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The European Single Procurement Document^{*}

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1 Introduction

This paper will show that the European Single Procurement Document (ESPD) introduced by Directive 2014/24/EU and Commission Implementing Regulation 2016/07 constitutes a paradigm shift on how public procurement procedures are run in the EU and one with unintended consequences. Before its introduction, each economic operator wishing to take part in a public procurement procedure had to submit all qualifying information at the start of the procedure. This means incurring in transaction costs that are certain to have the opportunity of an uncertain benefit: winning the contract. The ESPD alters the balance of power (and costs) by replacing the full documentation requirement with a simple self-declaration form, aiming for a reduction in transaction costs and the removal of a barrier to the participation of economic operators in public procurement procedures. It is unclear if in reality its use will amount to savings in transaction costs or if those will actually increase and if the change in incentives may lead to more strategic non-compliance by economic operators and reduced legal compliance by contracting authorities, which may be tempted to overlook at least minor shortcomings by winning bidders.

The ESPD is composed by the aforementioned self-declaration form, a free service provided by the European Commission, the underlying exchange data model and the open source code for the Commission's service. Together they make up what can be defined as the ESPD system.

The changes introduced by the ESPD system are significant and some of the implications do not appear to have been fully taken into account in the legislative process. In this paper it will be argued these issues are of a framework, practical and legal uncertainty nature. In addition to these issues it is possible to identify areas for legislative improvement such as restricting the possibility of the contracting authority asking for the documentation of all bidders instead of simply the winner and making the exclusion of Article 57(4)(h) of Directive 2014/24/EU a mandatory ground for exclusion instead of a discretionary one.

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2 What is the European Single Procurement Document

Until Directive 2014/24/EU economic operators had to provide at the beginning of a procurement procedure documentary evidence of their compliance with the legal or specific requirements set forth in the tender documents, leading to significant transaction and opportunity costs just for participation. The European Single Procurement Document (ESPD) was introduced by Article 59 of Directive 2014/24/EU and amounts to a re-usable digital self-declaration to be presented by economic operators interested in taking part in a public procurement procedure. This self-declaration constitutes a formal statement by the economic operator and replaces the obligation of presenting originals of the documents at the beginning of the procedure, while the contracting authority retains the possibility of requesting the originals at any given time. Its main objective is to reduce the transaction costs associated with the participation in public procurement procedures by setting aside the previous obligation of submitting all necessary evidence to participate in a procedure.

Article 59 of Directive 2014/24/EU establishes the obligation of contracting authorities of accepting the ESPD as *prima-facie* evidence of compliance with the requirements set forth in the tender documentation. In consequence, the ESPD replaces the actual documentation that would otherwise be provided by economic operators and checked by contracting authorities at the start of the procurement procedure. As such, exclusion grounds (Article 57) selection criteria (Article 58), third party capacity (Article 63) and reduction of candidates (Article 65) are now done based on the self-declaration contained in the ESPD and not the actual documentary evidence as until now.

According to Article 59(2) of Directive 2014/24/EU, the ESPD is to be used exclusively in electronic format. However, Article 90(3) of the same Directive afforded Member States a transitional period beyond the transposition deadline of the Directive, offering the possibility of using a paper version until 18 April 2018 at the latest.

3 Purposes of the ESPD

The ESPD serves three purposes: (i) reducing the amount of work undertaken by economic operators at the beginning of the procedure; (ii) sign-posting the contracting authority towards where the original documents are to be found.¹; (iii) provide the contracting authority with the information of databases where it can obtain the necessary information from economic operators. It effectively moves

¹ Article 59(1)§3 Directive 2014/24/EU.

the moment of assessing documentation from the beginning of the procedure to a later stage in the procedure.

As for the first purpose, its clear objective is to reduce a barrier to procurement participation posed by the request from participants to produce all necessary documentation to establish their ability (and suitability) to take part in the procedure. By replacing originals with what amounts to a collection of self-declarations by the participants, it is expected the ESPD would reduce the transaction and opportunity costs for economic operators, particularly for SMEs.² This introduction constitutes a significant departure from previous practice, whereby for any given procurement procedure economic operators had to supply the contracting authority with copies of the documentation required for the selection stage. Under Directive 2004/08/EC, having to provide all the documentation, all the time reduced the probability of economic operators being interested in taking part in the procedure as they would have a certain cost (obtaining, producing and preparing those documents) for an uncertain benefit - not knowing if they would make it through the qualification and selection stage. This was particularly problematic in countries like the UK where the restricted procedure was used more often than the open procedure and the selection stage adopted as a filter to reduce the number of candidates.³ This state of affairs is arguably behind the decision of the Coalition Government to restrict the use of pre-qualification systems and in consequence the restricted procedure. It can be argued that for some contracting authorities the role of the qualification and selection stage was to manage the field of potential contractors by raising the costs they would have to bear. This was a problem particularly for micro and small businesses since they are less likely to make it through a selection stage when, for example, high financial requirements are set.⁴

The second purpose of the ESPD is to identify where the original documents are to be found if and when they are needed. It is interesting to note that this is simply an obligation of identification of the document availability and not for the contracting authority to actually obtain it. In fact, the economic operator is still under the obligation of providing it if requested by the contracting authority

² Recital 84 Directive 2014/24/EU and Recitals 4 and 6 of the Commission Implementing Regulation (EU) 2016/07.

