best X candidates which have met the minimum requirements.

Once submissions are analysed via the application of the mathematical formula and further criteria, the contracting authority will proceed to notify each economic operator of the decision on the preliminary report described in section 3.2.1.

Although the complex selection model implies a ranking of economic operators, Portuguese law demands equal treatment for all economic operators during the award stage. It is unclear, however, if a stacked ranking will not generate a bias in favour of the "best" economic operator during the award stage, or at least lead to cognitive heuristics issues.[110]

107. Public Contracts Code 2008, Article 164(1)(m)(ii).
108. Public Contracts Code 2008, Article 206(2). On the peculiarities of selecting competitive dialogue candidates in Portugal, P. Telles, "Competitive dialogue in Portugal", in Arrowsmith and Treumer (eds), *Competitive Dialogue in EU Procurement* (2012), at 384-386.
109. Public Contracts Code 2008, Article 181(3).
110. On this topic of heuristics in public procurement, Mark Crowder, "Public procurement: the role of cognitive heuristics" (2015) 35:2 *Public Money & Management*, at 127-134, DOI: 10.1080/09540962.2015.1007707, particularly past behaviour heuristics, R.S. Batenburg, W. Raub and C. Snijders, "Contacts and contracts: dyadic embeddedness and the contractual behavior of firms" (2003) 20 *Research in the Sociology of Organizations*, at 135-188 and H.N. Garb, "The representativeness and past-behavior heuristics in clinical judgment" (1996) 27 3 *Professional Psychology: Research and Practice*, at 272-277.

3.2.3. Simple system

The simple selection method is the second method contracting authorities can use in Portugal. Whereas the complex model allows the contracting authority to rank candidates, the simple model operates on a pass/no-pass binary approach.[111] Either economic operators meet the minimum technical and financial capacity requirements, or they do not. The first proceed to the award stage, whereas the second do not. In the example of the restricted procedure with 20 qualified economic operators described in section 3.2.2 above, if the simple selection system had been adopted instead then all 20 would proceed to the tendering stage.

Due to its binary nature, the simple selection model is to be used in situations in which the contracting authority, for whatever reason, does not wish to select a finite number of economic operators. In a country like Portugal, where access to judicial review of procurement decisions is easy and relatively cheap, there is a built in incentive for the contracting authority to avoid discretionary selection decisions that would trigger a (lengthy) judicial review.[112] This was observed by the author when researching the use of competitive dialogue in Portugal, which, albeit limited, indicated a clear preference for the simple selection system precisely to reduce the prospects of litigation during the earlier part of the procedure.[113]

4. Reliance on third party capacity

The Public Contracts Code 2008, allows economic operators to rely on the capacity of third parties without prescribing detailed requirements. As such, in accordance with Article 168 and Article 81(3), if an economic operator wishes to rely on the capacity of a third party, all it needs to provide is an "honour statement" from the third party with a clear indication that they will undertake the tasks allocated to them as part of the contract, particularly in the case of sub-contractors. What is not clear is what should happen in case the third party will not be involved in the contract directly and is offering its capacity only as a means for the economic operator to be able to comply with

111. Public Contracts Code, Article 179.
112. Something similar was observed with the competitive dialogue in Spain, P. Telles, "Competitive Dialogue in Spain", in Arrowsmith and Treumer (eds), *Competitive Dialogue in EU Procurement* (2012), at 410.
113. P. Telles, "Competitive Dialogue in Portugal", in Arrowsmith and Treumer (eds), *Competitive Dialogue in EU Procurement* (2012), at 384-386.

the requirements. The textbook example here would be a group relationship where the subsidiary relies on the parent company's finances to comply with the financial requirements. Under Portuguese law this does not appear to be possible since the Public Contracts Code 2008 does not foresee the possibility of economic operators to use the financial capacity of third parties.[114]

5. Performance bonds

Performance bonds are a traditional feature in Portuguese public procurement and they are included in the Public Contracts Code as well in Articles 88 to 91. They represent the perennial fear that economic operators are not to be trusted or that any contract carries risks for the contracting authority. It is debatable that this measure can stand a proportionality test in low risk contracts and it clearly disadvantages smaller suppliers by complicating their cash-flow. In addition, all costs incurred are to be borne by the economic operator,[115] effectively meaning that they will have to pass the cost either to contracting authorities or other clients they may have.

To partake in any public procurement procedure for a contract valued at €200,000 or more,[116] economic operators need to pay a performance bond of up to 5 percent of the contract value as a guarantee of contract performance.[117] For smaller value contracts the contracting authority can instead withhold 10 percent of all payments during contract performance, something that again disadvantages smaller suppliers by creating cash-flow issues, particularly in a country where the public sector is known for taking too long to pay.

This performance bond is to be paid by the successful tenderer, within 10 days of being notified of the contract award and before the contract is signed.[118] If the economic operator does not pay the bond, the contract award will be declared null and void, with the contracting authority under the obli-

114. Melo Fernandes, "O aproveitamento da capacidade financeira de terceiros para efeitos de participacao num concurso" (2013) 7. *Revista de Contratos Publicos*, at 102.
115. Public Contracts Code 2008, Article 88 and 90(9).
116. Public Contracts Code 2008, Article 88.
117. Public Contracts Code 2008, Article 89(1). The value rises to 10 percent in case of an abnormally low price offer.
118. Public Contracts Code 2008, Article 90(1).

gation of awarding it to the next best tender.[119] The same collusion caveats and remarks made in section 6 above about qualification information are valid here as well.

The bond can be paid in different ways such as a cash deposit,[120] Portuguese State bonds, bank guarantee or insurance.[121] Irrespective of the form it takes, the bond usually means effectively setting aside the required funds, as banks and insurance companies will not provide their securities without collateral, usually cash.

6. Conclusion

In this chapter, the author has explored in detail how Portugal transposed Directives 2004/18/EC and 2004/17/EC in relation to qualitative selection and exclusion of economic operators. It was explained how policy decisions taken by the Portuguese lawmaker have made the national law very different from both Directives in what relates to qualitative selection and exclusion of economic operators.

One of the most interesting findings of this chapter is the understanding that the Portuguese legislator anticipated some of the changes that were subsequently introduced by Directive 2014/24/EU. These include changes such as dropping the traditional selection stage from the open procedure or trying to reduce the transaction and opportunity costs economic operators face when taking part in public procurement.

As for the transposition of Directive 2014/24/EU into Portugal, there is no information at the time of writing (January 2016) if the deadline transposition of April 2016 will be complied with or not. General elections were held in October 2015 and the new Government from the former opposition party only took office in December.

119. Public Contracts Code 2008, Article 91(1).
120. Public Contracts Code 2008, Article 90(2)(3), the deposit needs to be made on a Portuguese bank account held in Portugal on the behalf of the contracting authority.
121. Public Contracts Code 2008, Article 90(2).

Qualification, selection and exclusion of economic operators in public procurement procedures – The case of Romania

Dacian C. Dragos and Bogdana Neamtu

1. Introduction: location of rules in national law

In Romania, the development of the public procurement legal framework has taken place in the context of the accession to the EU and of the necessary legislative harmonisation. The legal instrument chosen for transposition of the Directives 18/2004/EC and 17/2004/EC was the Emergency Government Ordinance no. 34/2006 (hereafter EGO no. 34/2006), a delegated legislative act.

The regulation of the public procurement field in Romania is influenced by the chosen method of transposition of EU Directives together with the tendency of the executive body to bypass the Parliament in order to avoid lengthy legislative proceedings. In Romania there is a preference for exact transposition of the EU Directives into the national laws. Emergency Governmental Ordinances are acts issued by the government, in theory under emergency situations, with the same legal force as a law. Subsequently these acts need to be approved by the Parliament. What they create is an opportunity for the government to quickly introduce new amendments, based on EU law as well as on nationally driven reforms. This has generated in the last years a lot of instability – provisions concerning the same issue were subsequently modified several times (for example the competence of the review body as well as the procedures applicable for contracts of a certain value).

In the light of the above, it has to be noted that transposition implied mainly a "copy paste" approach, accompanied by an expansion of Directive's scope to all contracts above a national direct procurement threshold (now €30,000 for supplies and services and €100,000 for works). This means that rules governing the public procurement stemming from the 2004 directives have far-reaching effects, even beyond the thresholds established by the Directives.

This chapter will refer to practices and legal issues raised by the application of the 2004 Directives as transposed into national law but it will also take into consideration the provisions of the new directives (Directive 2014/24/EU and 2014/25/EU).

As a general characteristic, the process of drafting award documentation, including qualification and selection criteria, has always been affected by the lack of expertise of all the relevant actors involved in public procurement – contracting authorities, economic operators, and review bodies. Based on the case law available, one notices a common trend with regard to the most often made mistakes by the contracting authorities, and confusion between selection/qualification and award criteria has been one of them. However, in the light of the new 2014 directives, it is now possible to use qualification criteria as award criteria, so in retrospect maybe the clear delimitation between qualification and award criteria was not a good idea from the outset, and such mistakes in practice are sort of pardonable.

Economic operators, on the other hand, suffering from the same lack of expertise, react tardily with respect to the faulty award documentation – very often the award documentation gets challenged once the economic operators are dissatisfied with the result of the evaluation, when qualification and selection criteria have been applied.

Principles are important regarding the fight against corruption, as contracting authorities are misusing selection and qualification criteria in order to favor certain undertakings. The main practice by the contracting authorities is to draft criteria that "match" the exact description of a certain tenderer, thus eliminating competition. Such corrupt practices have created a general climate of mistrust in public procurement; even when the contracting authorities have no hidden agenda with the use of certain criteria, mistakes such as subjective evaluation factors are always interpreted by tenderers and the public in the light of corrupt practices.

The current institutional arrangement in public procurement is composed of the following public bodies:

– the National Authority for Regulating and Monitoring Public Procurement (hereafter called NARMPP) and the Unit for Coordination and Monitoring of Public Procurement[1] have been combined, forming now a single institution, called National Agency for Public Procurement[2] (hereafter NAPP). NAPP is the institution responsible for monitoring contracting authorities throughout the entire public procurement process. Its role is felt before the publication of the tender documentation, which is thoroughly monitored by the institution, with recommendations for contracting authorities. The decision to publish the tender documentation is taken by the NAPP when the tender documentation is considered to be in line with the EU and national legal requirements. The institution's "power" over contracting authorities is rather large, since it can order them to submit any documents, to provide any information related to public procurement. Its initial important role was furthermore consolidated in the context of recent critiques coming from the European Commission with regard to errors in the drafting of the award documentation for contracts financed from the structural funds, undetected during the monitoring procedures. The Romanian Government, at the initiative of NAPP, implemented some important changes (reflected in the amendments from December 2011 of EGO no. 34/2006). Currently, NAPP performs an *ex-ante* control of all public procurement procedures of all contracting authorities in Romania. It monitors all participation notices and the award documentation (with the exception of the technical aspects) published by contracting authorities on the national portal for public procurement (ESPP), established in September 2011, in order to validate their legality (conformity with public procurement legislation). This monitoring is a prerequisite for publishing notices about public procurement contracts above €30,000 (direct procurement threshold) and it is especially attentive to contracts financed from structural funds. Following the review/monitoring procedure, NAPP has to issue the ac-

1. The Ministry of Public Finances monitored the award procedures through a specialized structure at the central level called the Unit for Coordination and Monitoring of Public Procurement. At the sub-state level, the Unit coordinates specialized departments within the Agencies for public finances, called Departments for the Monitoring of Public Procurement. The civil servants who work within these structures are called observers. The Unit assists contracting authorities mainly in procedures for contracts financed from structural funds, but it can also assist them in procedures with higher values. The report regarding each procedure is sent to NARMPP and the observers are entitled to ask NARMPP for clarifications concerning legal provisions.
2. Emergency Government Ordinance no. 13/2015 concerning the foundation, organization and operation of the National Agency for Public Procurement.

ceptance for initiating the award procedure or to inform the contracting authority with regard to the errors found in the award documentation and the reason why the award documentation is not in conformity with the law. This ex-ante control has reduced the award documentations that are not conforming to the law, but has also reduced any "creativity" of the contracting authority when it comes to using the most advantageous economic tender criteria or out-of-the-ordinary qualification and selection criteria.

– The Management Authorities for Structural Funds, organized within different field ministries, are competent for an *ex post* control of the way in which payments from structural funds grants have been done, and this includes verifying the public procurement procedures in terms of irregularities. The control mechanism is very important in practice and generates a lot of litigation.
– The first instance review body in public procurement matters, the National Council for Solving Disputes (hereafter Council). The nature of the Council, considered an administrative (quasi-judicial) body or a special jurisdiction similar to a tribunal in the common law system, has resulted in national debates regarding its competence in relation to the courts of law. Any aggrieved participant in a public procurement procedure can choose to submit its complaint either with the Council or with a court of law. The decisions issued by the Council are also reviewable by the courts.
– The courts of law – the special units of administrative and fiscal law at tribunals, the courts of appeal and at the Highest Court of Cassation and Justice – are competent to rule on public procurement procedures, in first instance or in recourse correspondingly.

2. The legal sources of exclusion, qualification and selection criteria

The exclusion grounds are regulated solely in the EGO 34/2006 and its implementing secondary legislation. As for selection and qualification criteria, the problems raised in the practice of contracting authorities determined the NAPP to issue an implementing order – Order no. 509/2011 for the formulation of selection and qualification criteria,[3] which complements the general legislation (EGO 34/2006 and its implementing secondary legislation). The

3. Published in the Official Journal of Romania no. 687 of 28 September 2011.

order is meant to guide contracting authorities in establishing qualification and selection criteria that are nonrestrictive and non-limitative, so that the award documentation gets through the ex-ante control performed by the NAPP.

First, the mentioned Order reiterates that the qualification and selection criteria, although subjected to the discretion of the contracting authority based on the complexity, duration and nature of the contract, must be linked to the subject matter of the contract in a concrete manner and be limited to what's strictly necessary for carrying out the contract.[4] Moreover, the contracting authorities are advised to establish reasonable timeframes for producing evidence of the fulfilment of such criteria by the economic operators. In the Annex to the Order are listed examples of qualification and selection criteria that are considered by NAPP to be non-restrictive and non-limitative.

Also, guidelines on how to avoid the misuse of qualification and selection criteria are comprised in instructions from NAPP issued in 2013.[5]

3. Restrictive criteria – the main source of litigation

The main problem pertaining to the drafting of qualification and selection criteria in Romania is the fact that they are too restrictive. In the 2014 annual report made by the National Council for Solving Disputes,[6] the first instance review body in public procurement, most complaints lodged with the Council by the economic operators regarding the award documentation concern: restrictive requirements with regard to similar experience, qualification criteria, and technical specification; award criteria and evaluation factors lacking the calculation methodology, employing subjective, non-quantifiable or non-transparent elements; inclusion in the award documentation of technology names, products, brands, without mentioning or "equivalent"; lack of a clear and complete answer from the contracting authorities with regard to the clarifications requested by economic operators and concerning the award documentation; the way in which the participation guarantee has to be constituted; imposition of restrictive or unfair contractual clauses; refusal to split the ten-

4. Art.1 of the Order 509/2011.
5. Instructions no. 1/2013, for the application of art. 188 alin. (2) lit. d) and art. 188 alin. (3) lit. c) of the EGO 34/2006, published in the Official Journal of Romania no. 371 of 21 of June 2013.
6. National Council for Solving Disputes, 2014 Annual Activity Report, p. 23, online at http://www.cnsc.ro/wp-content/uploads/2015/04/raport2014_RO.pdf.

der into lots in the case of similar products/works. Table 1 below shows the total number of complaints for each of the grounds mentioned.

Table 1: Grounds for contesting the award documentation, 2014

	Ground for contestation	Number of complaints
1	Restrictive requirements with regard to similar experience, qualification criteria, and technical specification	757
2	Lack of a clear and complete answer from the contracting authorities with regard to the clarifications requested by economic operators and concerning the award documentation	230
3	Award criteria and evaluation factors lacking the calculation methodology, employing subjective, non-quantifiable or non-transparent elements	104
4	Imposition of restrictive or unfair contractual clauses	78
5	Refusal to split the tender into lots in the case of similar products/works	32
6	Inclusion in the award documentation of technology names, products, brands, without mentioning or "equivalent"	24
7	The way in which the participation guarantee has to be constituted	2
8	Others	351

In response to this identified problem, over the last few years NAPP has issued various regulations[7] detailing how contracting authorities should draft the qualification and selection criteria. The main goal of these acts is to offer some degree of standardization with regard to the selection and qualification criteria and to expedite the procurement process, especially when dealing with contracts financed from EU money. The standardization of the public procurement award documentation is among the obligations assumed by the Romanian government during the discussions with the European Commission and it has a twofold goal – to reduce the number of errors in the process of drafting the selection criteria and to limit corruption by limiting the use of re-

7. Order of the NARMPP President regarding the drafting of qualification and selection criteria, published in the Official Journal of Romania, no. 687/28.09.2011; Instructions of the NARMPP president concerning the application of articles 188 (2/d) and 188 (3/c) from EGO no. 34/2006 (professional capacity of the tenderer), published in the Official Journal of Romania, no. 371/21.06.2013.

strictive criteria which favor certain economic operators.[8] These efforts made by NAPP have to be understood in the context in which Romania has a very low absorption rate of the European funds, one of the causes being significant delays in conducting and concluding the public procurement procedures needed in the framework of EU-financed projects. Perhaps at this stage the lack of expertise among the contracting authorities is the most obvious – many of them employ wrongly drafted criteria used by other public organizations, thus perpetuating a vicious cycle of errors and deficiencies in the drafting of qualification/selection criteria.

It should be noted that errors in drafting the selection criteria are not only due to the limited expertise of contracting authorities but they also occur due to corruption. The most well-known situation is when contracting authorities draft selection criteria that are tailor-made for a specific economic operator, thus restricting competition and treating discriminatorily the potential tenders from the market.[9]

4. Selection criteria – exclusion grounds

The current and the new EU directive provide certain grounds under which contracting authorities in the member states must treat a tenderer as ineligible, and others under which they may treat them as ineligible. Under the current rules, contracting authorities are required to exclude potential tenderers where they have prior convictions for offences related to participation in a criminal organization, corruption, bribery, certain kinds of fraud, money laundering, involvement in criminal proceeds or the proceeds of drug trafficking. Contracting authorities may currently exclude tenderers on the basis of issues such as bankruptcy or winding up, default of tax or social security obligations or certain other business-related transgression such as conviction of a criminal offence relating to the conduct of their business or profession, or commission of an act of grave misconduct in the course of their business or profession. Exclusion grounds may be mandatory or optional.

The absence of exclusion grounds may be verified by the contracting authority by asking candidates or tenderers to supply the proving documents and may, where they have doubts concerning the personal situation of such

8. Motivation for issuing the 2011 Order of the NARMPP President regarding the drafting of qualification and selection criteria.
9. NARMPP, Code for ethical behaviour in public procurement, p. 23, online at http://www.anrmap.ro/sites/default/files/documente/documente-951.doc.

candidates or tenderers, also seek the cooperation of competent authorities to obtain any information they consider necessary. In other EU Member States, the information-sharing is based on cooperation between public authorities.[10]

4.1. Mandatory exclusion grounds

EGO 34/2006 provides in art. 180 (based on art. 45 of the Directive 2004/18/EC) selection criteria relating to the personal situation of the tenderer, stating that candidates or tenderers that have been the subject of a conviction by final judgment (of which the contracting authority is aware) for *participation in a criminal organization, corruption, fraud, money laundering*, shall be excluded from participation in a public contract. The exclusion regards convictions going back five years, which is a limitation of the scope of art. 45 from the directive. However, the Romanian legislator has not opted for the possibility to establish a derogation from mandatory exclusion grounds for overriding requirements in the general interest provided by art. 45 par. 1 third section of the directive 2004/18/EC, consequently they are fully applicable. In this context, the limitation of the exclusion grounds to convictions not more than five years old can be placed in this context, and we might say that it is an overriding reason of public interest to accept tenderers that have been convicted more than five years ago.

The grounds for excluding candidates have been reviewed, clarified and expanded under the new Directive 2014/24/EU. Some issues have moved from the "may exclude" to the "must exclude" category. In addition to a requirement to exclude candidates for participation in criminal organizations, corruption, fraud and money laundering, buyers must also exclude candidates who are guilty of: child labour or people-trafficking offences; offences linked to terrorism; breaching their tax or social security obligations (until the supplier has rectified the breach by entering into a binding commitment to pay its dues); and being bankrupt or the subject of insolvency or winding-up proceedings (save for where the buyer has established that the supplier would be able to perform the contract). Consequently, Romanian law will need to be adapted in the transposition process in order to include these two grounds as well.

As in the previous directives, the EU legislator offers the possibility to Member States to set these mandatory exclusions aside where there are overriding reasons relating to the public interest – such as the protection of public health or the environment. In addition, member states may take the power to

10. Art.182 of the EGO no. 34/2006.

set aside these exclusions where an exclusion would be disproportionate – such as where only a minor amount of tax is unpaid. In any event, the right to exclude a tenderer will expire once it has fulfilled its obligations by paying the amounts due for tax and social security, with interest and fines if any, or has entered into a binding arrangement to do so. Romania has not made use of these provisions in the implementation of the old directives, so it is most likely it will not use them now either.

There isn't much case law pertaining to EU exclusion grounds. From the few that exist, we note one situation where the president of the board of a tendering company was sentenced for corruption after the evaluation of the offer, but before the final report, this occurrence leading to the exclusion of its company from the tender procedure. The court held that such exclusion is illegal, because it is relevant to the situation of the economic operator at the date when the tenders were submitted, and not at the date of the report.[11] This interpretation is debatable even when assessed against the provisions of Directive 2004/18/EC art. 45,[12] but it will definitely not hold after the transposition of the directive 2014/24/EU, which in 57 par. 5 clearly stipulates the possibility of contracting authorities to exclude economic operators guilty of offences listed in par. 1 and 2 of the same article (thus including corruption) at any time during the procedure.

Further national exclusion grounds have been added to the EU ones by the national legislator. The first one regards a participation guarantee up to 2% of the estimated value of the contract (50% for SMEs) (art. 43 ind. 1 of the EGO 34/2006 and art. 84-88 of the GD 925/2006). This has been regarded as a "qualification condition" for the tender,[13] in the sense that tenderers that have not deposited the guarantee required by the contracting authority (within the limits imposed by legislation) shall be excluded from procedure. The participation deposit is meant to protect the contracting authority against the "improper behavior" of the tenderer during procedure, and it may be retained by the contracting authority when the tenderer retracts the offer during its availability, the winning tenderer does not constitute the deposit for execution of the contract in due time, or when the winning tenderer refuses to sign the contract. The deposit is returned to tenderers if none of the above instances occur upon completion of the procedure.

11. Bacau Appelate Court, decision 2810/2013.
12. See Dumitru-Daniel Serban, comment on the decision 28/10/2013 of the Bacau Court of Appeal, D.D. Serban, "*Jurisprudenta comenatta in materia achizitiilor publice*" (Hamangiu: Bucuresti, 2014), at 69.
13. Craiova Appellate Court, Decision 11324/2013.

A second national exclusion ground relates to *conflicts of interests*. Thus, the tenderer/candidate/associate/third-party/subcontractor that has in its board/supervisory body or among its shareholders family members or persons in commercial relations with the persons with decision power in the contracting authority must be excluded from procedure.[14] The last category includes not only the members of the evaluation commission, but also the heads of the contracting authority. In order for these provisions to become verifiable, the contracting authority has the obligation to publish in the tender notice the name of the persons with decision power, and after the period for submitting offers has ended, a short notice with the persons or companies that submitted tenders. The NAPP has adopted guidance for contracting authorities as to how to deal with conflict of interests.[15] The court has stated that a person who is technical director of the tendering company is in conflict of interest with his/her spouse being executive director of the contracting authority.[16] Also, the unique shareholder of a company cannot be, at the same time, a member of the local council of the municipality organizing the procedure. The moment when the incompatibility is appreciated is at the deadline for submitting the tenders,[17] such limitation being open to discussion. On the other hand, in a case when the tenderer had a leasing contract for land with a local councilor, has been considered as exceeding the scope of conflict-of-interest provisions.[18]

4.2. Optional exclusion grounds

Optional grounds are at the discretion of the contracting authorities, who may invoke them in order to exclude tenderers from the award procedure. Thus, contracting authorities *may exclude* (art. 181 of the EGO 34/2006) tenderers that are:

a) in bankruptcy (a decision of the bankruptcy judge is needed in order to consider this exclusion ground).

Other grounds of exclusion listed in the Directive (being wound up, affairs being administered by the court, arrangements with creditors, suspended business activities or any analogous situation arising from a similar procedure under national laws and regulations) were not transposed into EGO 34/2006;

14. EGO 34/2006, art.69 ind. 1.
15. The common ministerial order no. 543/2013, Official Journal no. 481/2013.
16. Pitesti Appelate Court, decision no. 1258/R-CONT of April 10th 2013.
17. Ploiesti Appelate Court, decision no. 1022/2013.
18. Ploiesti Appelate Court, decision no. 6557/2013.

similarly, the point b) of art. 45 par.2 is disregarded altogether – the provision regarding exclusion of those that are in *procedure* for a declaration of bankruptcy or comparable situations has been abrogated. In this context, the Directive is not fully transposed in Romania.

b) in breach of their obligations relating to the payment of taxes and social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority. The start of the procedure for declaring bankruptcy does not exempt the tenderers to prove that they have paid their taxes to the national budget.[19]

Moreover, the courts have stated that tenderers who own properties in more than one municipality have the obligation to present the certificates for payment of local taxes pertaining to all their properties, and this is not conditioned by the express mention of the requirement in the award documentation.[20]

In another case law, the requirements regarding the proof of payment of taxes have been complemented during the procedure in order to include both national budget and local budgets. This was considered a ground for annulment of the procedure by the contracting authority, based on express provisions of the law (art. 209 par. (1) c of the EGO 34/2006)[21] which states that procedure must be annulled if the qualification or selection criteria has been modified. The problem with this provision is that it was intended to work mainly in cases where the review body imposes such modifications, and less where the contracting authority determines such modifications itself.

c) the ground relating to conviction by a judgment of any offence concerning his professional conduct is limited in Romania to convictions occurred in the last three years, which is a limitation of the provisions of the Directive 2004/18/EC.

Moreover, the ground relating to grave professional misconduct proven by any means which the contracting authorities can demonstrate is absent from the transposing legislation.

d) the economic operator is guilty of serious misrepresentation in supplying the information required or has not supplied such information.

19. Timisoara Appelate Court, decision no. 1/2013.
20. Bacau Court of Appeal, Decision no. 1865/2012.
21. Bucharest Court of Appeal, Decision no. 3372 din 1 October 2012.

The means of proof are those specified in the Directive, no additions are featured in this regard in the transposing legislation.

e) a purely national ground is the one relating to economic operators having not fulfilled the contractual obligations in previous contracts. An administrative act that states the failure to fulfil the obligations of the contract is sufficient, no court judgement is necessary.[22] Neither has the contract to be declared void or terminated. It is, however, conditioned by the proof of fault of the tenderer and by the existence of the damage, or the potential damage, caused to beneficiaries.

In one case law, the tenderer has been in contractual relations before with the same contracting authority, and the contract has been terminated at the initiative of the contracting authority for lack of fulfilment of tenderer's obligations. The tenderer, excluded from the current procedure, asked the jurisdictional body to declare the termination of the previous contract void. Evidently, the review body refused to look at the previous contract and simply acknowledged that the contract was terminated for the fault of the tenderer and that the exclusion is lawful.[23]

4.3. Self-cleaning, state aid, change in consortia, debarment

Finally, we note that there are no provisions for self-cleaning in Romanian public procurement legislation, so there are no such practices allowed by the contracting authorities. Also, state aid is not considered grounds for exclusion. There is no government-wide debarring provisions either; the exclusion of the economic operators is to be decided by the contracting authorities on a case-by-case basis.

As for change of consortia, Romanian law only provides rules for common or multiple tenders (art.46 of the EGO 34/2006 forbids multiple offers or participation in multiple consortia) not for what happens when the consortia is changed. The practice is that there is no possibility to modify the consortia after the bid is made. When this happens after the conclusion of the contract, the administrative practice is to terminate the contract for the future, but there is no case law on this. The change of consortia intervenes in cases of insolvency, impossibility to execute the contract of one of the associates, problems with the payment of the associate by the leader of the consortia, etc. Usually

22. Bacau Court of Appeal Decision 2148/2012.
23. Bucharest Appellate Court, Decision no. 2538/2012.

contracting authorities allow a change in the way the contract is executed by associates, as long as the consortia stays as it is.[24]

5. Qualification and selection criteria

5.1. Scope and principles to be followed

Qualification and selection criteria under the Romanian public procurement legislation are stated in article 176 of EGO no. 34/2006. They include: the personal situation of the tenderer; suitability; economic and financial situation; technical and professional capacity; quality assurance; and environmental protection standards. They aim mainly at the proof of the technical, financial and organizational potential of each economic operator participating in the tender; the potential needs to reflect the actual capability of the economic operator to fulfil the contract and the solving of the potential difficulties regarding the completion of the contract, provided that his tender is the winning one.[25]

The national legislation, in accordance with EU rules, does not impose that contracting authorities employ minimum qualification criteria (with the exception of the situations falling under article 180 from EGO no. 34/2006, see previous section for details); rather it allows them to make use of this option, provided that the qualification requirements are announced in the award documentation. When contracting authorities impose minimum qualification criteria regarding the economic and financial situation, or the technical and/or professional capacity, they need to be able to motivate these requirements by drafting a justificatory note which will be attached to the dossier of the tender. Furthermore, the qualification criteria used need to be relevant and proportionate by reference to the nature and the complexity of the public procurement contract to be awarded.

The logic behind introducing minimum qualification requirements is to diminish, as much as possible, the risk of awarding the contract to an economic operator that is not capable of finalizing it. Qualification criteria play the role of a pass/fail type of filter. If the economic operator fulfils the minimum requirements, then he is capable to execute the contract. If the economic operator does not meet the imposed requirements, it means that there is a high risk that he will not execute the contract and therefore he needs to be disqualified.

24. http://www.ansar.ro/forum/viewtopic.php?f=2&t=133 last accessed 19/02/2016.
25. Government Decision no. 925/2006 regarding the approval of implementation norms of provisions from EGO no. 34/2006, article 7.

The qualification process is not meant to establish a ranking of the capability of the economic operators, but rather to split them into two groups: those who pass and those who fail, according to the qualification criteria.[26] Understanding this is highly relevant in the Romanian context, where the qualification criteria used by contracting authorities are deemed too restrictive (see next section for more details). NAPP has repeatedly stated that the level of the minimum requirements used by contracting authorities, as well as the documents which are used as proof for the fulfilment of these criteria, should be limited to what is absolutely necessary for the proper completion of the contract. In other words, the role of the qualification criteria is not to exclude as many tenderers as possible from the procedure; rather, contracting authorities should strive to eliminate only those candidates that do not fulfil minimum requirements and then use the award stage to differentiate between the tenderers.

Qualification criteria are considered disproportionate by reference to the nature and complexity of the public procurement contract if:[27] a) the sum of the values/quantities of products/services/works included in previous contracts presented by the economic operator as proof of his similar experience should be higher than the value/quantity of the products/services/works from the contract to be awarded; b) the value of the business turnover should be higher than the estimated value of the contract, multiplied by two; c) proof of a minimum level of the financial indicator general liquidity in the case of the award of a contract whose execution length is less than three months or in the case of the award of a contract with successive execution, with a length of more than three months, but for which the payments corresponding to the provided goods/services/works will be made in less than 60 days from their execution; d) the level of the financial indicator general liquidity must be over 100%, in the case of the award of a contract which does not fall into the categories discussed at c); e) proof of a minimum level of the financial indicator solvency when the economic operator has already presented documents which prove that he is not in any of the situations that act as grounds for exclusion (bankruptcy).

Letter a) refers to the so-called similar experience, which proves the extent to which the economic operator has managed activities/projects similar to the

26. G. Cazan, "Restrictive elements pertaining to the drafting of qualification criteria and other requirements included in the award documentation" (2013), http://www.avocat-achizitii.com/elemente-de-natura-restrictiva-care-apar-in-formularea-criteriilor-de-calificare-si-a-cerintelor-din-caietul-de-sarcini/.
27. Government Decision no. 925/2006 regarding the approval of implementation norms of provisions from EGO no. 34/2006, article 9.

ones that will be part of the contract he is bidding for. Quite often, contracting authorities have required similar past experience with contracts whose value was several times higher than the estimated value of the contract to be awarded. In order not to offer too much room for appreciation for contracting authorities with regard to what proportional means in this case, NAPP has set a clear ceiling to be respected in all cases. Letters b) through e) regard financial indicators. With regard to the business turnover, NAPP employed a similar approach as discussed previously, and set up a clear ceiling for the requirement. Liquidity and solvency indicators are quite important, but sometimes contracting authorities employ them even in situations when this is uncalled for. For example, if the economic operator receives money at the beginning of the contract and then payments are made on a monthly basis, such requirements are not important. Solvency based on these provisions can rarely be checked currently, provided the economic operator proves he is not in any of the situations listed under article 181/a+b.

Selection/preselection represents a different process following the qualification stage; its purpose is to limit of the number of qualified tenderers who will submit an offer during the second stage of a restricted procedure, or will participate to a competitive dialogue procedure or a negotiation procedure. Selection cannot be applied in the case of an open procedure and request for tenderer; the selection is made by assigning each tenderer a certain score which has to reflect the tenderer's capacity to fulfil the contract that will be awarded. The contracting authority has the obligation to include in the participation notice and in the award documentation the algorithm used for assigning points to the tenderers and obtaining their final ranking. It is relevant to note here that the selection criteria refer to the capability of economic operators to execute a specific contract while award criteria refer to the tenders submitted by the economic operators.

In reference to art. 11 par. (4) of GD no. 925/2006 the courts have stated in several instances that the self-declaration regarding the fulfilment of qualification criteria must make reference in an annex to concrete documents and information that prove the meeting of criteria, and not just state generally that such criteria are met.[28] However, the excessive detailed explanations on how the criteria are met shall not be imposed on tenderers.[29]

28. Craiova Appellate Court, decision no.11652/2013, decision no. 1141/2013, Bucharest Appellate Court decision no. 1026/2013 and 2443/2013, Galati Appelate Court decision no. 3500/2013.
29. Craiova Appelate Court, decision no.5474/2013.

5.2. How (not) to draft correct qualification and selection criteria?

5.2.1. Suitability to pursue the professional activity

Article 183 from EGO no. 34/2006 states, in a rather succinct manner, that contracting authorities have the right to require from any economic operator who intends to take part in a public contract, documents which prove its establishment as a natural or legal person as well as document certifying professional attestation or belonging, in accordance with the legal requirements from its country of establishment. In practice, contracting authorities have imposed a variety of restrictive requirements under the suitability to pursue the professional activity such as: the object of the contract must have, as correspondent, the main CAEN code from the certificate issued by the National Trade Register Office; the CAEN code must correspond to the CPV code pertaining to the object of the contract; the tenderer must possess a certificate of professional attestation issued by various entities based on their own statutes, which in turn are not based on legal provisions, etc.

Through the 2011 Order of the NAPP President, the text of article 183 received a somewhat clear interpretation: contracting authorities can request a certificate issued by the National Trade Register Office, which attests the object of activity of the economic operator. The object of the public procurement contract must correspond to the CAEN code from the certificate issued by the National Trade Register Office. Documents proving professional affiliation to the professional category required in order to fulfil the contract can be requested by the contracting authority only when the law has mandatory provisions in this sense. The lack of clarity of the legislation is just a part of the story why contracting authorities employ restrictive criteria/means of proof for the suitability to pursue the professional activity.

Most contracting authorities argue that the requirement "the object of the contract must have as correspondent the main CAEN code from the certificate issued by the National Trade Register Office" is used as a protection means against potential tenderers, which have in their statutes a long list of activities/CAEN codes. In these cases, it is quite difficult to assess if these economic operators are really specialized in all the activities included in the statute.

5.2.2. Economic and financial situation

Articles 184-186 of EGO no.34/2006 regulate the manner in which economic operators can demonstrate their economic and financial situation. EGO no. 34/2006 states, as examples, the following documents: a) bank declarations/letters or proofs regarding the insurance of professional risks; b) balance sheets or excerpts from balance sheets provided their publication is stipulated

in the legislation of the country of establishment; c) declarations regarding the global business turnover, or, if appropriate, the business turnover in the activity field corresponding to the object of the contract from a past period, no longer than three years, to the extent to which such information is available. More specific requirements are included in secondary legislation, namely the application norms of EGO no. 34/2006 and in various instructions issued by NAPP. It is quite difficult and confusing for contracting authorities and economic operators to have a coherent vision of what is allowed, and legal, and what it is not allowed with regard to the economic and financial situation of the tenderers.

As already mentioned, contracting authorities have often applied this criterion in a restrictive manner. Some of the most commonly requested documents by contracting authorities with regard to the economic and financial situation criterion and which represent a breach of the legal provisions include: a) letters from the national entity responsible with the evidence of payment incidents that must indicate that the economic operator is not listed in the evidence of this entity with major payment incidents; b) mandatory insurances regarding the professional risk even in cases when the law does not require it; c) the balance sheets for the last three years must be positive or they must indicate profit; d) access to credit lines with a specified fix value of X lei (the value is not correlated the period required for financing); e) letters from banks proving the creditworthiness of economic operators in the fix amount of X lei.

The instructions from NARMPP state that the tenderer must prove at the moment of the signing the contract that he will have access to – or has available real resources unencumbered by debt – credit lines confirmed by banks or other financial means that are sufficient for supporting the cash-flow for the execution of the contract. Contracting authorities do not have the right to limit the fulfilment of this requirement by imposing as means of proof certain specific documents. Important specifications from NAPP concern the way in which maximum sums/amounts should be calculated in order not to be restrictive. This applies both for the sum which should be mobilized by the economic operator, and for the business turnover.

The Council for solving Legal Disputes and the NAPP have indicated that the fulfilment of the requirement relating to general financial liquidity of the tendering company cannot be realized by resorting to other companies' liquidities, so every company from the association must prove its liquidity. The argument is based on the fact that "the financial indicator *general liquidity*

relates to a situation existent at one point in time and does not include resources that can be transferred for the fulfilment of the contract".[30]

5.2.3. Technical and/or professional capacity

EGO no. 34/2006 includes slightly different provisions with regard to technical and/or professional capacity depending on the type of procurement contracts we are referring to (contracts for goods, services and works). For each type of contract specific requirements are outlined. Some additional rules are comprised in the secondary legislation.

With regard to the technical and/or professional capacity, one of the most problematic areas refers to the past experience of the tenderers. In this case (similar to the other qualification/selection criteria discussed thus far), contracting authorities have often drafted criteria that are too restrictive. Because economic operators engage in a variety of activities and execute contracts for both private and public authorities, flexibility is needed when it comes to proving their past/similar experience. Some of the most commonly requested documents by contracting authorities with regard to the technical and/or professional situation criterion, and which represent a breach of the legal provisions include: a) recommendation letters issued specifically for the contracting authority which is awarding the contract; b) recommendations from past beneficiaries including the mention of the mark "very good"; c) lists comprising the main goods, services, works executed in the last two years, without any requirement concerning values, periods of execution, beneficiaries; d) minimum number of recommendations or a certain number of contracts; e) past experience concerning the exact type of products, services or works as in the case of the contract that will be awarded (experience concerning the building of national roads, printing of books in the field of economics; in these cases the building of roads of printing services would have been enough).

The courts have maintained that qualification criteria must be fulfilled at the date of the tender, so the fact that a person is in course of obtaining an attestation for the position of project manager and by the date of the conclusion of the contract he would have possessed such attestation, does not meet the criteria established by the contracting authority.[31]

According to NAPP, for proving similar experience, a more encompassing requirement would be – economic operators must present at least a docu-

30. Notification no. 7725/19.05.2011 of the NARMPP.
31. Alba Iulia Appellate Court, decision no. 1040/2013.

ment/contract/acceptance protocol or a maximum number of documents/contracts/acceptance protocols which confirm the execution of the contract whose value is X lei (alternatively, depending of the type of contract, it can make reference to the quantity of products instead of value). The value/quantity requested by contracting authorities should be lower than the estimated value for the contract to be awarded. In respect to similar experiences contracting authorities cannot impose both a value-based and a quantity-based ceiling.

The courts have held that experience counts for the actual executant of works, and not for the company (general entrepreneur) that sub-contracted the work to the executant,[32] the similar experience does not mean identical experience,[33] and that tenderers that have participated in an association cannot invoke the experience of other associates, but their own experience in carrying out the contract.[34]

A questionable jurisprudence states that third parties cannot contribute with their experience (as a resource) to the tender.[35] The argument here is the *intuitu personae* character of the experience as a resource to be "borrowed" from third parties. This last interpretation of the courts is contradicted by the provisions of the implementing legislation (GD 925/2006, art. 11 par. 4), which expressly allows for such experience to be considered a capacity to be relied upon, in the sense of art. 48 par. 3 of the Directive 2004/18/EC. The case law of the ECJ is also indicating the admissibility of experience as a resource.[36]

Additionally, the Order 509/2011 of NAPP specifies that some authorizations may benefit the tenderer if they are held by a subcontractor, with the condition that the subcontractor would carry out the part of the contract for which the authorization is needed.

Contracting authorities have also faced significant challenges when drafting qualification/selection criteria concerning the educational and professional experience of the personnel of the economic operators. The 2013 NAPP Instructions refer specifically to various issues regarding the personnel: educational level; general experience; specific experience; technical-professional attestation/authorization; life-long education programs. Though all these criteria can be used by contracting authorities, NAPP recommend that qualifica-

32. Bucharest Appellate Court, decision 1323/2012.
33. Bucharest Appellate Court, decision 864/2013.
34. Bucharest Appellate Court, decision 1801/2013.
35. Bucharest Appellate Court, decision 1370/2012.
36. Case C-176/98 Holst Italia SA v. Comune di Cagliari ECR I-8607.

tion criteria address mostly the specific experience of the personnel involved in the implementation of the project rather than the general experience.

With regard to the educational background of the personnel, NAPP believes that in certain situations the skills of an expert may be more relevant than the formal studies, therefore contracting authorities have to motivate when requiring a certain specialization why only an expert with studies in that field can carry out the job implied by the project. In order to further limit the use of restrictive criteria with regard to the educational background of the personnel, the instructions clearly state that contracting authorities cannot require that experts have bachelor degree, as well as a Masters or PhD, or to have just graduated studies (criterion often used in practice in order to exclude certain economic operators).

With regard to the general experience of the experts, the most restrictive criterion refers to the number of years of professional experience required. The instructions clearly state that contracting authorities cannot request more than five years of general experience (exceptions allowed only if imposed through legal acts in certain fields). Also, the number of years/months of general experience should be calculated by reference to the duration of the project, correlated with the function/activities performed by the expert and not by summing up the time effectively allocated for performing the activities.

As to the specific experience of the experts, the following restrictions/recommendations are provided by NAPP: a) contracting authorities cannot request more than three years of general experience (exceptions allowed only if imposed through legal acts in certain fields); b) contracting authorities should not require that the specific experience is acquired in one project or in projects implemented in the last X number of years or in the period required for general experience; c) the number of years/months of specific experience should be calculated by reference to the duration of the project, correlated with the function/activities performed by the expert and not by summing up the time effectively allocated for performing the activities; d) the contracting authorities cannot require simultaneously that specific experience is proven by a certain minimum number of years and also by involvement in a project/contract where the expert executed similar activities to the ones included in the contract to be awarded.

5.2.4. Procedures of evaluating/Means of proof

Due to numerous errors, the 2013 NAPP Instructions also offered additional details regarding:

i) Types of support/proof documents. Contracting authorities can request CVs and other support documents, which confirm the fulfillment of the educational and/or professional background. Contracting authorities cannot, however, limit the means of proof by expressly requesting recommendation letters; on the contrary, they should allow other documents to be used as proof for meeting a certain requirement. The contracting authorities should not require the proof documents to be issued by the beneficiary of the project in which the expert was involved; these documents can be issued by the providers of those services/works.
ii) Type of the project for which similar/past experience can be required. Contracting authorities cannot request that the experts were involved in a project whose value was in the amount of X lei or which implied the execution of works/investments of a certain capacity. Contracting authorities should not require experience in projects with external financing for experts and personnel. While contracting authorities may require that experts/personnel have past experience in similar activities with the ones forming the object of the contract to be awarded, they should not require that the project/contract in whose framework the activities were executed is financed from external funds.
iii) Cumulative positions for the same expert. Contracting authorities should only prohibit cumulative positions for an expert if they justify why the expert has to be in the same time and place simultaneously.

When examining other restrictive requirements that fall under the technical and/or professional capacity category, the most common mistakes include: contracting authorities require, for example, that economic operators own the technical equipment needed for performing a works or provision of goods contract (it could be rented as well) or that the equipment hasn't been in use for more than X number of years; requirements concerning a certain territorial coverage – for example a specific number of gas stations/per territory or a specific number of kilometers to the gas station; or that the equipment should be located no more than X number of kilometers away from the place where the works are executed.

5.2.5. Standards for quality assurance and environmental protection

Under Romanian legislation, compliance with quality assurance and environmental protection standards is included among the qualification/selection criteria. This provision has been wrongly interpreted and widely abused by contracting authorities.

A first question concerns whether or not contracting authorities can request ISO standards or similar ones that go beyond quality assurance (ISO 9001) and environmental protection (ISO 14001). In practice, contracting authorities have often used other standards, the most popular one being ISO OHSAS 18001:1999 or the SA 8000 certificate (both are related to health management and occupational security). The courts have often interpreted the provision from EGO no. 34/2006 as limiting these standards to the two areas described above. In 2011, the NAPP instructions clearly banned the possibility of contracting authorities to request the ISO OHSAS 18001:1999 or the SA 8000 certificates.[37]

Another problem regards the fact that in most award documentations contracting authorities require that the quality assurance or environmental protection standards apply to the activities that form the object of the contract. If, however, the object of the contract is drafted in a narrow way, it is almost impossible to have an ISO certification that matches the exact same activity (for example the award documentation defines as the object of the contract carpentry for windows with aluminum frames, while the ISO certification applies for carpentry activities in general). Often, the economic operators have reapplied for a different certificate in the light of an upcoming important tender. However, most experts believe that this is unnecessary and that the match between the object of the contract and the activities covered under ISO certification do not need to be exact.[38]

Another situation that often occurs in practice is when contracting authorities require from economic operators a wide variety of ISO standards, some of which are irrelevant for the said contract (ISO standard applies to the producer of goods but the contracting authority requires such a standard from the economic operator which makes the delivery of goods).

6. The new 2014 Public Procurement Directive: implications for national regulatory framework

It is worth discussing if and how the new 2014 Public Procurement Directive (article 58 refers specifically to the selection stage) will influence the drafting of selection criteria in Romania. The changes to permitted selection criteria

37. Dobrotă, M.E., Ways to fulfill the ISO 9001 quality assurance standard, 2015, online at http://www.avocat-achizitii.com/modalitate-de-indeplinire-a-standardului-de-calitate-iso-9001/.
38. Ibidem.

are relatively minimal as compared to the old legal regime. There is now a specific and clear reference to the well-established requirement that selection criteria must be relevant and proportionate. There is more detail on certain aspects of selection stage evaluation including provisions relating to the assessment of economic and financial standing. For example: a) Minimum annual turnover requirement, which must, in general, be limited to two times the estimated contract value. b) Financial ratios, such as asset/liability ratios. The methods and criteria to be used must be specified in the procurement documents and be transparent, objective and proportionate. The clear aim is to encourage the participation of SMEs in procurement, which is part of the wider EU agenda.[39]

Under the new rules, an absolute novelty regards the establishment of a simplified pre-qualification process (article 59) based on the use of the European Single Procurement Document (ESPD). When a potential supplier submits a request to participate in a procurement exercise or submits a tender, the contracting authority will be required to accept the ESPD. This document is envisioned to act as preliminary evidence of a supplier's satisfaction of the buyer's pre-selection criteria and as a confirmation that the candidate has not been excluded from competition due to one of the exclusion grounds. Only the winning bidder will have to submit full formal evidence to prove its status. This should result in a great deal less time and effort being spent preparing pre-tender paperwork.[40] The new Directive also introduces an obligation for the contracting authorities not to request information from the economic operators that could be accessible free of charge to them such as a national procurement register a virtual company dossier, an electronic document storage system or a pre-qualification system.