³ As justified by the Crown Commercial Service Public Procurement Notice 03/15 and Crown Commercial Service, *Procurement Policy Note: Standard Selection Questionnaire (SQ) Action Note 8/16* which maintains a ban on the use of qualification questionnaires for contracts with a value below the financial thresholds. The Crown Commercial Service is an executive agency under the dependency of the Cabinet Office, operating as a trading fund under the Government Trading Funds Act 1973. Developing public procurement policy and guidance on the behalf of the UK Government is part of its remit.

⁴ Also restricted under Article 58(3)§2 Directive 2014/24/EU.

and to do so without delay.⁵ It makes sense to include this obligation as it forces economic operators to at least know where the documents are to be found, even though they will not incur in the cost of actually obtaining them at the beginning of the procedure. As such, it is possible this would pre-empt rushed submissions as not providing that information would be a discretionary exclusion ground since the self-declaration would not be compliant with the requirements.⁶ Additionally, it is also arguable that making economic operators provide this information up front will reduce the scope of arguing that they need time to find out which authority holds the documentation.

The final purpose is to be found on Article 59(1)§3 of Directive 2014/24/EU and it is to give the contracting authority the possibility to obtain directly the information it requires from the economic operator. This possibility is to be read in conjunction with Article 59(5) and (6). The first mandates the contracting authority to go and search for the documentation before asking for it as long as the document required is available on a national database in any Member State available free of charge. Whereas the second creates on each Member State the obligation of making available on E-Certis a complete list of databases that can be used by contracting authorities in other Member States.⁷

It can be argued as well that another feature of the ESPD is the preference for standardisation as a means to achieve simplification. By establishing a common standard for the selection and exclusion information to be used in all cases, the ESPD simplifies the work of economic operators and contracting authorities as once they become regular users, they will soon become proficient as it is always the same ESPD that needs to be filled in, albeit with different questions. It is the same logic behind the benefits of a single set of driving rules in any given country, how the internet (mostly) works or the benefit for trade arising from the invention and adoption of containerisation.

4 How does the ESPD work

At a superficial level the ESPD works by allowing economic operators to provide the contracting authority with a self-declaration where they confirm their ability to comply with the procedure selection requirements and not fall within any of the exclusion grounds applicable. At a technical level, the ESPD is more complex and means different things: i) a standard form filled in by economic operators; ii) a free service provided by the European Commission; iii) the underlying exchange

⁵ Articles 59(1)§2 and (4) and 60 of Directive 2014/24/EU.

⁶ Article 57(4)(h) Directive 2014/24/EU and possibly subject “to prosecution under national law in cases of serious misrepresentations”, Commission Implementing Regulation 2016/7 Annex I.

⁷ E-Certis was introduced in 2010 as a first attempt to map and improve cross-border flow of information contained in databases. It is currently regulated in Article 60 of Directive 2014/24/EU.

data model guaranteeing cross-border interoperability; iv) the open source code of the ESPD service.

4.1 The standard form

The first is determined by the European Commission in its Commission Implementing Regulation 2016/7 Annex II, which was published in early 2016 before the transposition deadline for Directive 2014/24/EU. It is a “one size fits all” model to be used in all applicable public procurement procedures, as defined by Article 59(2) of Directive 2014/24/EU. It is divided into six parts:⁸

- Part I: Information concerning the procurement procedure and the contracting authority or contracting entity
- Part II: Information concerning the economic operator
- Part III: Exclusion criteria
- Part IV: Selection criteria
- Part V: Reduction of the number of qualified candidates
- Part VI: Concluding statements

The structure does not appear to create any particularly difficulties as the sections correspond roughly to the steps for selection and exclusion under Directive 2004/18/EC. As for the actual content, however, it raises some practical issues that should be explored, namely how lots, subcontractors/third party capacity and groups of economic operators are treated.

Regarding lots, every single lot an economic operator is bidding for in a contract requires a specific ESPD for it. This appears to be a trade-off made between the interests of the economic operators and the contracting authorities. Had the ESPD been designed solely with the interests of economic operators in mind, the solution that would better suit their interests would have been having a single ESPD for the whole procedure, leaving to the contracting authority the work of then applying said ESPD to each lot the economic operator was bidding on. The Implementing Regulation however has balanced the interests and put on the economic operator the responsibility of submitting a ESPD for each lot it is bidding on. This is an acceptable solution for three reasons. First, a significant part of the work is already done by the economic operator as most fields will not change and the content can be re-used. Second, it reduces the transaction costs for contracting authorities, which are likely to go up due to the presumption lots

⁸ Commission Implementing Regulation 2016/7 Annex I.

are to be used in public procurement.⁹ Third, it keeps the “mental model” that each lot corresponds to a mini-tendering exercise separate from the other lots, thus requiring its own ESPD the same way it requires its own bid.