The introduction of the pre-qualification stage is definitely a plus and it will most likely lessen the burden for economic operators, and more specifically for SMEs. Since often in Romania economic operators are required double proof for the same circumstance, simpler pre-qualification procedures will encourage more enterprises to participate in public tendering. On the other hand, the problem pertaining to the limited capacity of contracting authorities to draft error-free selection criteria will most likely remain a significant challenge, which cannot be addressed through simpler pre-qualification procedures.

39. Bevan Brittan, "Selection stage – Grounds for exclusion, selection criteria and the ESPD" (29.05.2014), http://www.bevanbrittan.com/articles/Pages/Bytesizeupdate6-SelectionstageGroundsforexclusion,selectioncriteriaandtheESPD.aspx.
40. Ibidem.

7. Clarifications

With regard to access to clarifications, the most problematic aspect from the practice is the distinction between the request for clarifications as a right or as an obligation of the contracting authority. First, the ambiguity is supported by the existence of multiple legal provisions both from EGO no. 34/2006 and Governmental Decision no. 925/2006 concerning the request of clarifications. Article 201 from EGO no. 34/2006 states the right of the contracting authority to request clarifications and if necessary the completion of the submitted documents by tenderers in order to prove compliance with the requirements of the award documentation. However, by asking for clarifications, the contracting authority is prohibited from creating an obvious economic advantage for a specific tenderer. Article 78 from Governmental Decision no. 925/2006 states among the attributions of the evaluation commission the obligation to determine the clarifications and the completions (concerning formal elements) or confirmation of elements from the offer which are necessary for the evaluation of each tender as well as the applicable deadlines. The courts have ruled after corroborating all the legal provisions that the request for clarifications can be an obligation only when there are unclear or ambiguous elements to the offer and not when there are missing documents or elements.[41] In some of the mentioned cases, requests should have been asked because the tender rejected as non-compliant, without asking for clarifications, offered the lowest price.[42]

8. The Role of NAPP in the early detection of wrongly drafted qualification/selection criteria

Starting in 2011, NAPP performs an ex-ante assessment of all the award documentations prepared by the contracting authorities in Romania, irrespective of the value of the contract (below or above the EU thresholds) and the source of funding (national or European). This is a tremendous job for a medium-size Authority and it was introduced with the clear goal of expediting

41. Oradea Appellate Court, Division for Commercial, Administrative and Fiscal Matters, Decision no. 2653/CA/2011-R/7.12.2011; Alba Iulia Appellate Court, Division for Administrative and Fiscal Matters, Decision no. 891/22.02.2012.
42. Bucharest Appellate Court, 8th Division for Commercial, Administrative and Fiscal Matters, Civil Decision no. 279/1.02.2010.

the public procurement procedures, which were often blocked because of numerous complaints lodged with the Council and/or the courts.

The ex-ante evaluation is conducted online, using SEAP (the electronic platform for public procurement). Before the invitation/participation notice is posted in SEAP and made publicly available, the operator of the system provides access for NAPP to all the relevant materials pertaining to the award documentation. In a maximum of 10 days from receiving the documents from SEAP, the Authority is obliged to either allow the contracting authority to go ahead with the tender or to notify it with regard to the errors in the award documentations and the justification explaining the non-compliance with the national and European legal provisions. The screening of the award documentation by NAPP has significantly curbed the number of tenders whose award documentation (including selection criteria) is faulty. On the other hand, the role of NAPP is often wrongly understood by economic operators. In complaints lodged with the Council or the courts, contracting authorities argue that since their award documentation was checked by NAPP, it has to be error-free. This is not true and there are cases when the courts did not agree with NAPP. Along the same lines, contracting authorities often claim that the selection criteria used in a certain procedure where drafted following the instructions of NAPP, from various manuals and guidelines, and therefore they must be correct. This is also not true, since the courts argued that the manuals from NAPP do not have legally binding force.[43]

9. Fulfilling the qualification and selection criteria through association, subcontracting, and reliance on the capacities of third parties

One important question in practice regards the possibility of economic operators to employ the resources available through association and/or subcontracting for the fulfillment of qualification/selection criteria. Until the 2011 NAPP instructions, economic operators complained about numerous uncertainties which often resulted in their exclusion from tendering procedures. In the table below (reproduced from the 2011 instructions), NAPP tried to assist both economic operators and contracting authorities by

43. Bucharest Appellate Court, Administrative and Fiscal Review Division, Civil Decision no. 2289/101.11.2010
Court.

providing them with an easy-to-understand summary of all the possible situations when subcontractors, associates, and third-party supporting entities are employed.

One situation often encountered in practice is related to the criterion of similar experience.[44] For works contracts in particular, economic operators often submitted support documents showing that the subcontractors they will use have been involved in the execution of similar contracts as the one been awarded. Both the Council and the courts have repeatedly argued that minimal qualifications criteria cannot be fulfilled through subcontractors because they do not have the status of parties to the public procurement contract. The review bodies based their decision on the distinction made in the law between association (article 44 (1) from EGO no. 34/2006 deals with the notion of joint tender) and subcontracting. The following arguments can be depicted from the case law: parties to the public procurement contract are the contracting authority and the winning tenderer or association; subcontractors are third parties by reference to the concluded contract; subcontractors are responsible for the way in which they fulfill their duties only with respect to the winning tenderer; and because the contract is not concluded with the contracting authority, the contracting authority cannot hold them liable for not completing the execution of the contract. In 2009, through Governmental Decision no. 834/2009 (article 11/7), contracting authorities were required to take into consideration the human and material resources of the declared subcontractors for their share of involvement in the execution of the contract to be awarded. Material resources include equipment and technical facilities while human resources refer to the personnel. In the literature it is argued that article 11/7 should be expanded to include similar experience.

44. B. Bello, "Similar experience of subcontractors – A hurdle in the way of winning public procurement contracts" (2010), http://www.vasslawyers.eu/ro/articole-de-specialitate/experienta-similara-a-subcontractantilor-%E2%80%93-un-hop-pentru-castigarea-contractelor-de-achizitie-publica/.

		Personal situation		Suitability		Economic and financial situation				Technical and professional capacity			
		Art. 180	Art. 181	Art 183 – CAEN code (field of activity)	Authorizations, certificates, attestations	Resources (liquidities)	Business turnover	General liquidity	Solvency	Human resources (certificates, authorizations)	Technical resources (certificates, authorizations)	Similar experience	Environmental protection standards	Quality assurance standards
Individual tender		Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Individual tender + third party supporting entity	Individual tender	Yes	Yes	Yes	Yes	It can be cumulated	Or	Yes	Yes	It can be cumulated	It can be cumulated	Or	Yes	Yes
	Supporting entity	Yes	No	No	No		Or	No	No			Or	No	No
Individual tender + subcontracting	Individual tender	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	Subcontractors	No	No	No	Yes	No	No	No	No	Yes, for their share of involvement	Yes, for their share of involvement	No	No	No
Joint tender	Associate 1	Yes	Yes	Yes, for the share of the contract they execute	Yes, for the share of the contract they execute	It can be cumulated	It can be cumulated	Individual	Individual	It can be cumulated	It can be cumulated	It can be cumulated if economic operators need to fulfil the requirement through a maximum number of cumulated contracts. If the requirement is for at least one contract the requirement will be fulfilled by one associate	Yes	Yes
	Associate n	Yes	Yes					Individual	Individual				Yes	Yes

		Personal situation		Suitability		Economic and financial situation				Technical and professional capacity			
Joint tender + third party supporting entity	Associate 1	Yes	Yes	Yes, for the share of the contract they execute	Yes, for the share of the contract they execute	It can be cumulated	It can be cumulated	Indivi-dual	Indivi-dual	It can be cumulated	It can be cumulated	It can be cumulated if economic operators need to fulfil the requirement through a maximum number of cumulated contracts. If the requirement is for at least one contract the requirement will be fulfilled by one associate	Yes
	Associate n	Yes	Yes					Indivi-dual	Indivi-dual				Yes
	Supporting entity	Yes	No	No	No		The requirement regarding business turnover will be fulfilled in its entirety by one supporting entity	No	No			The requirement regarding similar experience will be fulfilled in its entirety by one supporting entity	
Joint tender + subcontracting	Associate 1	Yes	Yes	Yes, for the share of the contract they execute	Yes, for the share of the contract they execute	It can be cumulated	It can be cumulated	Indivi-dual	Indivi-dual	It can be cumulated	It can be cumulated	It can be cumulated if economic operators need to fulfil the requirement through a maximum number of cumulated contracts. If the requirement is for at least one contract the requirement will be fulfilled by one associate	Yes
	Associate n	Yes	Yes					Indivi-dual	Indivi-dual				Yes
	Subcontrac-tors	No	No	No	Yes	No	No	No	No	Yes, for the share of involvement	Yes, for their share of involvement	No	No

10. Confusion between selection and award criteria: not a problem any more?

Based on the Directive 2004/18/EC, the national law and the case law have established a clear distinction between qualification/selection criteria and award criteria, in line with the Lianakis case. However, in practice, contracting authorities have very often used selection criteria among the award criteria (this was relatively widespread practice immediately after the adoption of the law in 2006, but now less likely to occur).

Governmental Decision no. 925/2006 comprising the guidelines for the implementation of EGO no. 34/2005, in article 15(1) clearly prohibits contracting authorities from using qualification and selection criteria listed in article 176 from EGO no. 34/2006 as factors for the evaluation of the bids. Article 293(j) from EGO no. 34/2006 states that such a practice by the contracting authority is a misdemeanor sanctioned with a fee of up to 100,000 RON.

Among the selection/qualification criteria most often used for the evaluation of the tenders are: the past experience of the tenderers with similar contracts; information concerning the personnel; the number of experts used for the implementation of the contract; and the technical equipment the tenderers have available. There were cases brought before the courts when the contracting authority not only used qualification criteria for the evaluation of the tenders but the said criteria were not assigned a clear weighing or a points system (no explanation concerning how past experience will count as an advantage in an objective evaluation algorithm). In other cases, a high number of points was assigned to past experience with similar tasks (30 points) while the financial offer was given only 20 points.

Seldom do economic operators challenge the award documentation (specifically the evaluation algorithm) within the legal timeframe; most likely this is invoked when they are dissatisfied with the outcome of the evaluation procedure. This leads to a very disturbing situation, namely to have a qualification/award procedure conducted based on illegal requirements. For example, in one case an economic operator was excluded from tendering following the qualification procedure because it did not comply with a request of the contracting authority (a declaration of all the associates in front of a notary publicly certifying that they agree with the signing of the contract once this gets awarded). This requirement is illegal, as it is not among the qualification criteria stated by public procurement law. The court ruled that the decision of the contracting authority based on which the entity was eliminated from the tendering procedure is illegal; thus the act was annulled and the contracting authority was forced to re-evaluate the tenders, including the one that had

been eliminated earlier. Though the requirement is obviously not legal, the doctrine argues that as long as the economic operators do not challenge the award documentation within the proper timeframe, the requirements, even those that are illegal, become mandatory for all parties to the procedure.

Both the Council and the courts have ruled in the vast majority of cases that qualification/selection criteria are not to be used as evaluation factors for the awarding of a public procurement contract.

The new Directive 2014/24/EU makes a breach into the rigid application of Lianakis doctrine, by allowing for certain qualification and selection criteria to be used as award criteria, namely organization, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract (art. 67 par. 2 b).

11. Final considerations

The qualification, exclusion and selection criteria used in contracts, as opposed to other areas of public procurement (remedies, secondary considerations, etc.) has generated a significant body of case law in Romania.

The main problem pertaining to the drafting of qualification and selection criteria in Romania is the fact that they are too restrictive. As a solution to the main problems occurring in practice, a strong *ex-ante* control by NAPP was established for all public procurement award procedures, irrespective of the value of the contract. Although this is criticized by some of the actors involved in public procurement as excessive, causing delays and centralization, in the light of the case law analyzed this seems a reasonable solution. This solution will most likely have to be maintained regardless of associated inconveniences until contracting authorities develop the necessary expertise to deal in a more professional way with their award procedures.

Overall, the national legislation in Romania has transposed the Directive 2004/18/EC pretty accurately, except in some cases where exclusion grounds are limited in their effect. The case law of the review body and of the courts has been instrumental in identifying problems in practice. The transposition of the new directive 2014/24/EU will bring in some new provisions, but the legal framework is fairly compatible with the novelties brought by the new legal instrument.

Qualification, Selection and Exclusion of Economic Operators under Spanish Public Procurement Law

Albert Sanchez Graells[1]

1. Introduction

Under Spanish law, qualification, selection (including short-listing, where relevant) and exclusion of economic operators for the purposes of public procurement procedures, is regulated in Articles 54 to 84 (Chapter II of Title II) of the consolidated text of the Law on Public Sector Contracts (LPSC).[2] The

1. Senior Lecturer in Law, University of Bristol Law School. a.sanchez-graells@bristol.ac.uk. Comments welcome. I am thankful to my peers of the European Procurement Law Group and co-authors of this book for their initial comments during the summer meeting held at LMU Munich in July 2014, and at the University of Birmingham in July 2015. I am particularly grateful to Prof. Steen Treumer and Dr. Luke Butler, who provided extensive comments, as well as to an anonymous referee. I am also grateful to Xavier Codina García-Andrade for his research assistance.

2. Royal Legislative Decree 3/2011 of 14 November, which approves the consolidated text of the Public Sector Contracts Act (LPSC). The LPSC is developed in several implementing instruments (some of which predate it): Royal Legislative Decree 2/2000, of 16 June, adopting the Recast Text of the Public Administration Contract Law, Royal Decree 1098/2001, of 12 October, adopting the General Regulations of the Public Administration Contract Law, and Royal Decree Law 817/2009 of 8 May, which partially implements Law 30/2007 of 30 October, the Public Sector Contracts Act. The implementing regulation in Royal Decree 1098/2001 of 12 October 2001 is still in force, despite having been adopted in relation to a prior version of the Spanish public contracts legislation – which has been criticised in light of the resulting regulatory confusion caused; see JA Moreno Molina, "Consideraciones críticas sobre el Real Decreto 817/2009, de 8 de mayo, de desarrollo parcial de la Ley de Contratos del Sector Publico" (2009) 88 *Contratación Administrativa Práctica* 35.

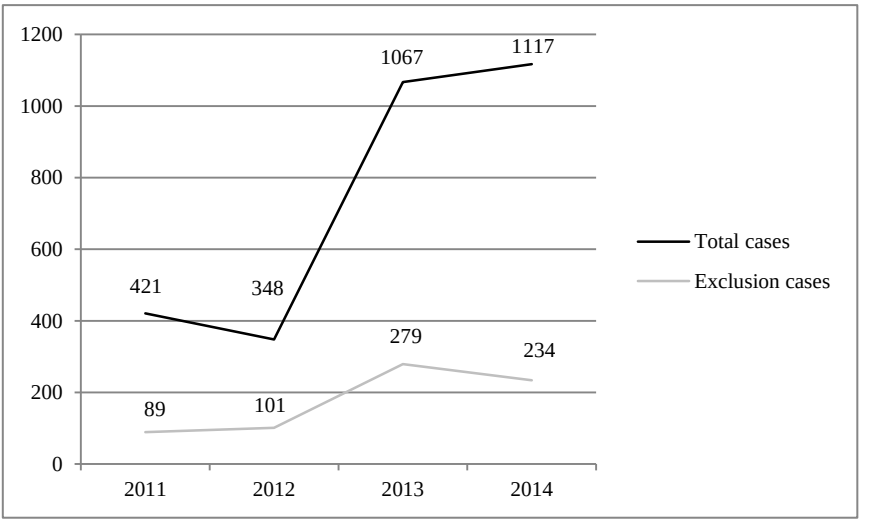
structure of the rules and their content closely corresponds those in Directive 2014/18,[3] which the LPSC transposed.[4] It should be observed, however, that Directive 2014/24[5] is yet to be transposed.[6] Therefore, this chapter focuses on the transposition of the EU rules under Directive 2004/18 into this law, and their interpretation and implementation by the Spanish judiciary and public procurement advisory bodies, both central and regional. Where relevant, the chapter identifies points of convergence or departure from Directive 2004/18 and Directive 2014/24, as areas of particular relevance for legislative reform in view of ensuring a proper transposition despite having missed the April 2016 deadline.

As will be shown, despite the fact that the rules are relatively straightforward, their practical implementation raises significant issues that are sometimes compounded by the complexities of the general regulation of administrative procedures – which overlaps with and controls the application of the

For the purposes of this contribution, only the rules in the LPSC will be taken into consideration, unless some of the implementing detailed rules are relevant to the discussion. This will be the case concerning the classification of economic operators (below, § 3), which LPSC rules are further developed in Arts 9-46 (Title II, Book I) of Royal Decree 1098/2001, as further developed by Royal Decree 817/2009 of 8 May.

3. Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L 134/114.
4. Originally, through Law 30/2007 on Public Sector Contracts, later recast in the LPSC. For a general discussion, see M.M. Razquin Lizarraga, "Selección de contratistas y adjudicación de contratos: (con especial referencia a la administración local)", (2008) 306 *Revista de estudios de la administración local y autonómica*, 31-66.
5. Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65.
6. As of 11 25 July 2+16. Some urgent measures were adopted for partial implementation by Legal Decree 3/2016, of 31 May, but nothing altered the previous regime significantly. A Draft Project Law on Public Sector Contracts was made public on 17 April 2015: minhap.gob.es/Documentacion/Publico/NormativaDoctrina/Proyectos/Borrador%20Anteproyecto%20de%20Ley%20de%20Contratos%20del%20Sector%20P%C3%BAblico-%2017%20abril%202015.pdf [accessed 23 June 2016]. At the time of writing (11 August 2015), the draft has received positive opinion from the Social and Economic Council: http://www.ces.es/documents/10180/2394234/Dic082015.pdf [accessed 23 June 2016], as well as the General Council of the Judiciary (CGPJ): http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Consejo-General-del-Poder-Judicial/Actividad-del-CGPJ/Informes/Informe-al-Anteproyecto-de-Ley-de-Contratos-del-Sector-Publico [accessed 23 June 2016]. This contribution is limited to the law as it stands.

LPSC when the contracting entity is part of the public sector.[7] In this regard, it is worth stressing that the exclusion of candidates or tenderers generates a significant volume of litigation in the form of administrative appeals in Spain. As a summative statistical analysis shows, a significant number of the decisions adopted by the Spanish Central Administrative Tribunal for Contractual Appeals (*Tribunal Administrativo Central de Recursos Contractuales*, "SCATCA" a non-judicial body) is directly or indirectly concerned with these issues.



Source: Own elaboration on the basis of SCATCA's Annual Reports 2011-2014.[8]

Remarkably, since its creation in October 2010, more than 700 of the decisions adopted by SCATCA have been concerned with the exclusion or

7. Law 30/1992 of 26 November, on the Legal Regime of Public Administrations and Common Administrative Procedure. This chapter will not explore any further the issue of whether the scope of application of the Spanish rules on administrative procedure coincides with the personal scope of the LPSC or that of the EU Directives on public procurement. Suffice it to stress that, where a contracting authority carries out procurement, the Spanish rules on administrative procedure apply (which will be the case for all contracting authorities except some public bodies, depending on their legal status for the purposes of Law 30/1992).
8. Data for 2011 includes cases for the last quarter of 2010, as SCATCA has not published disaggregated data for these consecutive years. That explains the apparent reduction in total cases between 2011 and 2012.

(non)selection of economic candidates,[9] with a clear year-on-year increase in the number of cases – at least for the period 2011 to 2013.[10] The percentage of exclusion-related cases has remained above 20% of the total workload of SCATCA, and it reached a peak of 29% of cases in 2012. Only a significant increase in other type of cases has brought the relative importance of exclusion-related cases down in 2014. This has resulted in a rather large body of administrative precedent, on which this contribution will focus.

The remainder of this chapter focusses on LPSC's rules as interpreted and applied by SCATCA (with a view to the case law of the Supreme Court, where it exists) in relation to: qualitative selection of economic operators (§ 2), including both exclusion (§ 2.1) and selection grounds (§ 2.2); the exclusion and selection procedures and means of proof (§ 3); the rules on reliance on the capacities of other entities for the purposes of meeting standing requirements (§ 4); the rules on short-listing or the reduction in the number of candidates (§ 5); and, finally, the criteria and rules for Government-wide debarment of economic operators (§ 6). Very brief conclusions follow (§ 7).

2. Criteria for Qualitative Selection

Generally,[11] participation in public procurement procedures is open to all economic operators with legal capacity, be they natural or legal persons.[12]

9. As reported by SCATCA in its repository, under the category "exclusion" http://www.minhap.gob.es/es-ES/Servicios/Contratacion/TACRC/Paginas/BuscadordeResoluciones.aspx [accessed 23 June 2016].
10. See SCATCA's Annual Reports 2011, 2012 2013 and 2014, available at http://www.minhap.gob.es/es-ES/Servicios/Contratacion/TACRC/Paginas/Memoria.aspx [accessed 23 June 2016].
11. For a comment on the provisions discussed in this contribution, J.A. Moreno Molina & F. Pleite Guadamillas, *La Nueva Ley de Contratos del Sector Público: estudio sistemático*, 3rd edn (La Ley: Madrid, 2011), 327-412. See also A. Palomar Olmeda, "Actuaciones preparatorias de los contratos. Procedimiento de selección y adjudicación de los Contratos Públicos", in *Novedades en la Ley de contratos del sector público* (Gobierno de La Rioja: 2008) 145-182; V. Gutiérrez Colomina, "Estudio de los principios, criterios, procesos y racionalización técnica en la selección y adjudicación de los contratos de los sujetos del sector público", in F.J. Gutiérrez Julián (ed.), *Manual práctico de la Ley de contratos del sector público* (Fundación Asesores Locales: 2009) pp. 225-78; and M.A. González Iglesias, "El procedimiento de contratación: preparación del contrato, adjudicación del contrato y selección del contratista", in M.M. Fernando Pablo et al (eds), *Contratos públicos, urbanismo y ordenación del territorio* (Ratio Legis: 2012), at 61-82.

Therefore, legal capacity becomes an implicit pre-requisite for qualitative selection.[13] The rules in articles 54 to 58 LPSC basically reiterate general rules of Spanish, EU and international private law controlling these issues – and establishes that the legal capacity of EU economic operators will be determined according to the rules of the Member State of their establishment, whereas the legal capacity of non-EU economic operators will be determined according to particular requirements of certification via diplomatic representation.[14] In case of participation by legal entities, it is a compulsory requirement that the activities implied by the future contract are covered by their corporate object, or, more specifically: "[l]*egal entities may only be awarded contracts which object is included within the aims, object or area of activity, according to their statutes or founding rules*" [art 57(1) LPSC].

Interestingly, participation of non-EU economic operators is subjected to certification by diplomatic representation that their home state allows participation of Spanish economic operators in their public tenders under a principle of reciprocity. Only economic operators covered by the WTO Government Procurement Agreement are excluded from such reciprocity requirements.[15] If legal capacity (and, where applicable, reciprocity) are recognised, participation in public tenders is possible and the economic operator will, consequently, be subjected to the selection and exclusion rules discussed in the remainder of the chapter.

2.1. Exclusion Grounds

Article 60 LPSC includes three lists of exclusion grounds, which are legally conceptualised as "prohibitions to contract" under Spanish law. Economic

12. Hence, entities without separate legal personality, such as common joint ownership arrangements, are excluded from participation. See Judgment of the National Court of 14 March 2002 (Rec. 139/2001).
13. V. Manteca Valdelande, "El derecho a ser contratista" (2005) 40 *Contratación Administrativa Práctica*, 33.
14. For some strange reason (probably derived from diverse historical evolution of works and other types of procurement), in case of works contracts only, it is also necessary that non-EU economic operators have a registered office and a local representative with sufficient powers of attorney in Spain, *ex* art 55(2) LPSC.
15. This is fundamentally in line, at least by way of principle, with the European Commission's Amended Proposal for a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries – COM(2016) 34 final, 29.1.2016,

operators affected by any of those circumstances are prevented from contracting with either any purchaser in the public sector [art 60(1) LPSC] or any public administration [art 60(2) LPSC], and some of the prohibitions are based on the situation in which some key individuals (mainly, directors and representatives) of the economic operator find themselves personally [art 60(3) LPSC]. Such impossibility to contract derives from the goal of protecting "public morality" and ensuring that there is no ground to challenge the legitimacy of the commercial deals that the public sector enters into.[16]

Remarkably, all exclusion grounds are mandatory, in the sense that contracting authorities are under a prohibition to contract with any affected economic operators and contravening this prohibition is sanctioned with the automatic (administrative) nullity of the ensuing public or private contracts [art 32(b) LPSC].[17] Each of these types of exclusion grounds are applied differently (see below 3), but their consequences are identical (i.e. result in the legal impossibility to enter into valid contracts with public buyers).[18] It is also worth stressing that all exclusion grounds are absolute. Economic operators affected by them have no possibilities to "self-clean" or to demonstrate that they have implemented measures to regain reliability after the facts that triggered the prohibition to contract (*cf* art 57(6) dir 2014/24). Indeed, transposition of the "self-cleaning" procedure that art 57(6) dir 2014/24 demands is likely to create significant resistance and procedural difficulties under Spanish law, given that the imposition of the "prohibitions to contract" has traditionally been seen as an objective measure to protect public interest under Spanish Administrative law.

Functionally, these three lists of exclusion grounds can be conceptualised as a list of "EU exclusion grounds" [since art 60(1) LPSC fundamentally contains the mandatory grounds foreseen in the EU rules and makes mandatory most of those established as discretionary under EU rules; see art 45 dir 2004/18 and art 57 dir 2014/24]; a list of "domestic or systemic exclusion grounds" aimed at ensuring consistency in the exclusion of economic operators that have demonstrated their insufficient reliability to deal with public administrations [art 60(2) LPSC]; and a list of "anti-fraud exclusion grounds"

16. Judgment of the Spanish Supreme Court of 31 May 2004 (Rec. 1609/2004); and Judgment of the Spanish Supreme Court of 28 March 2006 (Rec. 4907/2003).
17. For discussion on compliance of the mandatory character of all exclusion grounds with the case law of the CJEU and the principle of proportionality, see the contribution of Steen Treumer to this volume.
18. This affects both private and public contracts. Spanish Supreme Court of 4 July 2006 (Rec. 458/2004).

whereby the LPSC prevents abuses of the separate legal personality of undertakings and aims to exclude the individuals or groups of individuals that have triggered a loss of confidence from public administrations or other entities in the public sector [art 60(3) LPSC]. Each of these groups of exclusion grounds will now be assessed in more detail.

EU exclusion grounds. Article 60(1) LPSC replicates almost *verbatim* the current list of mandatory exclusion grounds of article 45(1) of Directive 2014/18 – which triggers the need to incorporate the additional mandatory exclusion grounds of article 57(1) and 57(2) of Directive 2014/24[19] – and makes mandatory most of those foreseen as discretionary under article 45(2) of Directive 2014/24.[20] Indeed, according to article 60(1) LPSC, a prohibition to contract with the public sector affects all legal or natural persons that find themselves in any of the following situations:

a) Being affected by a final criminal conviction for illicit association, corruption in international transactions, other types of (domestic) corruption, crimes against the Treasury or the Social Security, crimes against workers, misappropriation and other economic crimes, environmental crimes, or any other crimes that imply a sanction of professional disqualification. This prohibition to contract reaches legal persons whose administrators or legal representatives with current office or representation powers are in one of these situations due to actions taken in the name of, or on behalf of, such entities.
b) Being involved in bankruptcy or administration proceedings, or having been disqualified for the conduct of an economic activity as a result of a previous bankruptcy proceeding (in which case the duration of the prohibition to contract extends to all the disqualification period).[21]

19. For discussion of these new grounds, see A. Sanchez Graells, "Exclusion, Qualitative Selection and Short-listing in the New Public Sector Procurement Directive 2014/24", in F. Lichère, R. Caranta & S. Treumer (eds), *Modernising Public Procurement: The New Directive*, vol. 6 European Procurement Law Series (DJØF Publishing: Copenhagen, 2014), at 97, 105-07.
20. And it can be expected that a reform of the LPSC will also incorporate all or most of the discretionary grounds under art 57(4) dir 2014/24 as mandatory exclusion grounds under the Spanish domestic rules.
21. G. Jiménez Blanco & J.M. Anarte Balanzategui, "Régimen económico-financiero, concursal y paraconcursal del sector público" (2011) 15 *Revista de derecho concursal y paraconcursal*, 435-460; I. Fernández Torres, "Concurso y contratos con el sector público en el marco Real decreto 3/2009 y de la nueva Ley de contratos con el sector público" (2009) 11 *Revista de derecho concursal y paraconcursal* 267-292; M.C.

c) Being affected by a final conviction (i.e. an administrative sanction) for market manipulation, grave professional misconduct, grave infringement of labour and equality rules, health and safety/risk prevention, or environmental rules.
d) Lack of payment of fiscal or social contributions (in the terms of the implementing rules).[22]
e) Misrepresentations in self-declarations (including concealing information) or in the provision of any of the information required to assess their standing and compliance with qualification, exclusion and selection criteria.[23]
f) Having any director or significant shareholder in an illegal conflict of interest.[24] These two last prohibitions extend to people specially related to the person in illegal conflict of interest (such as spouses or partners, or descendants subject to their legal custody or representation); or
g) Having hired any other persons in an illegal conflict of interest due to their membership of Government or their position as a high-ranking civil servant, for a maximum period of two years since they stepped down from public post.[25]

Domestic or systemic exclusion grounds. Further to the above exclusion grounds, article 60(2) LPSC establishes an additional list of circumstances

Chinchilla Marín, "Efectos de la declaración del concurso sobre los contratos celebrados con las administraciones públicas", in L. Fernández de la Gándara & M.M. Sánchez Álvarez (eds), *Comentarios a la Ley concursal* (Marcial Pons, Ediciones Jurídicas y Sociales: 2004), at 351-404.

22. This is further developed in arts. 13 and 14 of RD 1098/2001. When it concerns lack of payment, the condition is of not being under an execution tax collection procedure or not having unpaid due taxes [art. 13(d)] and having no unpaid outstanding contributions to the Treasury of the Social Security [art. 14(d)]. On the compatibility of these harsh conditions with EU law, *cf* art 57(2) dir 2014/24.
23. This needs to be notified to ROLECE, so that it can be tracked by other contracting authorities and entities for the purposes of imposing the prohibition to contract [art 61(5) LPSC]. See below § 3.1.
24. As regulated in relation to political appointees and high-ranking officials by Law 5/2006 of 10 April on conflicts of interest of the members of Government and high-ranking Civil Servants of the General Administration of the State; Law 53/1984 of 26 December on incompatibilities of the personnel at the service of public administrations; or Organic Law 5/1985 of 19 June on electoral regime.
25. The last two prohibitions are discussed by A. Cea Ayala, "Breves reflexiones acerca de las prohibiciones para contratar" (2007) 67 *Contratación Administrativa Práctica*, at 26-40; and I. Gallego Córcoles, "Prohibiciones de contratar: el régimen de incompatibilidades" (2005) 40 *Contratación Administrativa Práctica*, at 52.

that carry a prohibition to contract with public administrations, which includes the following situations:

a) Having (culpably) triggered the final termination of a public contract.
b) Having breached a prohibition to contract with the public administration.[26]
c) Being under a prohibition to contract under the special rules derived from infringements of general subsidies law, or general tax law.
d) Having unlawfully withdrawn an offer or tender or, having provided a self-declaration, consequently preventing the award of a contract by failing (culpably or by negligence) to provide the necessary supporting information.[26] [27]
e) Having breached contract compliance clauses, if they amount to a serious (wilful or negligent) breach of the special regime foreseen in the LPSC (art 118).[26]

Anti-fraud exclusion grounds. Finally – and following a legal technique similar to the lifting or piercing of the corporate veil in company law – article 60(3) LPSC foresees that all previous exclusion grounds or prohibitions to contract also affect those economic operators which, because of the people who manage (*rectius*, control) them or other circumstances, can be presumed to be a continuation of, or to derive (such as by merger, transformation or legal succession) from other economic operators that would have been affected by the prohibition.

In principle, the prohibitions to contract just discussed create a *numerus clausus*,[28] so that contracting authorities and entities cannot create additional exclusion grounds. However, it must be taken into consideration that, further to the grounds expressly regulated in article 60 LPSC, article 56 LPSC sets up certain "special compatibility conditions" that can result in the exclusion of economic operators that find themselves in certain types of *structural* conflict of interest or are presumed to be in an advantaged position.[29] Article

26. This also needs to be notified to ROLECE, so that it can be tracked by other contracting authorities and entities for the purposes of imposing the prohibition to contract [art 61(5) LPSC]. See below § 3.1.
27. This is subject to a proportionality test; see Resolution 25/2012 of 20 March of the Administrative Tribunal for Contractual Appeals of Andalusia.
28. Judgment of the Spanish Supreme Court of 18 September 1996.
29. The compatibility of these rules with EU law and the case law of the CJEU is, at first sight, rather clear despite the uncertainty as to the evaluation of the presumption of advantage that seems implicit in the literal wording of the Spanish text (which nuances are difficult to translate); see *Fabricom*, C-21/03, EU:C:2005:127 and S. Treumer,

56(1) LPSC requires that, except in competitive dialogue procedures, economic operators that have participated in the development of technical specifications or preparatory documents for the contract must refrain from participating if such participation will result in competitive restrictions or grant them privileged treatment with respect to other tenderers. Similarly, although in a narrower setting, article 56(2) LPSC determines that contracts which have as their object the oversight, supervision, control and direction of the execution of works and installations may not be awarded to the same companies that were awarded the contracts for the works, or to companies linked to them (i.e. companies in the same group).[30]

It is also worth highlighting that Spanish rules create an implicit obligation to exclude tenderers or candidates in instances of multiple bidding, since multiple participation of economic operators in one tender procedure (either individually or in consortia) is expressly excluded by article 145(3) LPSC, which indicates that without prejudice to the admissibility of variants or improve-

"Technical Dialogue and the Principle of Equal Treatment: Dealing with conflicts of Interests after *Fabricom*" (2007) 16(2) *Public Procurement Law Review*, at 99-115. Consequently, this is an area where no significant changes will be necessary in order to properly transpose the rules in arts 40 and 41 dir 2014/24, as well as the corresponding exclusion grounds in art 57(4)(f) dir 2014/24.

30. Which must be understood as those found in any of the cases of Article 42 of the Code of Commerce, according to which "*A group exists when a company holds, or may hold, directly or indirectly, the control over one or several others. In particular, there shall be presumed to be control when a company, which shall be classified* [as] *controlling, is in a relation with another company, which shall be classified as dependent, in which any of the following situations arise: a) It holds the majority of the voting rights; b) It has the power to appoint or dismiss the majority of the members of the governing body; c) It may dispose, by virtue of agreements entered into with third parties, of the majority of the voting rights; d) It has used its votes to appoint the majority of the members of the governing body who hold office at the moment when the consolidated accounts must be drawn up and during the two business years immediately preceding. In particular, that circumstance shall be assumed when the majority of the members of the governing body of the governing body of the controlled company are members of the governing body or top management of the controlling company, or of another company controlled by it. In that event, consolidation shall not arise if the company whose directors have been appointed is bound to another in any of the cases foreseen in the first two letters of this section. For the purposes of this section, the voting rights of the controlling company shall be added to those it holds through other dependent companies, or through persons acting in its own name, but on account of the controlling company, or other dependent ones, or those with which it has made arrangements through any other person*." Official translation by the Spanish Ministry of Justice. mjusticia.gob.es/.

ments (art 147) and the presentation of new prices or values within an electronic auction (art 148 LPSC), "*tenderers cannot submit more than one proposal. Nor can they subscribe to any proposed joint venture with others if they have individually participated, or be included in more than one joint venture. Violation of these rules will result in the dismissal of all proposals subscribed by the tenderer*".[31]

Finally, it is worth stressing that SCATCA has often assessed instances of exclusion based on strict procedural grounds, the principle of proportionality and the principle of equal treatment[32] – e.g. exclusion (*rectius*, disqualification) due to lack of formal compliance with requirements of economic standing or other qualitative selection criteria, which was ultimately based on principle of equal treatment of economic operators.[33] The approach has always been strict and the proportionality test has had limited virtuality.[34] However, it must be acknowledged that some of these decisions are difficult to distinguish from other instances of straightforward disqualification of tenderers due to a lack of standing (below § 2.2). Consequently, it is difficult to support that exclusion grounds beyond those expressly regulated in articles 56 and 60

31. *Cf* with the case law of the CJEU in *Serrantoni and Consorzio stabile edili*, C-376/08, EU:C:2009:808, which would exclude an obligation to automatically reject all offers in enforcement of such prohibition of multiple participation. For discussion, see Sanchez Graells (n 44), 340-347.
32. It is worth stressing that this possibility is in line with the EU case law, as evidenced in *Fabricom*, C-21/03, EU:C:2005:127; *Makedoniko Metro*, C-57/01, EU:C:2003:47; or *ARGE*, C-94/99, EU:C:2000:677.
33. See SCATCA Resolution 175/2011 of 29 June 2011 (*Telefonica*), where it was found that "*participation in public procurement involves meeting a series of formal requirements by the tenderers, which aim to ensure* [first] *that the award of the contract is made to the most economically advantageous tender and, secondly, that it is done in absolute equality of all tenderers. Consequently compliance with the formal requirements must be enforced equally upon all of them*" (para 4). This resolution has later been used to apply this hybrid cause of exclusion/disqualification in a number of SCATCA Resolutions, some of them more clearly concerned with exclusion grounds than others, see: Res 208/2011 of 7 September; Res 220/2011 of 14 September; Res 236/2011 of 13 October; Res 147/2012 of 12 July; Res 154/2012 of 19 July; Res 253/2012 of 14 November; Res 90/2013 of 27 February; Res 151/2013 of 18 April; Res 369/2013 of 11 September; Res 445/2013 of 10 October; Res 233/2014 of 21 March; and Res 620/2014 of 8 September.
34. The approach is very similar to the rejection of tenders on the basis of formal non-compliance. See A. Sanchez Graells, "Award Criteria and Award-Related Challenges Under Spanish Public Procurement Law", in M.E. Comba and S. Treumer (eds), *Award of Contracts in Public Procurements*, vol. 5, European Procurement Law Series (DJØF Publishing: Copenhagen, 2013), at 209 and 240-43.

LPSC, and the one implicit in the prohibition of multiple bidding in article 145(3) LPSC, actually play an important role in practice.

2.2. Selection Criteria

As indicated above, once economic operators with legal capacity are determined not to incur (or until it is proven that they incur)[35] any prohibition to contract on the basis of the above exclusion grounds (§ 2.1), in order to successfully have their offers evaluated or to even be invited to tender (depending on the procedure followed for the award), they still need to "*prove their economic, financial and technical or professional ability or, where so required by this Act,* [that they] *are properly classified*". Equally, they "*must also have a business or professional qualification which, if any, is required to perform the activity or service that forms the object of the contract*" [art 54(1) *in fine* LPSC].

Consequently, the selection criteria that can be demanded by contracting authorities and entities can be broadly grouped in two categories: first, a general category of economic, financial and technical or professional ability, which includes the possession of any business or professional qualifications as proofs of suitability (a) – which need to be distinguished from award criteria (b) – and, second, classification requirements (c). Functionally, both sets of requirements are mutually exclusive and proof of (sufficient) classification (i.e. of registration in the Official State Registry of Tenderers and Classified Companies[36]) will exclude any other requirements of qualitative selection. Indeed, SCATCA has declared that clauses requiring *both* proof of classification *and* additional proof of compliance with qualitative selection requirements are null and void.[37]

However, classification is only applicable to Spanish and non-EU economic operators, while non-Spanish intra-EU economic operators are exempt from classification [art 66(1) LPSC] and, consequently, subjected to the gen-

35. On the procedures to carry out such determination, see below § 3.
36. Registro Oficial de Licitadores y Empresas Clasificadas del Estado (ROLECE). The Registry is accessible with advanced electronic signature only – not for the general public, at minhap.gob.es/es-ES/Areas%20Tematicas/Patrimonio%20del%20Estado/Contratacion%20del%20Sector%20Publico/Paginas/ROLECE.aspx [accessed 23 June 2016].
37. SCATCA Resolution 659/2015 of 17 July (*Asociación de Empresas de Mantenimiento Integral y Servicios Energéticos, AMI*).

eral rules on qualitative selection.[38] This is an important issue given the high practical relevance of classification for the award of works contracts, as discussed below (c). It is interesting, though, that official information provided to potential tenderers presents it as "advisable" to classify or register despite the exemption available to non-Spanish intra-EU economic operators. For example, in the webpage of the European Commission, where the factsheet on Spanish public procurement indicates that "[i]*n order to facilitate accreditation of* [technical and financial solvency for the specific contract], *a characteristics-based enterprise classification system exists to indicate those contracts for which they may bid. This classification is set out in the Register of Classified Enterprises. You would be advised to register. You will need to be registered in order to bid for public contracts above a certain budget. The enterprises of other EU Member States.*(sic) *They accredit compliance with the above requirements by means of: certificates, registrations and systems established in their own states for this purpose, or other equivalent methods.*"[39] This is, at best, misleading and, at worst, it puts pressure on intra-EU tenderers to register despite the fact that article 52(5)II of Directive 2004/18 [and now art 64(7) dir 2014/24] clearly indicates that this mechanism cannot be imposed to economic operators from other Member States. On this point, in my view, there is a good case of infringement of EU law for *de facto* discrimination of non-Spanish intra-EU economic operators.

2.2.1. Set of criteria for qualitative selection: proof of suitability, economic and financial standing, technical and professional ability

Selection criteria are primarily regulated in articles 62 and 64 LPSC. Article 62(1) LPSC merely mentions that in order to enter into contracts with the public sector, economic operators must prove to be "*in possession of the minimum economic and financial standing, and professional or technical capacity to be determined by the contracting authority*", and that this requirement will be replaced by classification "*where required in accordance with Act*" [see (c) below in this section]. Beyond this general statement, article 62(2) LPSC merely indicates that contracting authorities need to specify the required minimum standing (and the required means of proof) in the tender documents, and that they must do so by reference to the subject-matter of the

38. Exceptionally, classification requirements can be waived in case of particular public interest that justifies such waiver [art 66(2) LPSC]. In that case, the general rules will be applicable to all economic operators.
39. europa.eu/youreurope/business/public-tenders/tools-database/index_en.htm#spain_en_benefiting-from-public-contracts.

contract and in a proportionate manner.[40] Along the same lines, article 79bis LPSC[41] further indicates (with a significant amount of repetition) that the minimum economic and financial standing and technical or professional capabilities required for a contract and the means accepted for their accreditation (see below § 3.2) will be determined by the contracting authority or entity, will be indicated in the contract notice or the invitation to participate in the proceedings. Moreover, and in order to contribute to administrative simplification, this provision requires that specific clauses in the tender specifications detail the magnitudes, parameters or ratios to be used to assess each of the requirements, as well as the thresholds or ranges of values that will determine the admission or exclusion of tenderers or candidates. In their absence, the values established through implementing regulations for the relevant type of contract shall apply, which shall also have supplementary nature for those not otherwise specified or finalised in the tender specifications.[42]

Article 64(1) LPSC complements these general and rather vague requirements by indicating that in works and services contracts, as well as in supply contracts involving siting and installation, it may be required that economic operators specify (in the tender or in the request to participate) "*the names and professional qualifications of the staff responsible for their execution*". Moreover, provided these requirements are disclosed by the contracting authority from the outset, beyond proving that they comply with the minimum standing and capacity requirements, economic undertakings can also be required to "*commit to assign sufficient personnel or material resources to the*

40. These general requirements are somehow further developed in the implementing rules detailed in articles 9 to 24 to of Royal Decree 1098/2001, which however do not provide further details. Interestingly, article 11 on the determination of qualitative selection criteria included a cross-reference to certain provisions of the then current administrative contracts Act, which was repealed by what is now the consolidated text of the LPSC. Consequently, all these rules create a certain spiral towards regulatory vacuum only overcome by case law.
41. Introduced by Law 25/2013 of 27 December on impulse of electronic invoicing and the creation of a registry of invoices of the public sector.
42. The only difficulty with this provision is that the implementing regulations to which it refers are yet to be adopted, which creates significant legal uncertainty, particularly as regards a provision that would clarify the interaction between classification requirements and reliance on third party capacity (below 4.2). See R. Juristo Contreras, "La integración de la clasificación con medios externos tras la Ley 25/2013", *ObCP*, 14 April 2014, obcp.es/index.php/mod.opiniones/mem.detalle/id.149/relcategoria.208/relmenu.3/chk.c3b53d5bd7cd394d5a28a7f21a9c1a75 [accessed 23 June 2016].

performance of the contract", which would then be incorporated as a contract compliance clause and be treated as such [art 64(2)].[43]

Conceptually, it is difficult to include the requirements of article 64 LPSC under the general category of selection criteria, as they refer to conditions for the execution of the contract, regardless of their formal treatment as (essential) contract compliance clauses [art 64(2) LPSC] or otherwise [art 64(1) LPSC]. Indeed, SCATCA has been differentiating between both provisions, and only considers as selection criteria *stricto sensu* the rules under article 62 LPSC (the rest being treated as contract compliance requirements to be assessed at a later stage in the procurement process).[44] This is problematic because, *de facto*, undertakings that cannot comply with those conditions for the performance of the contract are barred from participation (or should have been barred, in case they are unduly allowed to participate despite not meeting this condition).

Given the lack of detail in the legal rules, it is interesting to look at the interpretative case law[45] and, with more detail, the opinions and reports issued by the Spanish Consultative Board on Administrative Procurement (CBAP).[46] In that regard, it is remarkable that its consultative activity has resulted in the adoption of over 50 reports and opinions on standing and solvency since 1992. Some of the most important ones refer to the generally

43. Contract compliance clauses are regulated in art 223(f) LPSC and their breach can result in the penalties foreseen in article 212(1) LPSC.
44. This approach is, however, problematic, as it can result in the qualitative selection of economic operators that cannot ultimately deliver on the contract because their selection is merely based on forward-looking commitments or promises. See SCATCA Resolution 174/2012 of 8 August (*SEPES*), where it clearly indicated that: "*Article 64* [LPSC] *only requires tenderers to submit a commitment to assign certain material or personal means to the performance of the contract, but which should only be required to the tenderer who is awarded the contract. It is at this time of the award when the contracting authority may require the contractor to prove that it really has the material or personal means that it promised to assign to the performance of the contract*". In my view, this is problematic. For discussion, see A. Sanchez Graells, *Public procurement and the EU competition rules*, 2nd edn (Hart Publishing: Oxford, 2015), at 315-318.
45. Judgment of the Spanish Supreme Court of 24 July 2007 (Rec. 1486/2003) declaring certain technical requirements concerned with experience in supervision of restoration works disproportionately specific.
46. Junta Consultiva de Contratación Administrativa del Estado. minhap.gob.es/en-GB/Servicios/Contratacion/Junta%20Consultiva%20de%20contratacion%20administrativa/Paginas/default.aspx [accessed 23 June 2016].

controversial issue of the treatment of experience as a selection criterion[47] [see (b) below] or the issue of the treatment of samples and the procedural complications they create.[48] This guidance is also complemented by the administrative doctrine of SCATCA, which has decided some interesting cases on the proportionality of selection criteria required in tender documents.[49] Its functional approach has always been to strike down disproportionate or unjustified requirements that restricted competition for the contract, such as requirement to employ 1,000 security guards when only 58 where necessary for the contract,[50] the requirement to own offices instead of having them available (eg, through rental),[51] or the suppression of "geographic presence requirements" on the basis of discrimination and market closure arguments.[52]

Despite this guidance, then, and subject only to a general proportionality criterion (which assessment depends on the existence of challenges against the tender documentation), contracting authorities are generally free to determine the level of qualitative selection requirements they impose in the tender documentation. In addition to those discussed above, the strict separation between selection and award criteria is one of the clear limits they must respect.