For those bidders using subcontractors or relying in third party capacity, the ESPD can become quite complex quite quickly, depending on the transposition approach taken to Directive 2014/24/EU by any given Member State. As for the first, under Annex I of Commission Implementing Regulation 2016/7 and Article 71(5) §3 Directive 2014/24/EU it is up for the contracting authorities, if so authorised in the national transposition, to request sub-contractors to fill Parts II and III of their own ESPD as the main contractor has to do. Regarding the reliance on third party capacity, each entity providing capacity will have to fill in its own, separate ESPD. Therefore, in a scenario where an economic operator is bidding for multiple lots within the same procurement while using subcontractors and relying on third parties for capacity, the preparation of a tender becomes very complex. While it is clear that for most traditional procurements (single bidder, single contract) the ESPD provides simplification and a clear reduction of the transaction costs involved, in complex procurements they do not allow for the full realisation of the simplification objective. Although the framework chosen can be understood and justified it is worth noting that for complex bidding structures, the run up to a public procurement procedure will remain challenging and that we may be pushing to later in the procedure difficulties that might be preferable to be tackled before the submission of tenders or participation requests.¹⁰

As for groups of economic operators, the members are treated individually and each will have to sign its own ESPD, that is Parts II to V. These are the parts containing the information from each economic operator.

4.2 The service provided by the European Commission

The second level of what consists the ESPD is the free online service provided by the European Commission.¹¹ This will probably constitute the most obvious usage source for the ESPD at least in the near future and while Member States are yet to fully embrace electronic procurement. It is available both for the contracting authority and the economic operators.

The ESPD service is connected with the Official Journal of the European Union (OJEU) and for contracts there advertised once the notice identifiers are provided, it will pull the required information about the tender from the OJEU database, automatically filling in the sections pertaining to the contracting authority. In

⁹ Article 46 of Directive 2014/24/EU.

¹⁰ Such as what should happen if a sub-contractor or third party does not provide the required documentary evidence on time, but these will be discussed in the next section.

¹¹ Available at: <http://ec.europa.eu/tools/espd>, accessed March 07th, 2017.

consequence, transaction costs for contracting authorities are reduced and the risk of clerical errors reduced as no data will be inputted manually. The service can be used for tenders not advertised on the OJEU, be it negotiated procedures without a notice or contracts with a value below-thresholds, but for those cases the contracting authority will have to fill the appropriate parts on its own.

Portugal is yet to transpose Directive 2014/24/EU at the time of writing but it has adopted a fully electronic approach to public procurement since 2009, with a suite of private electronic platforms available for use. The regulator IMPIC recognised the direct effect of the ESPD and the Commission Implementing Regulation 2016/07 and published a note highlighting to contracting authorities the need to comply with the ESPD,¹² without providing any information about a national solution. As such, it would appear that for now at least Portuguese contracting authorities and any economic operators will have to use the ESPD service provided by the European Commission.

4.3 The underlying exchange data model

As Member States move their procurement procedures electronically by October 2018 at the latest, each national electronic procurement system will be adapted to work seamlessly with the ESPD. For that to be achieved each system needs to support the underlying data model adopted by the ESPD so that interoperability between systems is to be supported, including between different national systems.¹³ In essence, it is no different from how the internet operates (based on accepted standards and protocols) supported by each vendor. It should be noted however, that it is conceivable for Member States not to support the exchange data model on their electronic procurement systems.¹⁴ It would be within the scope of Article 59 of Directive 2014/24/EU and the Commission Implementing Regulation 2016/07 to simply mandate the use of the Commission's ESPD service instead and that only the final document/output would have to be submitted in the national electronic procurement system. This option has the benefit of reducing the set up costs for the Member State as well as future development costs to keep compatibility, but effectively externalises those costs to the contracting authorities and economic operators. In every single procedure they would have to leave the electronic procurement platform and go to the Commission's ESPD service website to produce the ESPD before bringing the output back into the platform.

¹² Guidance Note 01/IMPIC/2016, 29/06/2016.

¹³ With the same view, Williams, R "The European single procurement document", in *Public Procurement Law Review*, 2016, 3, NA69-71.

¹⁴ In England and Wales, it is expected that the data model will be supported by the e-procurement systems, Crown Commercial Service, *Procurement Policy Note: Standard Selection Questionnaire (SQ) Action Note 8/16*.

While the cost per procedure would be low, this is another transaction cost that could be avoided by adoption of the ESPD exchange data model.

The current version of the data model is hosted on GitHub platform,¹⁵ a common choice for open source projects and with a large community of developers. However, one should note that the GitHub repository owned by the GitHub company (based in the USA), which may constitute a risk in the future if GitHub were to be acquired by a competitor or shut down. It is possible to take the source code elsewhere but there is no indication of a backup/risk assessment plan at this moment in time for the hosting of the exchange data model. Having said this, it may well be that the content of GitHub's repository is only for external purposes, *ie* to be transparent about the development process and to allow any interested party to see its development while the actual development is done on a private repository.

The importance of a common underlying exchange data model cannot be overstated. It is probably the first time EU procurement rules take the step from simply harmonising natural language, which is the traditional role of Directives to provide a technological backbone that facilitate cross-border procurement.¹⁶ In reality, this technical backbone goes beyond even the harmonization of legal regimes, aiming instead for unification of processes/practices via technology. While it can be argued that on each end Member States are free to determine how the data model will work for economic operators and contracting authorities, their discretion is severely limited by the data model: they cannot simply bolt on new features to it or refuse to support existing features that would break compatibility. In consequence, the possibility of using incompatible technology standards as barrier to cross-border procurement is set aside as Member States are under the obligation of ensuring the ESPD support in their national procurement systems.

The ESPD exchange data model needs to be understood in conjunction with the Internal Market Information System (IMI), established by Regulation (EU) 1024/2012 and referred to in Recital 128 and Article 86(2) of Directive 2014/24/EU. Assuming the IMI ends up including the underlying exchange data model, it is anticipated it could provide the technical means to enable the cooperation of public authorities across Member States, providing a network where ESPD requests could be channeled through.¹⁷ Its scope, however, is much bigger than public procurement and its current use appears to be quite limited.¹⁸ Having said that, there is already a fairly developed multilingual questionnaire specific

¹⁵ Available at <http://github.com/esp/esp-edm/>, accessed March 07th, 2017.

¹⁶ The same can be argued of e-invoicing in Directive 2014/55/EU.

¹⁷ On the IMI see, Wall, *Linked National Public Authorities – a Study on IMI* (2016:11).

¹⁸ Data from the European Commission, shows that only 7,658 public authorities registered, http://ec.europa.eu/internal_market/imi-net/statistics/index_en.htm, accessed April 3rd, 2017.

for public procurement information requests,¹⁹ but not clear indication of its integration with the ESPD system.

Going forward, it will be critical to determine who (or what institution) has the power to determine the evolution of the standard. Whomever holds that power will be in a position to influence the development of the standard and, in consequence, how electronic procurement will work in the EU. The source code for the exchange data model does not appear to have been open sourced and as such the European Commission seems in control even though the code it is publicly hosted on GitHub.

4.4 The open source code of the ESPD service

The European Commission has decided to release the source code of the ESPD service in two platforms: Joinup and GitHub.²⁰ The source code was made available subject to the European Union Public License (EURL),²¹ presumably, its current version 1.1.

The purpose of this approach appears to be twofold. First, as with the ESPD exchange data model, to have the development in the open and, probably, accepting more external change requests than the data model. For the ESPD service this approach is to be welcome, since it allows users to have an input in the evolution of the service and, indirectly, on the data model itself since both have to be in sync. By doing this on the open and in two different platforms, any lobbying activity for changes will be public by default.

Finally, by making the ESPD service source code open source, the European Commission is allowing any interested party to re-use for other purposes. This is to be welcome as well, since it allows extra-EU countries to set up similar systems without having to develop them from scratch, and thus incurring into costs the EU has already incurred into. It also builds upon a growing approach taken by institutions like the Government Digital Service in the UK or 18F in the USA which open the source code of their platforms/services as much as possible to help build the digital administration ecosystem.

¹⁹ Available at http://ec.europa.eu/internal_market/imi-net/_docs/data_protection/pp_en.pdf, accessed April 3rd, 2017.

²⁰ The source code is available at espd.github.io, accessed March 07th, 2017.

²¹ According to the information available on <http://espd.github.io/espd-service/docs/html/license.html>, accessed March 7th, 2017.

5 Issues raised by the ESPD system

The current iteration of the ESPD system raises a number of potential issues that are yet to be addressed. This can be grouped into: i) framework issues, that is those arising from the choices adopted in Directive 2014/24/EU and the Commission Implementing Regulation 2016/07, ii) those related with practical implications from the use of ESPD in day-to-day operations and iii) those generating legal uncertainty.

5.1 Framework issues

The stated objective of the ESPD system is to simplify public procurement and to reduce transaction costs for the parties involved. However, it is arguable that the “choice architecture” designed in Directive 2014/24/EU will allow for the objective to be achieved as anticipated for three reasons. First, the ESPD constitutes not a real saving of transaction costs but a transfer from the economic operator to the contracting authority. Second, the current design of the ESPD system allows contracting authorities not to change their current practice and second, for cross-border procurement, language barriers may pose a more significant challenge than would appear at first instance.

5.1.1 *Transferring transaction costs from the economic operator to the contracting authority*

The first framework issue raised by the ESPD derives from its stated aim. By establishing a self-declaration system whereby the economic operator does not have to provide the documentary evidence for its qualification at the start of the procedure and putting the onus in the contracting authority to find that information by itself, the ESPD effectively transfers the transaction costs from the economic operator to the contracting authority. In general, this is a welcome move as it gives contracting authorities the incentive to restrict request for documents to those that are really required, instead of what happened before where the transaction cost was fully borne by the economic operator. However, first and foremost it constitutes a transfer of those same transaction costs from the economic operator to the contracting authority. By forcing the contracting authority to look inside itself for copies of documents it already possesses²² or in freely available databases,²³ it will have to internalise the cost until borne by the economic operator. Additionally, once the system is up and running the transaction costs per procedure arising from the change may go in either direction. On

²² Article 59(5) §2 of Directive 2014/24/EU.

²³ Article 59(5) §3 of Directive 2014/24/EU.

the one hand, they may go up as contracting authorities will be less proficient at finding the necessary data in external databases, particularly those from other Member States. On the other hand, as more and more information is held in freely available databases, the technical systems improve and the contracting authorities reduce the request for documents in comparison with the past, it is possible that the transaction costs per procedure will fall.

There is another underlying risk associated with the move to self-declarations. Even if the transaction costs per procedure go down, the total transaction costs of the procurement system as a whole may go up if more economic operators start taking part in procurement procedures as it would be expected. As they are now borne by the contracting authority, they will be going up on the public side. This risk could have been avoided in case the ESPD system had been designed slightly differently in what concerns the obligation to find or provide the documents mentioned in the self-declaration. Had it stayed with the winning economic operator²⁴ then both the contracting authority and all other economic operators would benefit from the reduction in transaction costs associated with the move. The only party bearing the cost would be the winner of the contract, which would align the cost with the party that will benefit from the outcome.