2.2.1.1. Distinction between selection and award criteria[53]

Under Spanish law, and in line with EU case law, there is a clear-cut distinction between selection and award criteria.[54] This is seen as uncontroversial,

47. CBAP Report 51/05 of 19 December 2005. "Possibility of establishing experience in a given an activity as a criterion of technical competence"; CBAP Report 5/06 of 24 March 2006. "Experience as a criterion of solvency. Accreditation of work performed with certificates of satisfactory execution issued by the awarding bodies"; and CBAP Report 36/07 of 5 July 2007. "Application of certain means of solvency assessment relating to the accreditation of work experience in a particular place".
48. CBAP Report 41/05 of 26 October 2005. "The possibility to require the submission of samples as accrediting element of technical solvency and as award criterion"; and CBAP Report 4/06 of 20 June 2006. "Presentation of a sample of the finished product to verify the technical solvency of tenderers and as award criterion".
49. See also Report 7/2002 of 12 July of the Consultative Board on Administrative Procurement of Catalonia.
50. SCATCA Resolution 217/2012 of 3 October (*AESPI*).
51. SCATCA Resolution 187/2012 of 6 September (*UNIPOST*).
52. SCATCA Resolution 21/2013 of 17 January, as referred in SCATCA's 2012 Annual Report.
53. This issue is discussed in more detail in Sanchez Graells (n 34), at 212-215. Nothing has changed under Spanish law since then and, consequently, this only provides a minimal update.

despite the general debate around these issues at EU level,[55] and has been recently stressed by emphasising that the criteria for the award of government contracts "*have to be set in consideration of the public interest pursued by each particular contract. They must be objective criteria regarding the tender and not the tendering company, that is, they must be criteria linked to the subject-matter of the contract in question and not to the qualities of the bidder (experience, characteristics of the enterprise, employment status, etc.)*".[56]

2.2.1.2. Classification and registration in the Official State Registry of Tenderers and Classified Companies

As mentioned (above (a) this section), the Spanish public procurement system strongly relies on the classification of registered tenderers in the Official State Registry of Tenderers and Classified Companies (ROLECE), particularly for works contracts.[57] Indeed, classification is in principle mandatory for all work contracts with an estimated value equal or higher than €500,000 [art 65(1)(a) LPSC], and it is voluntarily used as a means of proof of compliance with selection criteria when the value is lower than this threshold. Classification is voluntary for services contracts and unavailable for other types of contracts, most importantly, supply contracts.[58]

The rules for classification and registration of economic operators are set up in articles 65 to 71 PSC, which are further developed in Royal Decree 817/2009. These rules set up a relatively simple procedure whereby economic operators can supply the information that would generally be required to

54. See, for its clarity, Judgment of the Spanish Supreme Court of 21 March 2007 (Rec. 6098/2000).
55. For discussion, see the contribution of Steen Treumer to this volume.
56. See Decision 2/2012 of 5 March of the Permanent Commission of the Public Procurement Body of Navarra, with reference to Judgment of the Navarra Regional Administrative Court of 6 September 2006 (No 2714/06).
57. F Blanco López, "El sistema de clasificación empresarial. Una reforma necesaria" (2005) 40 *Contratación administrativa práctica*, at 44.
58. This was modified by Law 25/2013 of 27 December on impulse of electronic invoicing and the creation of a registry of invoices of the public sector, as well as Law 14/2013 on support for entrepreneurs and their internationalisation, which raised the threshold for works contracts from €350,000 to €500,000 and suppressed classification requirements for services contracts, which were subjected to a threshold of €200,000. These rules are thought not to be in force, though. See Report 9/2014 of 2 April of the Consultative Board on Administrative Procurement of Aragon. In any case, generally, there is a clear trend towards reducing the scope of classification requirements. See also text accompanying (n 67) on a parallel trend expanding the use of self-declarations.

prove compliance with selection criteria (below § 3) and, if successful, they get registered to the ROLECE. Registration allows them to participate in procurement procedures simply having to provide certification attesting the registration and a self-declaration confirming that no material change has taken place that would imply their re- or de-classification (which it must notify promptly to ROLECE in any case, *ex* art 70(4) LPSC). As mentioned, there is an exemption for EU tenderers [art 66(1) LPSC] and in exceptional cases based on public interest [art 66(2) LPSC]. In cases where classification would be mandatory, non-Spanish intra-EU tenderers can prove their standing in accordance with the general rules [art 59(4) LPSC].

Despite their apparent simplicity, classification rules are perceived as a main barrier for the participation in public tenders, particularly by domestic SMEs. One of the easiest ways of restricting competition is to impose excessive classification requirements.[59] Given that classification is not based on a continuum of professional and economic qualities, but on pre-defined levels of ability, it is quite difficult for undertakings – and, in particular, SMEs – to get classification for very specialised or high value projects. Thus, by imposing disproportionate classification requirements, contracting authorities can vey swiftly exclude a significant number of potential competitors or *de facto* restrict competition to a small number of large or specialised potential suppliers.

3. Exclusion and Selection Procedures and Means of Proof

3.1. Exclusion procedure (or imposition of prohibitions to contract)

Spanish law creates a special administrative procedure for the determination of prohibitions to contract,[60] which has different characteristics depending on the specific ground being enforced.[61]

59. This has been repeatedly stressed by the National Competition and Markets Commission in its *Guide on Public Procurement and Competition, v.4* (in Spanish), where it recommends that classification requirements are proportionate to the object of the contract so as to avoid distortions of competition for the contract http://www.cnmc.es/Portals/0/Ficheros/Promocion/Guias_y_recomendaciones/GUIA_CONTRATACION_v4.pdf [accessed 23 June 2016].
60. As briefly mentioned above (n 7) and accompanying text, these issues may be complicated by the joint application (rectius, subsidiary application) of Law 30/1992 on administrative procedure. However, the general rules on administrative procedure do not affect the substantive requirements for the imposition of prohibitions to contract and, consequently, they are not explored in detail.

In a first group, certain prohibitions to contract are susceptible of *direct assessment and application by the contracting authority or entity*. These include situations concerning bankruptcy [art 60(1)(b)], lack of payment of taxes or social contributions [art 60(1)(d)],[62] illegal conflicts of interest [art 60(1)(f) and (g)] and a previous breach of prohibition to contract [art 60(2)(c)]. These prohibitions to contract are assessed directly and last for as long as the circumstances that triggered them affect the economic operator (e.g., in the case of bankruptcy, the prohibition is lifted with the closing of the bankruptcy procedure, provided there is no subsequent disqualification of the economic operator under the applicable rules).

In a second group, open to *hybrid assessment and application*, prohibitions to contract derived from a previous final conviction for having engaged in criminal activity [art 60(1)(a)] are subject to direct assessment only if the final judgment ruled on their scope and duration, in which case the prohibition to contract will persist for the entire period prescribed therein.[63] Otherwise, the existence of the prohibition to contract will still be assessed by the contracting authority or entity, but its scope and duration should be determined by special proceedings.[64]

Finally, in a third group containing all other prohibitions to contract (above § 2.1), a *special procedure to either confirm the existence of a prohibition to contract or to determine its scope and duration* will be required. This is established in paragraphs 2 and 3 of article 61 LPSC. This specific

61. This is regulated in article 61 LPSC and further developed in articles 17 to 21 of Royal Decree 1098/2001.
62. Cf with the case law of the CJEU in *Consorzio Stabile Libor Lavori Pubblici*, C-358/12, EU:C:2014:2063. For criticism of this excessively strict position, see the contribution of Steen Treumer to this volume and Sanchez Graells (n 19), at 106-107.
63. This is linked to the absence of self-cleaning possibilities under Spanish law, above and accompanying text. This may have influenced the inclusion of the final paragraph of art 57(6) dir 2014/24, which foresees that "*An economic operator which has been excluded by final judgment from participating in procurement* […] *award procedures shall not be entitled to make use of the possibility* [to self-clean] *during the period of exclusion resulting from that judgment in the Member States where the judgment is effective*." As mentioned elsewhere, this shows a lack of trust in self-cleaning measures and imposes exclusion as an irreversible sanction in the Member State adopting that decision (but, oddly, not in other Member States), which can sometimes disproportionately reduce competition (as well as creating a dual standard applicable in "domestic" and "cross-border" participation in procurement by that operator). See Sanchez Graells, *supra* (n 19), at 113.
64. Report 5/2004 of 9 June of the Consultative Board on Administrative Procurement of Madrid.

procedure is aimed at assessing the guilt, gravity and effects on public interest of the conduct in which the economic undertaking had engaged. It can result in prohibitions to contract for up to five years for most cases, but it can be extended to up to eight years in the case of previous conviction by final judgment [mainly, art 60(1)(a)]. However, in order to ensure a minimum period of effectiveness, the prohibitions derived from having prevented the award of a contract by unlawfully withdrawing an offer or tender or, having provided a self-declaration, failing (culpably or by negligence) to provide the necessary supporting information [art 60(2)(d) LPSC] will always be in place for at least two years since its registration in the ROLECE – as, indeed, prohibitions to contract are susceptible of registration at ROLECE and some of them must be registered prior to becoming effective [art 61(4) LPSC and art 9 RD 817/2009].[65] On its part, prohibitions derived from having breached contract compliance clauses [art 60(2)(e) LPSC] will not have a duration in excess of one year.

The procedure can only be started within three years, which are calculated according to special rules depending on the ground under consideration. The competence to carry out this special procedure is allocated to different institutions depending on the ground under consideration:

– The Ministry of Finance and Public Administration exercises competence for procedures based on a previous final conviction that lacks a determination of its scope and duration [art 60(1)(a) LPSC] and the need to declare the existence of a prohibition to contract due to a final (administrative) conviction for market manipulation, grave professional misconduct, grave infringement of labour and equality rules, health and safety/risk prevention, or environmental rules [art 60(1)(c) LPSC]. The Ministry will decide upon receiving a proposal from the Consultative Board on Administrative Procurement (CBAP). Prohibitions derived from this procedure will be effective in all procedures carried out by any contracting authority or entity during their duration (*universal exclusion or debarment*, see below § 6).
– Competence for procedures based on infringements vis-à-vis a specific contracting authority or entity will lay with them. This is the case of: 1) prohibitions based on misrepresentations in self-declarations (including concealing information) or in the provision of any of the information required to assess their standing and compliance with qualification, exclu-

65. This affects prohibitions based on arts 60(1)(c) and (e) and those based on art 60(2) LPSC, as well as the determination of the scope and duration of prohibitions based on art 60(1)(a) LPSC when that was not included in the original final conviction.

sion and selection criteria [art 60(1)(e) LPSC], which lay with the authority to which that information should have been communicated; 2) (a) having (culpably) triggered the final termination of a public contract, (d) having unlawfully withdrawn an offer or tender or, having provided a self-declaration, consequently preventing the award of a contract by failing (culpably or by negligence) to provide the necessary supporting information, or (e) having breached contract compliance clauses, if they amount to a serious (wilful or negligent) breach of the special regime foreseen in the LPSC (art 118) [art 60(2)(a), (d) and (e)], which lay with the contracting authority concerned; and 3) having breached a prohibition to contract with the public administration [art 60(2)(b) LPSC], which lay with the public administration that had declared the prohibition. In these cases, the prohibition to contract will solely affect contracting with the administration or public sector entity that imposed the prohibition. However, taking into account the damage to public interests that derived from the activities that lead to the prohibition, the Minister of Finance and Public Administration can decide to extend its effects to other contracting authorities or entities, or to the entirety of the public sector, always provided that it gives advance notice and hears the affected economic operator (*partial exclusion or debarment*, see below § 6).

3.2. Means of proof of qualitative selection criteria and handling of self-declarations

Documentary evidence is required to prove having sufficient legal capacity (above § 2) and to establish that the economic operator is not affected by a prohibition to contract (above § 2.1). Regarding the justification of having legal capacity, article 72 LPSC establishes different rules for Spanish, non-Spanish intra-EU and third country tenderers. All of these rules aim at specifying the incorporation documents needed to justify their legal existence, such as inscription in the corresponding commercial registry or substitutive certification or declaration, depending on the applicable rules. As far as the absence of prohibitions to contract are concerned, article 73 LPSC indicates that judicial and administrative documents will be required where available and that, failing that, economic operators will need to submit a sworn statement executed before an administrative authority, public notary or a qualified professional body, whereby they confirm that they are not affected by any of the prohibitions to contract discussed (above § 2.1). It also foresees that, in the case of intra-EU economic operators, and if this possibility is provided for by the legislation of their home State, the sworn statement can be executed before a judicial authority [art 73(2) LPSC].

Further to those requirements, the means of proof of the standing and solvency requirements used for qualification and selection purposes are expressly regulated in articles 74 to 82 LPSC in a way that follows very closely the rules in articles 46 and following of Directive 2004/18. Article 74 LPSC sets general requirements and establishes a *numerus clausus* of means of proof that can be requested from economic operators by reference to the following articles, which then deal in turn with economic and financial standing [art 75 LPSC]; technical ability in different types of contracts (works, supply, services, other) [arts 76-79 LPSC]; quality management [art 80 LPSC]; and environmental management [art 81 LPSC]. It is once more indicated that proper classification exempts from compliance with these documentary requirements, even if classification is not necessary for the specific tender [art 74(2) LPSC], and foresees the possibility to accept other means of proof when the tenders are not covered by the EU Directives [art 74(2) LPSC].[66] Articles 83 and 84 LPSC regulate proof of classification in official registries, both the ROLECE for Spanish [art 83 LPSC] and national official lists of approved economic operators and systems of certification by bodies established under public or private law [art 84 LPSC, which follows closely art 52 dir 2004/18].

It is important to take into consideration that these requirements can be softened by allowing for the presentation of self-declarations (which are becoming more widely used since they were first introduced in 2007). Indeed, according to article 146(4) LPSC and provided it is clearly disclosed in the specific administrative clauses included in the tender documents, the contracting authority or entity may replace all documentary requirements with a sworn statement (self-declaration) from tenderers or candidates indicating

66. The creation of a new category of "contracts subject to harmonised regulation" was criticised by the Spanish Council of State in its opinion 514/2006, of 25 May, on the draft LPSC. On this, see J.A. Moreno Molina, "Public Procurement", in Ortega, Arroyo & Plaza (eds), *Spanish Administrative Law under European Influence* (Europa Law Publishing: Groningen, 2010), at 83, 100-101, fn. 30, who also criticises the distinction because "the category provokes more confusion than clarity" – since the LPSC in fact extends many EU law obligations to all public contracts tendered under its rules, regardless of their falling inside or outside the category of "contracts subjected to harmonised regulation". In further detail, see ibid, ""Un mundo para Sara". Una nueva categoría en el Derecho español de la contratación pública: los contratos sujetos a regulación armonizada" (2009) 178 *Revista de administración pública*, at 175,176 & ff. For discussion, see A. Sanchez Graells, "Public procurement below EU thresholds in Spain", in D. Dragos & R. Caranta (eds), *Outside the EU Procurement Directives – Inside the Treaty?*, vol. 4, European Procurement Law Series (DJØF Publishing: Copenhagen, 2012), at 259 and 259-63.

that they meet the conditions set by law to contract with the administration. In such a case, the tenderer to whom it is proposed to award the contract must furnish the contracting authority or entity with valid documentation prior to the award of the contract. In any case (i.e. even if this is not indicated in the tender documents) these self-declarations will always suffice for works contracts with an estimated value lower than €1 million and for supplies and services with estimated values lower than €90,000.[67] As mentioned, failure to back these self-declarations up or misrepresentations in their submission or in the supporting documentation are a cause for mandatory exclusion (above § 2.1) and trigger potential government-wide debarment (below § 6).

Remarkably, article 4 og Legal Decree 3/2016 of 31 May 2016 has created an emergency rule whereby all contracting authorities must accept self-declarations or the European Single Procurement Document instead of any specific documentary requirements. This will create siginificant practical difficulties until Directive 2014/24 is properly and fully transposed.

3.3. Clarifications and requests for further information

In case the documentation presented by economic operators is insufficient, or presents gaps or inconsistencies, article 82 LPSC indicates that "[t]*he contracting authority or entity, or its assisting body, may seek clarification from the economic operator regarding the certificates and documents submitted* […] *or require the submission of complementary documentation*".[68] This aims to avoid the rejection of formally non-compliant tenders and creates some space for administrative flexibility. This can be easily reconciled with the *Manova* Judgment[69] and the new article 56(3) of Directive 2014/24,[70]

67. Art 79bis *in fine* also foresees the possibility that future implementing regulations set different thresholds below which there would be no need to proof standing. However, this is not yet in force.
68. For discussion on the standard of diligence that the contracting authority needs to discharge, which subjects the decision on exclusion to a proportionality assessment, particularly where it did not exercise its discretion; see Sanchez Graells (n 34), at 240-243. See also the contribution by Steen Treumer to this volume.
69. C-336/12, EU:C:2013:647. A. Brown, "The Court of Justice rules that a contracting authority may accept the late submission of a bidder's balance sheet, subject to certain conditions: Case C-336/12 *Danish Ministry of Science, Innovation and Higher Education v Manova A/S* (Case Comment)" (2014) 23(1) *Public Procurement Law Review*, NA1-3. See also K. Wauters, *CJEU case law on cooperative agreements between public authorities and its influence on certain national legal systems*, PhD thesis (2014), at 129-130. theses.gla.ac.uk/5765/ [accessed 23 June 2016]. See also *SAG ELV Slovensko and Others*, C-599/10, U:C:2012:191; and D. McGowan, "An obliga-

particularly through the general requirements of non-discrimination and proportionality in article 1 LPSC, which foresees that "*This Law is to regulate public sector procurement, to ensure that it conforms to the principles of* […] *non-discrimination and equal treatment of candidates*".

4. Reliance on the Capacities of Other Entities

4.1. Standing Requirements Permitting Third Party Reliance

Before assessing the possibilities that Spanish law creates for tenderers and candidates to rely on the capacity of other entities for the purposes of qualification and qualitative selection, it is important to stress that there is an ongoing controversy on the sorts of capacities on which reliance is acceptable.[71] In this regard, even if the academic consensus is that economic, financial, technical and professional standing are all capable of third party reliance, relevant consultative bodies still continue to maintain the traditional position that economic and financial standing had to be demonstrated by the tender or candidate on its own,[72] or at least show doubts about this possibility.[73] Further, there is consolidated case law that prevents the illegal transfer of workers, which can also limit the possibility to rely on third parties in terms of manpower or workforce, at least if that is not clearly instrumented as the provision of a service (or a subcontract) to the main contractor.[74] Moreover, some consultative bodies also require that the candidate or tenderer demonstrate certain minimum standing before it can rely on third parties to reach the levels required to participate in a specific tender or be awarded a given contract – that is, full reliance on third parties is not accepted, at least in some regions.[75]

tion to investigate abnormally low bids? *SAG ELV Slovensko a.s.* (C-599/10) (Case Comment)" (2012) 21(4) *Public Procurement Law Review*, NA165-68.

70. Sanchez Graells, *supra* (n 19) 102-104.
71. J.C. Gris Gonzalez, "La integración de la solvencia con medios externos en los contratos del sector público" (2012) 28 *Cuadernos de Derecho Local* 97-106, at 99.
72. See Report 45/2002 of 28 February 2003 of the Central Consultative Board on Administrative Procurement (*Junta Consultiva de Contratación Administrativa del Estado*).
73. See Report 29/2008 of 10 December of the Consultative Board on Administrative Procurement of Aragon.
74. Gris Gonzalez, *supra* (n 71), at 99.
75. Report 6/2010 of 21 December of the Consultative Board on Administrative Procurement of Madrid. *Cf.* Report 1/2010 of 17 February of the Consultative Board on

Consequently, even if the mechanisms discussed below can be considered to be in line with EU law and the CJEU's case law, there may be difficulty derived from pre-existing restrictions on the types of standing requirements that can be met by reliance on third party capacities.[76]

4.2. Subcontracting

Article 227 LPSC establishes the rules applicable to subcontracting, which is the most straightforward example of reliance on third party capacity by an economic operator.[77] The approach taken in this clause is flexible and permissive, as it indicates that "[t]*he contractor may engage third parties for the partial execution of the contract, unless the contract or the tender documents provide otherwise, or if it can be decided by virtue of their nature and conditions, it must be executed directly by the contractor*".[78] Other than the clear case of exclusion of subcontracting in the tender documents or the contract itself, then, the LPSC also excludes the possibility to subcontract *intuitu personae* obligations.[79] In its additional rules, article 227 LPSC imposes further subcontracting restrictions.

For the purposes of our discussion, it is worth stressing that subcontractors cannot be affected by exclusion grounds listed in article 60 LPSC (above § 2.1) or be otherwise affected by a legal impossibility to contract [art 227(5) LPSC]. In terms of the object of the subcontract, it is interesting to note that Spanish law adopts the reverse approach to that followed in Directive 2014/24. In that regard, instead of focussing on whether certain activities

Administrative Procurement of Aragon, which points out that reliance on third parties is open to candidates and tenderers without own resources.

76. Nonetheless, in practice, the extension of the use of self-declarations (*supra* 3.2) and future developments oriented at the further flexibilisation of selection requirements may diminish the relevance of this uncertainty.
77. E Marín Albarrán, "La subcontratación y la contratación pública: algunas consideraciones sobre la evolución normativa reciente y su contexto. Referencia a ciertas dificultades que plantea la aplicación de la subcontratación en el ámbito de la contratación pública", (2014) 5 *Anuario Aragonés del Gobierno Local 2013*, at 465-491; Gris Gonzalez, *supra* (n 71), at 102-104. See also Report 10/2008 of 12 September of the Consultative Board on Administrative Procurement of the Balearic Islands, and Report 1/2010 of 17 February of the Consultative Board on Administrative Procurement of Aragon.
78. Report 29/2008 of 10 December of the Consultative Board on Administrative Procurement of Aragon.
79. This offers a clear link to the possibility in art 63(2) dir 2014/24 to require specific performance of predetermined parts of the subject-matter of the contract ("critical tasks") by the prime contractor.

need to be executed by the main contractor (which could be regulated in the contract or the tender documents), article 227 LPSC establishes a dual regulation. First, it sets a cap on subcontracting of 60% of the value of the contract, unless a different percentage is established in the tender documentation [art 227(2)(e) LPSC].[80] Second (and conversely), it is expressly established that, provided adequate transparency is given to this obligation in the tender documentation, the contracting authority can impose the subcontracting of up to 50% of the value of the contract to non-affiliated undertakings [art 227(7) LPSC]. For certain parts of the contract to be mandatorily subcontracted, they must meet one of three conditions: have sufficient importance within the project as to make them susceptible of separate execution, having to be carried out by companies with a particular professional qualification, or being susceptible of attribution to companies with a proper classification to perform them. In summary, article 227 LPSC sets a rather flexible framework for subcontracting, which can nonetheless be restricted (or mandated) in the contract or in the tender documentation.

4.3. Temporary Associations of Undertakings and Economic Interest Groupings

A second possibility is for economic operators to participate as an unincorporated grouping, which is regulated in article 59 LPSC. This rather lengthy provision foresees that economic operators can participate on the basis of an unincorporated "temporary association of companies" or "temporary consortium", which, in my view, includes the possibility of a (European) economic interest grouping,[81] and that they do not need to enter into any binding incorporation agreement prior to the award of the contract to the group.

In order to promote joint participation in public tenders, and as a measure to facilitate SME access, this provision also allows economic operators interested in participating in groupings to register their interest in the Official

80. The cap does not capture subcontracts to affiliated companies in terms of art 42 of the Commercial Code; see Gris Gonzalez, *supra* (n 71), at 101-102. Whether tender documentation can establish a higher percentage is controversial. See Marín Albarrán, *supra* (n 77), at 486-489.

81. Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG) [1985] OJ L 199/1. See Gris Gonzalez, *supra* (n 71), at 104-105, who reports certain opposition to the possibility of admitting (European) economic interest groupings in view of the secondary nature of their activities under Spanish corporate law. However, some consultative bodies have already expressly accepted the participation of (E)EIGs in tender procedures. See Report 9/2006 of 20 November of the Consultative Board on Administrative Procurement of Catalonia.

State Registry of Tenderers and Classified Companies (ROLECE), with the hope that this will serve as a medium of connection of potential partners.[82] In case groups of economic operators avail themselves of this possibility, and in order to avoid difficulties for the contracting authority, article 59(2) LPSC imposes strict conditions, such as the fact that all economic operators will be jointly and severally liable towards the contracting authority, and their obligation to designate a single representative and grant it with sufficient powers to fulfil the contract throughout its duration.[83] To ensure these obligations, economic operators that participate under an article 59 LPSC grouping need to make a firm representation that they will enter into the necessary incorporation agreement(s) and, to ensure that it can be done promptly, they also need to indicate in their bid the exact composition of the grouping and their respective shares and types of participation. Article 59(3) LPSC indicates that the duration of the grouping will coincide with that of the contract, which implies that the group will be dissolved upon completion of its execution – unless its parties decide to continue their grouping regarding other activities, which possibility will depend on the specific corporate structure chosen to that effect.[84]

4.4. (Strict) Reliance on the Capacity of Third Parties

Finally, the possibility to rely on the capacities of third parties in order to meet the selection criteria discussed above (§ 2.2) is regulated by article 63 LPSC.[85] This provision foresees that "*to demonstrate the standing required*

82. Law 14/2013 of 27 September, on support for entrepreneurs and their internationalisation.
83. With the only restriction of additional controls regarding significant payments under the contract, which can be subjected to limitations on the ability of the sole representative to make them on its own. Suffice it to indicate that it is partially in line with art. 69 (1) *in fine* dir. 2014/24, which extends to groupings of operators the rules on reliance on third party capacity and, consequently, extends to them the possibility that "*Where an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial standing, the contracting authority may require that the economic operator and those entities be jointly liable for the execution of the contract*".
84. This issue deviates from the scope of this contribution and, consequently, will not be pursued further.
85. Generally, on the rules applicable to the reliance on third party capacity and their interpretation, see Gris Gonzalez, *supra* (n 71), at 99-101 and Marín Albarrán, *supra* (n 77), at 481-484, who relates an academic and practitioner debate on the possibility to use subcontracting only for the purposes of meeting selection requirements (i.e. independently from the execution of the contract), which remains rather confusing. On

to be awarded a particular contract, the economic operator may rely on the solvency and resources of other entities, regardless of the legal nature of the links which it has with them, provided it demonstrates that, for the execution of the contract, it actually has those means at its disposal".[86] This drafting is a mere reformulation of the case law of the CJEU in this area and, in particular, of its Judgment in *Holst Italia*.[87] At first sight, then, the Spanish rules follow the permissive and possibilistic approach derived from the EU case law.[88] There are several decisions concerning reliance on third party capacity, either through a grouping of economic operators or under other sorts of arrangements (such as subcontracting or, simply, reliance on third party capacity without any specific legal structure).[89]

5. Reduction of the Number of Candidates

An important issue connected to qualitative selection is the reduction in the number of candidates when procurement procedures include selective phases – now regulated in article 65 of Directive 2014/24. Under Spanish law, this is controlled by the rules in article 163 LPSC (on restricted procedures), which require that the contracting authority discloses, in the call for expressions of interest, the solvency criteria amongst those in articles 75 to79 LPSC (i.e.,

this, see also I Gallego Córcoles, "La integración de la solvencia con medios externos" (2008) 79 *Contratación Administrativa Práctica*, at 73.

86. See also CBAP Report 45/02 of 28 February 2003. "Accreditation of solvency of companies by means belonging to third parties and influence of such resources made available to perform the contract under evaluation of tenders".
87. Case C-176/98, *Holst Italia*, EU:C:1999:593, 31.
88. Ibid. See also Cases C-389/92, *Ballast Nedam Groep v Belgische Staat*, EU:C:1994:133; C-5/97, *Ballast Nedam Groep v Belgische Staat*, EU:C:1997:636; C-314/01, *Siemens and ARGE Telekom*, EU:C:2004:159; C-220/05, *Auroux and Others*, EU:C:2007:31; and C-94/12, *Swm Costruzioni 2 and Mannocchi Luigino*, EU:C:2013:646.
89. The following indicates some of the issues that generally trigger litigation and the position adopted by the SCATCA, such as SCATCA Resolution 331/2011 of 21 December (*Axion*) on insufficiency of the power of attorney of a member of a temporary grouping; SCATCA Resolution 117/2012 of 23 May (*Pegamo y Gomil*) on the restrictions on reliance on third party experience (manufacturers); SCATCA Resolution 107/2012 of 11 May (*Software AG*) and Resolution 131/2012 of 13 June (*EDITEC*), both on withdrawal by a member of a temporary grouping; and SCATCA Resolution 141/2013 of 10 April (*EKINSA*) on quality certification and compliance within a temporary grouping.

economic, financial, technical criteria) that will be used to short-list candidates – indicating the minimum (and maximum, if any) number of candidates to be short-listed. In any case, the number of invited candidates must be sufficient to ensure effective competition. Those criteria and the rules for their application must be objective and non-discriminatory and need to be applied in the way disclosed in the tender documentation. Generally, there is no possibility to deviate from the tender documentation, as it constitutes "the law of the tender" and, consequently, contracting authorities cannot "fine-tune" the shortlisting criteria after publication of the tender documentation.[90]

6. Government-wide Debarment

The possibility to impose long-lasting prohibitions to contract with the public sector may be considered equivalent to a system of suspension or debarment. Such debarment results from the procedures for the determination of prohibitions to contract and can take two forms (*supra* § 3.1).

On the one hand, *universal exclusion or debarment* can be the result of a direct decision by the Ministry of Finance and Public Administration, which will decide upon receiving a proposal from the Consultative Board on Administrative Procurement (CBAP), in cases based on a previous final conviction that lacks a determination of its scope and duration [art 60(1)(a) LPSC] or the existence of a prohibition to contract due to a final (administrative) conviction for market manipulation, grave professional misconduct, grave infringement of labour and equality rules, health and safety/risk prevention, or environmental rules [art 60(1)(c) LPSC]. In these cases, debarment can extend to up to eight years, which under certain circumstances could exceed the limit foreseen in article 57(7) of Directive 2014/24, which limits it to five years from the date of the conviction by final judgment.

On the other hand, *partial exclusion or debarment* can derive from the extension of effects of a previous (regional, sectorial) decision by the Ministry of Finance and Public Administration, in cases based on infringements vis-à-vis a specific contracting authority or entity. In these cases, taking into account the damage to public interests that derived from the activities that lead to the original prohibition to contract solely affecting the administration or public sector entity that imposed the prohibition, the Minister of Finance and Public Administration can decide to extend its effects to other contracting au-

90. Sanchez Graells, *supra* (n 53), at 239-240.

thorities or entities, or to the entirety of the public sector, always provided that it gives advance notice and hears the affected economic operator.

In both cases, the debarment decisions adopted by the Ministry of Finance and Public Administration would be open to a first challenge before the National Court (*Audiencia Nacional*) and a further (limited) appeal (cassation) to the Supreme Court (*Tribunal Supremo*). The applicable procedural safeguards are high, particularly as regards the burden of proof and the need to comply with criminal-law type requirements as the imputability (*mens rea*) of the ground for debarment is concerned.[91]

7. Conclusions

This review of the rules on qualification, selection, exclusion, classification and registration, short-listing and debarment of economic operators has shown how the Spanish rules, despite being fundamentally in line with existing requirements under Directive 2004/18, need some modifications in order to be adapted to the novelties of Directive 2014/24.

However, as the analysis has indicated, there do not seem to be significant difficulties for this reform which follows the same lines of simplification, flexibility and reduction of red tape (through self-declarations) that the Spanish legislation had already attempted in the reforms of the rules that have taken place since 2009 – with the only possible exception of foreseeable resistance in the adoption of self-cleaning mechanisms under art 57(6) dir 2014/24, given the "public morality" approach traditionally adopted in the design and enforcement of prohibitions to contract with the public sector.

An open question concerns the desirability of keeping a strong reliance on the system of classification and registration for works contracts, which does not seem to significantly reduce costs for contracting authorities when non-Spanish intra-EU economic operators participate in the tenders, and which should consequently be harmonised or at least better coordinated with the rules on the European Single Procurement Document (art 59 dir 2014/24).

91. Judgment of the Spanish Supreme Court of 11 May 2007 (Rec. 3540/2007). See also Judgment of the Spanish Supreme Court of 28 March 2006, and Judgment of the Constitutional Court of 29 March 1990 (61/1990).

Exclusion, Qualification and Selection in the UK under the Public Contracts Regulations 2015

Luke Butler

1. Introduction and Context

This Chapter examines the legal and policy position regarding exclusion, qualification and selection of economic operators in the UK.[1] As this Chapter will identify, the specific grounds for exclusion have not been the subject of extensive litigation. In contrast, the UK Government has been particularly active in promulgating procurement policy on issues which include promoting tax compliance through public procurement, streamlining pre-qualification, assessing supplier financial risk, and risk based on performance. The Chapter is divided into Sections which correspond to: criteria for exclusion and qualification (Section 2); means of proof (Section 3); reliance on the capacities of other entities (Section 4); reduction of candidates (in particular, through shortlisting) (Section 5) and government-wide debarment (Section 6), before offering some provisional conclusions (Section 7).

Until 2015, the relevant provisions were contained in the Public Contracts Regulations 2006[2] ("2006 Regulations") transposing Directive 2004/18/EC[3]

1. This Chapter is confined to a discussion of England, Wales and Northern Ireland. Scotland maintains a separate legal regime regulating public procurement.
2. The Public Contracts Regulations 2006 (SI 2006, No.5), Part 4, Regs 23-29.
3. Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L 134/114.

("2004 Directive") as amended.[4] However, in accord with the adoption of Directive 2014/24/EU[5] ("2014 Directive"), the UK announced its aim to adopt new Regulations but earlier than the required implementation date.[6] In 2013, the Cabinet Office issued a consultation document on UK transposition.[7] This coincided with the issuance of a draft version of The Public Contracts Regulations 2015[8] ("2015 Draft Regulations") and a Technical Note on their drafting.[9] The consultation process ended on 17 October 2014. On 5 February 2015, The Public Contracts Regulations 2015 ("2015 Regulations") were laid in Parliament and came into force on 26 February 2015.[10] The 2015 Regulations supersede the 2006 Regulations.

The stated rationale for expedited transposition was to allow contracting authorities to take advantage of the greater flexibilities provided by the 2014 Directive as soon as possible.[11] The UK Government decided to use the "copy-out" method where it is available in order to avoid so-called "gold-plating" which has no doubt also contributed to expedited transposition.[12] This approach will be supplemented by the issuance of additional policy guidance.

4. The Public Contracts (Amendment) Regulations 2009 (SI 2009, No.2992) and The Public Procurement (Miscellaneous Amendments) Regulations 2011 (SI 2011, No.2053).
5. Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65.
6. See Procurement Policy Note – Further progress update on the Modernisation of the EU Procurement Rules, Information Note 05/13, July 25, 2013.
7. Consultation Document: UK Transposition of new EU Procurement Directives Public Contracts Regulations 2015. The Cabinet Office had previously undertook informal, targeted engagement with a range of interested stakeholders in 2013, who declared a particular interest in a number of policy choices following the publication of Procurement Policy Note – Further progress update on the Modernisation of the EU Procurement Rules, Information Note 05/13, 25 July 2013. See Consultation Document, p.8, para. 14.
8. SI 2015 No. [X] Public Procurement, The Public Contracts Regulations 2015, issued by the Cabinet Office for consultation on 19 September 2014.
9. Technical Note on Drafting Accompanying the draft Public Contracts Regulations 20015 issued for public consultation on 19 September 2014.
10. The Public Contracts Regulations 2015, SI 2015 No, 102. See PPN Public Contracts Regulations 2015, Information Note 02/15, 6 February 2015.
11. See Procurement Policy Note – Further progress update on the Modernisation of the EU Procurement Rules, Information Note 05/13, 25 July 2013.
12. Technical Note on Drafting Accompanying the draft Public Contracts Regulations 2015 issued for public consultation on 19 September 2014, p.2, para. 12. For a specific discussion of this approach see p.10, paras. 57-60.

2. Criteria for Qualitative Selection

2.1. Exclusion Grounds

Before examining the substantive grounds of exclusion, a few preliminary observations can be made regarding the general scope of the exclusions.

A first issue concerns whether the 2014 Directive and 2015 Regulations clarify whether the exclusions apply exclusively to the economic operator itself or also cover another company within the group, a parent, subsidiary or director given the the absence of express references in the 2004 Directive and 2006 Regulations,[13] With regard to the discretionary exclusion grounds, academic commentary had supported the application of these grounds to both economic operators and associated persons.[14] With regard to the mandatory exclusion grounds, the issue was complicated by reference in the 2004 Directive to the possibility to request information concerning "if appropriate, company directors and any persons having powers of representation, decision or control in respect of the candidate or tenderer."[15] It had been suggested that the EU obligation extends to disqualification of certain economic operators because of convictions of their associates.[16] UK law has not contained any general provisions providing such an indication.[17] However, the 2006 Regulations provided that a contracting authority must not select an economic operator when it has actual knowledge that either that economic operator itself or "its directors or any other person who has powers of representation, decision or control of the economic operator" has a relevant conviction.[18] On

13. See Article 45(2) 2004 Directive as implemented in Reg. 23(4) 2006 Regulations concerning discretionary exclusion. See also Article 45(1) 2004 Directive as implemented in Reg. 23(1) 2006 Regulations concerning mandatory exclusions. For commentary, see Arrowsmith, *The Law of Public and Utilities Procurement*: *Regulation in the EU and UK, Volume I* (3rd ed, Sweet & Maxwell: London, 2014) paras 12-68-71 (discretionary exclusion grounds) and paras 12-125-12-128 (mandatory exclusion grounds).
14. For the arguments in support of this position based on analogous instances in which association between persons is recognised in domestic law and EU law, see Arrowsmith, *The Law of Public and Utilities Procurement* (n 13) paras 12-68-69.
15. Article 45(1) 2004 Directive.
16. Arrowsmith, The Law of Public and Utilities Procurement (n 13) paras. 12-125-127.
17. Although there is provision for exclusion of certain associated persons under some specific legislation: see the Fair and Equal Treatment (Northern Ireland) Order 1998 ("FETO") (SI 1998/3162) (N.I.21), Art. 63(1), which provides for exclusion of those found in violation of rules on discrimination under the relevant legislation. Cited by Arrowsmith, *The Law of Public and Utilities Procurement* (n 13) para. 12-127, fn 328.
18. Reg. 23(1) 2006 Regulations.

this basis, the 2006 Regulations required contracting authorities to exclude an economic operator where the above associates had convictions, although it was not clear whether exclusion was confined to the above associates.[19] In 2006, the Office of Government Commerce ("OGC") published Guidance suggesting that associates could include partners, those in an equivalent position or senior managers with the relevant powers.[20] Further, the Guidance also stated that the 2006 Regulations did not apply where the parent company of the economic operator had been convicted, unless the parent exercised direct control over the economic operator.[21] However, the Guidance does not consider whether a parent should be disqualified when the subsidiary has been convicted.[22]

The 2014 Directive, as implemented in the 2015 Regulations continues to lack an express reference to associated persons under the discretionary exclusion ground.[23] By contrast, the position regarding mandatory exclusion of associated persons is clarified in certain respects. The 2014 Directive now provides that the obligation to exclude an economic operator itself applies also where the person convicted by final judgment "is a member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control therein".[24] This applies to all the mandatory exclusions in Article 57(1) but not to the exclusion in Article 57(2) relating to non-payment of tax or social security contributions.[25]

19. Arrowsmith, The Law of Public and Utilities Procurement (n 13) para. 12-125.
20. OGC, Mandatory Exclusion of Economic Operators (January 2006; updated 2010), Section 3.2.
21. OGC, *Mandatory Exclusion of Economic Operators*, section 3.2 which indicated that legal advice should be sought on this point where it is relevant to a specific procurement. However, it is not clear what legal advice could be given other than to indicate the above position, perhaps suggesting an inherent degree of legal uncertainty on this issue.
22. Arrowsmith, The Law of Public and Utilities Procurement (n 13) para. 12-127.
23. See Article 57(4) 2014 Directive as implemented in Reg. 57(8) 2015 Regulations.
24. Article 57(1) 2014 Directive as implemented in Reg. 57(2) 2015 Regulations.
25. For a discussion in this regard, see A Sanchez Graells, "Exclusion, Qualitative Selection and Short-listing in the New Public Sector Procurement Directive 2014/24" (Working Paper Draft) University of Leicester 2014: who states at 106: "[i]n my opinion, at least where lack of payment is related to the activities of the economic operator, the rule should apply despite the legal person not being the one directly convicted or the direct addressee of the jurisdictional or administrative decision confirming the breach of tax or social security rules." Available at: https://lra.le.ac.uk/bitstream/2381/29214/2/20140903123319398.pdf [accessed 23 June 2016]. Accessed 15 May 2015.

A second issue concerns whether the 2014 Directive and 2015 Regulations address the time periods relevant to exclusion, an aspect that was left unspecified in the 2004 Directive and 2006 Regulations.[26] Prior to the 2014 Directive, one specific issue concerned whether and the extent to which contracting authorities may take into account convictions that are no longer operative or "spent" for the purposes of exclusion. The OGC Guidance effectively indicated that contracting authorities should only exclude on the basis of convictions that are unspent.[27] For instance, the Guidance distinguished two levels of disclosure which could be required for the purposes of providing information on convictions of individuals in the UK. The first concerns "Basic Disclosure" detailing all currently "unspent" convictions under the Rehabilitation of Offenders Act 1974.[28] The second concerns "Standard Disclosure" detailing all convictions whether "spent" or unspent.[29] The Guidance indicated that a contracting authority should only need to consider Standard Disclosure where it believes that the subject matter of the contract being awarded requires full disclosure.[30] In addition, the Guidance also indicated that: convictions of directors and other individuals other than the economic operator may be assessed; that contracting authorities may assess convictions that are spent; and unlike convictions of individuals, corporate convictions do not become spent and there is no official central record kept.[31] Consequently, it was arguable that lack of clarity in UK policy regarding the treatment of spent and unspent convictions was incompatible with the EU principles of proportionality, transparency and legal certainty.[32]

26. See Article 45(2) 2004 Directive as implemented in Reg. 23(4) 2006 Regulations regarding discretionary exclusion. See Article 45(1) 2004 Directive as implemented in Reg. 23(1) 2006 Regulations regarding mandatory exclusion.
27. Arrowsmith, The Law of Public and Utilities Procurement (n 13) para. 12-123.
28. Unspent convictions are those which have not yet become spent. See OGC, *Mandatory Exclusion of Economic Operators*, section 6 fn 5.
29. Spent convictions are convictions which are normally considered to be no longer live, because of the period of time that has elapsed without the individual incurring further relevant convictions. However, Article 3(j) of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (S.I. 1975/1023 as amended) enables contracting authorities and contracting entities to ask about spent convictions for the purpose of determining whether or not to treat a person as ineligible under the relevant procurement Regulations. See OGC, *Mandatory Exclusion of Economic Operators*, sections 6, fn 6.
30. OGC, Mandatory Exclusion of Economic Operators, section 6.
31. Ibid.
32. Arrowsmith, The Law of Public and Utilities Procurement (n 13) para. 12-123.

The 2014 Directive now requires Member States to determine a maximum period of exclusion.[33] Where the period of exclusion has not been set by final judgment, that period must not exceed five years from the date of conviction by final judgment with regard to mandatory exclusions and must not exceed three years from the date of the relevant event with regard to the discretionary exclusions.[34] Concerning the mandatory exclusions, the 2015 Regulations implement the maximum period of five years from the date of conviction, although the 2015 Regulations omit reference to conviction by "final judgment".[35] However, the stipulation of a maximum period of exclusion does not directly address issues raised in the OGC Guidance discussed above. Similarly, with regard to discretionary exclusions, the 2015 Regulations implement the maximum period of three years from the date of the relevant event.[36] This appears to refer to the date at which the relevant conduct occurred as distinct from the date at which the existence of the event was sufficiently established, although this is yet to be conclusively determined.[37]

Generally, it should be observed that the 2014 Directive contains an important exception to the five and three year time-limits, namely when the period of exclusion itself is "set by final judgment".[38] In this case, the length of the exclusion permitted is likely to be subject merely to the general proportionality principle.[39] By contrast, the 2015 Regulations are silent in this regard and which suggests that UK law place no particular emphasis on any requirement of exclusion determined by final judgment.

In addition, it appears that whilst the 2014 Directive refers to the application of exclusion periods for the mandatory and discretionary exclusions listed, the 2014 Directive does not refer to the specific provision on mandatory and discretionary exclusions for non-payment of tax and social security contributions. This may be due to the fact that these exclusions are only applicable to an ongoing breach.[40] On this basis, it has been suggested that the

33. Article 57(7) 2014 Directive.
34. Ibid.
35. Reg 57(11) 2015 Regulations.
36. Reg. 57(12) 2015 Regulations.
37. For a discussion of the possible implications of this distinction, see Arrowsmith, *The Law of Public and Utilities Procurement* (n 13) para. 12-110. The latest UK Guidance "Public Contracts Regulations 2015: New requirements relating to Pre-Qualification Questionnaires to help businesses access Public Sector contracts, Annex I" refers to "three years after the cause". Ibid.
38. Article 57(7) 2014 Directive.
39. See Arrowsmith, The Law of Public and Utilities Procurement (n 13) para. 12-124.
40. Article 57(2) 2014 Directive.

exclusion could last longer than this period.[41] By contrast, the 2015 Regulations provide that the five year time-limit from the "date of conviction" applies to the mandatory and discretionary exclusions for non-payment of tax and social security contributions.[42] The rationale for extending the same exclusion period of the mandatory exclusions to both the mandatory and discretionary exclusions for tax and social security is uncertain.

2.1.1. Discretionary Exclusion Grounds

In accord with the "copy out" method, the 2015 Regulations confined implementation to the discretionary grounds listed in the 2014 Directive.[43] This Section examines each ground in turn.