5.1.2 Contracting authorities may not change the way they operate

Whereas the logic of introducing the ESPD is to make do with the traditional selection stage where possible and streamline the public procurement procedures, the current legal drafting allows for contracting authorities to keep their practice unchanged. This is more true if we assume that under certain circumstances the selection stage was used for more than simply checking the eligibility of candidates, effectively functioning as a deterrent to participation in public procurement procedures as it appears to have been the case in the UK.

Article 59(4) of Directive 2014/24/EU provides contracting authorities with the possibility of asking tenderers and candidates “at any moment” to submit supporting documents, effectively offering a direct legal basis for contracting authorities to keep doing what they have been doing so far. Furthermore, it is even arguable that the contracting authority may include a clause in the tender documents asking for the documentation up front or with the tender,²⁵ which as long as it was not used to assess the tender itself would be compliant with the *Lianakis*²⁶ decision. It is true, however, that Article 59(5) of Directive 2014/24/EU is intended to mitigate the risk mentioned here by making instead the con-

²⁴ As Portugal did in 2009 when self-declarations were introduced in the country.

²⁵ Sanchez-Graells and Telles, (2016) Commentary to the Public Contracts Regulation 2016, available at: PCR2015.uk.

²⁶ Case C-532/06, *Lianakis AE and Others v Dimos Alexandroupolis and Others* ECLI:EU:C:2008:40.

tracting authority look for those documents in the sources identified in the ESPD if they are available free of charge and banning the contracting authority from requesting documents it already possesses.

For now, depending on the situation of each Member State, before the appropriate databases are freely available and populated with the necessary information, contracting authorities will be able to keep on doing what they have been doing so far. However, as time goes on it is likely that more economic operators will have more of their information in freely accessible databases/services, thus reducing the scope of application of Article 59(4).

5.1.3 *Language barriers*

Language barriers constitute the second framework issue that may affect the ESPD's ability to achieve its stated outcome. Directive 2014/24/EU is once more silent on language issues which can constitute a discriminatory effect against economic operators based in other Member States.²⁷ According to Article 61(3) of Directive 2014/24/EU, the European Commission must make the ESPD available in all languages, therefore ensuring that any entity is able to fill it in. But who will be able to read the content afterwards?

Article 59(5) of Directive 2014/24/EU requires the contracting authority to proactively obtain the documentary evidence from national databases in *any* Member State, the emphasis being on the database being freely accessible irrespective of the language used. Therefore, in first instance the contracting authority is under the obligation of obtaining the documentary evidence, even if cannot read it. Expecting contracting authorities to be able to access documents in any language of the Union shows a naive view of how public procurement works today and how it will work in the near future. Other than ensuring the ESPD integration within the IMI system and limiting information requests to the questions contained within its question set, it seems language limitations by contracting authorities will remain the *status quo* for the foreseeable future. The fact that at the time of writing, there is no information about the public procurement pilot that was supposed to have started in 2015 (Article 86(3) of Directive 2014/24/EU) does not bode well for its success in public procurement.

Furthermore, it appears to be an exception to the rule under which Member States or contracting authorities determine the language of the tender. If that is not the case, at least for the documentation supporting the ESPD, economic operators appear to be able to provide it in the language of their Member State

²⁷ Sanchez-Graells, (2012) Are the procurement rules a barrier to cross-border trade within the European Market? – A view on proposals to lower that barrier and spur growth, in C Tvarno, GS Olykke & C Risvig Hansen (eds), *EU Public Procurement: Modernisation, Growth and Innovation* (Copenhagen, Djof); European Commission, (2011) *Cross-border procurement above the thresholds*.

while submitting the tender in the language required by the contracting authority. In practice, what may happen is that contracting authorities may claim the documentation held in a database of another Member State is technically not freely available as it is not contained in an accepted language. It may well be that a definitive solution will depend on the interpretation of Article 59(5) of Directive 2014/24/EU leaving or not enough discretion for Member States to require documents to be available in a specific language. If that is the case, then Article 59(5) is a dead letter provision when dealing with cross-border documentation.

Not looking explicitly into language as a barrier to cross-border procurement in the development of Directive 2014/24/EU was a missed opportunity. However, in relation to the ESPD how language was treated appears to have been either an oversight or based in unrealistic expectations. It is possible this may become a contentious legal point in the near future, as more and more supporting documents are held in national databases.

5.2 Practical issues

As for the practical issues it is possible to point out a number of potential risks arising from the use of self-declarations and of the ESPD in particular.

5.2.1 *Lowering of legal compliance standards*

The use of a self-declaration system in public procurement changes significantly the way public procurement procedures are run and crucially, possibly the trade offs between legal compliance and awarding the contract to the best bid even if the bidder does not comply with all the selection and exclusion requirements. Under Directive 2004/18/EC the legal compliance with exclusion grounds or selection criteria was done for all economic operators at the same time and without knowledge of their bids. This raised its own set of problems such as increasing the transaction costs for both the contracting authority and participants as well as possibly leading to the bias in the award decision if the jury was the same²⁸ of the selection stage in case one was used. On the flip side, it ensured all economic operators were vetted and if needed be excluded or not-selected before the tendering stage.

The current structure of awarding the contract and only checking the self-declaration for the bidder with the best bid changes the incentives of the decision maker and introduces a new risk: that the compliance standards will be lowered as to ensure the best bid gets the contract. Article 59(4)§2 explicitly refers to the obligation of the contracting authority of checking the documentation of the

²⁸ Crowder, M, (2015) "Public procurement: the role of cognitive heuristics", *Public Money & Management*: 35:2, p. 127–134, DOI: 10.1080/09540962.2015.1007707 .

winner, but at this moment in the procedure there is a risk that the contracting authority will be tempted to ignore shortcomings in the bidder's documentation. This risk can be compounded if the Member State decides not to transpose Article 57(4)(h), effectively depriving contracting authorities from the appropriate exclusion ground. Furthermore, a literal reading of Article 59(4)§2 appears to imply the contracting authority is only under the obligation of requesting the documentation, not to automatically exclude the non-compliant bidder (“(...) shall (...) require the tenderer to submit up-to-date supporting documents in accordance with Article 60 and, where appropriate, Article 62”). This appears to be a significant reversal of practice to date and could be justified in analogous terms as to how abnormal low tenders are treated in Article 69: while there is an obligation to investigate if a tender is abnormally low, there is no obligation of excluding a tender that is found in that situation. The counter-argument to this view would be that the ESPD constitutes only “preliminary evidence”²⁹ and that only the formal certificates/documents would constitute the appropriate level of evidence, thus justifying the need to require the full set of documents, as appears to be the intention of Article 56 of Directive 2014/24/EU.

In this setting, the bigger the difference between the best and second best bids the more tempting it may be to decision makers to overlook at least minor legal non-compliances from economic operator. Without attempting to be exhaustive, the probability of this happening depends on multiple interacting variables such as the legal culture of the country, the likelihood of legal challenges, the transparency regime for decisions taken during the procedure or the risk tolerance of the contracting authority itself.

The risk posed above is a necessary consequence of the trade-off between simplification from a self-declaration and the prior paradigm. It is not possible to design a one size fit all solution that would be useful in all Member States, all of the time but it is possible the risks can be mitigated based on each Member State specificities. As such, it is preferable if the solution for this particular problem is left to the national transpositions even though it means a lesser degree of harmonisation in this particular instance.

5.2.2 Collusion of economic operators

The second risk posed by the ESPD, more so by checking the documentation of only the winner, is the facilitation of collusion between economic operators under the right circumstances. One example would be where the national law or tender documents mandate the contracting authority to move from the bidder with the best bid to the next in line in case of non-compliance with the require-

²⁹ Article 59(1) of Directive 2014/24/EU.

ment to provide the documentary evidence.³⁰ The same risk exists if instead of a mandatory obligation there is instead just the possibility of going to the next best bid and that becomes common practice by any given contracting authority. In a market where collusion is present, it is possible for bidders to coordinate actions and for certain bidders to simply not present their documentation, knowing the contract will then be offered to another of the colluders.

The collusion risk is real, but can be mitigated in multiple ways. For example, not imposing a mandatory obligation of offering the contract to the bidder with the next best bid would immediately introduce some uncertainty in the process. This approach was trialled successfully in Wales in 2012-13,³¹ but on a very limited scale and on pilot projects. At the Member State scale, other solutions would be preferable. In some countries bidders must present bonds or bank guarantees at the beginning of the procedure and as such not providing the necessary information could trigger the bond, as Portugal has done when it implemented a self-declaration system in 2009.

The effectiveness of the bond as a deterrent depends on multiple factors. First, the absolute and relative (to the contract) values. The higher they are, the stronger the deterrent effect. However, it is very easy to simply ask for bond values that deter competition in the first place, particularly from SMEs or from companies that have limited financial resources and would have to post multiple bonds for multiple procedures. Then, its deterrent effect would depend as well on the impact it would have or not on the credit rating of the economic operator, ie how would the banking and insurance markets react to a customer which repeatedly had their bond or bank guarantees triggered for the same reason?

Another line of defense against collusive behaviour would be to tie in the non-compliance with the exclusion grounds of Article 57(4), particularly (d) and (h). The former is a “catch all” provision for collusive behaviour but one that may imply a high burden of evidence bar to clear. As for the latter, this is precisely designed for cases of serious misrepresentation in self-declarations, and covers both the situations whereby the economic operator supplies the necessary documentary evidence but does not comply with the underlying requirement or simply does not provide it at all. Crucially, from the text of the Directive it would appear that the contracting authority would simply have to prove the information was withheld or that the economic operator “is not able to submit the supporting documents”, thus sparing if of proving any misleading or collusive intent. Since all grounds of Article 57(4) are discretionary exclusion grounds, it is be up to

³⁰ This appears to be situation in England and Wales for central Government at least, as the most recent guidance on the topic establishes in the standard questionnaire the obligation to move to then ext best bid, Crown Commercial Service, *Procurement Policy Note: Standard Selection Questionnaire (SQ) Action Note 8/16*, p. 14.

³¹ Telles et al, (2014) *Simplified Open Procedure Guidance*.

each Member State to decide to adopt it or not when transposing the Directive. If used, it would need to be tied in with appropriate self-cleaning provisions under Article 57(6) and (7).