2.1.1.1. Violation of environmental, social and labour law obligations

A new ground under the 2014 Directive enables a contracting authority to exclude an economic operator where it can demonstrate, by any appropriate means, a violation of applicable obligations in the fields of environmental, social and labour law.[44] This appears to be one specific instantiation of the pre-existing "grave professional misconduct" ground.[45] It has been suggested that its inclusion as an explicit ground is "merely symbolic and political" in its reinforcement of the importance which certain actors in the legislative process place on this issue.[46] However, the UK Government has not provided any detailed indication that these issues require a strategic policy focusing on exclusion. Rather, the discernable emphasis appears to be on simply ensuring

41. Arrowsmith, *The Law of Public and Utilities Procurement* (n 13) para. 12-123-12-124.
42. Reg. 57(11) 2015 Regulations.
43. Reg. 57(8) 2015 Regulations implementing Article 57(4) 2014 Directive, formerly Article 45(2) 2004 Directive as implemented in Reg. 23(4) 2006 Regulations. The discretionary ground of exclusion for non-payment of tax and social security contributions is contained in Article 57(2) 2014 Directive as implemented in Reg. 57(4) 2015 Regulations.
44. Reg.57(8)(a) Public Contracts Regulations 2015 referring to the obligations identified in Reg. 56(2) implementing Article 57(4)(a) 2014 Public Sector Directive also referring to the obligations identified in Article 18(2). For general commentary on this exclusion, see Arrowsmith, *The Law of Public and Utilities Procurement* (n 13) para. 12-100-101 and A Sanchez "Graells, Exclusion, Qualitative Selection and Shortlisting in the New Public Sector Procurement Directive 2014/24" (n 25) 101,102 and 109.
45. Arrowsmith, The Law of Public and Utilities Procurement (n 13), para. 12-100.
46. Ibid para. 12-101.

compliance with these issues through the use of corresponding obligations in contract clauses and conditions.[47]

2.1.1.2. Bankruptcy or related proceedings

The 2015 Regulations continue to enable a contracting authority to exclude an economic operator where it is bankrupt or is the subject of insolvency or winding-up proceedings; its assets are being administered by a liquidator or by the court; it is in an arrangement with creditors; its business activities are suspended; or it is in any analogous situation arising from a similar procedure under national laws and regulations.[48] In contrast to the 2015 Regulations, however, the 2006 Regulations set out what were considered to constitute UK domestic situations covered by the 2004 Directive.[49] The corresponding omission in the 2015 Regulations provides a less user-friendly text for foreign contracting authorities seeking to determine the legal position of economic operators under UK bankruptcy and related law. It has been observed that the list of domestic situations under the 2006 Regulations could assist not only UK contracting authorities but also contracting authorities from other Member States in determining which UK firms may be excluded in their procurements.[50]

2.1.1.3. Grave professional misconduct

Another exclusion ground which also previously featured under the 2004 Directive and which has been implemented in the 2015 Regulations concerns the instance in which the contracting authority can demonstrate, by appropriate means, that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable.[51] It should be observed in this regard that the 2015 Regulations omit the discrete professional conduct conviction exclusion ground which previously featured in the 2004 Directive and

47. See Consultation Document at 22, B4 and B5.
48. Reg.57(8)(b) 2015 Regulations implementing Article 57(4)(b) 2014 Directive which, in turn, consolidates Articles 45(2)(a) and (b) 2004 Directive as implemented in Reg.23(4)(a)-(c) 2006 Regulations into one provision. For general commentary on this exclusion, see Arrowsmith, *The Law of Public and Utilities Procurement* (n 13), paras. 12-72-12-75.
49. Reg 23(4)(a) 2006 Regulations.
50. Arrowsmith, The Law of Public and Utilities Procurement (n 13) para. 12-72.
51. Article 57(4)(c) 2014 Directive as implemented in Reg. 56(8)(c) 2015 Regulations implementing, formerly Reg. 24(4)(e) 2006 Regulations implementing Article 45(2)(d) 2004 Directive. For general commentary on this exclusion, see Arrowsmith, *The Law of Public and Utilities Procurement* ibid. 12-82-12-88.

2006 Regulations.[52] In light of the CJEU's interpretation of "grave professional misconduct" in *Forposta*,[53] namely, "all wrongful conduct which has an impact on the professional credibility" of the economic operator, it now appears that a discrete professional conduct conviction exclusion is substantially redundant.[54] The grave professional misconduct ground covers such an offence without the need to prove an actual conviction that has the force of *res judicata*.

The grave professional misconduct ground has not been the subject of extensive litigation in the UK. Similarly, UK policy has not issued detailed guidance in this regard. In 2013, the Welsh Government issued a Policy Advice Note for the Welsh public sector concerning blacklisting in the construction industry.[55] Whilst the construction industry is the principal focus, the Note indicates that its principles equally apply to other industry sectors.[56] The Policy Advice Note indicates that blacklisting of an economic operator by another can, in principle, amount to an act of "grave professional misconduct".[57] The Policy Advice Note indicates that a blanket ban would not be lawful in light of the requirement that the exclusion must be proportionate and considered on a

52. Article 45(2)(c) 2004 Directive as implemented by Reg. 23(4)(d) 2006 Regulations. For discussion of the scope of this former ground, see Arrowsmith, *The Law of Public and Utilities Procurement* ibid, paras 12-76-12-79.
53. Case C-465/11 *Forposta v Poczta Polska* CJ judgment of December 12, 2012, para. 27.
54. Arrowsmith, *The Law of Public and Utilities Procurement* ibid para. 12-80, para. 12-85 and para. 12-87. By contrast, Graells, "Exclusion, Qualitative Selection and Shortlisting in the New Public Sector Procurement Directive 2014/24" (n 25) 108 fn 22 observes that the legal position is unclear with regard to professional misconduct which is sanctioned by a final judgment but is not "grave" but also that: "given the absence of a common definition of "grave professional misconduct" the practical effects of such a change remain doubtful." In any event, Arrowsmith has argued that the professional conduct exclusion would likely require a degree of severity to legitimate exclusion in accordance with the principle of proportionality.
55. Policy Advice Note (PAN) for the Public Sector in Wales, Blacklisting in the Construction Industry, 10 September 2013. In 2009, prosecutions resulted from an investigation conducted by the Information Commissioner's Office which had concluded that The Consulting Association (TCA) provided a service to over 40 construction companies by determining the suitability of employment of individuals. This included maintaining a blacklist used to deny employment for reasons including membership of a trade union or having raised health and safety concerns. As a result, specific blacklist regulations were built into the Employment Rights Act 2010. This provided a catalyst for the inclusion of exclusion for blacklisting in public procurement.
56. Ibid p.3.
57. Pursuant to Regulation 23(4) of the Public Contracts Regulations 2006. See ibid p.6.

case-by-case basis as justified on the evidence.[58] Official sources indicate that the Welsh Government has not yet excluded any contractors through this process: however, the guidance was only published on 10 September 2013.[59] Whilst identifying the possibility for exclusion for blacklisting on grounds of grave professional misconduct, the Policy Advice Note also identifies the concept of self-cleaning which is discussed in more detail below.

A number of other outstanding issues remain under the 2015 Regulations which result from the broad interpretation of "grave professional misconduct" in *Forposta*.[60] For instance, it is unclear whether or not "grave professional misconduct" is limited to violation of a formal normative rule which does not necessarily constitute a criminal offence or also includes other behaviour.[61] Further, it is not clear whether the requirement specified by the CJEU in *Forposta* of conduct which involves wrongful intent or negligence "of a certain gravity" might require not only deliberate conduct but also a certain significant degree of impact.[62] In addition, it is not clear whether Member States may lay down rules (or administrative guidelines) to definitively exclude certain forms of conduct from forming the basis of exclusion, even though such conduct might be regarded as grave misconduct under the 2014 Directive.[63]

58. Ibid p.6.
59. Reported Scottish Affairs Committee – Sixth Report: Blacklisting in Employment: addressing the crimes of the past; moving towards best practice, 12 March 2014, para. [29].
60. Arrowsmith, *The Law of Public and Utilities Procurement* (n 13), para.12-87 also citing at 255 H-J Priess, "The Rules on Exclusion and Self-Cleaning under the 2014 Public Procurement Directive" (2014) 23 *PPLR* 112 on the continued application of the *Forposta* interpretation.
61. Arrowsmith, The Law of Public and Utilities Procurement (n 13), para. 12-83.
62. *Forposta*, para 30. As Arrowsmith *The Law of Public and Utilities Procurement* (n 13) observes at para. 12-84, A-G Gulmann has stated that an authority might be able to exclude under the grave professional misconduct provisions for deliberate omission to perform previously awarded contracts. See Case C-71/92 *Commission v Spain* [1991] ECR I-05923 but which does not clarify whether a certain significant degree of impact is also required or what reasons for non-performance might constitute mitigation of the gravity of the conduct.
63. In *Forposta* at para.34, the CJ stated that national legislation may not itself establish the parameters that require exclusion. However, as Arrowsmith, *The Law of Public and Utilities Procurement* (n 13) observes at para. 12-85, it is for Member States to decide whether or not to make the grounds available as well as apply them less rigorously than permitted by the Directive. Consequently, this does not, therefore, preclude Member States from laying down such rules to exclude definitively certain conduct from the basis of exclusion which might otherwise be regarded as grave misconduct.

Finally, as indicated, the grave professional misconduct ground now refers not only to the economic operator's grave professional misconduct but also such "which renders its integrity questionable". It has been suggested that this could be relevant in interpreting the scope of the provision, for example, implying an element of "culpability" in order for the provision to apply.[64] It is submitted that the variable quasi-criminal and tortious standards of liability aside, determinations as to what constitutes "questionable" "integrity" are difficult assessments to make in the abstract and even more so in practice, especially given an apparent relaxation of the formal proof required to establish such conduct.

2.1.1.4. Conclusion of agreements aimed at distorting competition

Another new exclusion under the 2014 Directive as implemented in the 2015 Regulations expressly enables a contracting authority to exclude an economic operator where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition.[65] As before, exclusion related to competitive distortion has not been the subject of extensive public procurement litigation in the UK. Again, in light of the UK's copy out method, a number of general issues of interpretation arise. For instance, it is not clear what type of conduct constitutes an "agreement with other economic operators aimed at distorting competition". It has been suggested that this clearly covers some violations of EU competition law under Article 101(1) TFEU, and may also cover violations whose source does not derive from Article 101(1) TFEU.[66] However, it has also been suggested that conduct violating formal competition law rules would be a ground for exclusion under the

64. Arrowsmith, The Law of Public and Utilities Procurement (n 13), para. 12-88.
65. Article 57(1)(d) 2014 Directive as implemented in Reg. 57(8)(d) 2015 Regulations. For general commentary, see Arrowsmith, *The Law of Public and Utilities Procurement* (n 13), para. 12-102-12-103. For the view that this should constitute a mandatory ground of exclusion, see Graells, "Exclusion, Qualitative Selection and Shortlisting in the New Public Sector Procurement Directive 2014/24" (n 25) 109-110 citing A Graells, "Prevention and Deterrence of Bid-Rigging: A Look from the New EU Directive on Public Procurement", in G M Racca and C R Yukins (eds), *Integrity and Efficiency in Sustainable Public Contracts* (Brulyant: Brussels, 2014) p. 137-157.
66. Arrowsmith, ibid, also referring at n 278 and n 279 referring to paras. 4-114-4-117. On the issue of the extent to which the exclusion covers conduct falling under Article 101(1) TFEU, see Arrowsmith, *The Law of Public and Utilities Procurement* (n 13), para. 12-103 citing at fn 281 H-J Priess, "The Rules on Exclusion and Self-Cleaning under the 2014 Public Procurement Directive" (2014) 23 *PPLR* 112.

general grave professional misconduct provision, as a result of which limitations such as the requirement for the conduct to be serious apply equally to this competition ground.[67] Further, similar to the grave professional misconduct exclusion, no conviction or other formal adjudication is required: the conduct may be proven by appropriate means giving rise to "sufficiently plausible indications" of occurrence.[68] It has been suggested that this seems to reflect the general requirement for reliable evidence for using the discretionary exclusions.[69] However, this does presume a direct correspondence with the grave professional misconduct ground which has not been confirmed. In the instance that it does not, it is not clear what constitutes an "indication" that is "plausible" and "sufficient" or whether more than one indication and more than one instance is required in light of the wording.[70]

2.1.1.5. Conflict of interest

A further new ground under the 2014 Directive as implemented in the 2015 Regulations explicitly provides for exclusion where a "conflict of interest"[71] cannot be effectively remedied by other less intrusive measures.[72] The 2015 Regulations identify certain types of conflict of interest identified under the 2014 Directive, e.g. personal interests in a procurement but do not explicitly addressed other types of conflict of interest.[73] To this extent, existing CJEU case law remains relevant in interpreting the exclusion, and which indicates that exclusion will not be permitted when, *inter alia*, the economic operator can show there is no risk of distortion to competition.[74] A further conse-

67. Arrowsmith, ibid para. 12-102 who also observes that this is is merely an elaboration of the more general provision and which is indicated by recital 101 of the 2014 Directive.
68. Arrowsmith, ibid.
69. Arrowsmith, ibid para. 12-102.
70. Reg.57(9)(d) Draft Public Contract Regulations 2015 identified "sufficiently plausible indications" in squared brackets which might have suggested possible uncertainty on the wording used.
71. Within the meaning of Article 24 2014 Directive as implemented in Reg. 24 2015 Regulations. Reg. 24 2015 Regulations further particularizes a definition of "procurement service provider" by reference to Recital 70.
72. Article 57(4)(e) 2014 Directive as implemented in Reg. 57(8)(e) 2015 Regulations. For general commentary, see Arrowsmith, ibid para. 12-143 and Graells, "Exclusion, Qualitative Selection and Short-listing in the New Public Sector Procurement Directive 2014/24" (n 25) pp.111-12.
73. Reg. 24 2015 Regulations.
74. See for example, Joined Cases 21-02 and C-34/03 *Fabricom v Belgium* [2005] ECR I-01559; Joined Cases C-213/07 *Michaniki v Ethniko Simvoulio Raidotileorasis*

quence of the copy out method is that it is not clear what may constitute "appropriate measures" which a contracting authority is required to take to prevent, identify and remedy a conflict of interest. The Cabinet Office has indicated that the UK Government has not elaborated on this requirement but intends to issue guidance on this matter in due course.[75]

It had been arguable as to whether the 2004 Directive as implemented in the 2006 Regulations contained an implied general requirement to avoid conflicts of interest as an aspect of the equal treatment principle.[76] However, it had been observed that there is little UK case law on this principle and how it could be applied in this context.[77]

2.1.1.6. Distortion of competition from the prior economic operator involvement

Another ground under the 2014 Directive as implemented in the 2015 Regulations now explicitly provides a basis for excluding an economic operator where a distortion from the prior involvement of the economic operator in the preparation of the procurement procedure,[78] cannot be remedied by other, less intrusive, means.[79] Again, as a result of the copy out method, a similar issue to that regarding the conflict of interest exclusion arises, namely uncertainty as to what constitutes a distortion from prior involvement, preparation of the procurement procedure and the nature and extent of remedial action to be taken by the contracting authority.

[2008] ECR I-099999; Case C-376/08 *Serrantoni v Commune di Milano* [2009] ECR I-12169, discussed in Arrowsmith, ibid paras. 12-137-12-141.

75. Consultation Document, UK Transposition of new EU Procurement Directives, Public Contracts Regulations 2015, para. 42.
76. For a discussion in this regard, see Arrowsmith, *The Law of Public and Utilities Procurement* ibid para. 7-16 by analogy to *Fabricom* concerning the possibility/requirement to exclude economic operators determined to have a conflict of interest as a result of potential to influence contract specifications.
77. A limited example is the decision of the High Court of Northern Ireland in *Traffic Signs and Equipment Ltd v Department for Regional Development and Department of Finance and Personnel* [2011] NIQB 25. See Arrowsmith, ibid para. 7-16.
78. As referred to in Article 41 2014 Directive as implemented in Reg. 41 2015 Regulations. For a discussion of Article 41 Directive, see Arrowsmith, *The Law of Public and Utilities Procurement* ibid para. 7-65
79. Article 57(4)(f) 2014 Directive as implemented in Article 57(8)(f) 2015 Regulations. This exclusion ground appears to have been formerly permitted under the equal treatment principle developed in Joined Cases 21-02 and C-34/03 *Fabricom v Belgium* and Joined Cases C-213/07 *Michaniki* (n 74) above. See generally, Arrowsmith, ibid para. 12-99 and 12-144.

2.1.1.7. Significant or persistent deficiencies in prior public contracts

The 2014 Directive as implemented in the 2015 Regulations also provides a new explicit ground for exclusion 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.[80] Exclusion had previously been possible under the 2004 Directive for serious past violations of contracts under the professional misconduct ground.[81] This new discrete ground provides a possibility to exclude an economic operator for deficiencies, which are "significant" in isolation (whether because of their intentional nature and/or impact) or "persistent".[8283] Given the copy out method, the Recitals to the 2014 Directive may continue to provide some further indication of what might be covered by this provision on past deficiencies.[84]

It is not clear to what extent this exclusion is likely to be as, or more, effective than the grave professional misconduct exclusion. For instance, significant and persistent deficiencies in contractual performance may not necessarily equate to contract termination. Further, instances of contract termination are relatively rare in practice for a host of reasons. For instance, it can be difficult to establish a breach of contract sufficient to justify termination. In addition, the costs of investment are already likely to have been significant. There is no guarantee of finding a replacement. Contracting authorities may also use a range of mechanisms to manage performance which do not require contract termination e.g. use of liquidated damages. A further factor concerns the cost of potential litigation.[85] There is also a reputational risk for contracting authorities that may wish to avoid acknowledging or disclosing that their

80. Article 57(4)(g) 2014 Directive as implemented in Reg. 57(8)(g) 2015 Regulations. For general commentary, see Arrowsmith, ibid paras. 12-104-12-106 and Graells, "Exclusion, Qualitative Selection and Short-listing in the New Public Sector Procurement Directive 2014/24" (n 25) p.110.
81. For a discussion in this regard, see Arrowsmith, ibid paras. 12-84 and 12-104.
82. See Arrowsmith, ibid para. 12-104 referring to the discussion of grave professional misconduct at para 12-84 and who states that confirmation that persistent minor actions might legitimate exclusion appears to be an explicit statement of a principle that applies more generally in determining whether conduct is sufficiently serious to warrant exclusion under the general professional misconduct ground and the explicit elaboration of that ground in the 2014 Directive. Ibid.
83. Ibid para. 12-104.
84. Ibid para. 12-105 citing recital 101.
85. Ibid para. 105.

procurement process led to the selection of a persistently deficient contractor. Whilst a contracting authority is also unlikely to wish to investigate whether circumstances legitimating termination in a previous contract were justified, it cannot be presumed that it would agree with any previous conclusion. Moreover, whilst the basis for termination may be more objectively verifiable, the imposition of "other comparable sanctions"[86] is an issue on which contracting authorities may be more likely to reasonably disagree.

2.1.1.8. Serious misrepresentation

The 2014 Directive as implemented in the 2015 Regulations continues to enable exclusion where the economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria or has withheld such information or is not able to submit the supporting documents required.[87] Again, the 2015 Regulations have not laid down general rules concerning the types of conduct which a Member State does or does not wish to form the basis for exclusion. For instance, it has been suggested that it would probably have been permitted to prescribe that a contracting authority could decide not to exclude an economic operator where a misrepresentation is not deliberate.[88] Further, a number of other issues remain. For example, as indicated above, it is not clear whether a misrepresentation would need to be deliberate in order to be considered "serious" or whether a single instance of negligent or inadvertent misrepresentation in a previous procurement would be sufficient.[89] In addition, as will be discussed in Section 3 below, the 2014 Directive introduces the "European Single Procurement Document" providing a form of self-declaration which contracting authorities must accept as evidence of compliance.[90] It has been suggested that the introduction of obligations to accept self-declarations will make the provision for

86. This term was originally placed in square brackets in the Draft Public Contracts Regulations 2015. This could indicate possible uncertainty in relation to the interpretation of this term.
87. pursuant to Article 59 2014 Directive. See Article 57(4)(h) 2014 Directive as implemented in Reg. 57(8)(h)(i) and (ii) 2015 Regulations referring to supporting documents required pursuant to Reg. 59. Formerly, Article 45(2)(g) 2004 Directive as implemented in Reg. 23(4)(h) 2006 Regulations. For general commentary, see Arrowsmith, paras 12-96-12-98.
88. Arrowsmith, The Law of Public and Utilities Procurement (n 13), para. 12-98.
89. Ibid who also observes, however, that such a case could probably give rise to exclusion from the specific procurement in question under Article 57(4)(i) 2014 Directive.
90. Article 59 2014 Directive as implemented in Reg. 59 2015 Regulations.

exclusion for misrepresentation in supplying information even more important than under the 2004 Directive, since it can help to ensure the accuracy of information in self-declarations.[91] As indicated above, in *Lion Apparel* the Court determined that a contracting authority did not commit a manifest error of assessment in failing to exclude a bidder that had deliberately misrepresented and withheld information required to verify absence of grounds for exclusion during selection. It is not clear to what extent the introduction of self-declaration will render contracting authorities more or less prone to investigating misrepresentations where there is clear suspicion.

2.1.1.9. Undue influence or undue advantages in the procurement process

A final new ground under the 2014 Directive as implemented in the 2015 Regulations now explicitly allows exclusion where the economic operator has undertaken to: unduly influence the decision-making process of the contracting authority or obtain confidential information that may confer upon it undue advantages in the procurement procedure.[92] This ground also provides for exclusion where the economic operator has negligently provided misleading information that may have a material influence on decisions concerning exclusion, selection or award.[93] It has been observed that this provision is directed at exclusion only from the specific procurement procedure in which the conduct in question occurred to ensure the proper conduct of that particular procurement procedure, in accordance with equal treatment.[94] However, conduct that falls within this provision could give rise to exclusion from future procurements, also, under the more general grave professional misconduct ground or under the general exclusion for misrepresentation in supplying information.[95] Again, it remains to be determined what might constitute "undue influence", "undue advantages" and a "material influence" on the relevant decision. It has been suggested that, as a matter of diligence (and subject to applicable domestic rules), the contracting authority seems likely to be un-

91. Arrowsmith, The Law of Public and Utilities Procurement (n 13), para. 12-98.
92. Article 57(4)(h) 2014 Directive as implemented in Reg. 57(8)(i) (i)(aa) and (bb), respectively 2015 Regulations. For general commentary, see Arrowsmith, para. 12-145 and Graells, "Exclusion, Qualitative Selection and Short-listing in the New Public Sector Procurement Directive 2014/24" (n 25) 110-111.
93. Article 57(4)(h) 2014 Directive Reg.57(8)(i)(ii) Public Contracts Regulations 2015. Reg.57(8) has separated the two instances of conduct undertaken from the negligent provision of misleading information.
94. Arrowsmith, *The Law of Public and Utilities Procurement* (n 13), para. 12-145 referring also to Recital 101 of the 2014 Directive.
95. Ibid, para. 12-145.

der a duty to report this behaviour to the competent authorities or courts and to push for criminal prosecution at least where such conduct constitutes a form of corruption.[96] However, it is submitted that whilst it is possible to envisage future UK policy encouraging information sharing between contracting authorities under this ground, UK law is unlikely to prescribe any specific legal duty to report such conduct to the extent that no obligation otherwise arises under domestic law.

2.1.2. Mandatory Exclusion Grounds

The 2015 Regulations list the mandatory exclusion grounds, which, in accord with the 2014 Directive expands on those under the 2004 Directive.[97]

2.1.2.1. Corruption and bribery

One specific issue that has arisen under UK law concerns the classification of corruption and bribery offences for the purposes of exclusion. Concerning corruption, the 2006 Regulations specified the offence of corruption within the meaning of s.1 of the Public Bodies Corrupt Practices Act 1889 or s. 1 of the Prevention of Corruption Act 1906.[98] More precisely, the 2015 Regulations implements the ground of corruption within the meaning of s.1 (2) of the Public Bodies Corrupt Practices Act 1889[99] or s.1 of the Prevention of Corruption Act 1906[100] but omits a reference to "active corruption" originally featuring in the Draft Public Contracts Regulations.[101] Concerning bribery, the 2006 Regulations simply identified "the offence of bribery".[102] In 2010, the Bribery Act was adopted in order to reform the UK's legal framework on such offences.[103] Specifically, the Bribery Act 2010 creates four new offenc-

96. Graells, "Exclusion, Qualitative Selection and Short-listing in the New Public Sector Procurement Directive 2014/24" (n 25) p.111.
97. Reg. 57(1) 2015 Regulations. These were formerly contained in Article 45 2004 Directive as regulated in Reg. 23(1) 2006 Regulations (and, where necessary, as amended). As indicated above, a mandatory exclusion is provided for under Article 57(2) 2014 Directive when the economic operator is in breach of obligations relating to the payment of taxes or social security contributions.
98. Reg. 23(1)(b) 2006 Regulations.
99. 1889 c.69; this Act was repealed by the Bribery Act 2010 (c.23), Schedule 2.
100. 1906 c.34; this Act was repealed by the Bribery Act 2010 (c.23), Schedule 2.
101. Reg. 57(1)(b) 2015 Regulations. See formerly, Reg. 57(1)(b) Draft Public Contracts Regulations 2015.
102. Reg. 23(1)(c) 2006 Regulations
103. The Act entered into force in 2011. See The Bribery Act 2010 (Commencement) Order 2011 (SI 2011/1418)

es, namely: bribing another person;[104] being bribed;[105] (3) bribing a foreign public official;[106] and failing to prevent bribery by persons associated with a commercial organisation.[107] The Draft Public Contracts Regulations 2015 specified two separate bribery offences, namely the offence of bribery, where the offence relates to active corruption[108] and bribery within the meaning of ss. 1 or 6 of the Bribery Act 2010.[109] By contrast, again the 2015 Regulations are more precise in specifying the common law offence of bribery[110] and bribery within the meaning of ss. 1, 2 or 6 of the Bribery Act 2010 or s. 113 of the Representation of the People Act 1893.[111] With regard to the s.2 offence of being bribed, prior to the adoption of the 2014 Directive, it had been questioned whether this offence could lead to a discretionary disbarment.[112] In light of the requirement of "active corruption", this offence could not fall under the mandatory corruption exclusion of the 2004 Directive, referring to the definition under Article 3 is the Council Act of 26 May 1997 or Article 3(1) of Council Joint Action 98/742/JHA. It appears that the s.2 offence of being bribed is now confirmed under the 2015 Regulations as constituting a ground for mandatory exclusion. It follows that forms of both active and passive bribery are now covered. Further, as indicated, the mandatory exclusion also includes bribery as understood under the Representation of the People Act 1893. This suggests a last minute decision to remove distinctions between active and passive forms of bribery (hence also omission of "active corruption" from the Regulations) and to catch all forms of bribery defined as offences under UK law.

However, an unresolved issue concerns the fact that the 2015 Regulations only refer specifically to s.1, 2 and 6. The status of the s.7 offence of failing to prevent bribery by persons associated with a commercial organization as a ground for exclusion continues to remain unclear. At the time of the adoption of the Bribery Act 2010, the Lord Chancellor and Secretary of State for Justice released a statement to the effect that the s.7 offence would attract discretionary rather than mandatory exclusion and that the 2006 Regulations would

104. Section 1 Bribery Act 2010
105. Section 2 Bribery Act 2010
106. Section 6 Bribery Act 2010
107. Section 7 Bribery Act 2010
108. Reg. 57(1)(c) Draft Public Contracts Regulations 2015
109. Reg. 57(1)(d) Draft Public Contracts Regulations 2015
110. Reg. 57(1)(c) Draft Public Contracts Regulations 2015
111. Reg. 57(1)(d) 2015 Regulations.
112. P Henty, "Public Procurement (Miscellaneous Amendments) Regulations 2011" (2012) 1 PPLR NA50-53, NA52

be amended to reflect this clarification.[113] The Bribery Act 2010 (Consequential Amendments Order) 2011 amended the 2006 Regulations to specify that bribery is to be defined by reference to the meaning of sections 1 or 6 of the Bribery Act 2010.[114] This appeared to confirm that the Regulations did not require the exclusion of firms convicted of the corporate offence.[115] This position had also been officially endorsed as a matter of UK Procurement Policy.[116] Whilst not explicitly clear, it has been suggested that the rationale for designation of the s.7 offence as a discretionary ground appears to be that the corporate offence is considered to be a less serious offence than the two other active offences outlined in the Bribery Act because it relates to a failure to prevent bribery rather than actually engaging in bribery itself.[117] Further, the s.7 offence does not necessarily require an actual intention on the part of the commercial organisation to commit a bribe.[118] It had, therefore, been suggested that there seemed little doubt that the corporate offence could fall within one of the existing discretionary grounds for exclusion.[119] In this regard, the grounds of "conviction of a criminal offence relating to the conduct of its business or profession" and/or an "act of grave misconduct in the course of its business or profession" have been identified.[120] This rationale may now be questioned in light of the fact that the distinction between active and passive forms of bribery has been lessened by the 2015 Regulations. Further, as indicated above, the professional conduct conviction ground is no longer a free-standing ground for discretionary exclusion under the 2014 Directive. It is likely that this will continue to constitute a discretionary ground for exclusion.

113. Written Ministerial Statement by Mr. Kenneth Clarke to the House of Commons, 30 March 2011: Column 11WS
114. See Reg 2 of the Bribery Act 2010 (Consequential Amendments Order) 2011 SI 2011/1441 (which entered into force on July 1, 2011) amending Regulation 23 of the 2006 Regulations. For commentary on the relationship between the Bribery Act 2010 and the Public Contracts Regulations 2006, see R Novak, P Henty and C Tullis, "The Bribery Act and its interaction with the public procurement rules in the UK" (2011) 5 *PPLR* NA230-236.
115. This interpretation appears to be supported by Arrowsmith, para. 12-117 and P Henty, Henty, "Public Procurement (Miscellaneous Amendments) Regulations 2011 (n 113) 52.
116. Procurement Policy Note – Amendments to the Procurement Regulations, Information Note 06/11, 31 August 2011, para. 15
117. Novak, Henty and Tullis, "The Bribery Act" (n 116) 234
118. Ibid.
119. Ibid.
120. Ibid.

A number of additional observations have been made in relation to the s.7 offence. It has traditionally been exceptionally difficult to convict commercial organisations under English law of such offences. Principles of corporate criminal liability have required that the relevant person reflect the company's controlling mind and will i.e. a Managing Director, rather than a person "associated with" a commercial organisation. The Bribery Act 2010 defines an "associated person" as being someone who performs services for or on behalf of the company, and includes illustrative examples.[121] It has been observed that this is a "very broad" definition.[122] In response to concerns, in 2011 the Ministry of Justice issued Guidance which includes further examples of what it believes might constitute an associated person.[123] In addition, the offence also applies to any commercial organisation carrying on a business (or part of a business) in the United Kingdom and the associated person need have no connection with the UK.[124] Finally, the Bribery Act provides for a defence to a potentially guilty commercial organisation if it can demonstrate that it had "adequate procedures" designed to prevent bribery.[125] The Bribery Act does not define what may constitute "adequate procedures" but the Ministry of Justice Guidance identifies certain principles to be followed.[126] This may correspond with the kinds of enquiries that may be undertaken for the purposes of self-cleaning under the other exclusion grounds (discussed below).

It had been argued that because the 2006 Regulations did not provide a timeframe within which a s.7 offence remains live, the possibility of debarment could last indefinitely regardless of the date of conviction.[127] However, as discussed above, maximum time-limits are now fixed under the 2015 Regulations although, as indicated, there is no reference to convictions determined by final judgment.[128] To deal with this inherent uncertainty, it has been

121. Section 8. The Act gives the examples of an employee, agent or subsidiary, but the list is by no means exhaustive.
122. Novak, Henty and Tullis, "The Bribery Act" (n 116) 231.
123. Ibid 231.
124. As Novak, Henty and Tullis observe ibid: "[t]hus, for example, it appears that a French company carrying on some business in the United Kingdom can be guilty of the s.7 offence if a German agent pays a bribe in, say, Italy even where that bribe has nothing to do with the UK business".
125. Bribery Act 2010, Section 7(2).
126. These include: (1) risk assessment; (2) top level commitment; (3) due diligence; (4) proportionate procedures; (5) communication (including training); and (6) monitoring and review.
127. Novak, Henty and Tullis, "The Bribery Act" (n 116) 235.
128. See Reg. 57(1) 2015 Regulations.

suggested that it would be helpful for the government to provide guidance covering the circumstances in which it will be appropriate for the authority to exercise its discretion against a party guilty of the s.7 offence and on the company's reporting obligations.[129]

2.1.2.2. Miscellaneous other grounds

In addition to the above grounds, the 2015 Regulations also implement grounds certain of which are found in the 2014 Directive as well as those provided exclusively under UK law. These include: participation in a criminal organisation by reference to the offence of conspiracy[130] fraud affecting the European Communities' financial interests,[131] terrorism related offences;[132] inchoate offences,[133] the offence of money laundering;[134] offences in

129. Novak, Henty and Tullis, "The Bribery Act" (n 130).
130. within the meaning of section 1 or 1A of the Criminal Law Act 1977 or article 9 or 9A of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 where that conspiracy relates to participation in a criminal organisation as defined in Article 2 of Council Framework Decision 2008/841/JHA. See Reg 57(1)(a)) (formerly, reg 23(1)(a) as amended by regulation 15 of the Public Procurement (Miscellaneous Amendments) Regulations 2011). See Article 57(1)(a) 2014 Directive.
131. As defined by Article 1 of the Convention on the protection of the financial interests of the European Communities (OJ C 316, 27.11.1995, p. 48). The 2015 Regulations provide expanded coverage of those found in the 2006 Regulations. Reg. 57(1)(e) identifies the following: (i) the common law offence of cheating the Revenue; (ii) the common law offence of conspiracy to defraud; (iii) fraud or theft within the meaning of the Theft Act 1968, the Theft Act (Northern Ireland) 1969, the Theft Act 1978 or the Theft (Northern Ireland) Order 1978; (iv) fraudulent trading within the meaning of section 458 of the Companies Act 1985, article 451 of the Companies (Northern Ireland) Order 1986 or section 993 of the Companies Act 2006; (v) fraudulent evasion within the meaning of section 170 of the Customs and Excise Management Act 1979 or section 72 of the Value Added Tax Act 1994; (vi) an offence in connection with taxation in the European Union within the meaning of section 71 of the Criminal Justice Act 1993; (vii) destroying, defacing or concealing of documents or procuring the execution of a valuable security within the meaning of section 20 of the Theft Act 1968 or section 19 of the Theft Act (Northern Ireland) 1969; (viii) fraud within the meaning of section 2, 3 or 4 of the Fraud Act 2006; or (ix) the possession of articles for use in frauds within the meaning of section 6 of the Fraud Act 2006, or the making, adapting, supplying or offering to supply articles for use in frauds within the meaning of section 7 of that Act. See Article 57(1)(c) 2014 Directive.
132. Namely any offence listed (i) in section 41 of the Counter Terrorism Act 2008 or (ii) in Schedule 2 to that Act where the court has determined that there is a terrorist connection. See Reg.57(1)(f).
133. Namely, any offence under sections 44-46 of the Serious Crime Act 2007 which relates to an offence covered by subparagraph (f). See Reg. 57(1)(g) 2015 Regulations.

connection with the proceeds of criminal conduct;[135] an offence concerning the trafficking of people for exploitation;[136] an offence concerning trafficking out of the UK for sexual exploitation;[137] an offence concerning slavery, servitude and forced or compulsory labour;[138]an offence in connection with the proceeds of drug trafficking;[139] and finally, any other offence within the meaning of the provision on mandatory exclusions under the 2014 Directive, as defined by the national law of any EEA state.[140] Whilst it may be possible to question whether the additional grounds specified under UK law are compliant with EU law, it may be interpreted that these are simply extensions or derivatives of the grounds listed under the Directive and are, therefore, likely to be compatible.

2.1.2.3. Derogation for overriding requirements of public interest

The 2014 Directive as implemented in the 2015 Regulations continues to allow a Member State to provide for a derogation from the mandatory exclusions, on an exceptional basis, for overriding reasons relating to the public interest such as public health or protection of the environment.[141] Again, in accord with the copy out method, a number of issues continue to remain unresolved. Whilst it has been suggested that it is possible to invoke this provision when the requirement cannot be obtained from another economic operator, it continues to remain unclear how it applies when exclusion will simply lead to a higher price or delay.[142] UK Guidance has taken a strict approach in stating that the derogation should be used "only in the most serious of circumstances,

134. Within the meaning of section 340(11) and 415 of the Proceeds of Crime Act 2002. See Reg.57(1)(h) 2015 Regulations.
135. Within the meaning of section 93A, 93B or 93C of the Criminal Justice Act 1988 or article 45, 46 or 47 of the Proceeds of Crime (Northern Ireland) Order 1996. See Reg. 57(1)(i) 2015 Regulations.
136. Under section 4 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004. See Reg.57(1)(j) 2015 Regulations.
137. Under section 59A of the Sexual Offences Act 2003. See Reg. 57(1)(k) 2015 Regulations.
138. Under section 71 of the Coroners and Justice Act 2009. See Reg. 57(1)(l) 2015 Regulations.
139. Within the meaning of section 49, 50 or 51 of the Drug Trafficking Act 1994. See Reg. 57(1)(m) 2015 Regulations.
140. Reg57(1)(n) 2015 Regulations.
141. Article 57(3) 2014 Directive implementing Reg. 57(6) 2015 Regulations. Formerly, Article 45(1) 2004 Directive and Reg. 23(2) 2006 Regulations. For general commentary on this provision, see Arrowsmith, paras. 12-121-12-122.
142. Arrowsmith, The Law of Public and Utilities Procurement (n 13), para. 12-121.

for example, in the case of a national emergency.[143] Further, approval of the Accounting Office or relevant Government Minister must be obtained, thus providing a possible check against abuse.[144]

2.1.2.4. Mandatory and Discretionary Exclusion: social security and taxes

Formerly, non-payment of social security obligations and taxes constituted a discretionary ground of exclusion or compulsory ground at the choice of the Member State.[145] The 2014 Directive, as implemented in the 2015 Regulations, now provides for mandatory exclusion when the economic operator is in breach (i.e. there is an ongoing violation) of obligations relating to the payment of taxes or social security contributions. The breach must be established by a judicial or administrative decision having binding and final effect in accordance with the legal provisions of the country in which it is established or with those of the Member State of the contracting authority (or any of the jurisdictions of the UK).[146] The mandatory exclusion only applies to the economic operator who is the subject of a judicial or administrative decision. This contrasts with the other mandatory exclusion grounds which provide that the obligation to exclude an economic operator also applies where the person convicted by final judgment is a member of the administrative, management or supervisory body of the economic operator, or has powers of representation, decision or control therein.[147] It has been argued that the provision should also apply where the economic operator is not the direct addressee of the jurisdictional or administrative decision confirming the breach of tax or social security obligations.[148]

For cases that do not fall within the mandatory exclusion, the 2014 Directive as implemented in the 2015 Regulations provides that contracting authorities may exclude an economic operator from participation in a procure-

143. See Arrowsmith, ibid para 12-121 citing at fn 323 OGC, *Mandatory Exclusion of Economic Operators*, section 9. Such emergencies are defined by the Civil Contingencies Act 2004.
144. Ibid.
145. Article 45(2)(e) and (f) 2004 Directive as implemented in Reg. 23(4)(f) and (g) 2006 Regulations.
146. Article 57(2) 2014 Directive as implemented in Reg 57(3)(a) and (b) 2015 Regulations. For general commentary on this exclusion in its mandatory and discretionary forms, see Arrowsmith, *The Law of Public and Utilities Procurement* (n 13), para. 12-89-12-95 and 12-119-120
147. Article 57(1) 2014 Directive as implemented in Reg. 57(2) 2015 Regulations.
148. Graells, "Exclusion, Qualitative Selection and Short-listing in the New Public Sector Procurement Directive 2014/24" (n 25) pp.106-107.

ment procedure where the contracting authority can demonstrate by any appropriate means that the economic operator is in breach (i.e. there is an ongoing violation) of its obligations relating to the payment of taxes or social security contributions.[149] In the absence of specific supplementation under the 2015 Regulation, it appears that the principles of interpretation arising *inter alia* from the ECJ *La Cascina* jurisprudence continue to apply.[150] At the very least it is clear that the exclusion must no longer apply when the economic operator has fulfilled its obligations by paying or entering into a binding arrangement with a view to payment.[151]

Again, certain interpretational issues remain outstanding. For example, in contrast to both the discretionary exclusion in the 2004 Directive and the mandatory exclusion under the 2014 Directive, the discretionary exclusion under the 2014 Directive as implemented in the 2015 Regulations does not refer explicitly to the need for the tax or social security obligation concerned to relate to the state of establishment or the awarding state.[152] It has been suggested that it is arguable that this discretionary exclusion is to be read as subject to the same limitation in this respect as the mandatory exclusion.[153] Further, there is discretion to determine what constitutes "minor amounts" of unpaid tax. It has been suggested that the absence of a common definition could risk a referral to the CJEU for a preliminary interpretation which it may be unwilling to provide unless is wishes to create a judicial "*de minimis* threshold" for this exclusion ground.[154] Alternatively, a case-by-case assessment may be preferable in accord with the proportionality principle. Ultimately, much will depend on the type of taxation that may be in issue (which may vary across jurisdictions for legitimate reasons) as well as the type of procurement in question.

More generally, it should be observed that, in 2013, the UK announced a new policy on the use of procurement to promote tax compliance.[155] The new

149. Article 57(2) 2014 Directive as implemented in in Reg. 57(4) 2015 Regulations.
150. These are discussed by Arrowsmith, *The Law of Public and Utilities Procirement* (n 13), paras. 12-89-92
151. Article 57(2) 2014 Directive as implemented in Reg 57(5) 2015 Regulations. See Arrowsmith, ibid 12-93.
152. For a discussion of this requirement under the 2004 discretionary exclusion, see Arrowsmith, ibid para 12-91
153. Ibid para. 12-94.
154. Graells, "Exclusion, Qualitative Selection and Short-listing in the New Public Sector Procurement Directive 2014/24" (n 25) p.107.
155. For a useful general commentary although focusing on Information Note 03/13 14 February 2013 – Promoting Tax Compliance and Procurement, see P Henty, "Use of

policy took effect from 1 April 2013. The latest Procurement Policy Note was issued in 2014.[156] The Policy applies to all suppliers (technically all "economic operators" as defined in the 2006 Regulations)[157] bidding for all central government department contracts (including framework agreements) of £5 million or more.[158] Therefore, the policy does not appear to apply across all departments within the UK. The £5 million threshold has been set in order to avoid adding an administrative burden to lower value procurements and to small businesses.[159] Departments must incorporate questions to suppliers in their procurement documentation at the selection stage (e.g. in the Pre-Qualification Questionnaire) or the Invitation to Tender (in the case of the open procedure only).[160] The policy operates entirely on the basis of self-certification by suppliers including non-UK suppliers and suppliers with international tax obligations.[161] A supplier must state whether any of its tax returns has: (1) given rise to a criminal conviction for tax related offences which is unspent, or to a civil penalty for fraud or evasion; or (2) has been found to be incorrect as a result of: (a) HMRC successfully challenging it under the new General Anti-Abuse Rule (GAAR)[162] or the "Halifax" abuse principle;[163] or (b) a tax authority in a jurisdiction in which the supplier is es-

public procurement to promote tax compliance in the United Kingdom" (2014) 1 *PPLR* NA26-28.

156. Procurement Policy Note: Measures to Promote Tax Compliance, Action Note 03/14, 06 February 2014 replacing Action Note 06/13 dated 25 July 2013, Information Note 03/13 (which consulted on the measures) and Action Note 04/13 which gave advance notification of the policy.
157. This includes: (1) a body corporate or association, or an individual; (2) a joint venture or consortium, where the self-certification must cover all members of the joint venture or consortium; (3) a partnership or limited-liability partnership ("LLP"), in which case the self-certification must cover that partnership, limited liability partnership or LLP, but not the individual members; and/or (4) a member of a group although in that case the self-certification does not cover other group companies, whether UK- or non-UK based. See Note, para 1.
158. Note, para. 1. Although, other contracting authorities (e.g. in local government and the wider public sector) may choose to apply it to their procurements.
159. Note, para.3.
160. Ibid.
161. Note, para. 16.
162. The Policy Note defines the "General Anti-Abuse Rule" as: (a) the legislation in Part 5 of the Finance Act 2013 and (b) any future legislation introduced into parliament to counteract tax advantages arising from abusive arrangements to avoid national insurance contributions. See also para. 13.
163. The Halifax abuse principle relates to CJEU Case 255/02 *Halifax and Others* [2006] ECR I-1609. Broadly, the ECJ ruled that whilst the tax authority cannot consider the

tablished successfully challenging it under any tax rules or legislation in any jurisdiction that have an effect equivalent or similar to the GARR or the "Halifax" abuse principle; or (c) the failure of an avoidance scheme which the supplier was involved in and which was, or should have been notified under the Disclosure of Tax Avoidance Scheme ("DOTAS")[164] or any equivalent or similar regime in a jurisdiction in which the supplier is established.[165] The responses to the questions should be evaluated on a pass/fail basis.[166] It should be observed that because the policy only applies when there has been a conviction or civil penalty for a tax-related matter or an anti-avoidance scheme, for the most part, such exclusions will fall within the exclusion grounds relating to convictions (now no longer an explicit ground, as indicated above) or grave misconduct.[167] This avoids the need to rely on the specific exclusion ground that relates to non-payment of tax and social security contributions where there is an on-going violation.[168]

According to this policy, there is no obligation to investigate a negative response to questions, nor to seek to verify negative responses.[169] If the answer to any of the above is affirmative, the answer constitutes an occasion of non compliance ("OONC").[170] If an OONC also falls within a mandatory exclusion criteria under the 2006 Regulations then the authority is obliged to

motives of taxpayers when considering whether or not a transaction is structured primarily to avoid tax, if there is no commercial substance to the relevant transaction(s), that will, prima facie, be abuse. See Note at paras. 13 and 24.

164. The DOTAS rules apply to transactions which contain certain "hallmarks", where one of the main aims is to achieve a tax saving. The aim of the DOTAS regime is to provide HMRC with information on new schemes as they arise and on the users of those schemes. By their nature, the DOTAS rules can capture transactions which, while partly motivated by a tax saving, may still be regarded as acceptable by HMRC. A so-called "occasion of non-compliance" only arises when a DOTAS scheme is shown to have failed and this will typically cover a wide range of scenarios than the GAAR or "Halifax" abuse principle. "Shown to have failed" will generally mean that the taxpayer has accepted the arrangement does not achieve the tax saving anticipated and this may be shown by his amending the return; accepting a tax assessment; or failing in litigation and not appealing any further. See para. 14. DOTAS is defined in the Policy Note at para.24.
165. Note, para. 7.
166. Note, para. 8
167. Arrowsmith, para 12-92.
168. Ibid.
169. Ibid.
170. para. 9. Para. 24.

exclude the economic operator.[171] The authority has no discretion and mitigating factors will not be relevant.[172] If an OONC does not fall within a mandatory exclusion criteria, the authority may decide to exclude the economic operator on the basis that the tax compliance provisions are also discretionary exclusion criteria under the 2006 Regulations 2006 as indicated above.[173]

This Policy has been the subject of criticism. In practice, the provision on self-certification is a matter on which companies are likely to require assistance from specialist tax advisers.[174] Further, certain aspects of the policy may require clarification. For example, what constitutes an equivalent tax in the case of foreign bidders is likely to be problematic in particular cases.[175] More generally, policies of this kind raise questions as to whether public procurement is an appropriate means of achieving tax compliance. It has been suggested that this policy will prove a "powerful weapon" in Her Majesty's Revenue Custom's armoury to prevent abusive tax avoidance.[176] However, whilst aggressive tax avoidance is currently an issue of great political interest in the UK, it is not clear that the supervisory and enforcement machinery is in place in the context of public procurement to mobilise these policy objectives.