5.3 Legal uncertainty

The current legal drafting of the ESPD in Directive 2014/24/EU and the Commission Implementing Regulation 2016/07 raises a significant number of practical issues, which will affect its day-to-day usage.

5.3.1 *Language requirements for supporting documents*

As mentioned in section 5.1.2, language requirements for supporting documents are likely to become a practical issue in the near future, once Member States conclude the transposition of Directive 2014/24/EU and national databases start to be included by economic operators in their self-declarations. This is more so in those cases whereby the national transposition does not address explicitly the language of documents covered by the ESPD and available on national databases in other Member States, or those questions not covered within the question set of the IMI once it is fully up and running for public procurement. For example, Regulation 59 of the Public Contracts Regulations 2015 which transposes Article 59 to England and Wales does not refer specifically to language that supporting documents need to be available in.³²

5.3.2 *Meaning of “without delay”*

Article 59(4) of Directive 2014/24/EU imposes the obligation on the economic operators to provide the contracting authority with the supporting documentation “without delay.” While the Directive is very prescriptive in what concerns timings and deadlines elsewhere, for example for the submission of tenders,³³ it does not follow the same approach in this instance. Not doing so creates unnecessary legal uncertainty on what constitutes “without delay.” As before, this is an issue that may be solved by national transpositions or will have to be dealt with by contracting authorities individually. In absence of a legal deadline, what constitutes “without delay”? Would a 24 or 48 hour period count as such? Or does the principle of proportionality require a longer period of time? Again, using the transposition into England and Wales as an example, it is possible to observe that Regulation 59 of the Public Contracts Regulation 2015 also does not include a time frame. Furthermore, the transposition into England and Wales

³² Sanchez-Graells and Telles, (2016) Commentary to the Public Contracts Regulation 2016, available at: PCR2015.uk.

³³ Articles 27, 28, 29 or 30 of Directive 2014/24/EU.

drops the “without delay” requirement, further blurring the lines of what would be appropriate in the jurisdiction,³⁴ guidance issued by the Crown Commercial Service in 2016, does mention the “without delay” requirement but without any further details.³⁵

5.3.3 Ban on asking for documents already in the possession of the contracting authority

Article 59(5)§2 of Directive 2014/24/EU bans contracting authorities from asking for documents already in its possession. From a theoretical perspective, this may seem obvious and setting up a “reuse first” approach is a laudable idea. However, under the current format it is also prone to two sets of practical problems. First, it implies that the contracting authority knows what documents it possesses. This is problematic as depending on the size and structure of the contracting authority, there may be multiple departments conducting procurement. The larger the contracting authority, the more real the risk. Additionally, for those working in silos, the documentation is technically in the possession of the contracting authority, but not readily available for the particular team running a given procurement procedure. This requirement may force contracting authorities to re-organise their internal practices and, eventually, the adoption of document management systems attached to the electronic procurement platform being used. In the long run, this will probably be a positive force on changing practice.

Banning the contracting authority from asking for documents it already possesses raises another problem. How will the contracting authority know if the document in its possession is still valid, relevant or even true at any given moment in time? In many instances, a cursory look of the document will be enough to reach a conclusion, but not in every case. For example, what if an insurance policy for an economic operator would still look to be valid but it had already changed insurance providers? How would the contracting authority know it was outdated? Even though the contracting authority cannot request a new document as it has a valid one in its possession, surely there is a duty by the economic operator to refer to the new document in the ESPD. However, what are the consequences for the economic operator if it does not do so? Would it constitute a cause for exclusion assuming Article 57(4)(h) was transposed to the national law? I would assume this to constitute an analogous situation to a misrepresentation but depending on the situation, the principle of proportionality might allow for minor corrections to the documentation to be done by the economic operator.

³⁴ Sanchez-Graells and Telles, (2016) Commentary to the Public Contracts Regulation 2016, available at: PCR2015.uk.

³⁵ Crown Commercial Service, *Procurement Policy Note: Standard Selection Questionnaire (SQ) Action Note 8/16*, p. 14.

6. What remains to be done

Although the ESPD system introduces a significant change in how public procurement procedures operate, the previous section showed that the current legal draft does not go as far as solving a number of issues related with it. In addition to those, it is possible to conceive other two other future legislative changes that would improve its effectiveness. First, contracting authorities should be restricted to request documentary evidence from only the winner instead of all participants. Second, non-compliance by economic operators for providing information as required should be made a mandatory ground for exclusion, instead of a discretionary one. The European Commission is due to review the practical application of the ESPD in 2017³⁶ and propose changes to optimise cross-border access if needed be, in addition to a more substantial review in 2019.³⁷

6.1 Restricting contracting authorities to request documentary evidence of the winner

As identified in section 5.1.1, the ESPD system amounts to a transfer of transaction costs from economic operators to the contracting authority. However, it is still possible for contracting authorities to request supporting evidence from all participants in the procedure at any moment under Article 59(4), subject to the restrictions of Article 59(5). This appears to be a hold out from the previous paradigm of asking documentation from all economic operators, all the time. But it is one that does not make sense within the logic of the new regime, where transaction costs are to be minimised. Furthermore, it can be argued that there is no added value in checking the documentation of all economic operators as only one will be a winner at the end. In fact, checking the information all participants is a waste of resources, irrespective of which of the parties is bearing the cost: the economic operators until the ESPD came into force and the contracting authorities now.