2.1.3. Self-cleaning

The 2004 Directive did not specify the extent to which "self-cleaning" could affect exclusion.[177] However, prior to the 2014 Directive, UK policy had recognized the concept of self-cleaning. For instance, the UK Policy Note on promoting tax compliance provides that where a supplier is determined to have committed an OONC, a supplier may provide details of any mitigating

171. Para 9 and citation at fn2. This is subject to a determination of whether there are overriding requirements in the general interest to prevent exclusion. However, it is difficult to find examples in which such overriding requirements are likely to be accepted and which, as indicated above, appears to be strictly applied under UK law.
172. Note, para. 15.
173. Ibid para. 9.
174. Henty, "Use of public procurement to promote tax compliance in the United Kingdom" (n 158) 28.
175. Ibid.
176. Ibid.
177. See generally, S Arrowsmith, H-J Priess, P Friton, "Self-cleaning as a defence to exclusions for misconduct: an emerging concept in EC public procurement law?" (2009) 6 *PPLR* 257-282.

factors that it considers relevant for consideration by the relevant authority.[178] To assist with evaluation, the Policy Note identifies some examples of mitigating factors. These could include, for example: corrective action undertaken by the supplier to date;[179] planned corrective action to be taken; changes in personnel or ownership since the OONC;[180] changes in financial, accounting, audit or management procedures since the OONC;[181] or the OONC was an isolated one and there is no indication that the business generally adopts an "aggressive" tax stance.[182] Further, in case of difficulty, contracting authorities may seek advice from the Efficiency Reform Group service desk.[183]

The 2014 Directive as implemented in the 2015 Regulations now provides for a specific self-cleaning defence applicable to the mandatory and discretionary grounds of exclusion listed.[184] At the outset, it should be observed that UK Guidance indicates that self-cleaning is not applicable to discretionary exclusion grounds which are "procurement-specific and which do not arise from supplier misdeeds".[185] Concerning the application of self-cleaning

178. According to the Note, in order to consider any factors raised by the supplier, procuring authorities will find it helpful to have the following information: a brief description of the occasion, the tax to which it applied, and the type of "non-compliance" e.g. whether HMRC or the foreign tax authority has challenged pursuant to the GAAR, the "Halifax" abuse principle etc; where the OONC relates to a DOTAS, the number of the relevant scheme; the date of the original "non-compliance" and the date of any judgment against the supplier, or date when the return was amended; and the level of any penalty or criminal conviction applied.
179. Note para. 11.
180. Note para. 11. In more detail at para. 12: "Since the transactions were entered into which gave rise to the OONC, the company's senior management, or key senior personnel with responsibility for tax matters, have changed and the new personnel have stated to the contracting authority that they will not engage in similar tax avoidance."
181. Para. 11.
182. Para. 12.
183. The Note states that HMRC have undertaken to provide support and advice to departments through the service desk where questions arise on tax specific matters. See para. 10.
184. With the exception of the exclusions for non-payment of tax or social security contributions. See Article 57(6) 2014 Directive, as implemented in Reg 57(13)-(17) 2015 Regulations. For a general discussion see Arrowsmith, *The Law of Public and Utilities Procurement* (n 13), paras. 12-107-12-111 on the discretionary grounds and 12-133-134 on the mandatory grounds. See also Graells, "Exclusion, Qualitative Selection and Short-listing in the New Public Sector Procurement Directive 2014/24" (n 25) pp.112-113.
185. Public Contracts Regulations 2015: New requirements relating to Pre-Qualification Questionnaires to help businesses access Public Sector contracts, Annex I.

to mandatory exclusions, a number of issues arise. First, the 2015 Regulations do not make reference to the important limitation contained in the 2014 Directive that an economic operator that has been excluded by final judgment from participation is not entitled to make use of the self-cleaning provision during the period of exclusion resulting from that judgment in the Member States where the judgment is effective.[186] It is not clear what rationale should exclude the possibility of an excluded economic operator being able to similarly rely on this provision. Second, the 2014 Directive appears to indicate that it is for Member States to decide whether to allow the individual contracting authorities to carry out the relevant assessment or to entrust this to other authorities on a central or decentralized level.[187] By contrast, the 2015 Regulations refer to a contracting authority's assessment of the evidence and its provision of a statement of the reasons for the decision but does not contain any reference to assessments by other authorities, although this possibility is likely.[188] UK Guidance published after entry into force of the 2015 Regulations indicates that the contracting authority's decision on considering the evidence is final.[189] It remains to be seen whether to what extent the UK will actively engage self-cleaning not least given that its resource implications for contracting authorities have not been fully discerned.

2.1.4. Grounds based on equal treatment and transparency

Beyond the grounds listed, the CJEU in *Fabricom* recognized the possibility to exclude an economic operator to ensure equal treatment and transparency, specifically when the economic operator has been involved in preparations leading to the award procedure.[190] The 2014 Directive as implemented in the 2015 Regulations expressly provides for permitted consultations prior to the launch of the award procedure, as well as provision to ensure that competi-

186. Article 57(6) 2014 Directive. For a discussion of this provision, see Graells, "Exclusion, Qualitative Selection and Short-listing in the New Public Sector Procurement Directive 2014/24" (n 25) p.113 who argues that self-cleaning should also be available in this instance.
187. Recital 109 as discussed in Arrowsmith, *The Law of Public and Utilities Procurement* (n 13), para. 12-109.
188. Reg 57(14) and (17) 2015 Regulations. It has been suggested that such reasons must be amenable to judicial review under the applicable rules of each Member State. See Graells, "Exclusion, Qualitative Selection and Short-listing in the New Public Sector Procurement Directive 2014/24" (n 25) p.113.
189. Public Contracts Regulations 2015: New requirements relating to Pre-Qualification Questionnaires to help businesses access Public Sector contracts, Annex I.
190. Joined Cases 21-02 and C-34/03 *Fabricom v Belgium* [2005] ECR I-01559.

tion is not distorted as a result of the economic operator's participation.[191] It is recalled that the 2014 Directive as implemented in the 2015 Regulations also provides for exclusion where a distortion of competition from the prior involvement of economic operators in the preparation of the procurement procedure cannot be remedied by other, less intrusive measures.[192] As a matter of UK policy, it had been relatively clear for some time that it was legitimate to conduct discussions with participants prior to launching an award procedure, subject to the requirement that any discussions must be conducted in accordance with the equal treatment principle[193] and which has been confirmed in UK case law.[194] However, UK policy and case law have not examined in any detail other issues concerning equal treatment and transparency in this context such as changes of consortia (*Makedoniko Metro*),[195] State aid (*Arge*),[196] the possibility of submitting additional bids, participating in several consortia[197] or other grounds.

2.2. Selection Criteria

Before examining UK law on selection criteria, this Section outlines certain exceptional instances in which the 2015 Regulations have deviated from a

191. Articles 40 and 41 2014 Directive as implemented in Regs. 40 and 41 2015 Regulations 2015. For general commentary, see Arrowsmith, *The Law of Public and Utilities Procurement* (n 13), paras. 7-60 – 7-65.
192. Article 57(1)(f) 2014 Directive as implemented in Reg. 57(8)(f) 2015 Regulations. For general commentary, See Arrowsmith, ibid 12-144.
193. See Procurement Policy Note, *Procurement Supporting Growth: Supporting Material for Departments*, Action Note 04/12, May 9, 2012. Discussed in Arrowsmith, para. 7-60.
194. *Excel Europe Ltd v University Hospitals Coventry and Warwickshire NHS Trust* [2010] EWHC 3332 (TCC). For a case commentary, see L Osepciu, "Lifting and autonmatic suspension: Excel Europe Ltd v University Hospitals Coventry and Warwickshire NHS Trust" (2011) 3 *PPLR* NA 120-124.
195. On which, see generally, Adrian Brown, "Case Comment: Post tender changes in the membership of a bidding consortium: case C- 57/ 01 Makedoniko" (2003) 3 *PPLR* NA56-59; Adrian Brown, "Green light to Thessaloniki metro contract, despite post-tender modifications: Commission press release IP /03/2003 of April 30, 2003" (2003) 4 *PPLR* NA90-91; Adrian Brown, "Case Comment: Inadmissibility of a challenge to the Commission's decision to close its file on Thessalonika Metro: Case T-202/02 Makedoniko Metro and Michaniki v Commission" (2004) 4 *PPLR* NA91-94 and Arrowsmith, para. 12-188.
196. For a discussion generally, see Arrowsmith, *The Law of Public and Utilities Procurement* (n 13), paras. 7-260-1, 12-12 and 12-139.
197. For a discussion generally, see Arrowsmith, *The Law of Public and Utilities Procurement* (n 13), para. 12-189.

copy-out of the 2014 Directive. On the day after entry into force of the 2015 Regulations, the UK Cabinet Office and Crown Commercial Service published guidance on the use of pre-qualification questionnaires for above and below thresholds.[198] These changes implement a number of recommendations identified in 2013 by Lord Young, the Prime Minister's advisor on small enterprise, in a published report entitled "Growing Your Business".[199] The Report proposed a number of recommendations primarily aimed at encouraging SME participation in public procurement processes, certain of which have been given effect in Part 4 of the 2015 Regulations.[200]

First, the Regulations provide that contracting authorities must have regard to any guidance issued by the Minister for the Cabinet Office in relation to the qualitative selection of economic operators.[201] The guidance is statutory but does not constitute a comprehensive guide to the law.[202] The Guidance provides that all public sector bodies subject to the guidance should adopt the set of standardized selection questions identified in the guidance when assessing supplier suitability and which are presented in the format of a pre-qualification questionnaire.[203] The Guidance identifies a number of general principles. For instance, the contracting authority should allow providers to self-certify that the exclusion grounds do not apply as well as ensure the relevance and proportionality of the questions relative to complexity and risk.[204] Further, general guidance is provided on application of the exclusion grounds, self-cleaning,

198. Public Contracts Regulations 2015: New requirements relating to Pre-Qualification Questionnaires to help businesses access Public Sector contracts, 27 February 2015.
199. The Rt Hon the Lord Young of Graffham, Growing Your Business, A Report on Growing Micro Businesses, May 2013.
200. See also the Small Business, Enterprise and Employment Act 2015.
201. Reg. 107(1) 2015 Regulations. According to Reg. 107(2) "qualitative selection" means the processes by which, in accordance with regulations 57 to 65, contracting authorities – (a) select economic operators to participate in procurement procedures; and (b) decide whether to exclude economic operators from such participation. According to Reg. 107(3), such guidance may, in particular, relate to – (a) the use of questionnaires for the purposes of qualitative selection, including the avoidance of burdensome, excessive or disproportionate questions; (b) the assessment of information relevant to qualitative assessment.
202. Public Contracts Regulations 2015: New requirements relating to Pre-Qualification Questionnaires to help businesses access Public Sector contracts, Annex I.
203. Ibid. According to the Guidance, contracting authorities should select from the bank of questions contained in the PQQ and not deviate from their wording. The Guidance also indicates that from 1 September 2015, any deviations are to be reported to the Crown Commercial Service.
204. Ibid.

assessment of economic and financial standing and technical and professional ability.[205] In addition, the 2015 Regulations provide that where a contracting authority conducts a procurement in a way which represents a reportable deviation from this guidance, the contracting authority must send a report to the Cabinet Office explaining the deviation.[206] For this purpose, something is only a reportable deviation if it falls within criteria laid down for that purpose in guidance issued.[207] The Guidance states that contracting authorities should select from the bank of prescribed core and additional questions contained in the standardized PQQ and not deviate from the wording in these questions.[208] The Guidance further states that there will be a limited number of circumstances where an authority may need to deviate from the wording of these questions but must be able to justify and variation if asked.[209] However, the Guidance does not indicate what might constitute a deviation from the wording sufficient to be determined reportable or the nature or extent of any justification required. The Guidance appears to indicate that *any* deviation, no matter how slight, is reportable. With regard to the sending of reports, the Guidance identifies that *any* deviations from the wording from the bank of questions are to be reported to the Crown Commercial Service within 30 days of the PQQ being available to candidates with a brief rationale explaining the reason(s) for deviation.[210] However, the report is said to be "for information only". Therefore, the consequences of the report are not specified.

The 2015 Regulations also contain a new prohibition on the use of a pre-qualification stage for most contracts below specified thresholds.[211] The 2015 Regulations provide that "a contracting authority shall not include a pre-qualification stage" for any below threshold contract.[212] Instead, a contracting

205. Ibid.
206. Reg. 107(4) 2015 Regulations.
207. Reg. 107(5) 2015 Regulations.
208. Public Contracts Regulations 2015: New requirements relating to Pre-Qualification Questionnaires to help businesses access Public Sector contracts, Annex I.
209. Ibid.
210. Ibid.
211. Reg. 109 to 112 2015 Regulations.
212. Reg. 107(1) and (2) 2015 Regulations further confirming Reg. 105(1) 2015 Regulations. A "pre-qualification stage" means "a stage in the procurement process during which the contracting authority assesses the suitability of candidates to perform a contract for the purpose of reducing the number of candidates to a smaller number who are to proceed to a later stage of the process." See Reg. 111(4) and Public Contracts Regulations 2015: New requirements relating to Pre-Qualification Questionnaires to help businesses access Public Sector contracts, para. 4.

authority may ask candidates to answer a "suitability assessment" but only if the question is both relevant to the subject matter of the procurement and proportionate.[213] A "suitability assessment question" means a question which relates to information or evidence which the contracting authority requires for the purpose of assessing whether candidates meet minimum standards of suitability, capability, legal status or financial standing,"[214] although these provisions do not refer to the format which the suitability questions must take.

The 2015 Regulations therefore appear to remove the possibility of a pre-qualification stage as it is conventionally understood in the UK. This is arguably a fundamental issue in the UK in light of UK practice's prior tendency to treat pre-qualification as a full and detailed stage in the procurement process.[215] Pre-qualification typically comprised two stages, namely questions prescribing minimum standards (to which a response is given) and, (only where those standards have been met), the submission of a tender. By contrast, it is not clear whether the approach under the 2015 Regulations provides that, where suitability assessment questions are used, they must be included in the invitation to tender. In which case, there may only be a single stage under which all economic operators contemporaneously respond to suitability questions prescribing minimum standards and submit a tender. It is unclear whether this removes the possibility to generate a shortlist from the pool of economic operators who exceed these minimum standards.

Importantly, the 2015 Regulations also explicitly require that "contracting authorities shall have regard to any guidance issued by the Minister for the Cabinet Office."[216] This may include guidance on how to establish and assess whether candidates meet requirements or minimum standards relating to suitability, capability, legal status and financial standing.[217] However, it should be observed that no separate guidance has been issued equivalent to that discussed above in relation to PQQ based assessments. The issued guidance simply reiterates that PQQs are not permitted for below threshold contracts but that suitability assessment questions may be used.[218] A further emphasis

213. Reg. 111(5) 2015 Regulations.
214. Reg. 111(6) 2015 Regulations.
215. I am grateful to Dr. Pedro Telles for this observation when commenting on an earlier draft of this Chapter.
216. Reg 111(7) 2015 Regulations.
217. Ibid.
218. Public Contracts Regulations 2015: New requirements relating to Pre-Qualification Questionnaires to help businesses access Public Sector contracts, Annex I.

on enforcement is also reinforced by a provision to the effect that where a contracting authority conducts a below threshold procurement in a way which represents a "reportable deviation" from the above guidance, the contracting authority must send a report to the Cabinet Office explaining the deviation.[219] Again, the same issues in relation to determining what constitutes a "reportable deviation" appears to arise concerning below threshold contracts.

2.2.1. Set of criteria: economic and financial standing, technical and professional ability and suitability

2.2.1.1. Suitability to pursue the professional activity

The 2015 Regulations implementing the 2014 Directive continue to provide that a contracting authority may require economic operators to be enrolled in one of the professional or trade registers kept in their Member State of establishment.[220] These provisions have not been the subject of litigation or detailed policy in the UK and are not considered further in this Chapter.

2.2.1.2. Economic and financial standing

In accord with the slight change in emphasis in 2014 Directive, the 2015 Regulations now go beyond providing means by which economic and financial standing may be proved to provision on requirements for economic and financial standing, namely, requirements concerning minimum yearly turnover, information on annual accounts and an appropriate level of professional risk indemnity insurance.[221] Although economic and financial standing has not been the subject of extensive litigation in the UK, the UK Government has been particularly active in its promotion of policy guidance in this area. In 2013, the UK published Procurement Policy Note – Supplier Financial Risk Issues.[222] This responds to concerns raised by suppliers through the

219. Reg. 111(8).
220. Reg. 58(5) 2015 Regulations 2015 implementing Article 58(2) 2014 Directive. These registers are listed at Schedule 5 of the 2015 Regulations. See formerly, Article 46 2004 Directive as implemented in Reg. 23(4)(j) 2006 Regulations. For general commentary, see Arrowsmith, paras. 12-53-12-56.
221. Article 58(3) 2014 Directive, formerly Article 47 2004 Directive as implemented in Reg. 58(1) and (7)-(14) 2015 Regulations, formerly Reg. 24 2006 Regulations. See generally, Arrowsmith, paras. 12-10-12-30; Graells, "Exclusion, Qualitative Selection and Short-listing in the New Public Sector Procurement Directive 2014/24" (n 25) p.116-117.
222. Procurement Policy Note – Supplier Financial Risk Issues Information Note 02/13 18 February 2013.

Cabinet Office's "Mystery Shopper Scheme"[223] in particular, regarding the use of financial information required by authorities; the use of credit rating reports; contract limits set by turnover and business insurance requirements.[224] Further, a Mutuals Taskforce Report has also indicated that the Cabinet Office should issue guidance setting out clear expectations in respect to the assessment of financial standing.[225]

In general terms, the Procurement Policy Note confirms the need to ensure that the financial assessment of potential providers complies with EU procurement law.[226] With regard to specific issues, it states that, where appropriate, potential providers should be requested to provide accounts for the past two (as opposed to the typical three) years of trading.[227] In the absence of audited statements, other information should be requested that is considered sufficient for assessment purposes.[228] The Procurement Policy Note further states that potential providers such as SMEs and public service mutuals may have been recently formed and thus unable to provide accounts for the previous two years or to provide any filed accounts at all.[229] Authorities are therefore urged to exercise flexibility towards all potential providers when specifying their financial information requirements.[230] In addition, the Procurement Policy Note may also have its eye on potential future developments in practice concerning the use of credit rating reports as such assessments become increasingly uniform and standardized, acknowledging that these are not necessarily a substitute for a fuller examination where information is incomplete.[231]

223. Details of this scheme are available at: http://www.cabinetoffice.gov.uk/content/cabinet-office-mystery-shopper-scheme [accessed 23 June 2016].
224. Procurement Policy Note – Supplier Financial Risk Issues (n 225) para. 1.
225. A Mutuals Taskforce Report: Public Service Mutuals – The Next Steps (June 2012).
226. Procurement Policy Note – Supplier Financial Risk Issues (n 225) para. 6.
227. Ibid para. 9.
228. Ibid. At para. 11, the PPN identifies a non-exhaustive list of other information that may demonstrate the potential provider's economic and financial standing. These include: parent company accounts (if applicable); deeds of guarantee; bankers statements and references; accountants' references; management accounts; financial projections, including cash flow forecasts; details and evidence of previous contracts, including contract values and capital availability.
229. Ibid para. 10.
230. Ibid.
231. Ibid para. 13. As the PPN observes: "Information from credit rating reports may not be available for a particular supplier, or may not be complete or up to date, which will influence the report conclusions. For example, new potential providers or foreign parent companies may not have been assessed or parent companies may not have been

In addition, the Procurement Policy Note also deals with turnover requirements. It states that Departments using turnover requirements have tended to apply a maximum percentage threshold of "annual contract value to turnover".[232] This reference is unclear in light of the fact that the 2014 Directive as implemented in the 2015 Regulations states a general rule that the minimum yearly turnover must not exceed two times the "estimated contract value".[233] This appears to suggest that the maximum turnover limit under the 2014 Directive relates to the total value of the contract rather than its annual value.[234] If so, in some cases, a requirement for twice the value will be disproportionately high, and may be unlawful under the general rule requiring requirements to be proportionate.[235] Alternatively, it is possible that the rule is to be interpreted as requiring a limit no greater than two times the annual value of the contract.[236] It has been suggested that this seems inappropriate given that many long-term contracts require significant investment which far exceeds the capability of a firm with just two times the turnover of the annual contract value.[237] On balance, it has been argued that the better view is that the 2014 Directive refers to two times the total value of the contract.[238] UK policy guidance on qualitative selection issued after entry into force of the 2015 Regulations simply refers to "the contract value".[239] In any event, the Procurement Policy Note indicates that whilst turnover may be a useful indicator, financial position, capacity, capability and dependency should all be considered as part of the appraisal.[240] If a potential provider is not selected, there must be clear and demonstrable evidence of financial risks, capacity or capability issues over and above a simple turnover or ratio measure.[241]

2.2.1.3. Technical and professional ability

As indicated above in relation to economic and financial standing, the 2015 Regulations have adopted the slight change of emphasis in the 2014 Directive

included in an assessment at all. The reports may also be sensitive to market information that could change at short notice."

232. Ibid.
233. Article 58(3) 2014 Directive as implemented in Reg. 58(9) 2015 Regulations.
234. Arrowsmith, The Law of Public and Utilities Procurement (n 13), para. 12-16.
235. Ibid.
236. Ibid.
237. Ibid.
238. For criticism of this rule, see Ibid para. 12-16.
239. Ibid.
240. Procurement Policy Note – Supplier Financial Risk Issues (n 225), para. 14.
241. Ibid.

from provision on means by which technical and professional ability may be proved to provision on requirements for technical and professional ability.[242] However, one issue of uncertainty in the 2014 Directive as implemented in the 2015 Regulations concerns the possibility for a contracting authority to assume that an economic operator does not possess the required professional abilities where it has established that the economic operator has "conflicting interests" which may negatively affect contract performance.[243] It has been suggested that further clarification could have been provided given reference to the concept of "conflict of interest" elsewhere in the 2014 Directive.[244] However, it is submitted that "conflicting interests" is likely to concern practical issues of conflict, for example, logistical issues regarding priority or timing of performance of other contracts which could potentially affect performance of the contract to be awarded.

A small number of UK cases at the High Court and Court of Appeal have dealt with aspects of technical and professional ability. Certain cases have confirmed now well-established principles of EU law, for example, the requirement that a contracting authority may consider technical and professional capabilities only in so far as these relate to the contract(s) being awarded in that procurement.[245] Further, a contracting authority must formulate its criteria in a manner which enables it to effectively verify whether the criteria are

242. Article 58(4) 2014 Directive, formerly Article 47 2004 Directive as implemented in Reg 58(1) and (15)-(18), formerly Reg. 25 2006 Regulations. See generally, Arrowsmith, *The Law of Public and Utilities Procurement* (n 13), paras. 12-31-12-52 and Graells, "Exclusion, Qualitative Selection and Short-listing in the New Public Sector Procurement Directive 2014/24" (n 25) pp.117-118.
243. Article 58(4) 2014 Directive as replicated in Reg 58(17) 2015 Regulations.
244. Article 24 2014 Directive. See Graells, Graells, "Exclusion, Qualitative Selection and Short-listing in the New Public Sector Procurement Directive 2014/24" (n 25), p.118.
245. See, for example, *R v Secretary of State for the Environment Ex p. Harrows London Borough Council* [1997] 3 *C.M.L.R.* 870 (1997) 29 H.L.R. In that case, the High Court held that an authority awarding a contract for housing management services, and contemplating selling the housing to the contracting partner in future, could not impose a requirement that tenderers should be qualified to operate social housing (including being legally recognised as potential owners of social housing), since the contract required only the management, and not the purchase, of the housing stock. Such a requirement did not relate to the subject matter of the contract. See also Article 44(2) 2004 Directive transposed in 2006 Regulations, Reg. 15(12) for open procedures, Reg. 16(12) for restricted procedures, Reg. 17(14) for negotiated procedures and Reg. 18(15) for competitive dialogue. For general commentary, see Arrowsmith, *The Law of Public and Utilities Procurement* (n 13), paras. 12-11 and 12-37.

satisfied.[246] UK case law has also addressed an issue that is not specifically addressed by the Directive or Regulations, namely that a contracting authority may exclude a contractor for alleged inadequacies in its health and safety policy on the basis that this is an aspect of technical ability.[247]

Whilst the UK case law has generally been limited, the UK Government has sought to develop a policy approach to the issue of past performance with the publication of Policy Notes on Bidder's past performance[248] and Strategic Supplier Management.[249] In the UK, it had been observed that there has not always been a consistent approach to the consideration of past performance of bidders to ascertain whether they can be relied on to perform the obligations under the contract to be awarded.[250] The Procurement Policy Note – Taking Account of Bidders' Past Performance sets out the Government's view of how Departmental Bodies should apply minimum standards for reliability based on past performance. The Policy applies to Departmental bodies when procuring in respect of information and communications technology, facilities management or business processing outsourcing with a total anticipated contract value of £20 million or greater, although the principles deriving from the Policy can be applied to other contracting authorities and procurement outside its scope.[251] It has been suggested that the general purpose

246. Easycoach Ltd v Department for Regional Development [2012] NIQB 10.
247. *General Building and Maintenance v Greenwich Borough Council* [1993] I.R.L.R. 535, QBD. For useful commentary, see S Arrowsmith, "Case Comment: Restricted awards procedures under the Public Works Contracts Regulations 1991: a commentary on General Building and Maintenance v Greenwich Borough Council" (1993) 4 *PPLR*, CS92-103 and Arrowsmith, *The Law of Public and Utilities Procurement* (n 13), para. 12-34.
248. Procurement Policy Note – Taking Account of Bidders' Past Performance, Action Note 09/12, 08 November 2012.
249. Strategic Supplier Risk Management Policy, 8 November 2012.
250. Procurement Policy Note – Taking Account of Bidders' Past Performance, Action Note 09/12, 08 November 2012, para. 12. For useful commentary, see N Pourbaix, "United Kingdom: Procurement Policy Note – Taking Account of Bidders' Past Performance and related Strategic Supplier Risk Management Policy" (2013) 3 *PPLR* NA79-83.
251. Note, para. 2 and 3. The Policy also applies to both owners and users of Framework Agreements in so far as (i) they covers goods and/or services in respect of information and communications technology, facilities management or business processing outsourcing and (ii) they may involve an individual Call-off Agreement for such matters with an anticipated value of £20 million or greater. See para. 43.

of the PPN appear to be largely consistent with the 2006 Regulations and ECJ case law, in particular, *Forposta*.[252]

Focusing generally on the PPN on Past Performance, this Policy identifies a number of general principles which include ensuring that minimum standards based on the principal goods and/or services delivered in the previous three years are stated in the OJEU notice.[253] In terms of evidence required, each bidder should provide a list comprising a statement of the principal goods and/or services provided in the previous three years.[254] Departmental bodies should consider whether this statement should be limited to particular categories of such principal goods sold and/or services provided, so as to provide more focused evidence and a less demanding requirement for information on bidders.[255] In addition, the Policy Note seeks to encourage attempts by each bidder to obtain certificates from those to whom the goods and/or services on the list were provided.[256] It precedes that the Policy envisages that Departmental Bodies should (in their capacities as customers) provide certificates to their suppliers on request.[257] A copy of each certificate should also be sent to the Cabinet Office that intends to establish a central repository of certificates and other information that will enable Departmental Bodies, where appropriate, to verify information provided by bidders to show that they meet the minimum standards of reliability.[258] Where a Departmental Body is unable to certify that the supplier has performed satisfactorily, the Departmental Body should give reasons as to why performance was not in accordance with the contract.[259] If any such Certificate cannot be obtained, the supplier may, itself, provide the certification.[260] If the Certificate does not

252. Pourbaix, "United Kingdom: Procurement Policy Note – Taking Account of Bidders' Past Performance and related Strategic Supplier Risk Management Policy" (n 253), 80.
253. Para. 22.
254. Para. 23 confirming the then Article 48(2)(a)(ii) 2004 Directive as implemented in Reg. 25(2)(c) 2006 Regulations. See generally, Arrowsmith, *The Law of Public and Utilities Procurement* (n 13), para.12-50.
255. Ibid.
256. Para. 24.
257. Para. 29.
258. Para.17 and 29.
259. Para. 30. The reasons may include: (a) delays in providing the goods and/or services in accordance with the contract; (b) failure to supply all the goods and/or services in accordance with the scope set out in the contract; (c) failures to meet any service levels and/or supply the goods and/or services in accordance with quality standards; (d) any other failure by the supplier to comply with its obligations under the contract.
260. Ibid.

state that the goods and/or services have been provided satisfactorily in accordance with the terms of the contract under which they were to be provided, bidders should provide information to show that the reason(s) for such failure will not recur in the performance of the contract being procured.[261] This mechanism is questionable for a host of reasons not least that it is questionable whether it provides an accountable or reliable means of verification given that it relies almost exclusively on a customer focused assessment (which may be biased) and, in default, information (effectively self-cerification) provided by the bidder.[262] This is so notwithstanding that the Policy Note emphasises the need for verification to accord with principles of non-discrimination, equal treatment, transparency and proportionality.[263] Practically, there may also be insufficient incentive for a body to assist in this process. As with a number of the UK's recent policy initiatives, there appears to be an increasing expectation that contracting authorities and contractors are able to effectively exchange information on sufficiently objective terms without a full understanding of the resource implications.

3. Procedures for Evaluating/Means of Proof

The preceding Sections have indicated a discernable policy shift in the UK towards standardizing, streamlining or abolishing excessive PQQ requirements and encouraging the use of self-certification to prove compliance with qualitative selection criteria. The 2014 Directive as implemented in the 2015 Regulations now provides for self-declaration of compliance through the European Single Procurement Document.[264] In addition, the 2014 Directive as implemented in the 2015 Regulations also requires contracting authorities to obtain the information they need from national databases in certain instances as opposed to directly from the economic operator and to ensure that such databases may be consulted under the same conditions by contracting authori-

261. Para. 25.
262. See generally Pourbaix, "United Kingdom: Procurement Policy Note – Taking Account of Bidders' Past Performance and related Strategic Supplier Risk Management Policy" (n 253), 81.
263. Paras. 32, 33 and 36
264. Article 59(1) 2014 Directive as implemented in Reg. 59 2015 Regulations. For useful commentary on self-declaration under the 2014 Directive, see Arrowsmith, *The Law of Public and Utilities Procurement* (n 13), paras. 12-154-12-164.

ties of other Member States.[265] It has been suggested that this is likely to be of less importance in the UK (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.[266] This Section focuses on a number of discrete issues that have arisen in the UK with regard to proving compliance with the qualitative selection criteria.

3.1. Exclusion grounds

With regard to means of proof concerning the mandatory exclusion grounds, the 2014 Directive as implemented in the 2015 Regulations provides rules which are effectively the same as those under the 2004 Directive as implemented in the 2006 Regulations.[267] In the UK, judicial and administrative authorities do not issue documentary evidence to this effect and so the authority must accept, as an alternative, a declaration of compliance.[268] However, an issue which may arise concerns the reference to a contracting authority's awareness of relevant convictions. According to the 2014 Directive as implemented, contracting authorities must exclude an economic operator where they have established, by verifying in accordance with the Directive,[269] or were are "otherwise aware" that the economic operator has been convicted of a listed offence.[270] Previously, the 2004 Directive referred to exclusion of any candidate or tenderer who has been the subject of a conviction by final judgment, of which the contracting authority is aware, for one or more of the reasons listed.[271] The 2006 Regulations required exclusion when the contracting authority had "actual knowledge" of the relevant conviction.[272] In light of these references, it had been questioned whether the contracting authority was subject to a duty to make enquiries of firms, or seek other evidence, on

265. Article 59(5) 2014 Directive as implemented in Reg. 59(11) 2015 Regulations.
266. Arrowsmith, The Law of Public and Utilities Procurement (n 13), para. 12-166.
267. See Article 60(2) 2014 Directive and Reg. 60(1) and (4) 2015 Regulations. Formerly, Article 45(1) and 45(3) 2004 Directive and Reg. 23(5)(a) 2006 Regulations 2006. See generally, Arrowsmith, *The Law of Public and Utilities Procurement* (n 13) paras. 12-131-132.
268. Reg 23(5)(c) 2006 Regulations 2006 and Reg. 60(5) 2015 Regulations.
269. under Articles 59 (European Single Procurement Document), 60 (means of proof) and 61 (e-Certis) 2014 Directive.
270. Article 57(1) 2014 Directive as implemented in Reg. 57(1) 2015 Regulations. See previously Article 45(1) 2004 Directive as implemented in Reg. 23(1) 2006 Regulations.
271. Article 45(1) 2004 Directive.
272. Reg. 23(5)(c) 2006 Regulations.

whether a conviction exists or to seek any evidence to establish the position.[273] It had been suggested that it is arguable that it is necessary under the 2004 Directive at least to ask economic operators themselves to confirm that they do not have relevant convictions, and to exclude those who do not confirm this, and that contracting authorities are required to seek evidence of convictions at least when they have, or possibly should have, suspicions of a conviction.[274] The 2006 Regulations did not, on their face, impose any obligation to enquire about, or investigate, relevant convictions.[275] Previously, the OGC had published guidance on mandatory exclusions which stated the view that these provisions do not involve any legal obligation to ask the economic operator whether it has a conviction or to seek evidence.[276] However, it is notable that this guidance was amended in 2010 in line with the view of the 2004 Directive, and which states that authorities should seek a declaration from firms that they have no relevant convictions.[277] Further, the Guidance states that an authority should seek further clarification or information if it believes a response is incomplete or unclear.[278] However, there is no duty to acquire actual evidence from every tenderer, which would be "unnecessarily burdensome".[279] The 2014 Directive (and thus the 2015 Regulations) does not address this issue but merely states the evidence that may be considered.

273. Arrowsmith, The Law of Public and Utilities Procurement (n 13), para. 12-129.
274. Ibid
275. The 2006 Regulations merely stated that authorities "may" require firms to supply evidence of criminal convictions in the form of an extract from the judicial record or equivalent or, where a country does not issue such documents, a solemn declaration. See Reg. 23(5) 2006 Regulations. It was also provided that a contracting authority "may" apply to the relevant competent authority to obtain further information regarding the economic operator and, in particular, details of the conviction if the authority considers it needs such information to decide on any mandatory exclusion. See Reg. 23(3) 2006 Regulations.
276. "There is no requirement within the Regulations proactively to seek "actual knowledge"". See para. 3.2 of the original January 2006 guidance prior to its amendment in 2010
277. Section 3.2 which further states: "The declaration should be directed at the economic operator as a corporate entity and to all those who represent the economic operator. This could include the directors of a company, the partners of a firm and/or those in an equivalent position, or senior managers who have "powers of representation, decision or control".
278. Section 4.
279. Ibid.

To this extent, it has been suggested that the position thus appears to be the same under the 2014 Directive as under the 2004 Directive.[280]

With regard to the discretionary grounds for exclusion, again, the 2014 Directive as implemented in the 2015 Regulations provide rules regarding means of proof which do not radically differ from those under the 2004 Directive and 2006 Regulations.[281] To the extent that it is only required that the specific ground be established (as opposed to requiring specific means of proof), reference should be made to discussion in Section 2 above. However, one observation can be made with regard to exclusion on grounds of bankruptcy or related proceedings. The 2014 Directive provides for the possibility that Member States may require or may provide for the possibility that the contracting authority does not exclude an economic operator where it has established that the economic operator will be able to perform the contract, taking into account the applicable national rules and measures on the continuation of business […]."[282] Whilst this may be considered an important limitation to this exclusion ground,[283] the 2015 have not expressly incorporated this limitation for reasons which are not apparent.

3.2. Qualitative Selection

As indicated above, similar to the position in relation to the exclusion grounds, the 2014 Directive as implemented in the 2015 Regulations provides for listed information that may be required.[284] This Section considers certain

280. Arrowsmith, *The Law of Public and Utilities Procurement* (n 13) para. 12-130.
281. For a discussion of the means of proof for each individual exclusion, see Arrowsmith: para. 12-100 (violation of environmental/social obligations); para. 12-74 (bankruptcy); para. 12-77 (conviction of an offence relating to professional conduct); para. 12-86 (grave misconduct); para. 12-102-3 (agreements aimed at distorting competition); para. 12-143 (conflicts of interest); para. 12-144 (distortion of competition resulting from prior involvement); para. 12-105-106 (deficient performance); para. 12-97 (misrepresentation); para. 12-145 (undue influence); para. 12-91-2 (social security contributions and tax).
282. Article 57(4) 2014 Directive.
283. See Arrowsmith, *The Law of Public and Utilities Procurement* (n 13), para 12-75.
284. Formerly set out in the main text of the 2004 Directive in Article 47(1) as implemented in Reg 24 (now reg. 60(6) (economic and financial standing); Article 48(2) as implemented in Reg 24(2)(b)-(0) (now Reg 60(9) (technical and professional ability). For general commentary on the means of proof under these grounds see Arrowsmith, paras. 12-22 et seq (Information for proving financial and economic standing); 12-29 et seq: formulation and disclosure of the criteria and methodology for assessing financial and economic standing; 12-42 et seq: information for assessing technical and professional ability; 12-48 et seq Details of the listed information/criteria for as-

issues that have arisen in domestic law concerning the assessment of information, correction of errors concerning selection information, verification of qualification criteria and the conduct of due diligence exercises.

3.2.1. Information for assessing technical and professional ability

A small number of English cases have pronounced on the information that may be used to assess technical and professional ability.[285] The 2014 Directive, as implemented in the 2015 Regulations, lists certain information that authorities may use to assess technical and professional ability and which may be requested from economic operators.[286] This information may be expressly requested from economic operators. However, domestic case law has also confirmed that such information may also be used if it comes into the authority's possession in some other way.[287] For example, the contracting authority may, in principle, consider information about performance on past contracts with the contracting authority itself, based on its own knowledge, since the contracting authority is permitted to demand information on past contracts.[288] Further, it is recalled that UK case law has confirmed the possibility of verifying compliance with health and safety requirements.[289] It has also been held that in order to assess health and safety issues, authorities can demand a firm's health and safety policy statement, under the rules which allow authorities to seek information "supplementary" to that listed.[290] In this regard, it has been suggested that authorities should be limited to considering health and safety only in so far as evidenced by previous contracts, or by the

sessing technical and professional ability; 12-51 et seq Formulation and disclosure of the criteria and methodology for assessing technical capacity/ability

285. See generally, Arrowsmith, *The Law of Public and Utilities Procurement* (n 13), paras. 12-47-12-50.
286. This is now set out in Annex XII (Pt II), rather than in the text of the Directive itself which had previously been the case. See formerly, Article 48(2) of the 2004 Public Sector Directive and Public Contracts Regulations 2006, regs 25(2)(b)-(o).
287. R v Tower Hamlets London Borough Council Ex p. Luck (the first Luck case), judgment of October 30, 1998, HC, per Richards J (for appeal see (1999) 15 Const. LJ 235, CA) and Luck (t/a G Luck Arboricultural & Horticultural) v Tower Hamlets London Borough Council (the second Luck case) [2002] EWHC 717 (QB) per Judge MacDuff at para. 116 (and for appeal see [2003] EWCA CIv 52. Cited in Arrowsmith, *The Law of Public and Utilities Procurement* (n 13), para. 12-46 fn 130.
288. See the first and second *Luck* cases. Cited in Arrowsmith, ibid.
289. General Building and Maintenance v Greenwich Borough Council (n 250).
290. Arrowsmith, *The Law of Public and Utilities Procurement* (n 13), para. 12-50.

grounds of exclusion relating to professional honesty, solvency and reliability.[291]

3.2.2. Correction of errors concerning selection information

The 2014 Directive, as implemented in the 2015 Regulations, now provides that where information or documentation to be submitted by economic operators is, or appears to be, incomplete or erroneous, or where specific documents are missing, contracting authorities may request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation, provided that such requests are made in full compliance with the principles of equal treatment and transparency.[292] Prior to the adoption of the 2014 Directive, one issue that had been raised by the UK case law concerned the question of whether economic operators may amend or supplement information provided for selection purposes after the deadline for submission. It is recalled that the ECJ in *Manova* has stated that the case law on correction of tenders provides guidance on correction of selection information.[293] As a matter of domestic law, in *Deane Public Works Ltd v Northern Ireland Water*, the High Court of Northern Ireland appeared to endorse the view that there is no general duty to permit correction.[294] However, this leaves the question as to whether an authority may allow correction if it wishes to do so.

The case of *William Clinton (t/a Oriel Traning Services) v Department for Employment and Learning/Department of Finance and Personnel* usefully

291. Arrowsmith ibid.
292. Article 56(3) 2014 Directive as implemented in Reg. 56(4) 2015 Regulations. For general commentary on Article 56(3) 2014 Directive, see Arrowsmith, ibid paras 7-98, 7-161, 7-292, 8-41, 9-36. See also A Sanchez Graells, "Exclusion, Qualitative Selection and Short-listing in the New Public Sector Directive 2014/24" (n 25), 102-104.
293. Case C-336/12 *Danish Ministry of Science, Innovation and Higher Education v Manova A/S* CJ, judgment of October 10, 2013, para. 38. See generally, Arrowsmith, ibid paras. 7-115 and A Brown, "Case Comment: The Court of Justice rules that a contracting authority may accept the late submission of a bidder's balance sheet, subject to certain conditions: Case C-336/12 Danish Ministry of Science, Innovation and Higher Education v Manova A/S" (2014) 1 *P.P.L.R.* NA1-NA3.
294. *Deane Public Works Ltd v Northern Ireland Water Ltd* [2009] NICh 8. Arrowsmith suggests that there will be a duty in very limited cases under the principle of proportionality which will arise when, *inter alia*, it can be established from the application documents themselves what the error is and what the correct content of the documents should be. See Arrowmisth, ibid para. 7-115.

illustrates this difficulty.[295] This case concerned an appeal from the High Court decision[296] in which Clinton successfully challenged the conduct of a procurement of publicly funded apprenticeship programmes in Northern Ireland. The claimant's bid had been rejected at qualification or selection stage. The Department notified the claimant that it had not satisfied one relevant criteria which required the economic operator to demonstrate necessary experience of delivery of high qualify programmes through the use of examples. The claimant was notified that the submission contained "insufficient evidence" and failed to provide specific data in respect of achievements, success rates or destinations into positive outcomes. The claimant disputed that this information was required and that had this been required, it would have provided this information. The appeal was dismissed on the ground that the wording of the selection criteria were not sufficiently clear and transparent.[297] However, the Court of Appeal also considered the extent of any obligation to seek clarification of information in light of the fact that the Department sought further information from 13 tenderers not including the claimant. In this regard, Girvan LJ considered that the Department should have sought the information which it had expected to be included in Clinton's tender.[298] By contrast, Sir Anthony Hart referred to the ECJ decision in *SAG ELV Slovensko*[299] in which it was held that the Directive did not "preclude, in particular, the correction or amplification of details of a tender where appropriate, on an exceptional basis, particularly when it is clear that they require mere clarification, or to correct obvious material errors".[300] According to Sir Anthony Hart, subsequent submission of the data in issue could not be characterized as either mere clarification, or relate to "obvious material errors", because the

295. *William Clinton (t/a Oriel Training Services) v Department for Employment and Learning* [2012] EWHC 2. For general commentary, see P McGovern, "Case Comment: United Kingdom – procurement and competition law: the case of William Clinton trading as Oriel Training Services v Department for Employment and Learning and Department of Finance and Personnel" (2013) 3 *PPLR* NA73-75.
296. Clinton (t/a Oriel Training Services) v Department for Employment and Learning [2012] NIQB 2. For commentary, see P McGovern, "Case Comment: Selection and award criteria: Clinton (t/a Oriel Training Services) v Department for Employment and Learning (2012) 4 *PPLR*, 215-219.
297. Para. 37.
298. Para. 41.
299. C-599/10 *SAL ELV Slovensko*, judgment of 29 March 2012, para. 40. This judgment was not available to the trial judge because judgment in *Slovenko* was given after the judgment at trial.
300. Para. 59 citing C-599/10 *SAL ELV Slovensko*, judgment of 29 March 2012, para. 40.

absence of the data was fundamental to the validity of the tender.[301] On this basis, had the Department contacted the claimant and asked for the information, it would, in reality, have led to the submission of a new tender, thereby contravening the test in *Slovenko*.[302] Morgan LCJ agreed.[303] It has been suggested that to the extent that these remarks might suggest that information can never be submitted after the deadline, they are not correct in light of *Manova* but may be correct in relation to the specific facts of *William Clinton*, on the basis that the data in issue there takes time to compile and there may thus be an advantage gained by late submission.[304]

Another relevant principle confirmed in UK case law is that where there is an application to be invited to tender, the principle of equal treatment will require that applicants in a comparable position be treated in the same way, those in a comparable position being all those who submit applications with comparable errors/omissions.[305]

3.2.3. Verification of qualification criteria

The 2014 Directive, as implemented in the 2015 Regulations, provides that before awarding a contract, the authority must have verified that the tenderer is not subject to exclusion and meets the qualification requirements.[306] However, this does not deal with the nature or extent of verification and thus merely entails that the contracting authority's chosen verification process must be followed prior to the award.[307] It is recalled that in *EVN/Weinstrom*, the ECJ stated that entities may not use an award criterion which is not accompanied by requirements which permit information to be verified.[308] Further, an entity may not use a criterion that "it neither intends nor is able to verify".[309] However, it is not clear how much discretion an entity enjoys in deciding on the extent of investigations. It has been suggested that it seems

301. Para. 60.
302. Ibid.
303. Para. 84.
304. Arrowsmith, *The Law of Public and Utilities Procurement* (n 13), para. 7-116.
305. Arrowsmith, *The Law of Public and Utilities Procurement* (n 13), para. 7-117. See Deane Public Works Ltd v Northern Ireland Water Ltd 2009] NICh 8 and William Clinton (t/a Oriel Training Services) v Department for Employment and Learning [2012] EWHC 2 where McCloskey J concluded that there was a violation. This particular issue was not considered by the Court of Appeal.
306. Article 56(1) 2014 Directive as implemented in Reg 56(1) 2015 Regulations.
307. Arrowsmith, para 12-167.
308. C-448/01 *EVN and Wienstrom* [2003] ECR I – l4527, para. 52.
309. Ibid, para. 51.

likely that authorities probably enjoy significant discretion over the extent of verification undertaken in each case in accord with the proportionality principle.[310] These principles were applied in domestic law in *Public Interest Lawyers v Legal Services Commission*.[311] This case is said to support the view that authorities enjoy significant flexibility in establishing the degree of verification needed in specific cases.[312] This case concerned a procurement procedure conducted by the Legal Services Commission for Part B services relating to the provision of legal services in public law and mental health law. As a result of the procurement process, a number of existing providers received fewer new contracts than anticipated. Public Interest Lawyers challenged the procurement process on grounds *inter alia* that the Legal Services Commission had acted unfairly, unlawfully, and in breach of the duties of equal treatment and transparency by failing to take adequate steps to verify that successful bidders satisfied all criteria. Specifically, the contract required tenderers to have supervisory staff that met certain quality standards. To this effect, tenderers were required to complete a form that provided for self-certification of certain matters.

First, Cranston J rejected the submission that *EVN/Wienstrom* had no application because in that case the criterion could not be verified whereas in the present case it had not been suggested that the criteria could not be verified, the basis of challenge rather concerning the manner in which it was proposed to verify compliance with the criteria.[313] Cranston J derived from *EVN/Wienstrom* that equal treatment applies whether or not the public authority is able to verify the criteria and that if the contracting authority is able but omits to do so, that is as much a breach of duty as if it sets criteria which cannot be verified.[314]

Second, Cranston J determined that no objection could be taken to self-certification and which thus may constitute a sufficient form of verification. Specifically, the Legal Services Commission was entitled to the view that it

310. Arrowsmith, *The Law of Public and Utilities Procurement* (n 13), para. 7-210 who considers relevant factors to include cost to both the contracting authority and economic operators, the importance of verification, and whether there is any reason to suspect that the information is false. See also para. 12-167.
311. *Public Interest Lawyers v Legal Services Commission* [2010] EWHC 3277. For a general discussion of this case, see Arrowsmith, para 7-211. For commentary on the case, see P Henty, "Case Comment: Public Interest Lawyers v Legal Services Commission" (2011) 3 PPLR NA 97-99.
312. Arrowsmith, *The Law of Public and Utilities Procurement* (n 13), para. 12-167.
313. Para. 63.
314. Ibid.

was legitimate, initially in the first instance, to rely on statements made by professional persons who are bound by obligations of integrity and that it would not be a sensible use of resources to seek to independently verify compliance at that stage.[315]

Third, however, he determined that verification was deficient in this case such as to constitute a violation of equal treatment. One reason concerned the fact that verification was not completed at the time the contracts were entered.[316] Additionally, the self-certification form did not require confirmation of certain facts which appeared to constitute standards that were set in the contract and whilst the form may have verified compliance with a necessary standard, it did not ensure that the requirements of the contract itself were met. Therefore, simply being asked to declare in general terms that the quality standards were met was an insufficient assurance of compliance.[317] Therefore, UK law confirms that whilst contracting authorities have considerable flexibility as to the choice and means of verification, it must be conducted in accord with EU Treaty principles.

4. Reliance on the Capacities of other Entities

The issue of the extent to which economic operators may rely on the capacities of other entities has not been the subject of extensive litigation in the UK. However, there has been some consideration of the *Ballast Nedam I* jurisprudence.[318] It is recalled that in *Ballast Nedam I*, the ECJ ruled that in considering the position of an economic operator in a group, the contracting authority must take account of companies belonging to the group where the economic operator "actually has available the resources of those companies for carrying out the work".[319] The 2014 Directive as implemented in the 2015 Regulations continues to confirm that an economic operator may rely on any appropriate means to prove to the contracting authority that they will have the necessary

315. Para. 64.
316. Para. 65.
317. Para. 65.
318. Case C-389/92 *Ballast Nedam Groep NV v The State (Belgium)* [1994] ECR I-01289. See also Case C-5/97 *Ballast Nedam Groep NV v The State* [1997] ECR I-07549.
319. Ibid.

resources at their disposal.[320] Further, an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities to prove economic and financial standing and technical and professional ability, regardless of the legal nature of the links which it has with them.[321] In addition, the 2014 Directive as implemented in the 2015 Regulations also continues to confirm that a group of economic operators[322] may rely on the capacities of participants in the group or of other entities.[323] ECJ case law will continue to be relevant in interpreting this provision.[324]

With regard to UK case law, *Ballast Nedam* was considered in relevant part in the case of *Harmon CFEM Facades (UK) Ltd v The Corporate Officer of the House of Commons*.[325] The case concerned a contract for fenestration work on a new parliamentary building for the House of Commons. One relevant claim raised concerned the fact that Harmon CFEM Facades (UK) Ltd (the claimant bringing the action) was not the same legal entity that had completed the pre-qualification questionnaire earlier in the procedure, having been completed by another company within the same group, Harmon Contract (UK) Ltd. The contracting authority was only notified subsequently that it was proposed that Harmon CFEM Facades (UK) Ltd should submit a tender and perform the contract if successful. It was argued that because Harmon CFEM Facades (UK) Ltd was not the original participant in the procurement, it was not a "contractor" for the purposes of the then Public Works Contracts

320. Article 60(1) 2014 2014 Directive as implemented in Reg 60(3) 2015 Regulations. It has been suggested that this was formerly implicit in Article 47(2) 2004 Directive. See Arrowsmith, *The Law of Public and Utilities Procurement* (n 13), para. 12-20.
321. Article 63(1) 2014 Directive as implemented in Reg.63(1) 2015 Regulations. See previously Article 47(2) 2004 Directive and Reg. 24(4) 2006 Regulations. For general commentary, see Arrowsmith, Ibid para. 12-19-12-21.
322. Article 19(2) 2014 defines "groups of economic operators". This definition is replicated in Reg. 19(3) 2015 Regulations. See formerly Article 4(2) 2004 Directive and Reg. 28 2006 Regulations.
323. Article 63(1) 2014 Directive 2014/24/EU as regulated in Reg. 63(6) 2015 Regulations. See previously, Article 47(3) 2004 Directive and Reg. 24(4) 2006 Regulations.
324. See e.g. Case C-389/92 *Ballast Nedam Groep NB v The State (Belgium)* [1994] ECR I-01289; Case C-5/97 *Ballast Nedam Groep NV v The State* [1997] ECR I-07549; Case C-176/98 *Holst Italia SpA v Commune di Cagliari Ex p. Ruhrwasser AG International Water Management* [1999] ECR I-08607; *Édukövízig and Hochtief Construction*, para. 38. For discussion of this case law, see Arrowsmith, ibid para. 12-20.
325. *Harmon CFEM Facades (UK) Ltd v The Corporate Officer of the House of Commons* (2000) 2 *L.G.L.R.* 372. For useful case commentary, see S Arrowsmith, "Case Comment: EC procurement rules in the UK courts: an analysis of the Harmon case: Part 1" (2000) 3 *PPLR* 120.

Regulations 1991 sufficient to establish standing in order to bring a claim under the Regulations, or, at least not entitled to bring proceedings in respect of any decision taken prior to its involvement in the procurement process.[326] HHJ Humphrey Lloyd rejected this argument on the basis that there was no objection at the time of the "change" of company; that the awarding authority treated Harmon CFEM Facades (UK) Ltd as if it were the tendering party and as if it had been so from the outset and that the decision that Harmon CFEM (UK) Ltd should be one of the firms invited to bid was based on an assessment of the overall resources of the Harmon group, on the understanding that these would be harnessed for the contract performance. Specifically, HHJ Humphrey Lloyd indicated that *Ballast Nedam* shows that it is permissible to look beyond the immediate company to test its worth for the purposes of registration and pre-qualification.[327] It has been suggested that in reaching this conclusion the judge seemed to take the view that each of the Harmon companies could effectively be treated as being "the same" entity, and that the precise identity of the company responsible for each part of the process was immaterial.[328] The judge's conclusion and reasoning on this point imply that in circumstances where members of a group are effectively treated as a single entity in the tendering process, the procuring entity is permitted to allow the group to put forward any relevant company as the actual bidder or contractor, even if that company had not acted in its own name earlier in the process.[329] However, it has also been suggested that the conclusion in *Harmon* appeared to be based on the fact that the contracting authority had itself earlier accepted the group's substitution of the main contractor by another group member and so it seems unlikely that the group may nominate any one of its members as the main contractor.[330]

5. Reduction of number of candidates

Prior to the 2004 Directive, it appeared that the only criteria that could be used for the purposes of shortlisting qualified economic operators were those used for qualification, namely economic and financial standing, technical or

326. Para. 361.
327. Para 361.
328. S Arrowsmith, "Case Comment" (n 328), 129.
329. Ibid.
330. Arrowsmith, *The Law of Public and Utilities Procurement* (n 13), para. 12-20.

professional ability and professional honesty, solvency and reliability.[331] This view is confirmed in the 2006 Regulations.[332] Further, contracting authorities cannot generally use any criteria that do not relate solely to the contract being awarded and which has been confirmed as a matter of UK law.[333] With regard to the number of economic operators to be invited, the 2014 Directive as implemented in the 2015 Regulations confirms the position under the 2004 Directive, namely a minimum of five in the restricted procedure and a minimum of three in the competitive procedure with negotiation, competitive dialogue and innovation partnership procedures.[334] Again, the reduction of the number of economic operators through the specific use of selection criteria has not been the subject of extensive litigation in the UK. In one case, it has been acknowledged *obiter* (but which the court did not investigate) that on the facts of one case, it was unclear whether a decision not to invite a contractor to tender was one of "exclusion", i.e. that he was disqualified because he did not satisfy the minimum criteria or "non-selection", i.e. he did satisfy these criteria but should not be one of those selected to tender from the pool

331. Case C-360/89 *Commission v Italy*. Discussed in Arrowsmith, ibid, para. 7-106.
332. See Reg. 16(7) 2006 Regulations for exclusion based on the grounds in Article 45 2004 Directive as implemented in Reg. 23 2006 Regulations and for non-registration under Article 46 2004 Directive as implemented in Regs 25-26 2006 Regulations. Regulation 16(8) 2006 Regulation then provides for the "selection" of those to be invited to tender to be made in accordance with Regs 23-26 2006 Regulations. It appears that the concept of "selection" in that provision refers to the second-stage process of choosing which of the qualified economic operators are to be invited to tender, thus indicating that the second-stage choice from qualified firms, and not just the actual qualification stage, is to be made in accordance with the criteria and the procedures referred to in Regs 23-26 2006 Regulations. See Arrowsmith, ibid, para. 7-107 and fns. 357-8
333. *R v Secretary of State for the Environment Ex p. Harrows London Borough Council* [1997] 3 *C.M.L.R.* 870 (1997) 29 H.L.R. In that case, the English High Court held that an authority awarding a contract for housing management services with the intention of possibly selling the housing to the contracting partner in future could not impose a condition that tenderers should be qualified to operate social housing, since the contract itself concerned only the management, and not the purchase, of the housing stock. Similarly (although this was not considered in *Harrow*) an entity would not be able to consider an economic operator's ability to own social housing in choosing which of the qualified economic operators to invite. See Arrowsmith, ibid para. 7-108.
334. Article 65(2) 2014 Directive as implemented in Reg. 65 2015 Regulations. Previously Article 44(3) 2004 Directive as implemented in Regs. 16(10) (restricted procedure), Reg. 17(11) (negotiated procedure); and Reg. 18(12) (competitive dialogue) 2006 Regulations.

of qualified suppliers.[335] Whilst criteria must be disclosed, it is suggested that contracting authorities continue to experience difficulties in undertaking the shortlisting process on the basis of clear criteria, just one example of which might be where shortlisting is based on an assessment of past performance.[336]

6. Government-wide debarment

As indicated in Section 2, the Directives and Regulations have provided a basis for excluding economic operators on the grounds listed. The UK does not have a formal Government-wide "debarment" system such as to give effect to these exclusions. It is open to question to what extent UK initiatives towards the development of repositories on contractor performance provide the rudiments of such a system.[337] However, one interesting issue which has arisen in the UK concerns the potential interactions between the mandatory exclusion grounds and criminal prosecutions for offences of which the mandatory exclusion grounds are comprised. This issue is problematic given the possibility of both mandatory exclusion from public procurement and prosecution for a criminal offence. For instance, in 2009, the UK published Guidance on Corporate Prosecutions which guide decisions as to whether or not prosecute based *inter alia* on public interest grounds.[338] In a section concerning "additional public interest factors against prosecution", the Guidance makes specific reference to certain mandatory exclusion grounds under the 2004 Directive, namely fraud relating to the protection of the financial interests of the European communities, corruption and money laundering.[339] On one hand, the Guidance states that the 2004 Directive is intended to be "draconian" in its effect and that companies can be assumed to have been aware of the potential consequences when embarking on the offending.[340] It further emphasises that prosecutors should bear in mind that "a decision not to prosecute

335. *Luck* (*t/a Luck Arboricultural & Horticultural) v Tower Hamlets London Borough Council* [2003] EWCA Civ 52, para 56. For a useful case commentary, see S Arrowsmith, "Case Comment: The final stage in the Luck litigation? A second decision of the Court of Appeal in Luck v London Borough of Tower Hamlets" (2003) 4 *PPLR*, 4, NA94-100.
336. Guidance Note for the Public Sector in Wales, Selection, Short-listing and Contract Award Criteria (undated), 6.
337. I am grateful to Dr. Pedro Telles for his observations on this issue.
338. Serious Fraud Office, Guidance on Corporate Prosecutions, December 2009.
339. Ibid. 9
340. Ibid.

because the Directive is engaged will tend to undermine its deterrent effect."[341] Thus, exclusion from public procurement should not necessarily preclude further prosecution and that a decision not to prosecute could undermine a clear deterrent effect of the Directive. However, on the other hand, the Guidance also states that a conviction is likely to have "adverse consequences for the company under European law, always bearing in mind the seriousness of the offence and any other relevant public interest factors".[342] More generally, the Guidance also states that a prosecutor "should take into account the commercial consequences of a relevant conviction under European law, particularly for self-referring companies, in ensuring that any outcome is proportionate".[343]

As adverted to in this Guidance, in recent years, the UK's Serious Fraud Office ("SFO") has sought to emphasise the importance of self-reporting. This has included the publication of guidance on self-reporting or self-referring.[344] The basis for this approach is to encourage early disclosure in return for negotiation on the outcome for the economic operator. With specific regard to procurement, according to this Guidance, a negotiated settlement (with civil sanction) rather than a criminal prosecution would mean that the mandatory debarment provisions under the 2004 Directive will not apply."[345] Whilst it is beyond the scope of this Chapter to examine this issue, an open question concerns the extent to which the objectives of both public procurement and criminal prosecution are best served and whether each may be undermined.[346] For example, it is not clear to what extent there may be any incentive to self-refer convictions if it could potentially result in exclusion from public procurement and which may, in turn, undermine the SFO's self-report-

341. Ibid.
342. Ibid.
343. Ibid. 10.
344. Serious Fraud Office, Self-Reporting Guidance 2009. This was originally publically available on the Serious Fraud Office website but which has now been replaced. See http://www.sfo.gov.uk/bribery--corruption/corporate-self-reporting.aspx [accessed 23 June 2016]. This is a consequence of the fact that the 2009 policy was revised with a new set of policies published on 9 October 2012 and which can also be accessed at this address.
345. Ibid.
346. For a useful discussion of certain of these issues, see Corruption Watch, "Creating effective corporate sanctions: debarment under EU procurement laws and its impact on enforcing overseas corruption offences", March 2010.

ing strategy.[347] Conversely, it is not clear to what extent self-referrals may result in the use of civil sanctions (or prosecutions for lesser offences) thereby undermining the purported deterrent effect of mandatory exclusion in public procurement and prosecutions for full offences. Questions may also arise as to precisely who is the appropriate arbiter of decisions regarding mandatory exclusion under the public procurement Directives.

7. Conclusions

Prior to the transposition of the 2014 Directive into the 2015 Regulations, UK law and practice has not given rise to significant issues in the area of qualification and selection. The limited domestic case law has largely confirmed or been confirmed by EU case law. The UK's copy out approach under the 2015 Regulations has the effect of directly importing many of the issues that arise under the 2014 Directive rather than exacerbating pre-existing issues under domestic law. However, as indicated, the copy out approach creates new issues for the UK. Any uncertainty in the Directive is replicated in the 2015 Regulations. Consequently, the UK has placed significant emphasis on supplementary guidance to aid interpretation. Yet, as indicated throughout this Chapter, there are many areas of potential uncertainty which may not be resolved by guidance and may simply replicate or exacerbate it. It is perhaps in the area of pre-qualification where issues may become most acute given that this is an exceptional area where the 2015 Regulations deviate from the copy out and rely on statutory guidance. More generally, it is becoming increasingly apparent that the UK is seeking to streamline the content, flow and verification of procurement information at the qualification stage through various policies which are tied, in particular, to the broader SME strategy. However, it remains to be seen whether there is the necessary infrastructure and appetite within UK government bodies and contracting authorities to coordinate standardization and information exchange initiatives backed by any serious sanctions. All the while, economic operators continue to face a proliferation of laws and policies that do not seem to make for easier reading or application. It remains to be seen whether the UK has struck an adequate balance between flexibility and legal certainty in an increasingly evolving policy framework.

347. See J Pickworth and L O'Neill, "Procurement bans and the threat to self-reporting", (9 July 2010) *The In-House Lawyer*.

Exclusion and Qualitative Selection of Economic Operators under Public Procurement Procedures: A Comparative View on Selected Jurisdictions

Albert Sanchez-Graells, Luke R.A. Butler and Pedro Telles[1]

1. Introduction

The exclusion of economic operators from public procurement procedures aims to protect the integrity (or probity) of the process by preventing the participation of economic operators deemed to be *undesirable partners* of the public administration.[2] Recently, the debate has been concentrating on cor-

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2. See S. Arrowsmith, J. Linarelli and D. Wallace Jr. (eds), *Regulating Public Procurement. National and International Perspectives* (Kluwer Law International: The Hague, 2000), at 41-49. See also 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), *In-*

ruption issues,[3] but the justification for the exclusion of economic operators extends to other areas of criminal activity or professional misconduct,[4] as well as other causes of lack of reliability.[5] Different public procurement traditions have developed diverse mechanisms to exclude economic operators under certain circumstances.[6] The existence of some sort of exclusion regime is a common trait of all major procurement systems,[7] and clearly a current common trait of the systems of the EU Member States.[8]

In order to harmonise those systems, and building on previous efforts at the European level,[9] Directive 2004/18[10] created an enabling system for the exclusion of economic operators by the contracting authorities of the Member

tegrity and Efficiency in Sustainable Public Contracts (Bruylant: Brussels, 2014) at 117, 124-133.

3. See *in extenso* S. Williams-Elegbe, *Fighting Corruption in Public Procurement. A Comparative Analysis of Disqualification or Debarment Measures* (Hart-Bloomsbury: Oxford, 2012). See also T. Medina Arnaiz, "Grounds for exclusion in Public Procurement: Measures in the fight against corruption in the European Union", in K.V. Thai (ed.), *Advancing Public Procurement: Experiences, Innovation and Knowledge Sharing* (Pracademics Press: Boca Raton, FL, 2006), at 329-352.
4. See the background laid out by the European Commission, *Green Paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement* Market, COM (2011) 15 final, at 51-53.
5. For a broader discussion, see T. Tátrai, "Ethical public procurement" (2013) 14(1) *ERA Forum*, at 59-68.
6. The existence of exclusion grounds is a common feature of systems like the United States's Federal Acquisitions Regulation (41 U.S.C. 106), which have had them for a long time; see A.A. Gray, "Responsiveness Versus Responsibility: Policy and Practice in Government Contracts" (1974) 7(1) *Public Contract Law Journal*, at 46-80. The practice is now closely linked to issues of past performance, as discussed by K.M. Manuel, "Evaluating the "Past Performance" of Federal Contractors: Legal Requirements and Issues" (2015) Congressional Research Service Report for Congress, at https://www.fas.org/sgp/crs/misc/R41562.pdf [accessed 22 February 2016].
7. Some date back a long time. As Lichère stresses, this was a feature of the French system in the 14th century.
8. This is evident in the national chapters on which this contribution is based. Also, A. Spapens, M. Peters and D.Van Daele (eds), *Administrative Measures to Prevent and Tackle Crime. Legal possibilities and practical application in EU Member States* (Eleven International Pub.: The Hague, 2015).
9. E. Piselli, "The scope for excluding providers who have committed criminal offences under the E.U. Procurement Directives" (2000) 9(6) *Public Procurement Law Review*, at 267.
10. Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public contracts [2004] OJ L 134/114-240.

States (the 2004 framework). This system was mainly of a substantive nature, and based on a limited number of mandatory and discretionary exclusion grounds (art 45). It did not create any procedural rules applicable to the exclusion of economic operators. Therefore, under the 2004 framework, Member States retained significant flexibility in terms of the design of their own exclusion procedures, with only a limited number of requirements for the mandatory exclusion of economic operators in certain circumstances (primarily limited to criminal activity of EU relevance),[11] and the possibility to expand the list of exclusion grounds to cover situations in which the professional integrity of the economic operator has been damaged or, for any other practical reasons, its ability to act as a suitable contractor can be reasonably and proportionately questioned.[12]

Thus, when approaching an assessment of the exclusion rules developed and enforced in different EU jurisdictions under the 2004 framework, one would expect to see convergence on substantive issues, as well as a relatively high level of variety in both the procedural setting, the legal mechanisms, and the actual practice of exclusion of economic operators from public procurement procedures.[13] This chapter tests this intuition by providing a critical assessment of the substantive (section 2) and procedural rules (section 3) applicable to the exclusion of economic operators from procurement in some EU countries under the 2004 framework – in particular, France, Germany, Italy, Portugal, Romania, Spain and the United Kingdom (with the exception of Scotland).

11. S. Williams, "The mandatory exclusions for corruption in the new EC Procurement Directives" (2006) 31 *European Law Review*, at 711; S. Arrowsmith, H.-J. Prieß and P. Friton, "Self-Cleaning as a Defence to Exclusions for Misconduct–An Emerging Concept in EC Public Procurement Law?" (2009) 18(6) *Public Procurement Law Review*, at 257.
12. An issue of particular controversy affects cases of bankruptcy, where a change of contractor can trigger significant derived legal complications. See S. Treumer, "Transfer of contracts covered by the EU public procurement rules after insolvency" (2014) 23(1) *Public Procurement Law Review*, 21-31; and M. Comba, "Retendering or sale of contract in case of bankruptcy of the contractor? Different solutions in an EU comparative perspective", in G. Piga and S. Treumer (eds), *The Applied Law and Economics of Public Procurement* (Routledge: Oxford, 2013), at 201-212.
13. Ultimately, this hypothesis is premised on the relevance of administrative traditions for the implementation of EU policies, as discussed by C. Knill, "European Policies: The Impact of National Administrative Traditions" (1998) 18(1) *Journal of Public Policy*, at 1-28.

It is worth noting, that Directive 2014/24[14] (mainly art 57) modified the EU exclusion rules,[15] both in their substantive aspects (creating new mandatory and discretionary grounds for exclusion, and requiring rules creating a possibility for self-cleaning),[16] and through the imposition of minimum procedural requirements (notably, requiring Member States to adopt explicit procedures and regulating maximum durations for situations of exclusion beyond the specific procurement tender).

However, with the exception of the UK (which was very quick to transpose),[17] Denmark (which is not covered in this book),[18] France[19] and Germany – which have transposed the Directive – the country reports used in this

14. Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65-242.
15. See the critical remarks of Treumer in his contribution to this book. See also S. Arrowsmith, *The Law of Public and Utilities Procurement. Regulation in the EU and the UK*, Vol. 1, 3rd edn. (Sweet & Maxwell: London, 2014), at 1237-1299; H.-J. Prieβ, "The rules on exclusion and self-cleaning under the 2014 Public Procurement Directive" (2014) 23 *Public Procurement Law Review*, at 112; 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), *Novelties in the 2014 Directive on Public Procurement*, vol. 6 European Procurement Law Series (DJØF Publishing: Copenhagen, 2014), at 97; and ibid., *Public procurement and the EU competition rules*, 2nd edn. (Hart-Bloomsbury: Oxford, 2015), at 284-301.
16. Issues of self-cleaning are addressed by Caranta and Richetto in this book. We refer the reader to their chapter. See also E. Hjelmeng and T. Søreide, "Debarment in public procurement: rationales and realization", in G.M. Racca and C.R. Yukins (eds), *Integrity and Efficiency in Sustainable Public Contracts* (Bruylant: Brussels, 2014), at 215.
17. Transposition in the UK took place in February 2015 by means of the *Public Contracts Regulations 2015*, SI 2015 No. 102. Note that Scotland has its own rules in the *Public Contracts (Scotland) Regulations 2015*, SSI 2015 No. 446. The latter are not considered for the purposes of this chapter.
18. Denmark transposed the Directive on 15 December 2015 through Law nr 1564.
19. France transposed the Directive on 23 July 2015 by means of Ordinance n° 2015-899. However, as Lichère indicates in his contribution to this book, "*the Ordinance shall be completed by a decree for this implementation of other provisions and the decree is yet to be published or even known*". For a background explanation of the foreseen adoption of a revised Code of public demand applicable to all types of public contracts to be tendered in France from early 2016, see French Economy Ministry, "*Réforme de la commande publique. Un code unique pour les marchés publics, les délégations de service public, les concessions, les partenariats public-privé*" (July 2015), http://proxy-pubminefi.diffusion.finances.gouv.fr/pub/document/18/19508.pdf [accessed 26 February 2016].

chapter do not take into consideration the legal reforms required to transpose this revised 2014 framework – which are still underway in the majority of EU jurisdictions at the time of writing.[20] Moreover, in all cases, the country reports do not include information on any actual practice under the 2014 framework, which is still to be developed at the national level. Therefore, the discussion in this chapter is fundamentally backward-looking and focuses on the state of the law under the 2004 framework. To the extent possible, though, the chapter takes a forward-looking glimpse and the common trends derived from the comparative assessment are used to sketch some general views of the rules in Directive 2014/24, particularly in relation to the right to good administration under the Charter of Fundamental Rights of the European Union (section 4).

This Chapter also examines certain issues arising in the context of qualitative selection, although the focus is subsidiary in light of the more limited findings deriving from national reports (section 5). It appears that many Member States have taken active steps to bring qualitative selection process into line with basic requirements under ECJ case law. Perennial issues are likely to continue to arise concerning the blurring of the proper boundaries between qualification and award decisions and the extent to which third party capacity can be relied upon. Further, as efforts continue towards less formal means of establishing qualification, questions arise not only regarding the effectiveness of these forms but also Member States' approaches to the verification and clarification of qualification assessments. The chapter concludes with a number of observations (section 6).

2. Exclusion: Substantive Issues

The two most recent generations of EU public procurement rules – i.e. Directive 2004/18 (art 45) and Directive 2014/24 (art 57) – have included substantive grounds for the exclusion of economic operators. Both sets of rules distinguished between grounds under which the affected economic operators had to be excluded (mandatory grounds), and others under which the exclusion of economic operators was merely a possibility for the contracting authority (discretionary grounds). Member States retained the flexibility of cre-

20. As of 1 October 2015, only the UK had transposed. For an update at the end of 2014, see PPN Italian Presidency, "*The Transposition of the New EU Public Procurement Directives in the Member States*", at http://www.publicprocurementnetwork.org/docs/ItalianPresidency/documento%206.pdf [accessed 22 February 2016].

ating additional exclusion grounds,[21] both discretionary and mandatory – and, in the latter case, could make EU discretionary grounds *mandatory for their domestic* contracting authorities. This section explores the way Member States have used these regulatory options.[22]

2.1. Decisions on the use of mandatory exclusion grounds

Member States have generally had no difficulty in incorporating the *list of mandatory exclusion grounds* of Article 45(1) of Directive 2004/18 into their domestic systems. Some of them have done so with strict adherence to the EU list – such as the UK[23] or Romania – or by adhering to equivalent standards that restrict the requirement for mandatory exclusion to short lists of grounds identifying issues considered "of a serious nature" – such as Germany.[24] Other Member States have extended the list of mandatory exclusion grounds beyond the EU short list.

In that regard, it is worth highlighting that Member States have tended to create *additional exclusion grounds* to tackle particular domestic issues. Remarkably, Italy has developed a system of anti-mafia exclusion requirements that goes well beyond the strict limits of the mandatory exclusion grounds at the EU level.[25] Some Member States have specified additional mandatory ex-

21. The limits to be respected are that "*further exclusionary measures designed to ensure observance of the principles of equal treatment of tenderers and of transparency, provided that such measures do not go beyond what is necessary to achieve that objective*"; Judgment in C-213/07, *Michaniki*, EU:C:2008:731, paragraph 49.
22. For a complementary analysis focussed on issues relating to organised crime, see M. Peters and D. Van Daele, "A legal comparison of the administrative approach to serious and organized crime in the EU", in ibid. and Spapens (eds), *Administrative Measures to Prevent and Tackle Crime*, *supra* note 8, at 505, 532-536.
23. Which has repeated the same copy-out approach in the transposition of the 2014 framework. See Butler's chapter in this book for extended discussion of the difficulties this creates in the UK domestic setting.
24. Note that Germany has opted not to lay down grounds for exclusion beyond those regulated at the EU level. However, it must be stressed that the German system under the 2004 framework was not based on exclusion grounds strictly speaking, but on an assessment of the reliability of the economic operator, which included requirements for it to be law-abiding, as explained in detail by Burgi and Wittschurky in their chapter.
25. Additionally to Comba's contribution to this book, see F. Calderoni and F. Di Stefano, "The administrative approach in Italy", in Spapens, Peters and Van Daele (eds), *Administrative Measures to Prevent and Tackle Crime*, *supra* note 8, at 239; and G.M. Racca, "Italian Legal Rules and Procedures on Public Procurement and Prevention of Corruption and Organised Crime Infiltration", at http://www.warningoncrime.eu/wp-content/uploads/2016/01/w2_Italian-legal_rules.pdf [accessed 28 February 2016].

clusion grounds that, despite possibly being covered by discretionary exclusion grounds, concern issues that Member States consider particularly deserving of exclusion. This is the case of criminal offences related to labour law and workers' rights, particularly concerning health and safety at work, which feature as a common ground in several jurisdictions (such as Italy or Portugal, but also in Germany or France, where labour law creates *non-procurement* causes for debarment, see below section 3.3). It is also the case of *intra-procurement* infringements, where exclusion results from previous infringement of procurement rules or lack of compliance with obligations under previous public contracts (as is the case in Portugal, Romania and Spain). And this can also extend to the consideration of *conflicts of interest* as a mandatory exclusion ground in jurisdictions such as Romania or Spain, or the UK, where it is gaining particular prominence.

Finally, it should be stressed that some Member States have taken a *holistic approach* to the configuration of exclusion grounds and decided to exclude any discretion in the exclusion process, and have extended the *mandatory character* to all exclusion grounds regulated in their domestic frameworks (i.e. both grounds of EU and of domestic origin). This is the case of France (under the 2004 framework),[26] Italy,[27] Portugal[28] and Spain,[29] where contracting authorities must treat all exclusion grounds in the same manner – ultimately, as a requirement for them to behave *legally*, and the corollary requirement for them not to support *illegal behaviour* in any way.[30]

26. Lichère considers this potentially in conflict with the principle of proportionality, at least under the rules of Directive 2004/18, but not necessarily under the rules of Directive 2014/24, given that Art 57(4) now clearly establishes that Member States can require their contracting authorities to exclude economic operators affected by EU discretionary exclusion grounds. However, counterintuitively, the 2015 Ordinance transposing the 2014 framework seems to conform to the EU distinction between mandatory and discretionary grounds.
27. Comba indeed stresses that all grounds are mandatory and the contracting authority retains no discretion.
28. Telles clearly indicates that "*no margin of discretion is given to contracting authorities*".
29. As justified in Sanchez Graells' contribution to this book; also A. Huesca and J.E. Conde, "The administrative approach in Spain", in Spapens, Peters and Van Daele (eds), *Administrative Measures to Prevent and Tackle Crime*, *supra* note 8, at 373, 394-397.
30. By analogy, see H.C.H. Hofmann, "General Principles of EU Law and EU Administrative Law" in C. Barnard and S. Peers (eds), *European Union Law* (OUP: Oxford, 2014) at 198, 206. For extended discussion, see A. Sanchez-Graells, "Assessing Public Administration's Intention in EU Economic Law: Chasing Ghosts or Dressing

Some Member States have also developed *non-listed mandatory exclusion grounds*, particularly on the basis of the principles of equal treatment and competition.[31] This development has taken place in the judicial practice or case law of Member States such as France, where the *Conseil d'Etat* has backed-up exclusion decisions based on the protection of the principle of equal treatment, either related to criminal cases of favouritism or as a self-standing exclusion; and also in order to avoid distortions of competition, particularly in case of previous involvement of a tenderer in the preparation of the tender documentation, where it has stressed issues of impartiality of the contracting authority. The same exclusion ground exists in Portugal, where the relevant statute requires the exclusion of economic operators with a previous involvement in the preparation of the tender documentation, but only if it provides them an advantage that affects competition.[32] Conversely, some Member States such as Italy or Spain have imposed a *numerus clausus* of exclusion grounds (at least formally), so as to avoid contracting authorities from excluding economic operators for non-listed reasons.[33] As a matter of practice, the UK has also not developed exclusion grounds beyond those listed in the applicable regulations (which ultimately replicate the EU ones).

2.2. Decisions on the use of discretionary exclusion grounds

Despite the relatively common trend in jurisdictions based in the French administrative law tradition[34] to extend the mandatory nature to all exclusion

Windows?" (7 August 2015), available at http://ssrn.com/abstract=2641051 [accessed 28 February 2016].

31. For a view that this is an existing obligation under Directive 2004/18 and, more clearly, under Directive 2014/24, see A. Sanchez-Graells, *Public Procurement and the EU Competition Rules*, 2nd edn. (Hart: Oxford, 2015) ch 5.
32. See Telles' contribution and his discussion on the need to carefully draft this exclusion ground in order to comply with the doctrine of the Court of Justice of the European Union in its Judgment in C-21/03, *Fabricom* EU:C:2005:127. For extended discussion, see S. Treumer, "Technical Dialogue and the Principle of Equal Treatment – Dealing with Conflicts of Interest after *Fabricom*" (2007) 16 *Public Procurement Law Review*, at 99.
33. As discussed in relation to Spain in the relevant chapter, though, some of the listed reasons are open-ended, which raises some questions as to the effectiveness of such a principle of numerus clausus of exclusion grounds.
34. For background discussion on administrative law traditions, see the contributions to R. Caranta and A. Gerbrandy, *Traditions and Change in European Administrative Law* (Europa Law Publishing: Groeningen, 2011). See also C. Harlow, "Global Administrative Law: The Quest for Principles and Values" (2006) 17 (1) *European Journal of International* Law, at 187-214; and F. Bignami, "Comparative Administra-

grounds (see above 2.1), some Member States have kept the separation between mandatory and discretionary exclusion grounds in their domestic rules. This is, once more, the case in the UK as a result of its copy-out approach to the transposition of EU public procurement rules.[35] It is also the case of Romania. Germany has also kept the distinction and used *discretionary grounds* for what are considered minor cases (*rectius*, less serious, if compared to mandatory exclusion).[36] The ground that seems to have received more attention, due to its catch-all nature, is the possibility to exclude economic operators that have committed proven acts of grave misconduct casting doubt on their reliability – which includes antitrust violations.[37] In these cases, it is important to take into account that the contracting authority does not have unfettered discretion to appreciate the concurrence of the ground of exclusion, not to determine without restrictions whether exclusion should take place. However, there is discussion in German doctrine as to the extent to which the apparent discretion of the contracting authority could actually be reduced to zero, at least where grave misconduct occurs and there is a poor prognosis of the concerned economic operator's reliability.[38] If that was the case – that is, should contracting authorities not have *actual* discretion to appreciate these circumstances – then the system would be functionally very close to the Spanish and French systems, where all exclusion clauses are mandatory for the contracting authority.

2.3. Use of anti-fraud or anti-avoidance provisions

Some jurisdictions have consolidated explicit anti-fraud or anti-avoidance rules that require an analysis of the possible concurrence of exclusion

tive Law", in M. Bussani and U. Mattei (eds), *The Cambridge Companion to Comparative Law* (CUP: Cambridge, 2012), at 145-170.

35. Other than Butler's contribution, see M. Peters and A.C.M. Spapens, "The administrative approach in England and Wales", in ibid. and Van Daele (eds), *Administrative Measures to Prevent and Tackle Crime*, *supra* note 8, at 91, 111-116.
36. D. Van Daele, "The administrative approach in Germany", in Spapens, Peters and Van Daele (eds), *Administrative Measures to Prevent and Tackle Crime*, *supra* note 8, at 191, 219-220.
37. For discussion, see Sanchez-Graells, *Public Procurement and the EU Competition Rules*, *supra* note 31, at 296-301. See also A. Brown, "The Permissibility of Excluding an Economic Operator From a Tendering Procedure on the Ground that it has Previously Committed an Infringement of Competition Law: Case C-470/13 Generali-Providencia Biztosító Zrt v Közbeszerzési Hatóság Közbeszerzési Döntobizottság" (2015) 24(3) *Public Procurement Law Review* NA51-NA60.
38. Burgi and Wittschurky consider that this position should be rejected, particularly in relation to Dir 2014/24.

grounds beyond the strict sphere of the tenderer, or, at least, in total or partial disregard of the limits of its separate legal personality.[39] For example, in Spain, the applicable statute determines that all exclusion grounds also affect those economic operators which, because of the people who control them or other circumstances, can be presumed to be a continuation of or to derive (such as by merger, transformation or legal succession) from other economic operators that would have been affected by the prohibition. This is an open issue in Italy, where some case law has carried the effects of exclusion grounds over to the absorbing company in a merger.[40] It is also an unclear issue in the UK, where doubt exists as to whether the exclusion grounds may apply not only to the economic operator itself, but also cover other associated persons.[41]

2.4. Exceptions and disapplication of exclusion grounds

Some Member States such as Romania or France have not made use of the possibility envisaged in Article 45(1)III of Directive 2004/18, whereby they can "*provide for a derogation from the requirement* [of mandatory exclusion] *for overriding requirements in the general interest*". The UK has now foreseen this possibility in line with Article 57(3) of Directive, according to which "*Member States may provide for a derogation from the mandatory exclusion … on an exceptional basis, for overriding reasons relating to the public interest such as public health or protection of the environment*", but the lack of any detailed rules trigger significant uncertainty as to the conditions under which contracting authorities will be able to derogate from exclusion grounds.[42] Other Member States have developed this possibility, even beyond the limits derived from a strict interpretation of the EU rules. In Germany, for instance, there are two possibilities for the disapplication of exclusion grounds. First, where there are compelling reasons of general interest and the service cannot be adequately rendered by companies not affected by the exclusion (e.g. in case of urgent need). This falls clearly within the scope of Article 45(1)III of Directive 2004/18. Second, it is also possible to avoid exclusion where, despite the applicability of an exclusion ground, due to the specific circumstances of the case, the violation covered by the exclusion ground

39. This brief discussion is not interpreted as meaning that such considerations are not taken into account in other Member States. However, the Member States mentioned in the text are those for which contributors to this book discuss this issue explicitly.
40. See Comba's contribution to this book for further discussion.
41. See Butler's contribution for more details.
42. See Butler's contribution for further discussion.

does not cast doubt on the reliability of the economic operator. This has been justified on the basis of the principle of proportionality.[43]

Along the same lines, Portugal has enabled contracting authorities to take into account the rehabilitation of economic operators affected by exclusion grounds, but has not provided guidance on how to assess this issue.[44] Romania opted to restrict the consideration of mandatory exclusion grounds to circumstances arising five years prior to the tender. Finally, the disapplication of exclusion grounds linked to the lack of payment of taxes or social security contributions has also triggered debates around issues of proportionality in Italy.[45] Most of these issues have affected the new rules in Articles 57(3), 57(6) and 57(7) of Directive 2014/24, respectively on exceptional waivers of mandatory exclusion grounds for overriding reasons relating to the public interest such as public health or protection of the environment, self-cleaning,[46] and maximum duration of the exclusion.

3. Procedural Issues

In contrast to the substantive approximation of the rules applicable to exclusion grounds sought by Article 45 of Directive 2004/18, and now by Article 57 of Directive 2014/24, neither the 2004, nor the 2014 framework for the exclusion of economic operators from public procurement procedures specify a significant number of procedural issues. Article 45 of Directive 2004/18 included no procedural provision whatsoever, and simply indicated that "*Member States shall specify, in accordance with their national law and having re-*

43. Burgi and Wittschurky consider that this has now received explicit legal cover at the EU level by Art 57(3) of Dir 2014/24. However, this is only the case for infringements linked to the breach of obligations relating to the payment of taxes or social security contributions. Thus, German law may be going beyond the scope allowed by EU law when it comes to the disapplication of mandatory exclusion grounds, which Art 57(3)I of Dir 2014/24 clearly indicates that should take place "*on an exceptional basis*". Addressing this issue exceeds the possibilities of this comparative chapter.
44. As criticised by Telles in his contribution to this book.
45. Judgment in C-358/12, *Consorzio Stabile Libor Lavori Pubblici*, EU:C:2014:2063. For discussion, see Sanchez-Graells, *Public Procurement and the EU Competition Rules*, *supra* note 31, at 286-287, and ibid., "Exclusion, Qualitative Selection and Short-listing in the New Public Sector Procurement Directive 2014/24" (*supra* note 15), at 107.
46. On self-cleaning, see the chapter by Caranta and Richetto in this book. See also Prieβ, "The rules on exclusion and self-cleaning under the 2014 Public Procurement Directive", *supra* note 15.

gard for [Union] *law, the implementing conditions*" needed to give effect to the substantive mandatory and discretionary exclusion grounds it established. The only exception was to be found in Article 45(3) of Directive 2004/18, which established a *numerus clausus* of documentary requirements that Member States needed to respect (which is now largely irrelevant in view of the rules concerning the ESPD, see section 3.2 below).

Article 57(7) of Directive 2014/24 follows the same line of respect for the principle of Member States' administrative autonomy,[47] and simply determines that "[b]*y law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article. They shall, in particular, determine the maximum period of exclusion*". In the absence of any specific minimum procedural requirements in either Directive 2004/18 or Directive 2014/24, the intuition is that Member States' domestic administrative law will offer a significant degree of variety in the way these issues are dealt with. This section looks in detail at some of the key procedural issues raised in the exclusion of economic operators from public procurement procedures: i.e. general procedural issues, including the allocation of authority or competence to exclude (3.1), issues related to the assessment of documentation and measures to reduce red tape (3.2) and debarment practices (3.3).

3.1. General procedural issues and allocation of authority to exclude

Member States seem to diverge significantly in procedural rules and the allocation of authority or competence to exclude. At the flexible end in the procedural spectrum, some Member States such as Germany and the UK seem to allow each contracting authority to reach its own exclusion decisions – even if they may be stirred to comply with specific pieces of guidance or policy directions, or even obliged to take specific issues into due account, such as the registration of certain circumstances in centralised registers. These are Member States that also allow contracting authorities' discretion in the assessment and application of non-mandatory exclusion grounds (discussed above in section 2.2). At the opposite end of the procedural spectrum, countries such as Spain, Portugal or Italy do not allow contracting authorities discretion to en-

47. See Article 291(1) of the Treaty on the Functioning of the European Union; J. Schwarze, "European Administrative Law in the Light of the Treaty of Lisbon: Introductory Remarks", in European Parliament, "*Workshop on EU Administrative Law: State of Play and Future Prospects – Briefing Notes*" (2011) 22, http://www.europarl.europa.eu/RegData/etudes/divers/join/2011/453215/IPOL-JURI_DV(2011)453215_EN.pdf [accessed 28 February 2016].

force exclusion grounds and the procedure mainly relies on an *external authority's decisions* to impose prohibitions to contract with the public sector, either for specific cases or in general terms (for either a specified or an indefinite period of time). In Portugal and Spain, a special administrative procedure exists for the imposition of exclusion as an administrative sanction, and these administrative decisions are subject to judicial review. In Italy, the particularities of the anti-mafia legislation also trigger an independent screening of economic operators by the prefect. These procedural discrepancies may trigger issues of recognition of exclusion or debarment decisions in cross-border settings, particularly in countries positioned at the formalistic end of this spectrum (for some critical remarks, see section 4 below).

3.2. Documentary requirements for exclusion and systems of pre-qualification or classification

Generally, all Member States have a rigid approach to the assessment of documentary evidence supporting the non-existence of grounds of exclusion. However, there are several ways in which the administrative burden resulting from heavy documentary requirements tries to be minimised. First, by introducing possibilities to clarify or complete exclusion-related submissions and provide additional (pre-existing) documentation to the contracting authority.[48] This is the case in countries like Germany, Romania or Spain under general administrative law, as well as Italy, which however makes this possibility subject to the payment of a fine (of no more than €50,000) by the economic operator. This triggers significant issues of equality of treatment in all jurisdictions and requires a balanced approach.[49]

Second, some Member States have been using possibilities to accept copies of documents, or even *self-declarations or declarations of honour* in relation to all or some of the exclusion grounds. For instance, France requires a declaration of honour for candidates to certify that they are not in one of the

48. This practice is out of question after the Judgment in C-336/12, *Manova*, EU:C:2013:647, and explicitly regulated in Art 56 of Dir 2014/24. For discussion, see Sanchez-Graells, *Public Procurement and the EU Competition Rules*, *supra* note 31, at 321-323.
49. Ultimately, the issue is very similar to the need for a balanced approach to the rejection of non- or non-fully compliant bids, particularly due to formal shortcomings. For discussion, see A. Sanchez-Graells, "Rejection of Abnormally Low and Non-Compliant Tenders in EU Public Procurement: A Comparative View on Selected Jurisdictions", in M. Comba and S. Treumer (eds), *Award of Contracts in EU Procurements*, vol. 5 European Procurement Law Series (DJØF: Copenhagen, 2013), at 267-302.

exclusion grounds,[50] and only the bidder chosen for the award of the contract must provide additional documentation to the contracting authority. Portugal also restricts documentary requirements to the winning bidder and accepts declarations of honour where no official documents are available to support specific requirements (particularly in the case of tenderers from other Member States). Spain also accepts sworn declarations in certain cases (and, particularly, by tenderers from other Member States). Similarly, Germany allows for the use of self-declarations, but not for all types of procurement, and not always with the same evidentiary value. Declarations of compliance are common in the UK.

Additionally, some Member States have developed *systems of pre-qualification or classification of economic operators*, which cover issues of exclusion as well as qualitative selection. This is the case in Germany and in Portugal for works contracts, as well as the general case in France,[51] Italy,[52] and Spain. Some documents required for the verification of the inexistence of exclusion grounds can either be requested from the competent authorities (mainly, tax and social security-related documents), or included in *centralised registries* (mainly, for issues related to corruption). Some Member States have been experimenting with these possibilities (notably, for corruption registries, Italy regarding new "white-listing" possibilities, and some German Länder; and, more generally, Spain and the United Kingdom[53]), but all countries seem to still require significant adjustments and developments to be able to comply with the rules derived from the self-certification system resulting

50. D. Van Daele, "The administrative approach in France", in Spapens, Peters and Van Daele (eds) *Administrative Measures to Prevent and Tackle Crime*, *supra* note 8, at 151, 177.
51. Code des marchés publics 2006 – 2016, Titre III – Passation des marchés, Chapitre IV – Système de qualification, Arts 152 et seq.
52. Consider the Judgment in C-327/12, *Soa Nazionale Costruttori*, EU:C:2013:827.
53. Peters and Van Daele, "A legal comparison of the administrative approach to serious and organized crime in the EU", *supra* note 22, at 534. However, they indicate that the registry is not an open source, nor published online. *Cfr* Butler, who indicates that the UK does not have a formal Government-wide "debarment" system such as to give effect to exclusions on the basis of the grounds listed in the EU Directives and domestic regulations.

from the European Single Procurement Document created by Article 59 of Directive 2014/24 (ESPD).[54]

3.3. Debarment beyond one-off exclusion decisions

It is not easy to have a clear overview of the situation of debarment rules in all Member States. Debarment is a standard practice in Germany, but its administration and ultimate legal basis seem to trigger significant legal discussion,[55] and this seems to be an issue waiting for resolution in the framework of the transposition of Directive 2014/24. Remarkably, though, there are rules on debarment beyond procurement legislation and it is worth noting that both the Act to Combat Clandestine Employment and the Working Conditions Act sanction some violations with procurement debarment. Similarly, France seems to have held a varying position regarding the existence of government-wide debarment mechanisms. A system of debarment for false declarations was abandoned in 2004, but a variation of the system was reinstated in 2011 in order to fight fraudulent employment.[56] Other jurisdictions also have labour law related mandatory exclusion grounds (above section 2.1). Therefore, there seems to be an emerging trend of using procurement debarment provisions to uphold labour law, which is in line with the push created by Article 18(2) and Article 57(4)(a) of Directive 2014/24. Spain also has a general system of debarment through the imposition of *prohibitions to contract*, and Portugal operates a very similar system where an independent administrative body determines issues of exclusion of economic operators from ongoing and future procurement procedures.

4. General Remarks in View of the revised rules in Directive 2014/24: Two groups of Member States facing different challenges?

The general impression that emerges from the *bird's eye perspective* of the rules on exclusion of economic operators from public procurement procedures taken in previous sections is that, in fact, the degree of substantive con-

54. See Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document [2016] OJ L 3/16-34.
55. Burgi and Wittschurky suggest that, in general, it seems meaningful to allow for debarment only if a mandatory exclusion ground is fulfilled.
56. See Lichère's contribution for more details on this debarment system.

vergence is indeed higher than the approximation of procedural rules. However, even at the substantive level, there are important differences of approach between different Member States. Two main groups of Member States seem to be identifiable. First, a group of Member States willing to defer to the discretion of the contracting authority when it comes to the assessment of discretionary grounds of exclusion, such discretion to be tempered by principles of proportionality between exclusion and competition (or practicability, such as the UK) and other general principles of administrative law, such as the principle that sanctions should not be excessive (which would seem to be the German case, and possibly the Romanian case, although this is much less clear-cut). Second, a group of Member States of the French administrative tradition (at least *lato sensu*), which are not necessarily not willing to defer to the discretion of the contracting authority (although some of them, such as Italy and Spain, explicitly exclude any discretion by both mandating exclusion under all grounds and prohibiting the creation of new grounds of exclusion at contracting authority level), but where the influence of the obligation for those authorities to act under the rule of law and to ensure legally-compliant behaviour seems to carry more weight (such as in France and Portugal).