It would have been preferable instead to restrict the contracting authority to request the information only of the winner, which is the solution adopted by Portugal in its current legislation. It can be counter-argued that such solution would change the incentives significantly, leading to economic operators that would be filtered out in the previous regime to potentially be awarded a contract for which they are not qualified, for example. That is a real risk but one that needs to be anchored in probabilities and (once more), incentives. Although economic operators are now spared of the transaction costs of the selection stage, bidding is not cost free. Drafting and preparing tenders is costly, particularly in complex

³⁶ Article 59(3) of Directive 2014/24/EU.

³⁷ Article 92 of Directive 2014/24/EU.

contracts. Incurring in that certain cost without complying with the selection criteria just does not make sense, except if there is a reasonable expectation (probability) of the contracting authority awarding the contract to what amounts to be a non-compliant bidder. Compliance will depend, in first instance, of the expectations a non-compliant bidder has from being able to be able to perform the contract despite the non-compliance. In addition, it may also depend on future implications if caught, leading to the second suggestion for improvements.

6.2 Making exclusion of Article 57(4)(h) of Directive 2014/24/EU a mandatory ground for exclusion

As it stands, a non-compliant bidder may be automatically excluded from future public procurement procedures if the Member State decides to include the exclusion ground of Article 57(4)(h) of Directive 2014/24/EU. This should have been made a mandatory exclusion in the Directive instead of a discretionary one.³⁸ Had it been made a mandatory exclusion ground in all Member States, as it happens with the grounds of Article 57(1) of Directive 2014/24/EU, it would send an important signal that every non-compliant bidder would pay a price much higher than any profit from a single contract: the possibility of being banned from tendering for a significant period of time. In addition to the obvious potential for loss in income, if the exclusion was to be part of a public register, affected economic operators could also suffer reputation damage as happened with Siemens in the late 2000s. Therefore, a mandatory exclusion would increase the risks associated with non-compliance, as well as enhancing the probability of them actually being imposed in the economic operator.³⁹

However, it is important to recall the possibility of non-compliance to be overlooked by the contracting authority as argued in section 5.2.1. That possibility is real, particularly for minor issues or in those situations where a significant difference in price/quality exists between the winning bid and the second best one. That is a different problem that depends on national conditions and needs to be tackled differently, for example via judicial review or by publishing the winner candidates, bearing in mind the limitations imposed by data protection rules in any given jurisdiction.

³⁸ Sanchez-Graells & Telles, (2016) Public Contracts Regulation 2015, available at www.pcr2015.uk. Subject, however to the self-cleaning provisions.

³⁹ Disputing the effectiveness of Article 57(4)(h) to be a deterrent, McGowan, D, (2016), Permissible evidence to demonstrate economic operators' technical ability: Case C-46/15 *Ambisig v AICP*, Public Procurement Law Review, 6, NA-180-NA184.

7 Conclusion

This paper showed that the European Single Procurement Document (ESPD) introduces significant changes to how public procurement procedures are to be run in the EU. Until now, each economic operator interested in taking part in a public procurement procedure had to submit all qualifying information and evidence at the beginning of the procedure. In consequence, all economic operators incurred in a certain transaction cost, for the uncertain benefit of winning the contract. The ESPD replaces the need for that documentation at the start by accepting a self-declaration instead, with the aim of reducing the transaction costs with the procedure and removing a barrier to the participation of economic operators in public procurement procedures.

It is possible to define the ESPD system by how it works and what it does. It is a self-declaration form, a free service provided by the European Commission. an underlying exchange data model that should allow for interoperability between systems, national or otherwise and open source code that may be re-used by other procurement systems outside the EU.

A closer inspection of the ESPD shows that not all of the changes have been thought through and a significant number of issues remain. These can be defined into framework issues, practical ones and legal uncertainties.

From a framework perspective, the ESPD amounts to a transaction cost transfer from the economic operators to the contracting authorities which may lead to higher overall costs on the long run. It is also arguable that contracting authorities will try and find ways to not change their current practices, at least during a transitional period. Finally, it is unclear if the language implications have been fully taken into consideration by the lawmaker which appears to assume that contracting authorities will easily assess databases freely available in other Member States.

As for the practical issues, the ESPD may lead to a drop on compliance standards due to the changes in incentives posed by the fact that the contracting authority will be able to check the documentation of the bidder with the best bid and perhaps overlook at least minor compliance issues. There are also fears of collusion being facilitated in those Member States, like England and Wales, where the contracting authority is mandated to award the contract to the next best bidder and there is no clear consequence for the non-compliant bidder.

Regarding the legal uncertainties, it is possible that the interpretation of language requirements in public procurement became more complex with the new approach. Furthermore, there are interpretative doubts about what constitutes the “without delay” obligation to provide the contracting authority with the documentary evidence and the ban on the contracting authority asking for documents that are already in its possession.

Finally, in addition to the issues detected there are two clear areas of improve-

ment for future revisions of Directive 2014/24/EU or changes in its practical operation. The first would be to fully embrace the new paradigm and ban the possibility of contracting authorities requiring the documentary evidence from all economic operators, moving completely into a system whereby the focus of the analysis of documentary evidence is on the winner of the contract. The second is an advocacy for the non-compliance exclusion grounds of Article 57(4)(h) to be made mandatory as to reduce the risk of economic operators presenting themselves without complying with all the stated requirements.