Similar issues seem to reappear when the assessment turns towards procedural issues, despite the existence of a much more limited common base of rules and approaches across different Member States. Here, the two groups would seem to cluster Member States at two opposing sides of a continuum of procedural flexibility/rigidity.

First, there are Member States that do not have very formalised procedures to determine the exclusion or debarment of economic operators from public procurement procedures. In these cases, Member States such as Germany and the UK seem to allow each contracting authority to reach its own exclusion decisions – even if they may be stirred to comply with specific pieces of guidance or policy directions, or even obliged to take specific issues into due account.

Second, there are Member States where, beyond limited instances where contracting authorities are allowed to self-assess the concurrence of an exclusion ground, most exclusion and debarment decisions are adopted by an external administrative authority in charge of making these determinations, and subject to judicial review (this is the case in Italy, Spain and Portugal).

If these groupings, being largely coincidental in substantive and procedural issues, reflect some underlying truth about the domestic approach to the exclusion of economic operators (even if in a simplified manner), it is possible to foresee that countries in each of these groups may well face different

challenges in order to adapt their exclusion rules, procedures and practices to the requirements of Directive 2014/24 and, more importantly, to the demands of a practice seeking to achieve smarter public procurement increasingly open to legal issues derived from flexibility and the conduct of negotiations. For simplicity, we will label these groups as *discretion-oriented Member States* (which we take to reflect the position in the UK and Germany) and *procedure-oriented Member States* (where we would group France, Italy, Portugal and Spain).[57] The following are some sketches of the challenges we envisage for each of these groups of Member States.

In our view, for *discretion-oriented Member States*, one of the main challenges will be to ensure that their systems of exclusion (and debarment) meet the requirements of the right to good administration under Article 41 of the Charter of Fundamental Rights of the European Union (Charter),[58] as well as their right to a fair trial under Article 47 of the Charter,[59] particularly where decisions of debarment may extend for significant periods of time.[60] This is a relevant issue because, as the Court of Justice of the European Union (CJEU) has clarified in the area of administrative law,[61] and even in situations that may appear to be purely domestic, the protection afforded by the charter will need to be respected where the domestic authorities of the Member States implement EU law (in terms of art 51 Charter). In that regard, the CJEU established that

57. We do not include Romania in these considerations because, in our view, Dragos and Neamtu's contribution indicates that the particular attention paid to issues of corruption and the relatively limited experience and tradition in the management of a procurement system prior to acceding the European Union may distort any considerations in this regard.
58. See P. Craig, "Article 41 – Right to Good Administration" in S. Peers, T. Hervey, J. Kenner and A. Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart: Oxford, 2014), at 1069-98.
59. It is important to stress that this right is triggered in "*the determination of … civil rights and obligations*" (*ex* Art 6 European Convention of Human Rights, *as per* Arts 47 and 52(3) Charter) and that, consequently, Member States are obliged to provide for a system of judicial review of decisions that can negatively affect rights; for discussion, see A. Sanchez-Graells, "The EU's Accession to the ECHR and Due Process Rights in EU Competition Law Matters: Nothing New Under the Sun?", in V. Kosta, N. Skoutaris and V. Tzevelekos (eds), *The Accession of the EU to the ECHR* (Hart: Oxford, 2014), at 255, 263-264.
60. For discussion, see A. Georgopoulos, "The EU Accession to the ECHR: An Attempt to Explore Possible Implications in the Area of Public Procurement", in Kosta, Skoutaris and Tzevelekos, *supra* note 59, at 271 *et seq*.
61. Judgment in C-206/13, *Siragusa*, EU:C:2014:126.

> In order to determine whether national legislation involves the implementation of EU law for the purposes of Article 51 of the Charter, some of the points to be determined are whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it.[62]

There can be no doubt whatsoever that domestic public procurement law aims to implement the EU directives on procurement – particularly, but not exclusively, because all Member States either have transposed, or are reforming their procurement rules, with the explicit objective of transposing these rules into their domestic legal systems; but it is also uncontroversial that the objectives of public procurement rules are common at the EU and domestic level, at least when it comes to the guarantee of the general principles and, in particular, of the principle of equality and non-discrimination,[63] and that there are no divergent national goals when it comes to ensuring the integrity of public procurement procedures. This can be a challenge for *discretion-oriented Member States.*

Ultimately, all procurement exercises covered by the EU Directives, as well as all those where the general principles of EU law are relevant,[64] will engage compliance with the Charter in their dimensions linked to the *integrity* of the procedure. In that regard, all decisions of exclusion and debarment will need to be subjected to sufficient judicial review and it would definitely be desirable from the perspective of good practice that important exclusion and debarment decisions were adopted by independent authorities or, at least, by units not directly involved in the award of the contract.[65] Otherwise, these Member States can see some of the benefits derived from the flexibility with which they apply the EU rules on exclusion eroded by unnecessary litigation

62. Ibid., paragraph 25, references to other case law omitted.
63. Regarding the commonality of other goals, notably value for money, *cfr* S. Arrowsmith, "The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies" (2011-2012) 14 *Cambridge Yearbook of European legal studies,* at 1-42.
64. In our view, in short, all exercises of public procurement; see A. Sanchez-Graells, "The Continuing Relevance of the General Principles of EU Public Procurement Law after the Adoption of the 2014 Concessions Directive" (2015) 10(3) *European Procurement & Public Private Partnership Law Review,* at 130-139.
65. Sanchez-Graells, *Public Procurement and the EU Competition Rules*, *supra* note 31, at 470-474.

on the basis of basic requirements of procedural diligence and procedural-related protections.

Conversely, in our opinion, for *procedure-oriented Member States* the challenges will lie in trying to gain advantage of the flexibility afforded by the new rules in Directive 2014/24, as well as to avoid liability for the imposition of unjustified requirements on economic operators. In these Member States the main difficulty can be that given the very limited discretion reserved for each contracting authority, they may be put in situations where they cannot benefit from flexibility within the rules[66] – in ways that may well reduce or restrict competition, and thus result in an infringement of Article 18(1) of Directive 2014/24.[67] They can also tend to overshoot the mark when it comes to managing conflicts of interest in ways that fall short from exclusion – primarily, because of institutional inertia, or mistrust in rules that deviate from their traditional approach to exclusion based on a formal analysis of conflicts of interest.

In these cases, the downsides are not merely *commercial or of an economic nature*, but they can also trigger legal challenges on the basis that the imposition of excessive requirements goes against the principle of proportionality consolidated in Article 18(1) of Directive 2014/24. If such *procedure-oriented Member States* opt to relax the requirements for non-domestic suppliers (as they are doing in terms of accepting *self-declarations*, and they will have to do more and more due to the roll-out of the ESPD), they will create issues of *reverse discrimination* whereby, counterintuitively, participation by non-domestic EU bidders may be easier and subjected to more flexible rules (on exclusion, in our case) than participation by domestic bidders.[68] In these

66. See, for instance, Telles' account of the the pre-2012 Portuguese rule whereby *any* prior involvement in the preparation of procurement documents required an automatic exclusion of the affected economic operator, which on top of running contrary to *Fabricom*, *supra* note 32, significantly hand-cuffs contracting authorities.
67. For discussion, see A. Sanchez-Graells, "A deformed principle of competition? The subjective drafting of article 18(1) of Directive 2014/24", in G.S. Olykke and A. Sanchez-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules in 2014* (Edward Elgar Publishing: Cheltenham, 2016) forthcoming.
68. For background discussion, see A. Tryfonidou, *Reverse Discrimination in EC Law* (Kluwer Law International: The Hague, 2009), ch. 5, discussing reverse discrimination as an incongruity in a genuine internal market. See also D. Hanf, "Reverse Discrimination in EU Law: Constitutional Aberration, Constitutional Necessity, or Judicial Choice" (2011) 18(1) *Maastricht Journal of European and Comparative Law*, at 29-61; and Peter Van Elsuwege, "The Phenomenon of Reverse Discrimination: An Anomaly in the European Constitutional Order?", in L.S. Rossi and F. Casolari, *The*

cases, the situation can become difficult to manage but, more importantly, may leave these Member States' contracting authorities in a situation of great difficulty when trying to apply diverging standards to tenderers participating in one same bid.

These different challenges would require different solutions and adjustments to the existing procedural structures in *discretion-oriented* and in *procedure-oriented* Member States. In our opinion, there is limited scope for mutual learning at this stage because the practices based on the 2004 framework were too limited and deeply-rooted in national administrative law traditions (or their lack), and because Member States should experiment independently in the early stages of implementation of the 2014 framework. Nonetheless, this should be an area of strategic interest for the European Commission in its report on the implementation of the 2014 framework (due in April 2019 *ex* art 92 dir 2014/24).

5. Qualitative Selection

ECJ jurisprudence and Directive 2014/24 in certain respects introduce more flexibility than ever regarding qualification and selection assessments. As this Section will demonstrate, it is clear that some Member States have actively embraced initiatives towards simpler pre-qualification processes, the building of institutional memory regarding qualified economic operators for future work and broader permitted assessments of whose capacity can be relied upon. However, there remain areas in which heavy conditions may still be imposed on the participation of contractors in public contracts; the boundaries between the application of qualification and award criteria are not always certain; the historical tendency to caution against reliance on third party capacities may continue to be a residual issue; and shortlisting remains a grey area. This Section therefore takes an opportunity to review just some aspects of historical Member State practice with an eye on the extent to which the transition towards less formal qualification processes will be possible in the future.

EU after Lisbon. Amending or Coping with the Existing Treaties? (Springer: Berlin, 2014), at 161-176.

5.1. Legal capacity to participate and other participatory conditions

Before even considering substantive qualification and selection criteria, a preliminary issue concerns whether or not Member States may place certain conditions on participation by economic operators at the outset. For instance, in certain Member States, participation may be open to all economic operators. However, in theory, access may be foreclosed if the entity is required to demonstrate their legal capacity to contract, whether as natural persons, or more problematic, legal persons. This issue has been raised in certain comparator chapters and it is suspected that in at least a number of Member States, national legal or administrative requirements concerning the verification of legal capacity to contract are routinely being imposed.[69] Such requirements are to be distinguished from any rule requiring economic operators to take a specific legal form when contracting. Whilst these requirements do not appear to generally apply to non-domestic EU economic operators but rather non-EU economic operators from non-GPA countries, the possibility of such requirements to non-domestic economic operators cannot be excluded. The Directives' general prohibition on such requirements suggests that even preliminary conditions which seek to verify an economic operators' capacity to contract may be incompatible with EU law. Such assessments may also be problematic in practice given that it may be impossible to discern a company's precise scope of activities from a company's founding statutes, governing rules or a company register. Although this issue is of limited relevance in England and Wales where companies incorporated since 2006 are no longer required to define their object, this can be relevant in civil law Member States such as Spain or Portugal, where a legal person's capacity is restricted to the scope of activities included in its statutory object. In consequence, there may be some potential hurdles for economic operators without object to prove their capacity in those Member States.

A further issue which may become increasingly significant concerns the use of so-called "reciprocity clauses". For instance, in Spain, participation of non-EU economic operators from non-GPA signatories is subject to certification by diplomatic representation that the home state of the non-EU economic operator allows participation of Spanish economic operators in their public

69. Article 57(1) Royal Legislative Decree 3/2011 of 14 November approving the consolidated text of the Public Sector Contracts Act (LPSC) as referenced throughout A. Sanchez Graells, "Qualification, Selection and Exclusion of Economic Operators under Spanish Public Procurement Law" in this edition.

tenders.[70] Given the EU's ongoing efforts to establish a harmonised third country access regime based on verifiable reciprocity,[71] such conditions and their application should be the subject of more sustained focus in analysis. Aside from the difficulties surrounding the conceptual remit of "reciprocity", as well as evidentially substantiating and verifying reciprocity, such conditions seem to lack credibility in many instances. Certification by diplomatic representation may be criticised on a number of grounds. It is not clear that diplomatic representation is an indicator of market reciprocity or even how well informed it may be.[72] Further, it is difficult to see why a diplomatic representative would give any indication other than a positive one that reciprocity is ensured. Such requirements also seem somewhat rudimentary and disproportionate to their objectives. In fact, it would appear that its only function is to enact a sort of trade barrier to discourage non-EU or non-GPA economic operators from coming forward to a procurement procedure.

5.2. Professional registers

As indicated above, in certain Member States (for example, Spain or Portugal), there may be a particular emphasis in policy terms on ensuring that contractors have a certain "status" or capacity to act as contractors for public contracts generally. It is therefore unsurprising that practice in those Member States also follows through to assessments of technical or professional capacity at the qualitative selection stage of individual procurement procedures.[73] By contrast, the approach under the Directives, and in a majority of the Member States, is to simply focus on using the qualitative selection criteria to establish whether or not the economic operator is able to perform the contract. For instance, in Spain and Portugal, contracting authorities have re-

70. Sanchez Graells, "Qualification, Selection and Exclusion of Economic Operators under Spanish Public Procurement Law", Section 2 generally.
71. Amended proposal for a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries, COM (2016) 034 final. For discussion of the original 2012 proposal, see detailed appraisal of the European Commission's Impact Assessment Third countries' reciprocal access to EU public procurement, at http://www.europarl.europa.eu/RegData/etudes/BRIE/2014/508963/EPRS_BRI%282014%29508963_REV1_EN.pdf [accessed 23 June 2016].
72. Nationally based competition and markets authorities may be able to offer a clearer indication (but may not be able to offer statutorily binding opinions or certifications if such evidence is at all available).
73. See, for example, the historical practice in Romania in Section 5.2.1 and Spain.

quired economic operators to comply with either qualitative selection criteria or prove that they are classified through registration on a State registry of tenderers.[74] This has created an anomalous situation in which domestic and third country economic operators are subject to such classification requirements whilst EU economic operators are exempt. Consequently, EU economic operators have only been subject to qualitative selection criteria whilst simultaneously being encouraged to apply for certification in light of the benefits of this status. It has been argued that this puts undue pressure on EU economic operators to register to be classified, a requirement which now appears to be clearly incompatible with EU law.[75]

A broader issue is that generalised systems of classification or certification can represent major barriers to participation. In at least one Member State, it has been observed that classification is not typically based on a continuum of professional and economic qualities but rather on pre-defined levels of ability. Therefore, it is quite difficult for undertakings, in particular SMEs, to get classification specially for very specialised or high value projects, instances in which certification is likely to prove most useful.[76] Further, there is also evidence that whilst certificates may be obtained for certain types of contract, alternative attestations are provided to economic operators leading to variable "quasi-certification" in practice.[77]

Projecting into the future, the argument about the legality of professional registers may be diminished if not eliminated with the Directive 2014/24/EU requirement for Member States to accept the European Single Procurement Document. Having said that, it is possible to envisage that if efforts to encourage greater self-declarations of economic operators' abilities at the EU level fail, centralised systems of classification may become more and more important as the default standardised alternative. Therefore, there is scope for more sustained empirical analysis of certification regimes to discern whether greater harmonisation between national systems may be necessary.

74. Sanchez Graells, "Qualification, Selection and Exclusion of Economic Operators under Spanish Public Procurement La", Section 2.2 generally. Telles, "Qualitative selection and exclusion of economic operators in Portugal", Section 2.2, although this requirement only applies to public works contracts. See also Italy, Section 3.
75. Sanchez Graells, ibid. also citing Article 52(5) II Directive 2004/18/EC and now Article 64(7) Directive 2014/24/EU.
76. Spain, Section 2.2.
77. Spain, Section 2.2; Portugal, Section 3.1 referring to the use of an "honour statement" for contracts other than works.

5.3. Qualitative selection criteria

Generally, Member States have not regulated qualification and selection criteria beyond the minimum prescribed in the Directives, leaving flexibility to contracting authorities to determine qualitative selection requirements.[78] Practice suggests that most Member States have been able to ensure general restraints on the application of such criteria through administrative and judicial review on proportionality grounds.[79]

However, there is a notable instance in which Portugal has adopted more sophisticated methods of assessment than set in the Directive's criteria. For instance, concerning the assessment of economic and financial standing, Portuguese law has imposed the use of a specific mathematical formula to calculate financial ratios.[80] It has been argued that by replacing heuristic assessments such a model may improve decision-making at the expense of reducing the contracting authority's discretion.[81] At present, practice is slowly transitioning to the use of self-declarations to reduce contracting authority discretion. In which case, there ought to be greater focus in analysis on the ways in which other prescriptive or standardised tools of this kind may address qualification.[82] While the imposition of mathematical formulae does not appear to contravene Directive 2014/24/EU, it may be that for the foreseeable future Portugal will remain the only Member State the authors are aware of that imposes mathematical formulae at either selection or award stages. An interesting issue that has not yet been explored concerns the comparative use of mathematical models and the extent to which legal regulation beyond the minimum set in the Directives is necessary, useful or desirable.

Another issue that arises from historical comparative experience, but no longer appears to be an issue, concerns the exclusion of an economic operator for having an excessive turnover, i.e. a turnover disproportionate to the nature

78. Spain, Portugal, Germany, France, Italy, UK.
79. A notable exception is Romania in which it is reported that, historically, qualification and selection criteria have been applied too restrictively an issue attributable both to historical corruption and relative inexperience of contracting authorities. See Section 3.
80. P. Telles, "Qualitative selection and exclusion of economic operators in Portugal", Section 2.2 in this edition citing Article 165(2) of the Public Contracts Code 2008.
81. Ibid.
82. Another example might be the use of credit reports, for example to evidence financial standing. See UK policy guidance in Section 2.2.1. Whilst these may be supplementary to other means of establishing economic and financial standing, they are another example of a move towards standardisation of qualification assessments.

of the contract.[83] For instance, in France, exclusion was used as an equivalent to a small business policy to encourage bids by small- and medium-sized enterprises. Similarly, there have been attempts to set a minimum number of SMEs to be admitted as candidates for procedures. However, such requirements have since been removed.[84] Thus, there does not appear to be any strong evidence in the comparator reports that qualitative selection criteria are being used to great extent to achieve strategic or secondary objectives in public procurement or to filter admittance to procedures, in contrast to more explicit efforts recognised under the exclusion grounds.[85]

A further issue that has not generally been explored in the comparator chapters but which has been identified in at least one Member State concerns the extent to which matters which should be stipulated as a matter for contract performance have been used as part of the qualification criteria.[86] Consequently, there are instances in which qualification criteria, which should be used to establish minimum capacity, have been used effectively to verify the economic operator's concrete ability to perform, blurring the boundaries between qualitative selection, award, and the use of contract performance conditions. Inevitably, this overlap is most likely apparent in the assessment of technical capacity; therefore, the distinction between qualification assessments, and contract performance conditions, considerations continue to be blurred. The categorical separation of contract performance clauses ought to be clearer.

Another issue that appears to have exercised contracting authorities in at least certain Member States concerns the assessment of past performance and past experience at the qualitative selection stage. Given additional clarification now brought by the Directives under the exclusion grounds with regard to the assessment of past performance, it is hoped that a more consistent approach to past performance assessments will emerge across both exclusion and qualitative selection assessments. There are clear instances of policy initiatives within at least some Member States to focus more strategically on past performance and supplier risk, although it must be acknowledged that such initiatives also bring new challenges.[87] Unsurprisingly, again, these new challenges may concern the use of certifications and other attestations by one

83. France, Section 2.2.
84. Ibid. having been struck down by the Conseil d'Etat.
85. Examples including the need to ensure tax compliance, for example.
86. See for example, practice in Italy, Section 2.2.
87. On the difficulties of assessing past performance or experience, see Romania. For recent policy initiatives, see for example, UK practice discussed in Section 2.2.1.

contracting authority as to past performance which may be relied on or not by other contracting authorities.[88] As a matter of practicality, difficulties include ensuring that appropriate checks and balances are in place as well as the bases for challenging repositories of information on past performance.

Finally, however, the distinction between selection criteria and award criteria which has proven to be problematic as a matter of EU level, no longer appears to be the subject of intense debate or judicial scrutiny within a majority of the Member States.[89]

5.4. Means of proof

Even those Member States which impose strict documentary requirements for qualitative selection are experiencing some increase in the use of self-declarations.[90] This is also accompanied by a shift towards greater use of pre-qualification systems generally. For instance, in Germany, pre-qualification systems have been particularly important in overcoming a historically bureaucratic system for the verification of qualification criteria.[91] There is evidence that repeated compliance with pre-qualification requirements may result in economic operators being assigned a certification code and placement on a database which contracting authorities may consult.[92] Systems of this kind are likely to increase as centralisation and standardisation of pre-qualification assessments normalises.

An issue which emerges in some of the comparator chapters concerns the timing or stages at which qualification documentation is verified. It may be inferred that in most Member States, verification that the qualification criteria are met will typically occur before the tender stage. However, in at least one Member State, there is an overriding emphasis on checking qualification documentation provided by the winner only after award.[93] Whilst bringing

88. See the discussion of UK policy in this regard.
89. Spain, Section 2.2; Germany, Section 2.2. Whilst the use of selection criteria among the award criteria had been "widespread" before *Lianakis*, clarification provided by *Lianakis* is likely to reduce such instances.
90. Spain, Section 3.2; Germany, Secton 3 and Italy, Section 3.
91. Germany, Section 3.
92. Ibid. Another example of a qualification database and the issuing of a so-called AVC pass, see Italy, Section 3.
93. Portugal, Section 3.1 also discussing the disadvantages of checking exclusion at the end of the procedure, not least an added incentive on the part of the winner to manipulate data provided having won the contract. Contrast this with France, where the absence of a single document at the qualification stage results in the rejection of the

certain benefits, it has been acknowledged that such an approach also has certain drawbacks.

A further issue in practice may concern differences between Member States on whether original copies of documents are required or whether copies and certified reproductions will suffice, or alternatively, references to databases which can be accessed by contracting authorities.[94] Issues concerning the form and level of documentary verification are likely to continue to vary across the Member States, in particular in those that have historically relied heavily on authenticated paper copies. Inevitably, the transition to electronic documentation should reduce these issues, although it is necessary to ensure that where contracting authorities and economic operators specify internet sources for access, these are publicly accessible.

A final issue that continues to create uncertainty in some Member States concerns requests by contracting authorities for clarificatory documents and the consequences of failure to produce those documents. In certain Member States, it has been considered necessary to avoid the formal exclusion for minor documentary errors. For instance, in Italy, a contracting authority is now precluded from excluding an economic operator from a procedure for failing to produce required documents. However, in turn, this has created the possibility of imposing a fine on the economic operator.[95] This possibility raises as many potential issues as it solves, for example, determining the proportionate level of fines, categorising the seriousness of documentary breaches, and the consequences of non-payment of fines on subsequent tenders by the economic operator, to name but a few.

5.5. Reliance on the capacities of other entities

The comparator chapters indicate that Member States continue to support the general proposition that it is possible to rely on the capacities of other entities in establishing economic and financial standing and technical and professional ability, including the capacities of subcontractors.[96]

However, it has been observed there remains a traditional preference, at least in some Member States, for the economic operator to establish ability by reference to their own capacity. Further, this has not precluded, for example,

candidate, unless the candidate is asked to complete the file (a matter at the complete discretion of the contracting authority).

94. Portugal, Sections 3.1 and 3.2.1.
95. Italy, Section 4.
96. Spain, Section 4.1; Portugal Section 4; Germany, Section 4; France, Section 4. A notable exception in this regard is Romania.

a requirement that the candidate or tenderer nevertheless demonstrates minimum capacity before it can rely on third party capacities necessary to meet the levels required under the contract to be awarded.[97] A further issue of uncertainty concerns what should happen in the case in which a third party will not be directly involved in the contract but offers its capacity exclusively as a means for the economic operator to comply with the requirements,[98] which the Court of Justice has already indicated falls short from satisfying the requirements under the new rules of Directive 2014/24/EU as far as they allow the contracting authority scrutinise the substantiality of the arrangements between the prime contractor and the third party on which capacities it aims to rely.[99] Another open question is whether the increasing use of self-declarations will further reduce restrictions on reliance on third party capacity.[100]

5.6. Reduction of the number of candidates: "shortlisting"

A further issue arising from selection of candidates is the possibility for "shortlisting" candidates and how said shortlisting is to be carried out. How should contracting authorities rank the candidates on a shortlist and how should the qualified candidates be selected to take part in the award stage? This issue is particularly relevant for contracts tendered under the restricted procedure, competitive dialogue and – going forward – also for the competitive procedure with negotiation and innovation partnerships where only a limited number of candidates are to be carried forward from selection. This is not a problem in all Member States, for example, it was not found in the UK, but it has appeared elsewhere.

In Portugal,[101] contracting authorities have the option between two different selection systems. One pass/fail (simple) and another where candidates are ranked from best to worst in accordance with a specific mathematical formula (complex). In this Member State, any economic operator deemed good enough under the simple system has to be invited to the next stage and shortlisting is not permitted. Under the complex system only the X best candidates are invited to go forward, so the shortlisting is done effectively by the results obtained by the candidates under the required mathematical formula.

97. Spain, Section 4.1.
98. Portugal, Section 4.
99. See Judgment of 7 April 2016 in *PARTNER* C-324/14, *Apelski Dariusz*, EU:C:2016:214.
100. Spain, Section 4.1.
101. Portugal, Section 3.2.

In other Member States such as Germany,[102] which operates a system of "qualification +" it appears that economic operators have to be shortlisted after being deemed as qualified, as to identify which candidates are more suitable. However, what limitations and procedural checks or criteria requirements imposed on German contracting authorities is not clear. In France,[103] it was until recently possible to simply draw lots among all the qualified candidates to select which ones to carry forward. This option has been argued as being preferable to the German alternative because drawing lots is fairer than providing a discretionary power to the contracting authority to select economic operators. Both the German and the previous French approach have significant drawbacks in terms of fairness and ensuring the decision-making process is not tampered with. For example, under the German system it appears the contracting authority may pick whatever economic operators it prefers, thus facilitating corruption and preferential treatment. It also functions as a barrier against new entrants in a market which would not have a prior reputation to help them being selected. The previous French system while fairer for new market entrants is also subject to abuse as a "drawing lots" system can easily be compromised. Out of the three approaches, it would seem that Portugal managed to find a good compromise between a fair decision and keeping the transaction costs down for both the economic operators and the contracting authority. By offering two alternative selection models to be selected before launching the procedure and imposing one with a robust decision-making matrix for those situations where shortlisting might occur, it limits the discretion of the contracting authority in those situations subject to potential abuse.

6. Conclusions

This chapter has provided support to the intuition that, given that the scope of Article 45 of Directive 2004/18 (and now art 57 of dir 2014/24) was limited to substantive grounds for exclusion of economic operators from public procurement procedures, Member States' domestic rules and administrative practice would show a relatively high level of convergence in substantive terms and more variety in the procedural setting. It has then submitted that, in simplified terms and on the basis of the general trends they show regarding

102. Germany, Section 5.
103. France, Section 5.

substantive and procedural regulatory choices, Member States can be considered either *discretion-oriented* or *procedure-oriented*. In the transposition of Directive 2014/24, the former face challenges primarily related to ensuring sound standards of administrative practice and judicial review, whereas the latter risk not gaining advantage of the flexibility afforded by the new rules, and need to avoid liability for the imposition of unjustified requirements on economic operators. These different challenges would require different solutions and adjustments to the existing procedural structures in *discretion-oriented* and in *procedure-oriented* Member States. The chapter has submitted that there is limited scope for mutual learning at this stage, but that this should nonetheless be an area of strategic interest for the Commission in reviewing the implementation of the 2014 framework.

With regard to qualitative selection, the findings have been more limited. The generality of the qualification and selection provisions under Directive 2004/18 has meant that Member States have exercised considerable discretion to develop qualification and selection processes. Even before qualification and selection, Member States have adopted certain approaches to the assessment of legal capacity and participation on which the Directives have been largely silent. To date, the impact of classification systems and professional registers has been largely unexplored. An open question concerns the extent to which simplified pre-qualification and qualification processes coming into effect as a result of Directive 2014/24/EU will reduce the importance of such systems in the future. However, simplified and standardised qualification processes also bring new challenges, e.g. information sharing between contracting authorities and the continuing need to verify information provided. In terms of qualification and selection criteria specifically, although a significant proportion of challenges concern qualification and selection, the types of qualification criteria adopted do not appear to be as significant and issue as the scope of qualification decisions. A key example concerns a blurring of qualitative selection and issues regarding performance. Finally, there continues to remain some uncertainty surrounding the reduction/shortlisting of candidates with a diversity of approaches ranging from models based on qualification criteria through to drawing of lots. It remains to be seen what impact simplified qualification processes will have on all of the above issues.

On Self-cleaning[1]

Roberto Caranta[2] and Sara Richetto[3]

1. Introduction

As pointed out inter alia by Sanchez-Graells, Article 57(1) and 57(2) of the new Directive significantly extend the remit of the grounds for mandatory disqualification.[4] This is because the EU lawmakers expect procurement law to contribute to sustainable development goals while enhancing the integrity of public contracting as advertised *inter alia* in Article 18(2) of Directive 2014/24/EU.[5]

Moreover, Article 57(5) of Directive 2014/24/EU has clarified that contracting authorities are under a duty to act on those grounds of exclusions which are mandatory under EU or national law, and this at any and every stage of the award procedure, thus reinforcing an obligation which is also

1. We thank Albert Sanchez Graells and an anonymous reviewer for useful comments on an earlier draft. All mistakes are ours.
2. University of Turin.
3. Studio legale Prof. Avv. Andrea e Mario E. Comba.
4. In addition to A. Sanchez Graells "Exclusion of Economic Operators from Public Procurement Procedures. A Comparative View on Selected Jurisdictions", in this collection, also see A. Sanchez Graells "Exclusion, Qualitative Selection and Shortlisting in the New Public Sector Procurement Directive 2014/24" in F. Lichère, R. Caranta, S. Treumer (eds), *Modernising Public Procurement: The New Directive* (DJØF: Copenhagen, 2014) at 105; see also (critically) A. Sanchez Graells, *Public Procurement and EU Competition Rules* 2nd (Hart: Oxford, 2015) at 284 ff; and H.-J. Prieß, "The rules on exclusion and self-cleaning under the 2014 Public Procurement Directive" (2014) 23 *PPLR*, at 112.
5. On the different goals pursued by Directive 2014/24/EU please refer to R. Caranta "The changes to the public contract directives and the story they tell about how EU law works" (2015) 52 *Common Market Law Review*, at 395 ff.

provided in Articles 56(1)(b) and 57(1), the breach of the latter provision being among the grounds for termination of contract under Article 73(b).[6]

Beyond a certain point this development may play out against the best interests of contracting authorities. The exclusion of large or innovative players from some markets may deprive contracting authorities of potential contractors or more often reduce competition and therefore the chances of getting best value for money, something which we think is not covered by the power given to contracting authorities by Article 57(3) to waive an exclusion clause for overriding reasons related to the public interest.[7]

Almost inevitably the strengthening of the exclusion regime has been somewhat compensated by mechanisms allowing economic operators to show contracting authorities that their "misbehaving" is past them and that they are now to draw a line and comply with the rules. The overall idea is to exclude companies from taking part in award procedures "at least until such time as those parties are rehabilitated and once more can be considered trustworthy".[8] Some avenue for redemption may also be seen as necessarily flowing from the proportionality and equal treatment principle (all now listed in Article 18(1) of Directive 2014/24/EU).[9]

In the EU the possibility to remedy past violations is normally referred to as "self-cleaning". According to the Oxford Dictionary "self-cleaning" is an adjective. It refers to an object or apparatus able to clean itself, such as a "self-cleaning oven". Writing of "self-cleaning" with reference to public procurement is probably stretching English a bit far. However, it has now be-

6. See A. Sanchez Graells "Exclusion, Qualitative Selection and Short-listing" *supra* note 1, at 100.
7. On the limits to competition flowing from debarment, E. Hjelmeng and T. Søreide, "Debarment in public procurement: rationales and realisation" in G.M. Racca and C.R. Yukins (eds), *Integrity and Efficiency in Sustainable Public Contracts* (Bruylant: Bruxelles, 2014), at 220; D.D. Stevenson and N.J. Wagoner "FCPA Sanctions: Too Big to Debar?" (2011) 80 *Fordham L. Rev*, at 816.
8. F.F. Fariello and C.C. Daly, "Coordinating the Fight Against Corruption Among MDBs: The Past, Present, and Future of Sanctions" (2013) 45 *Geo. Wash. Int'l L. Rev*, at 257.
9. E. Hjelmeng and T. Søreide, "Debarment in public procurement" *supra* note 4, at 218 and 226 f; see also S. De Mars "Exclusion and Self-Cleaning in Article 57: Discretion at the Expense of Clarity and Trade?" in G.S. Olykke and A. Sanchez Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules in 2014* (Edward Elgar Publishing: Cheltenham, 2016), ch. 11 writing of self-cleaning as a countermeasure to a strengthened exclusion regime..

come a term of art, so we will not put up a fight against the evolution of language.[10]

2. The history up to Directive 2014/24/EU, also with reference to the EU financial rules

Law makers flirted with self-cleaning when discussing what was to become Directive 2004/18/EC, but nothing came of this.[11] However, self-cleaning did not begin with the 2014 public procurement reform. EU public contract directives provide a legislative framework, but in many areas the Member States still have some leeway and exclusions is one of this areas.[12] Indeed the well-known case of Siemens very much contributed in bringing the issues surrounding self-cleaning to the consciousness of EU public procurement law.[13]

Also self-cleaning was, and is, provided under the rules applicable to the contracts passed by EU institutions and bodies. To the extent that self-cleaning is mandated by the principles of competition and proportionality, the rules applicable to EU institutions and contracting authorities in the Member States should not fundamentally diverge. More specifically, a new Article 133a (Application of exclusion criteria and duration of exclusion) was added to Commission Regulation (EC, Euratom) N. 2342/2002[14] as part of the changes to the Implementing regulation brought about by Commission Regulation (EC, Euratom) N. 478/2007.[15] Under the first part of this provision, in

10. See H.-J. Prieß, "The rules on exclusion and self-cleaning" *supra* note 1, at 121, also providing a German genealogy for the term; "corporate compliance" is instead used in competition law: see EU Commission *Compliance Matters* (2012).
11. See E. Hjelmeng and T. Søreide, "Debarment in public procurement" *supra* note 4, at 226.
12. See the discussion in S. Arrowsmith, H.-J. Prieß and P. Friton "Self-Cleaning – An Emerging Concept in EC Public Procurement Law?" in H. Pünder, H.-J. Prieß and S. Arrowsmith (eds), *Self-Cleaning in Public Procurement Law* (Heymanns: Köln, 2009), at 2.
13. But not just EU law: see with reference to US law D.D. Stevenson and N.J. Wagoner "FCPA Sanctions: Too Big to Debar?", *supra* note 4, at 780 f.; J. Tillipman "The Congressional War on Contractors" (2013) 45 *Geo. Wash. Int'l L. Rev*., at 241.
14. Commission Regulation (EC, Euratom) N. 2342/2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) N. 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities.
15. Commission Regulation (EC, Euratom) N. 478/2007 amending Regulation (EC, Euratom) N. 2342/2002 laying down detailed rules for the implementation of Council

order to determine duration of exclusion from EU contract award procedures and to ensure compliance with the principle of proportionality, the institution responsible was to take into account various aspects, including "the measures taken by the entity concerned to remedy the situation".[16]

Self-cleaning has been upgraded from implementing rules to the 2012 Financial Regulation which were in force until the end of 2015. Article 106 thereof, on exclusion criteria applicable to participation in procurement procedures, provides that exclusions of an economic operator because its officials and/or representatives have been convicted of an offence concerning their professional conduct or for fraud, corruption and so on, do not apply "where the candidates or tenderers can demonstrate that adequate measures have been adopted against [those] persons".[17]

It is to be noted that Article 106 has now been recast with effect from 1 January 2016, by Regulation (EU, Euratom) N. 2015/1929 amending Regulation (EU, Euratom) N. 966/2012 on the financial rules applicable to the general budget of the Union. The provision strengthens the regime of self-cleaning. Under the new Article 106(3), besides complying with the proportionality principle, any decision on the application of exclusion grounds shall take into account any mitigating circumstances, "such as the degree of collaboration of the economic operator with the relevant competent authority and its contribution to the investigation as recognised by the contracting authority, or the disclosure of the exclusion situation by means of the declaration referred to in paragraph 10" of the same provision.[18]

Under the new Article 106(7) of Regulation (EU, Euratom) N. 966/2012, an economic operator cannot be excluded from participating in a procurement procedure inter alia where it has taken remedial measures, thus demonstrating its reliability. Under Article 106(8) measures remedying an exclusion situation may include, in particular: (a) measures to identify the origin of the situations giving rise to exclusion and concrete technical, organisational and personnel measures within the relevant business area of the economic operator, appropriate to correct the conduct and prevent its further occurrence; (b)

Regulation (EC, Euratom) N. 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities.

16. See also S. Arrowsmith, H.-J. Prieß and P. Friton "Self-Cleaning" *supra* note 9, at 30.
17. Regulation (EU, *Euratom*) n. 966/2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, *Euratom*) N. 1605/2002.
18. See also Article 141 of Commission Delegated Regulation (EU) 2015/2462 amending Delegated Regulation (EU) N. 1268/2012 on the rules of application of Regulation (EU, Euratom) N. 966/2012.

proof that the economic operator has undertaken measures to compensate or redress the damage or harm caused to the Unions financial interests by the underlying facts giving rise to the exclusion situation; and (c) proof that the economic operator has paid or secured the payment of any fine imposed by the competent authority or of any taxes or social security contributions due.

3. Self-exclusion provisions in Article 57 of Directive 2014/24/EU

Rather than being drawn by mermaids' chants for simplification, the EU lawmakers answered the need for additional and more detailed regulation of this area of EU public procurement law.[19] The provisions on self-cleaning have therefore been hailed among the "most significant specific change" brought about by the 2014 reform.[20]

A number of provisions in Article 57 Directive 2014/24/EU may be referred to self-cleaning, understood widely.

3.1.

Article 57(2) provides for exclusion in case of breach of obligations relating to the payment of taxes or social security contributions.[21] However, under the last phrase of that paragraph, exclusion "shall no longer apply when the economic operator has fulfilled its obligations by paying or entering into a binding arrangement with a view to paying the taxes or social security contributions due, including, where applicable, any interest accrued or fines". This provision basically clarifies that full payment also covering interests and/or fines is tantamount to self-cleaning, not requiring an *ad hoc* decision by the contracting authority. In doing so Article 57(2) limits the discretion which the Member States had under the older directives but also does away with the uncertainties which had followed from that approach.[22]

19. H.-J. Prieß, "The rules on exclusion and self-cleaning" *supra* note 1, at 112.
20. S. Arrowsmith, *The Law of Public and Utilities Procurement* 3rd (Sweet & Maxwell: London, 2014), at 206.
21. See also Recital 101.
22. See Joined Cases *C*-226/04 and *C*-228/04 *La Cascina* [2006] *ECR* I-1347, spec. paragraphs 23 ff; the words in the Directive seems to rule out the sufficiency a mere offer from the economic operator to enter into an agreement to may: see, concerning the Italian case law, M. Comba "Qualification, Selection and Exclusion of Economic Operators (Tenderers and Candidates) in Italy", at 2 c).

The provision must be read in the light of the recent judgment in the *Consorzio Stabile Libor Lavori Pubblici* case.[23] A first instance administrative court in Italy doubted the consistency with the proportionality principle of the refusal to sign a contract with the *Consorzio* because in ex post qualification it was found out that the *Consorzio* had failed to fulfill its obligations relating to the payment of social security contributions to the amount of €278. The applicable Italian legislation required contracting authorities to exclude tenderers who had committed an infringement relating to social security contributions where what is still due is lower of €100 or, in any case, not exceeding 5% of the sums originally owed. The Court of Justice held, first, that the domestic legislation at issue pursued the legitimate objective in the public interest "to ensure the reliability, diligence and responsibility of the tenderer and its proper conduct in relation to its employees".[24] Moreover, the establishment of a precise threshold for exclusion was considered to ensure "not only equal treatment of tenderers but also legal certainty".[25] Finally, the applicable EU law provisions were held to allow the Member States to provide for the exclusion of economic operators in breach of their social security obligations without any consideration as to the unpaid amount.[26] Following *a maiori ad minus*, "setting such a minimum amount in national law amounts to tempering the grounds for exclusion under that provision and cannot therefore be regarded as going beyond what is necessary".

In *Consorzio Stabile Libor Lavori Pubblici* the Court of Justice was determined in preserving the discretion of the Member States to provide for exclusion even in case of minor breaches.[27] Article 57(2) leaves this discretion in place but, when compared with Article 27 of Directive 2004/18/EU, provides for the cleaning power of late, but full, payment. Article 57(2) provides for a special self-cleaning mechanism when compared to Article 57(6). Indeed the general mechanism provided in Article 57(6) does not apply to the exclusion grounds regulated under Article 57(2).[28]

23. Case C-358/12 Consorzio Stabile Libor Lavori Pubblici [2014] ECLI:EU:C:2063.
24. Paragraph 32.
25. Paragraph 34.
26. Paragraph 36.
27. This at least for EU mandatory grounds of exclusion: see also the last phrase of Recital 101.
28. This is criticised by H.-J. Prieß, "The rules on exclusion and self-cleaning", *supra* note 1, at 117, who writes about "self-cleaning light"; see also S. De Mars "Exclusion and Self-Cleaning" *supra* note 6, correspondfn25.

3.2.

Under Article 57(4), contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator who is bankrupt or is the subject of insolvency or winding-up proceedings. However, under the last phrase of the same provision:

"Member States may require or may provide for the possibility that the contracting authority does not exclude an economic operator which is in one of the situations referred to in that point, where the contracting authority has established that the economic operator in question will be able to perform the contract, taking into account the applicable national rules and measures on the continuation of business".

This provision makes sense considering that bankruptcy law in Europe has evolved – much along the US tradition – from viewing bankruptcy as a sanction to looking for ways to allow any viable economic activity.[29]

It is striking that while Article 106 of the 2012 Financial Regulation extended this specific waiver to other exclusion grounds, the new text in force from 1 January 2016 is again in line with Article 57(4) of Directive 2014/24/EU.[30]

Moreover, confirming provisions in the older directives, Article 32(2)(d) of Directive 2014/24/EU allows the use of the negotiated procedure without prior publication to be used for the purchase of supplies or services "on particularly advantageous terms, from either a supplier which is definitively winding up its business activities, or the liquidator in an insolvency procedure, an arrangement with creditors, or a similar procedure under national laws or regulations". Obviously this will not be possible if such economic operators were always disqualified. Article 57(4) cannot, however, be properly considered a case of self-cleaning but rather an exceptional *ad hoc* waiver of an exclusion ground.

3.3.

The main provision on self-cleaning is however Article 57(6).[31] Article 57(6), first sentence, provides that where exclusion is provided under Article 57(1) –

29. See the Recommendation of the European Commission on a new approach to business failure and insolvency COM (2014) 1500 final, at http://ec.europa.eu/justice/civil/files/c_2014_1500_en.pdf [accessed 23 June 2016].
30. Regulation (EU, *Euratom*) N. 966/2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, *Euratom*) N. 1605/2002, now amended by Regulation (EU, Euratom) N. 2015/1929.

mandatory exclusion under EU law – and 57(4) – facultative or mandatory exclusion under national law – any economic operator may provide evidence to the effect that the measures taken by it "are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion".

The provision indicates that the (main) objective of the EU regime on exclusions is to ensure the reliability of the private contractor. This is reinforced by Recital 101 as it clarifies that "grave professional misconduct can render an economic operator's integrity questionable and thus render the economic operator unsuitable to receive the award of a public contract irrespective of whether the economic operator would otherwise have the technical and economical capacity to perform the contract".[32]

Under the second sentence of Article 57(6) and in logical order, the measures to be taken by the economic operator concerned to re-establish reliability are: a) active collaboration with the investigating authorities to fully clarify the relevant facts and circumstances; b) "concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct"; and c) payment or undertaking "to pay compensation in respect of any damage caused by the criminal offence or misconduct".[33]

According to the third phrase of Article 57(6), the authorities competent to decide on self-cleaning are tasked with evaluating the measures taken by the economic operators "taking into account the gravity and particular circumstances of the criminal offence or misconduct". A duty to give reasons is provided only where the measures taken are considered to be insufficient. Following an indication added by the Council, if, on the contrary, "such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure" (Article 57(6) first phrase).

Again, due to an amendment tabled by the Council, a final judgment providing for exclusion limits the discretion of the competent authority which, under the last phrase of Article 57(6), "shall not be entitled to make use of the possibility provided for under this paragraph during the period of exclusion resulting from that judgment in the Member States where the judgment is effective". It is to be stressed that the limit to the discretion of contracting authorities will normally only apply within the jurisdiction having

31. See also A. Sanchez Graells, *Public Procurement and EU Competition Rules supra* note 1, at 294 ff.
32. See also *Generali-Providencia Biztosító* (C-470/13, EU:C:2014:2469), paragraphs 35 ff, and case law referred therein.
33. See H-J. Prieß, "The rules on exclusion and self-cleaning", *supra* note 1, at 121.

pronounced the exclusion.[34] Indeed mutual recognition of judgments in criminal matters still require a specific procedure which cannot be substituted by a decision taken by a contracting authority.[35]

Finally also relevant here is Article 57(7) which, while giving the Member States the power to specify the provisions for implementing the exclusions regime specifically indicates that: "They shall, in particular, determine the maximum period of exclusion if no measures as specified in paragraph 6 are taken by the economic operator to demonstrate its reliability".

The main aspects deserving analysis are the choice of the authority competent to decide on self-cleaning, the measures which have to be taken, the discretion which is left to the decision-maker, and finally the procedural safeguards for the economic operators involved.

4. The regime of self-cleaning

4.1. Who decides?

It has to be stressed that on many aspects Directive 2014/24/EU leaves quite some margin of choice to the Member States.[36] In principle, the decision on self-cleaning reverts to the same contracting authorities that are competent with reference to exclusion. Under Article 56(1) Directive 2014/24/EU each contracting authority needs to verify that tenders come from tenderers that are "not excluded in accordance with Article 57" before making any contract. Exclusion is worded as a duty of contracting authorities again in Article 57(5). Self-cleaning obliterates grounds for exclusion and should be assessed by the contracting authority.[37]

A problem with this literal and systematic interpretation of Articles 56 and 57 is that identical procedures should be iterated for each tender submitted by an economic operator, something which could easily lead to divergent decisions taken by different contracting authorities with reference to the very

34. For some indication as to the reasons of this amendment, see again H.-J. Prieß, "The rules on exclusion and self-cleaning", *supra* note 1, at 122; critically A. Sanchez Graells, *Public Procurement and EU Competition Rules*, *supra* note 1, at 295.
35. *Programme of measures to implement the principle of mutual recognition of decisions in criminal matters* (2001/C 12/02)
36. S. De Mars "Exclusion and Self-Cleaning", *supra* note 6; E. Hjelmeng and T. Søreide, "Debarment in public procurement", *supra* note 4, at 218.
37. See E. Hjelmeng and T. Søreide, "Debarment in public procurement" *supra* note 4, 230.

same self-cleaning measures.[38] Recital 102 allows for an alternative that Member States should rather follow (provided they are allowed to do so under domestic law).[39] After indicating that "it should be left to Member States to determine the exact procedural and substantive conditions applicable" to self-cleaning proceedings, following changes introduced by the Council during the legislative procedure leading to the adoption of Directive 2014/24/EU, the provision also clarifies that the Member States "should, in particular, be free to decide whether to allow the individual contracting authorities to carry out the relevant assessments or to entrust other authorities on a central or decentralised level with that task".[40]

This possibility is confirmed by a change in the wording of the relevant provision. While Article 55(4) of the 2011 Commission proposal expressly referred to the contracting authorities as the ones having to evaluate self-cleaning measures, due to changes in the formulation proposed by the Council what has become Article 57(6) is not committal as to the competent authority.

Removing decisions on self-cleaning from contracting authorities should facilitate both process and predictability.[41]

4.2. Appropriate self-cleaning measures

The existence of a ground of exclusion makes it clear that the economic operator concerned is "unsuitable" to be awarded the contract. Recital 102 however clarifies that allowance should be made "for the possibility that economic operators can adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour".

Basically the economic operator is asked to both remedy past wrongdoings and prevent future ones. Again, according to Recital 102, economic operators must be given "the possibility to request that compliance measures

38. See also S. Arrowsmith *The Law of Public and Utilities Procurement*, *supra* note 17, at 1272.
39. For instance according to A. Reidlinger, S. Denk and H. Steinbach "Austria" in H. Pünder, H.-J. Prieß and S. Arrowsmith *Self-Cleaning in Public Procurement Law*, *supra* note 9, at 34, blacklisting is forbidden in Austria.
40. Compare Recital 35 in the proposal of the Commission with the amended text proposed by the Council; see also S. De Mars "Exclusion and Self-Cleaning" *supra* note, spec. Part II; H.-J. Prieß, "The rules on exclusion and self-cleaning", *supra* note 1, at 121.
41. E. Hjelmeng and T. Søreide, "Debarment in public procurement", *supra* note 4, at 229.

taken with a view to possible admission to the procurement procedure be examined". Setting up self-cleaning assessment procedures is therefore a duty incumbent on the Member States. This conclusion is consistent with the idea that the objective of EU public procurement law is the widest competition possible.[42]

The bottom line is that, following an addition to the original proposal pushed by the Council, where self-cleaning measures "offer sufficient guarantees, the economic operator in question should no longer be excluded on those grounds alone".[43] The use of "should" is consistent with both the proportionality principle and with the distinctive EU approach recognising that economic operators have an individual right to take part in award procedures as part of their market access which is safeguarded by the four freedoms.[44]

The list of measures to be taken by the economic operator seeking readmission to procurement procedures is not very long, especially when compared to the ones found in the corresponding provisions in the US which will be referred to later (section 6). As already recalled, under Article 57(6) the economic operator concerned has to prove to have acted on three fronts.[45]

First, the economic operator shall prove that it "has clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities". This is logically the first step of many clemency

42. E.g. Case C-358/12 Consorzio Stabile Libor Lavori Pubblici [2014] ECLI:EU:C:2063, paragraph 29.
43. Recital 102; this formula echoes quite strongly a conclusion by H.-J. Prieß, "Questionable Assumptions: The Case for Updating the Suspension and Debarment Regimes at the Multilateral Development Banks" (2013) 45 *Geo. Wash. Int'l L. Rev.* 274, at 282.
44. S. Arrowsmith, H-J. Prieß and P. Friton "Self-Cleaning", *supra* note 9, at 11 ff, where the principle of proportionality and the relevant case law are discussed as well; see H.-J. Prieß, "Questionable Assumptions", *supra* note 40, esp. 283; a similar approach, based on the equality principle, have been followed by the Austrian Constitutional Court: see for reference and discussion A. Reidlinger, S. Denk and H. Steinbach "Austria", *supra* note 9, at 41 f. Other public procurement regimes do not however recognise such a right: e.g., with reference to the US, R. Majtan, "The Self-Cleaning Dilemma: Reconciling Competing Objectives of Procurement process" (2013) 45 *Geo. Wash. Int'l L. Rev.*, at 342 ff.
45. These measure are basically those listed in S. Arrowsmith, H-J. Prieß and P. Friton "Self-Cleaning", *supra* note 9, at 4 ff; for a more in depth analysis see also H.-J. Prieß, H. Pünder and R.M. Stein "Germany" in H. Pünder, H-J. Prieß and S. Arrowsmith *Self-Cleaning in Public Procurement Law, supra* note 9, at 76.

mechanisms. Indeed, self-cleaning aims at discouraging a culture of concealment.[46]

Second, the economic operator must have "taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct". This is specified by Recital 102 indicating that "[t]hose measures might consist in particular of personnel and organisational measures such as the severance of all links with persons or organisations involved in the misbehaviour, appropriate staff reorganisation measures, the implementation of reporting and control systems, the creation of an internal audit structure to monitor compliance and the adoption of internal liability and compensation rules".

It has been claimed that personnel measures must include – in compliance however with the applicable rules of labour law – the unconditional and immediate dismissal of "all officers, directors and employees" involved in the wrongdoing.[47] This may be going too far, especially concerning employees who might be simply carrying out orders and who might, in most cases, be relocated to other tasks. Concerning organisational measures, one important step is the creation of a compliance office separated from the business operations of the economic operator concerned.[48] Also, drawing from the US experience, the involvement of external monitors has been suggested.[49] Whistleblowers should also be encouraged rather than sanctioned or otherwise harassed.[50]

Finally, as a further necessary self-cleaning measure, the economic operator concerned must show to have "paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct". The relevance of making good the harm done as part of the self-cleaning mechanism has often been stressed.[51] The present text owes to the Council.[52] The proposal of the Commission required actual compensation. It is questionable whether the duty only covers damages which are beyond dispute or also those for which litigation is pending or has not even started. Article 57(6), referring

46. H. Pünder, H.-J. Prieß and S. Arrowsmith "Self-Cleaning", *supra* note 9, 204.
47. M. Burgi and L.K. Wittschurky, "The Qualification, Selection and Exclusion of Economic Operators (Tenderers and Candidates) from a German Perspective", at 2 b); see also H.-J. Prieß, H. Pünder and R.M. Stein, "Germany", *supra* note 9, at 78.
48. H.-J. Prieß, H. Pünder and R.M. Stein, "Germany", *supra* note 9, at 80.
49. E. Hjelmeng and T. Søreide, "Debarment in public procurement", *supra* note 4, at 229.
50. H.-J. Prieß, H. Pünder and R.M. Stein, "Germany", *supra* note 9, at 80 f.
51. S. Arrowsmith, H-J. Prieß and P. Friton, "Self-Cleaning", *supra* note 9, at 5.
52. See also S. De Mars "Exclusion and Self-Cleaning", *supra* note 6, correspfn24.

as it does to an "undertaking", might well be understood as allowing commitments conditioned on future judgments on actions brought against the economic operator. Undue pressure to agree to pay just to avoid exclusion might thus be avoided. However, one could question whether an attitude showing a determination to fight any claim to the end might be inconsistent with a readiness to cut ties with a past of misconducts.[53]

Unlike what is provided in the US, the economic operator is not expressly required to shoulder the "investigative or administrative costs incurred by the Government". However the words in Article 57(6) do not rule out a choice by a Member State to characterise these costs as "damages".

In line with the idea that the exclusion regime is not about punishment, what is left out from the EU approach is the possibility for the authority competent for self-cleaning to fine the economic operator. Fines may well be imposed by other authorities, including those responsible to enforce criminal law.

Unlike US law, or Article 106(8) of the revised Financial Regulation, Article 57(6) Directive 2014/24/EU does not explicitly require economic operators to pay or to agree to pay "all criminal, civil, and administrative liability for the improper activity".[54] Provided, however, that an economic operator can hardly be consideres "reliable" if he hasn't even attempted to pay those fines resulting from his wrongdoings, it is submitted that the implication of this particular measure is still required for self-cleaning. Still, it is puzzling that the Directive and the Financial Regulation treat this aspect differently.

The above discussion about investigation or administrative costs and fines means that the list of measures found in Article 57(6) cannot be considered as an exhaustive one, and contracting authorities may ask for further measures they think are needed on the specific circumstances of the given case to consider an economic operator reliable again. The flip side is, of course, that this is due to accrue the potential for divergennece among decisions taken by different contracting authorities on the same measures taken by any given economic operator.

What is clear is that the law is so generic that decision makers will obviously enjoy wide discretion.[55] This is also the case elsewhere. Decisions by

53. See the discussion in M. Burgi and L.K. Wittschurky, "The Qualification, Selection and Exclusion of Economic Operators", *supra* note 4, at 2 b).
54. For a comparative discussion see R. Majtan, "The Self-Cleaning Dilemma", *supra* note 44, at 342 ff.
55. E.g. E. Hjelmeng and T. Søreide, "Debarment in public procurement", *supra* note 4, at 219.

the World Bank on this matter have been described as being of a "highly discretionary nature".[56] Even more precisely worded rules as to the relevant factors to consider, such as the US ones, still end up leaving a wide discretion to decision makers.[57]

The only yardstick used in Article 57(6) is "the gravity and particular circumstances of the criminal offence or misconduct".[58] As remarked by Hjelmeng and Søreide, the measures required to allow self-cleaning should be more profound "the larger and the less trustworthy the contractor".[59] In any case, again, the economic operator concerned needs to re-establish its reliability.[60] Procedural safeguards are badly needed to avoid discretion being abused.

4.3. Procedural rights

Exclusion has adverse consequences on the economic operators affected. US-style government-wide debarment might even lead to bankruptcy of companies whose main stream of revenue comes from public procurement.[61] It has therefore been rightly stressed that "[i]t is also essential that the procedural rights of the respondents are safeguarded".[62]

Directive 2014/24/EU is, however, quite cursory on safeguards and this concerns both exclusions and self-cleaning. Under Article 55(1), candidates and tenderers must be informed "as soon as possible" of decisions concerning the conclusion of contracts, including, it is submitted, exclusions. Under Arti-

56. H.-J. Prieß, "Questionable Assumptions", *supra* note 40, at 282.
57. C.R. Yukins, "Suspension and Debarment: Reexamining the Process" (2004)13 *PPLR*, at 255; see also R. Majtan, "The Self-Cleaning Dilemma: Reconciling Competing Objectives of Procurement process" (2013) 45 *Geo. Wash. Int'l L. Rev.*, esp. at 309 ff; S.L. Schooner, "The Paper Tiger Stirs: Rethinking Suspension and Debarment" (2004) 13 *PPLR*, at 213.
58. A. Sanchez Graells, *Public Procurement and EU Competition Rules*, *supra* note 1, at 295.
59. E. Hjelmeng and T. Søreide, "Debarment in public procurement", *supra* note 4, at 225, with useful exemplification¸ see also H.-J. Prieß, H. Pünder and R.M. Stein, "Germany", *supra* note 9, at 78 and 82 ff.
60. H.-J. Prieß, H. Pünder and R.M. Stein, "Germany", *supra* note 9, at 84; H. Pünder, "Self-Cleaning: A Comparative Analysis" in H. Pünder, H-J. Prieß and S. Arrowsmith *Self-Cleaning in Public Procurement Law*, *supra* note 9, at 190.
61. See S.L. Schooner, "The Paper Tiger Stirs", *supra* note 54, at 214; J.J. McCullough and A.J. Pafford, "Government Contract Suspension and Debarment: What Every Contractor Needs to Know" (2004) 13 *PPLR*, at 240.
62. H.-J. Prieß, "Questionable Assumptions", *supra* note 40, at 274; see also S.L. Schooner, "The Paper Tiger Stirs", *supra* note 53, at 213 f.

cle 55(2) candidates and tenderers may ask in writing for the reasons for their exclusion. These safeguards are quite limited, even compared with the procedure for excluding abnormally low tenders under Article 69 Directive 2014/24/EU. Concerning self-cleaning, Article 57(6) is similarly generic, only providing that reasons must be given if the contracting authority considers the measures taken to be insufficient.

Keeping the provisions on procedural safeguards in the 2014 directives minimal was intentional. According to Recital 102 "However, it should be left to Member States to determine the exact procedural and substantive conditions applicable in such cases". Because of the residual procedural autonomy of the Member States, contracting authorities will apply the safeguards enshrined in their national law.

This is expected to lead to very different standards and one might wonder whether Article 41 of the EU Charter of Fundamental Rights will be referred to by national courts as a benchmark to streamline or challenge the validity of domestic rules designing the procedures which need to be followed by contracting authorities.[63]

If this were to happen, the wisdom of opting for minimal safeguards should be challenged. Reasoning from analogy with the provisions in the revised Financial Regulation, it is submitted that domestic rules must at least provide for a right of economic operators to be informed about the opening of a procedure possibly leading to exclusion,[64] for a duty to be heard before the decision on exclusion (or not, because of self-cleaning) is taken,[65] and for the right of an economic operator having taken self-cleaning measures to ask for

63. See also A. Sanchez Graells, "Exclusion of Economic Operators", *supra* note 1, at 4; see generally E. Chevalier, *Bonne administration et Union européenne* (Bruyllant: Bruxelles, 2014); J. Dutheil de la Rochère, "The EU Charter of Fundamental Rights, Not Binding but Influential: The Example of Good Administration", in A. Arnull, P. Eeckhout and T. Tridimas (eds), *Continuity and Change in EU Law. Essays in Honour of Sir Francis Jacobs* (University Press: Oxford, 2008), at 157.
64. Article 108(1) and 8(b) of Regulation (EU, *Euratom*) n. 966/2012 as revised by Regulation (EU, Euratom) N. 2015/1929 on the early detection and exclusion system.
65. Article 107(2) of Regulation (EU, *Euratom*) n. 966/2012 as revised by Regulation (EU, Euratom) N. 2015/1929; see also Article 108(8)(b) and (c) concerning the panel procedure; this right was already provided under Article 133a of Regulation (EC, Euratom) N. 2342/2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) N. 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities as amended by Commission Regulation (EC, Euratom) N. 478/2007.

a revision of exclusion decisions, and for a duty of contracting authorities to act promptly on the request.[66]

5. Of deep running differences in the Member States

The national chapters in this book tell us of deep differences among the Member States as whether self-cleaning, or similar practices, were being used before the implementation of the 2014 directives. Somewhat of a North/South divide seems to emerge. This is quite new.[67]

The chapters also show that, when self-cleaning was allowed, the measures required from economic operators caught by an exclusion clause were not always convergent with the requirements later imposed in Directive 2014/24/EU.

Self-cleaning had already been practiced in Germany;[68] unsurprisingly, after the Siemens corruption scandal which has already been referred to. While not expressly foreseen in the legislation, self-cleaning corresponded to standard practice as was considered to be required by both the principle of competition and that of proportionality (which, as it is well known, finds its origins in Germany).[69] Reading the case law affirming administrative decisions accepting self-cleaning, the impression one gets is that economic operators are ready to act quite strongly against board members and employees and do co-operate fully with the investigators.[70] Proposed legislation implementing the 2014 Directives consolidates the pre-existing approach but also centralises (exclusions and) self-cleaning through the establishment of a nation-

66. Article 106(9) of Regulation (EU, *Euratom*) n. 966/2012 as revised by Regulation (EU, Euratom) N. 2015/1929.
67. Reference is to H. Pünder, H-J. Prieß and S. Arrowsmith, *Self-Cleaning in Public Procurement Law*, *supra* note 9. This work presents self-cleaning as a universal phenomenon, which is not our conclusion even when limiting our focus to the EU.
68. M. Burgi and L.K. Wittschurky, "The Qualification, Selection and Exclusion of Economic Operators", *supra* note 44, spec. 2 b).
69. M. Burgi and L.K. Wittschurky, "The Qualification, Selection and Exclusion of Economic Operators", *supra* note 44, at 2 b); see also H.-J. Prieß, H. Pünder and R.M. Stein, "Germany", *supra* note 9, at 76; on proportionality, including a brief history, P.P. Craig, "Proportionality, Rationality and Review" (2010) 265 *New Zealand Law Review*.
70. See the cases discussed by H-J. Prieß, H. Pünder and R.M. Stein, "Germany", *supra* note 9, at 87 ff.

wide corruption register.[71] Austria is very much influenced by German law, including the relevant case law, and self-cleaning was discussed in the literature and included in the 2006 legislation implementing the 2004 Directives.[72]

Unsurprisingly, a less principled approached was followed in the UK before the implementation of the 2014 Directives. Self-cleaning was an accepted practice, for instance, concerning breaches of tax rules. Self-cleaning has now made it into the law books under the 2015 Public Contracts Regulations. The UK has opted not to follow the heed provided by Recital 102 of Directive 2014/24/EU, so that decisions about (exclusion and) self-cleaning are left to the contracting authority.[73]

Italy sits somewhere in the middle. Self-cleaning was expressly regulated in the 2006 Code implementing the old Directives but with exclusive reference to only one mandatory exclusion ground.[74] Under Article 38(1)(c) of that Code, an economic operator must be excluded when one of its owner(s), officials and so on, have been found guilty of crimes relating to their professional reliability. This extends to the wrongdoings of those having, or having had, powers to represent the company in the past three years, unless the economic operator concerned has not only discharged them, but taken other steps to break with the past including – according to the case law – suing former owners, officials and others for damages for their wrongdoing.[75] The latter may not even be sufficient if the wrongdoer is still the owner of the economic operator.[76]

It is to be noted that the provisions on exclusion in the 2004 Directives were not cut and pasted in the 2006 Italian code.[77] Because organised crime is more relevant in Italy than in other jurisdictions analysed in this book, the exclusion regime in that Code is more complex, and clearly has not benefited

71. M. Burgi and L.K. Wittschurky, "The Qualification, Selection and Exclusion of Economic Operators (Tenderers and Candidates) from a German Perspective", *supra* note 44, § 1.
72. A. Reidlinger, S. Denk and H. Steinbach, "Austria", *supra* note 9, at 44 ff.
73. L. Butler, "Exclusion, Qualification and Selection in the UK under the Public Contracts Regulations 2015", at 2 g).
74. M. Comba, "Qualification, Selection and Exclusion of Economic Operators", at 2 c).
75. See also M. Clarich and C.F. Giordano, "Italy" in H. Pünder, H-J. Prieß and S. Arrowsmith *Self-Cleaning in Public Procurement Law*, *supra* note 9, at 109 ff.
76. See again, with reference to the more recent case law, M. Comba, "Qualification, Selection and Exclusion of Economic Operators", *supra* note 71.
77. M. Comba, "Qualification, Selection and Exclusion of Economic Operators", *supra* note 71; see also the comparative remarks by A. Sanchez Graells, "Exclusion of Economic Operators", *supra* note 1.

from the debate taking place in Germany on self-cleaning. Moreover, some courses of action limiting a wrongdoer's liability are foreseen in disparate pieces of legislation and may impact on the exclusion regime.[78]

It is remarkable that some personal and organisational measures relevant for self-cleaning in Germany, and today under the 2014 Directives, are instead referred to in Italy as measures to prevent companies from being liable under the specific legislation on corporate crimes.[79] True conviction under these rules entails exclusion from a number of benefits, including public contracts. However, to become exempt from criminal liability corporations need to show that measures to prevent corruption were in place before any wrongdoing was committed, and wrongdoings were possible only by eluding the control mechanisms in place. It is therefore doubtful whether this really amounts to self-cleaning in public contracts as discussed in this chapter, where measures are taken after, rather than before, wrongdoings.[80]

Article 80 of the new Italian Code on Public Contracts is a mix of old and new rules. Article 80(3) reiterates the exclusion for wrongdoings of part representatives and similar, unless steps have been taken to break with the past. Article 80(7), however, allows self-cleaning if the jail term is under 18 months or if the judgement acknowledged cooperation with the investigators. It would seem that Article 80(7) is very much lowering the bar when compared to Article 80(3) and the strict domestic case law reading its predecessor

On the opposite side of the spectrum, we have Spain. A "public morality" approach saw the prohibition to contract as an objective measure to protect public interest so that self-cleaning was excluded.[81] Also in Portugal, self-cleaning is not expressly allowed, even if companies do benefit from their owners or officials being rehabilitated of past crimes. Arguably from the provisions – as they are now waiting for the new Directives to be implemented – exclusion will not happen if those convicted no longer have a role in the economic operator concerned, but there is no case law on this topic. Finally,

78. M. Clarich and C.F. Giordano, "Italy", *supra* note 9, at 114 ff.
79. See however M. Clarich and C.F. Giordano, "Italy", *supra* note 9, at 112 ff
80. Similar approaches to the criminal liability of corporations are obviously widespread, the US having a well developed tradition in this area: R.J. Bednar, A.B. Styles and J. McDowell, "United States" in H. Pünder, H-J. Prieß and S. Arrowsmith *Self-Cleaning in Public Procurement Law, supra* note 9, at 166 ff.
81. A. Sanchez Graells, "Qualification, Selection and Exclusion of Economic Operators under Spanish Public Procurement Law", *supra* note 1, at 2.1.

scholarly debate on this topic is very recent and related to developments in Germany and at EU level.[82]

It may be assumed that the same reasons may explain why self-cleaning was simply neither discussed nor applied in France[83] and Romania.[84]

From a comparative law point of view, it is interesting to notice how the German experience, by far the most advanced on this matter, has deeply influenced the present EU regime on self-cleaning. The other Member States will benefit from looking to the German case law when applying the new provisions. The North/South divide might however still influence the readiness of contracting authorities to accept self-cleaning measures.[85]

The EU Member States also tend to see self-cleaning as a matter for unilateral administrative decisions based on measures offered and/or enacted by the concerned economic operator. This is one of the aspects that sets the EU apart from the US, where administrative agreements are widely used in this area.[86]

Concerning procedural safeguards (judicial review included), each Member State seems to move from the assumption that those generally provided under their domestic law will apply to decisions (or agreements) on self-cleaning.[87] This might not be the case. For instance, the UK Guidance to the application of the 2015 Public Contracts Regulation indicates that the contracting authority's decision on considering the evidence is final. This might not – and should not – rule out judicial review, but might point to a deferent

82. P. Telles, "Qualitative selection and exclusion of economic operators in Portugal", at 2 d); scholarly debate has been launched by P. Cerquiera Gomes, "The Portuguese debarment system of those convicted of corruption" (2013) *Revista de Contratos Publics*, at 111.
83. F. Lichère, "Qualification, Selection and Exclusion of Economic Operators under French Public Procurement Law", at 2 a).
84. D.C. Dragos and B. Neamtu, "Qualification, Selection and Exclusion of Economic Operators in Public Procurement Procedures – The Case of Romania", at 2 e).
85. A. Sanchez Graells, "Qualification, Selection and Exclusion of Economic Operators", *supra* note 1, at 2.1 and 7.
86. E.g. R.J. Bednar, A.B. Styles and J. McDowell, "United States", *supra* note 9, at 175 f. and 181.
87. See for instance with reference to Germany M. Burgi and L.K. Wittschurky, "The Qualification, Selection and Exclusion of Economic Operators (Tenderers and Candidates) from a German Perspective", *supra* note 44, at 6.

approach by the courts.[88] In Germany too (but similarity might be deceptive) decisions on self-cleaning are subject to limited review only.[89]

6. A look at the US and what makes the EU approach special

The expected convergence of public procurement regimes across the Atlantic provides a good reason to have a look at the way self-cleaning is dealt with on the other side of the pond. As should always be remembered, when dealing with US public procurement law, the focus will be very much partial and limited to federal procurement rules, i.e. the Federal Acquisition Regulation – FAR.[90]

Qualification is regulated in Part 9 of the FAR on contractor qualification. More specifically, Part 9.4 deals with suspension, debarment and ineligibility. Suspension is a temporary measure, normally taken during investigation, while debarment is the exclusion from federal contracts and may – but does not need to – be extended to State and local contracts.[91] Finally, "ineligible" means excluded from Government contracting (and subcontracting, if appropriate) pursuant to statutory, executive order, or regulatory authority other than the FAR and its implementing and supplementing regulations.[92]

As it is usually the case in every jurisdiction, public procurement law does not operate in a normative vacuum. Some grounds for debarment may also trigger the liability under criminal law, as for instance the situations caught under the Foreign Corrupt Practices Act – FCPA.[93]

Basically, suspension is instrumental to possible future debarment, and both are administrative decisions taken following a procedure under FAR 9.406-3. Ineligibility depends on a political decision, which is expressed in

88. The question is still open: see L. Butler "Exclusion, Qualification and Selection", *supra* note 70, at 2 g).
89. M. Burgi and L.K. Wittschurky, "The Qualification, Selection and Exclusion of Economic Operators (Tenderers and Candidates) from a German Perspective", *supra* note 44, at 2 b).
90. See also, but with limited applications to public procurement, Part 919 of the Code of federal regulations (US) (revised as of Jan. 1, 2014).
91. J. Tillipman, "The Congressional War on Contractors" (2013) 45 *Geo. Wash. Int'l L. Rev.*, at 235 ff; S.L. Schooner, "The Paper Tiger Stirs: Rethinking Suspension and Debarment", *supra* note 53, at 212.
92. Instances are listed in FAR 2.101.
93. See extensively D.D. Stevenson and N.J. Wagoner, "FCPA Sanctions: Too Big to Debar?", *supra* note 4, at 783 ff and at 793 ff.

rules of general application. The basic idea flowing from FAR 9.4 is that debarment is not for punishing contractors, it is to make sure that government deals with "responsible" partners.[94] The debarring official is given wide discretion as to whether to debar or not, to what extent to debar (the company in its entirety or some divisions thereof only), and for how long.[95]

More specifically – and this is already a major difference when compared to the situation in the EU under Article 57(1) of Directive 2014/24/EU – the existence of a cause for debarment "does not necessarily require that the contractor be debarred" (FAR 9.406-1). Under EU law, exclusion may be foregone only under the quite restrictive conditions laid down in Article 57(3). In the US the debarring official is tasked with considering both "the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors". More specifically, the debarring official is called to consider a number of factors which clearly qualify as self-cleaning measure.[96] At the same time, under the FAR, the existence or non-existence of any mitigating factors

94. E.g. C.R. Yukins, "Suspension and Debarment: Reexamining the Process" (2004) 13 *PPLR*, at 255 f.
95. See, writing of "enormous discretion", C.R. Yukins, "Suspension and Debarment: Reexamining the Process", *supra* note 90, at 255; see also R.J. Bednar, A.B. Styles and J. McDowell, "United States", *supra* note 9, at 171.
96. Namely "(1) Whether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment or had adopted such procedures prior to any Government investigation of the activity cited as a cause for debarment. (2) Whether the contractor brought the activity cited as a cause for debarment to the attention of the appropriate Government agency in a timely manner. (3) Whether the contractor has fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official. (4) Whether the contractor cooperated fully with Government agencies during the investigation and any court or administrative action. (5) Whether the contractor has paid or has agreed to pay all criminal, civil, and administrative liability for the improper activity, including any investigative or administrative costs incurred by the Government, and has made or agreed to make full restitution. (6) Whether the contractor has taken appropriate disciplinary action against the individuals responsible for the activity which constitutes cause for debarment. (7) Whether the contractor has implemented or agreed to implement remedial measures, including any identified by the Government. (8) Whether the contractor has instituted or agreed to institute new or revised review and control procedures and ethics training programs. (9) Whether the contractor has had adequate time to eliminate the circumstances within the contractor's organization that led to the cause for debarment. (10) Whether the contractor's management recognizes and understands the seriousness of the misconduct giving rise to the cause for debarment and has implemented programs to prevent recurrence."

or remedial action "is not necessarily determinative of a contractor's present responsibility" and, if a cause for debarment exists, "the contractor has the burden of demonstrating, to the satisfaction of the debarring official, its present responsibility and that debarment is not necessary". In any case, "the application of remedial measures and mitigating factors in the U.S. system does not guarantee that contractors will be able to avoid debarment".[97]

Again, the debarment official enjoys much discretion in deciding – only subject to the duty to give reasons – provided that the conditions for debarment are present, whether to debar, and when faced with mitigating factors, whether not to debar.[98]

The relevance given to the different behaviour of the company whose debarment is being weighted lays the foundations for possible administrative compliance agreements between the federal government and the contractor.[99] Indeed, "contractors may avoid debarment provided they agree to undertake self-cleaning measures".[100] As was remarked, the threat of eliminating the contractor's government revenue stream provides debarring officials with "significant leverage to facilitate ethical transformations in the companies".[101] However, breach of the terms of the agreement is a cause for debarment.[102]

What should we make of the US federal government experience with debarment? Although it may compare to the one provided under the EU Financial Regulation, the Federal US system is more centralised than the one applicable to EU Member States under at least two aspects.[103] First, the suspension and debarment official is either the head of the agency or – and more often – someone named by the head specifically to this task.[104] Second, his/her

97. R. Majtan, "The Self-Cleaning Dilemma", *supra* note 41, at 305.
98. R. Majtan, "The Self-Cleaning Dilemma", *supra* note 41, at 310.
99. J. Tillipman, "The Congressional War on Contractors", *supra* note 87, at 238 f.
100. R. Majtan, "The Self-Cleaning Dilemma", *supra* note 41, at 314; see also R.J. Bednar, A.B. Styles and J. McDowell, "United States", *supra* note 9, at 175 f and 181.
101. J. Tillipman, "The Congressional War on Contractors", *supra* note 87, at 242; this is also true of the threat of criminal sanctions: see D.D. Stevenson and N.J. Wagoner, "FCPA Sanctions: Too Big to Debar?", *supra* note 4, at 787.
102. *Ibidem*.
103. On centralisation see also R.J. Bednar, A.B. Styles and J. McDowell, "United States", *supra* note 9, at 170; see also at 173, concerning different effects of debarment at federal level for the US States.
104. This is normally someone quite high in the structure: see with reference to the US Dep. of Defence http://www.acq.osd.mil/dpap/dars/dfars/html/current/209_4.htm [accessed 23 June 2016].

decisions, which do not need to be taken on the occasion of a specific award procedure, have government-wide effects.[105] Additionally, and as already recalled, US officials have a wide discretion in deciding whether to debar a company or not.[106]

This system compares with the one used in multilateral development banks such as the World Bank. Cases are investigated by senior Bank officials and the decision to debar is taken by the president.[107]

Instead, in the EU Member States, exclusion takes place on the occasion of a specific award procedure and may be decided by some low ranking official at some small local authority in any one of the Member States. The contracting authority is often given no, or very little, discretion by the applicable EU or national legislation, exclusion being in many cases mandatory when given circumstances are present. Some of the exclusion clauses are, however, loosely worded. In principle exclusion does not have effects beyond that individual procedure. If exclusion is mandatory under either EU or domestic rules, it should take place over and over again every time the economic operator submits a tender. Besides the duplication of administrative work, divergent interpretations or factual assessments among contracting authorities cannot be ruled out. As already remarked, the discretion given to individual contracting authorities is instead quite wide concerning self-cleaning, and centralisation is only an option under Recital 102 and, if taken, would anyway be limited to one Member State.[108]

A more centralised approach, like the US one, would therefore commend itself because it provides much more certainty as to the situation of a given economic operator, and because having wider effects obviously strengthens policing potential contractors' behaviour.[109] At the same time, the resistance opposed by the Member States to the EU-wide procurement passport proposed by the Commission in 2011 and replaced by the more limited ESPD

105. E.g. § 919.935 of the Code of government regulations; see for more detailed information D.D. Stevenson and N.J. Wagoner, "FCPA Sanctions: Too Big to Debar?", *supra* note 4, at 806.
106. See also D.D. Stevenson and N.J. Wagoner, "FCPA Sanctions: Too Big to Debar?", *supra* note 4, at 806.
107. F.F. Fariello and C.C. Daly, "Coordinating the Fight Against Corruption Among MDBs", *supra* note 5, at 258.
108. For a discussion as to the shortcomings of a diffuse approach to exclusions see H-J. Prieß, H. Pünder and R.M. Stein, "Germany", *supra* note 9, at 70 f.
109. E. Hjelmeng and T. Søreide, "Debarment in public procurement", *supra* note 4, at 231.

during the legislative process clearly shows that we are very far from anything more centralised.[110]

7. Conclusions

Much ink has been spilled discussing the objectives of any exclusion regime and of self-cleaning. Are these business decisions aimed at making sure that contractors are reliable? Is exclusion about punishing wrongdoings? Are these mechanisms about deterring potential wrongdoers?[111] The issue has been hotly discussed, especially in the US, and to some extent also with reference to MDBs.[112]

Probably all of the above theories are true to some extent[113] in different jurisdictions.[114] Anyway, a more precise classification does not necessarily entail much of a difference as to the actual legal discipline of exclusion and self-cleaning.[115] Whatever the aim of the exclusion regime, including punishing wrongdoings, this may well allow for self-cleaning solutions, including those avoiding exclusion altogether. Indeed, self-cleaning is akin to leniency programs in competition law.[116] These programs show that even what are undoubtedly sanctions may be avoided by co-operating with investigators and resolutely addressing past violations. Even if one takes punishment and or/deterrence among the aims of an exclusion regime, self-cleaning can very

110. See R. Caranta, "The changes to the public contract directives", *supra* note 2.
111. See e.g. different takes by J. Tillipman, "The Congressional War on Contractors", *supra* note 87, at 235 ff.; F.F. Fariello and C.C. Daly, "Coordinating the Fight Against Corruption Among MDBs", *supra* note 5, at 259; see also S. Arrowsmith, H-J. Prieß and P. Friton, "Self-Cleaning", *supra* note 9, at 17 ff; R.J. Bednar, A.B. Styles and J. McDowell, "United States", *supra* note 9, at 169 f.
112. Contrast R. Majtan, "The Self-Cleaning Dilemma", *supra* note 41, at 322 ff, and H-J. Prieß, "Questionable Assumptions", *supra* note 40, at 278 f.
113. Writing of competing objectives see R. Majtan, "The Self-Cleaning Dilemma", *supra* note 41, at 294; see also E. Hjelmeng and T. Søreide, "Debarment in public procurement", *supra* note 4, at 215.
114. For the EU see also Case C-465/11, *Forposta and ABC Direct Contact* [2012] ECLI:EU:C:801, paragraph 27.
115. See also F.F. Fariello and C.C. Daly, "Coordinating the Fight Against Corruption Among MDBs", *supra* note 5, at 265 f.
116 http://ec.europa.eu/competition/cartels/leniency/leniency.html [accessed 23 June 2016].

well be allowed.[117] Foreseeing effective redress for those harmed will just add to both punishment and deterrence.[118]

It has been claimed that self-cleaning and similar measures tend to benefit large companies, which can walk away from their responsibilities by paying a limited price for breaching the law.[119] Large companies will have more resources to spend in reshuffled compliance programs and be more at ease in doing away with some key people.[120] While this is true, it is not in itself an argument against self-cleaning; it simply confirms that being big brings some competitive advantage. As pointed out by Stevenson and Wagoner, "[e]ffective programs require more than commitment from the top, they require resources".[121]

The overall point of an articulated exclusion regime is to have a well working mechanism which, by cleverly combining exclusions and self-cleaning, strives to make sure that contracting authorities deal with all economic operators complying with all the relevant legal and ethical standards, and only with those economic operators.

The difficulties with the EU regime are that it is extremely decentralised and based on minimal if not non-existent procedural safeguards. As already recalled, under Articles 56 and 57 of Directive 2014/24/EU, exclusion is the responsibility of each contracting authority. While the cases of mandatory exclusion are normally linked to the existence of a final judgment, which is quite an objective circumstance, most of the grounds listed in Article 57(4) leave a wide discretion to contracting authorities. In those Member States having chosen to exclude contractors guilty of grave professional misconduct, each contracting authority is called to decide whether it has "appropriate means" to establish misconduct and thus to exclude. What one authority considers appropriate might not satisfy another authority.[122] The same is the case

117. Criticisms of World Bank debarment system are therefore well grounded in so far as that system is read as allowing self-cleaning as a mitigating factor only: H-J. Prieß, "Questionable Assumptions", *supra* note 40, at 281.
118. See also H. Pünder, "Self-Cleaning", *supra* note 9, at 192 f.
119. D.D. Stevenson and N.J. Wagoner, "FCPA Sanctions: Too Big to Debar?", *supra* note 4, at 802 ff.
120. J. Tillipman, "The Congressional War on Contractors", *supra* note 87, at 244.
121. R.J. Bednar, "Emerging Issues in Suspension & Debarment: Some observations From an Experienced Head" (2014) 23 *PPLR*, at 224.
122. A. Reidlinger, S. Denk and H. Steinbach, "Austria", *supra* note 9, at 38, rightly characterise "grave misconduct" as a "catch-all clause".

with "plausible indication of collusion".[123] The potential for divergence becomes elevated considering that in the EU there are somewhere in excess of 100,000 contracting authorities (but we guess no one knows the exact number) often enjoying wide discretion in applying possibly divergent national standards.[124] EU law has been ready to accommodate the different preferences of the Member States.[125] Decentralisation may, however, lead to embarrassing situations, in which one and the same economic operator is disqualified by some contracting authority while qualified by others.[126]

The potential for divergence and discrimination is even stronger with self-cleaning.[127] As already discussed, under Article 57(6) of Directive 2014/24/EU, contracting authorities enjoy wide discretion in assessing whether the measures taken by the economic operator concerned are "sufficient to demonstrate its reliability". Once again, the potential for divergence is ingrained in law. True, the last phrase of Article 57(6) rules out self-cleaning of economic operators excluded by final judgment from participating in award procedures; this, however, applies only "in the Member States where the judgment is effective". The choice of some Member States to centralise self-cleaning proceedings taking advantage of the discretion they have according to Recital 102 may be expected to reduce divergences. This, however, will only be true inside the one jurisdiction having decided to centralise. So far this is likely to be the case in Germany only.[128]

Inconsistent decisions may be avoided this way within one Member State only, but nothing specific is foreseen to prevent them at EU level. The provisions on administrative cooperation laid down in Article 86 of Directive

123. A. Sanchez Graells, "Exclusion, Qualitative Selection and Short-listing", *supra* note 1, at 108 ff.
124. See e.g. the numbers discussed in the *Annual Public Procurement Implementation Review 2012* – SWD (2012) 342 final, at http://ec.europa.eu/internal_market/publicprocurement/docs/implementation/20121011-staff-working-document_en.pdf, at 20 [accessed 23 June 2016].
125. See critically S. De Mars "Exclusion and Self-Cleaning", *supra* note 6. Internationally, moreover, the trend is towards co-ordination: see F.F. Fariello and C.C. Daly, "Coordinating the Fight Against Corruption Among MDBs", *supra* note 5, at 260 ff.
126. H.-J. Prieß, "The rules on exclusion and self-cleaning", *supra* note 1, at 122. The same happened, and to some extent still happens, with MBDs: see F.F. Fariello and C.C. Daly, "Coordinating the Fight Against Corruption Among MDBs", *supra* note 5, at 260 ff.
127. See also S. Arrowsmith, *The Law of Public and Utilities Procurement*, *supra* note 17, at 1272.
128. M. Burgi and L.K. Wittschurky, "The Qualification, Selection and Exclusion of Economic Operators", *supra* note 44, at 2 b).

2014/24/EU, which specifically refer to Article 57, while of obvious relevance here, simply foresee information exchange. Coordination in decision making would instead be needed with reference to both exclusion and self-cleaning.

Information exchange is obviously not going to avoid diverging interpretations and applications of the law, also given that contracting authorities operate in and belong to different legal cultures, with authorities in one jurisdiction being used to higher or more stringent standards concerning, for instance, the duty to give reasons.[129] It might be expected that in jurisdictions where courts are more deferent to the decisions taken by contracting authorities, the latter will be readier to rely on their own judgment in matters of exclusion and self-cleaning rather than to adhere to a more structured and precedent-based approach.

As it is well known, this area of judicial protection has been largely unaffected by the case law of the Court of Justice and the Remedies Directives do not go into any detail.[130] The very limited nature of harmonisation of judicial review procedures is going to contribute to divergences in exclusions and self-cleaning.[131]

The unsustainable vagueness of present EU remedies concerning the standard of review sits uncomfortably with the bold choice of Article 108(11) of the Financial Regulation for maximum depth review of decisions concerning exclusion and (by implication) self-cleaning. Indeed, under Article 108(11) "The Court of Justice of the European Union shall have unlimited jurisdiction to review a decision whereby the contracting authority excludes an economic operator and/or imposes on it a financial penalty, including reducing or increasing the duration of the exclusion and/or cancelling, reducing or increasing the financial penalty imposed".[132]

129. See S. Treumer and F. Lichère (eds) *Enforcement of the EU Public Procurement Rules* (DJØF: Copenhagen, 2011); not linked to public procurement but providing insights on the different approaches to judicial review, see the papers collected in R. Caranta and A. Gerbrandy (eds), *Tradition and Change in European Administrative Law* (Europa Law Publishing: Groningen, 2011), and O. Essens, A. Gerbrandy and S. Lavrijssen (eds) *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Europa Law Publishing: Groningen, 2009).
130. See F. Wilman *Private Enforcement of EU Law before National Courts* (Elgar: Cheltenham, 2015), at 381 ff.
131. See generally R. Caranta, "Remedies in EU Public Contract Law: The Proceduralisation of EU Public Procurement Legislation" (2015) 8 *Rev. Eur. Adm. Law*, at 91 ff.
132. Regulation (EU, EURATOM) n. 966/2012 as revised by Regulation (EU, Euratom) N. 2015/1929.

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.[133]

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.[134] 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.[135] 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.[136]

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.[1] 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.[2] 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/

curement 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".[3] 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.[4] The self-declaration applies only in replacement of certificates issued by public authorities as a "preliminary evidence"[5] of the mandatory and discretionary exclusion grounds (provided in the 2014 Public Procurement Directive).[6] The ESPD should be provided exclusively in electronic means on the basis of a standard form recently established by the EU Commission[7] and should be recognized by all contracting authorities.[8]

The Member States were obliged to transpose the ESPD by 18 April 2016.[9] Notwithstanding this deadline, Member States are allowed to postpone the application of the provision of the ESPD in electronic form until 18 April 2018[10] 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 [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.[11]

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

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

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".[19] 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).[20] 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 [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".[21] The e-CERTIS, a free on-line information database,[22] managed by the EU Commission, provides details of the different certificates[23] and attestations frequently requested in procurement procedures across the 28 Member States.[24] 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.[25] Member States may postpone until 18 April 2018[26] the recourse to e-Certis by the contracting authorities,[27] while ensuring the up-dating of the "information concerning certificates and other forms of documentary evidence introduced in e-Certis" by 18 April 2016.[28]

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.[29]

will be linked to eSENS, a currently ongoing large scale pilot, the standardisation initiative by CEN/BII, 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 [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 [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.[30] Such self-declarations apply only in replacement of "certificates issued by public authorities or third parties"[31] confirming that the relevant conditions are met and identifying the authority or the third party responsible for establishing the supporting documents.[32]

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".[33] 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".[34] 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 ri-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".[35]

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.[36] This provision does not seem to be limited to the documents related to the self-declaration[37] 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".[38] 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".[39] 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[40] 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".[41] 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.[42]

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",[43] increasing cross-border participation in award procedures and all the forms of joint procurement.[44] 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.[45]

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.[46] Indeed, the ESPD can be reused[47] 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 [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 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.[48] 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.[49]

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,[50] and to establish a better mutual recognition of certificates[51] 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.[52] In the UK, the Public Contract Regulations 2015 implemented the ESPD with the "copy-out" method,[53] 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 14th 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).[54] 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.[55]

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.[56]

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".[57] 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)[58] for the qualitative selection of economic operators.[59] 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.[60] 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-

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.[61]

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[62] established at the Italian Anti-Corruption Authority (which assumed the functions of the Italian Authority for the Supervision of Public Contracts).[63] 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.[64] To this end, the Italian Anti-corruption Authority has developed a computerized system known as AVCpass (Authority Virtual Company Passport).[65] 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.[66] 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.[67] 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[68] together with the implementation of the ESPD.[69] The draft of the new Italian Public Contracts Code introduces in the Italian legal system[70] 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".[71] 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 og 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".[72] The French implementation of 2014 Public Procurement directives[73] 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.[74]

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".[75]

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".[76]

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

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".[78]

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.[79] 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.[80]

As is well known, the mandatory exclusion grounds[81] refer to the participation in a criminal organisation,[82] corruption and bribery[83] as well as frauds affecting the European Communities' financial interests,[84] terrorism related offences,[85] the offence of money laundering,[86] forms of trafficking of human beings.[87] 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.[88]

The discretionary exclusion grounds[89] refer to violation of obligations "in the fields of environmental, social and labour law",[90] bankruptcy, insolvency or winding-up proceedings,[91] a grave professional misconduct,[92] an agreement among the economic operators[93] and the prior involvement of economic operators aimed distorting competition,[94] conflict of interest,[95] 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 [accessed 23 June 2016].
81. A. Semple, *supra* note 4, at 94-95.
82. Directive 2014/24/E, *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 payements 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,[96] the misrepresentation in supplying information required to verify exclusion,[97] an undue influence or advantage in the procurement process.[98]

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[99] (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)[100] and the one related to the payment of taxes or social security contributions,[101] to insolvency, conflicts of interests or professional misconduct.[102]

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",[103] "fraud",[104] "terrorist offences",[105] "money laundering",[106] "trafficking of human beings"[107]) but

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.

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,[108] but also specifies the application of the definition provided by "the national law of the contracting authority or the economic operator".[109] The application of this rule, although in compliance with EU[110] and international provisions,[111] may be influenced by the different provisions giv-

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).

en by national legal systems and can be an obstacle for cross-border and transnational participation.[112] 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.[113]

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",[114] the bankruptcy, insolvency or winding-up proceedings of an economic operator[115] and the misrepresentation of information[116] 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).[117] 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).[118]

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, 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.[119]

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.[120]

The integrity of the economic operator related to serious professional misconduct,[121] to a conflict of interest[122] and the provision of an exclusion ground in case of "persistent deficiencies in the performance (…) under a prior public contract"[123] 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,[124] 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".[125]

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/E, *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).[126] 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[127] 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.[128]

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.[129]

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.

a professional or trade register[130] is easily verifiable through a database, like a particular authorization, the membership in an organization or the minimum yearly turnover,[131] the possibility for the contracting authority to specify methods and criteria to consider a ratio between assets and liabilities[132] 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.[133]

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.[134] 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.[135]

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.[136]

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.[137] The Public Contracts National Database should permit to look for the relevant information on economic operators according to the ESPD provisions.[138]

The German Government will examine whether to introduce a nationwide central "corruption register".[139] 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.[140]

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 [accessed 23 June 2016], at 38.
137. Protocollo d'intesa Anac-Agcm 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-Agcm 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 [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"),[141] 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.[142] The IMI system is an online European cooperation tool that facilitates the exchange of information among EU countries' public authorities.[143] The *Interoperability Solutions for European Public Administrations* (ISA) programs, supported by the EU Commission,[144] are strictly related to the EU public procurement policy[145] 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)146 to create, edit and reuse existing ESPD documents".[147] All this

142. About IMI see: 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 (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 [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 [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 [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 [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.[148]

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 [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, [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 [accessed 23 June 2016].

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Pedro is currently a Senior Lecturer in Law at Swansea University where he lectures EU, Competition and Company Law. He was previously a Lecturer in Law and procurement law specialist at Bangor University (2011-2015), where he was Course Director for Law with Languages. He co-organised the Procurement Week from 2012 to 2015, making it a leading international procurement with over 500 participants and was a founding member of the Institute for Competition and Procurement Studies in 2012.

Pedro undertook his PhD at the University of Nottingham (2007-2010) and before that was a lawyer specialised in Portugal and Spain (2003-2007), advising public and private entities in public procurement and administrative law matters.

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Steen is currently Deputy Chairman of the Danish Association for Public Procurement Law (former chairman), and a member of the Complaints Board for Public Procurement that is the primary enforcement body in the field in Denmark. He has also been a consultant in numerous public procurement cases and has arranged more than 30 international conferences and seminars including two global public procurement conferences in 2010 in collaboration with Professor Sue Arrowsmith, University of Nottingham.

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