

**THE ELECTRONIC AWARD AND EXECUTION OF PUBLIC
PROCUREMENT**

Prof. G. M. Racca¹

INDEX

**1. E-PROCUREMENT STRATEGIES IN THE FUTURE OF PUBLIC
PROCUREMENT**

**2. THE CHALLENGE: OVERCOMING INERTIA AND
FRAGMENTATION**

**3. EFFICIENCY AND TRANSPARENCY THROUGH E-PROCUREMENT
SOLUTIONS**

**4. PRE-AWARD ELECTRONIC ADVERTISING: THE EVOLUTION
TOWARDS FULL ELECTRONIC MEANS FOR THE SUBMISSION OF
THE REQUIREMENTS AND OF THE OFFERS**

4.1 Electronic advertising in some EU Member States

4.2 The electronic submissions of tenders and of e-signatures

**5. THE ELECTRONIC EVALUATION OF THE TENDERERS
REQUIREMENTS**

**6. E-PROCUREMENT SOLUTIONS FOR THE AUTOMATIC
EVALUATION OF BIDS AND TENDERS: THE LOWEST ELECTRONIC
PRICE AND THE MOST ECONOMICALLY ADVANTAGEOUS
ELECTRONIC TENDER**

6.1 Electronic auctions as a tool for electronic evaluation of tenders

¹ Professor of Administrative law - University of Turin

7. IMPLEMENTATION OF ELECTRONIC AWARD IN SOME EU MEMBER STATES

8. IT SOLUTIONS IN THE EXECUTION OF THE CONTRACT: E-ORDERING, E-INVOICING AND E-PAYMENT

8.1 Towards the standardisation of the entire procurement procedure: PEPPOL

9. CONCLUSIONS

1. E-PROCUREMENT STRATEGIES IN THE FUTURE OF PUBLIC PROCUREMENT

It is normally reported that in Europe public authorities spend around 19% of GDP on works, goods and services.² Less well known is that the Public Procurement Directives cover only a small percentage of such expenditure. It is possible to argue from the EU data that currently only 20% of the value of Public Contracts awarded in Europe are above threshold or fully inside the scope of the Public Procurement Directives. The value of this market strongly decreases if we consider that approximately only 4% of EU GDP is fully awarded according to the Directives and only around 2% is below thresholds, the remainder of which is not or not fully covered by the Directives.³ From this perspective, the need to find new solutions to create an effective internal market for EU Public Procurement becomes evident. IT solutions seem to become strategic in order to better enforce non-discrimination and transparency principles to also favour crossborder participation.⁴

Such re-organization could favour the wider development and implementation of IT solutions that is definitely *the solution* for the future of public procurement.⁵ This idea

² Commission (EC) ‘Public Procurement indicators 2010’ (2011), with reference to 2010, the total expenditure on works good and services is over € 2,400 billion spent annually.

³ Commission (EC) ‘Evaluation Report Impact and Effectiveness of EU Public Procurement Legislation Part 1’, SEC(2011) 853 final, June 27, 2011, <http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/er853_1_en.pdf>.

⁴ Commission (EC) ‘A strategy for e-procurement’ April 20, 2012 COM(2012) 179 final. D. SORACE – A. TORRICELLI ‘Monitoring and Guidance in the Administration of Public Contracts’ in R. NOGUELLOU – U. STELKENS *Droit compare des contrats publics - Comparative law on public contracts* (Bruylant, Bruxelles, 2010), 199 et seq.

⁵ J. ROBERTS *The Modern Firm* (Oxford University Press, Oxford, 2004), 112.

has been well established for a number of years, especially considering the ambitious policy vision underpinning the 2004 Commission Action Plan aiming at creating a situation where “... any business in Europe with a PC and an internet connection can participate in a public purchase conducted electronically”.

However, the adoption of e-procurement solutions was not so easy to devise and implement in practice.⁶ As indicated above,⁷ electronic procurement presently accounts for only a small percentage (around 5%⁸) of all procurement carried out in Europe in contrast to the much more optimistic EU forecast⁹ of 2005 which estimated that at least 50% of procurement would be conducted by such means by 2010. Realistically, given the complexity of the change required and the inherent challenges in moving towards electronic

⁶ It recognised the need to take into account an EU level dimension, without which the switch-over could be hampered and resources could be wasted as the wheel was constantly re-invented.

⁷ G.M. RACCA ‘Collaborative procurement and contract performance in the Italian healthcare sector: illustration of a common problem in European procurement’ (2010) *P.P.L.R.*, 119; Commission (EC) ‘Evaluation of the 2004 Action Plan for Electronic Public Procurement Accompanying document to the Green Paper on expanding the use of e-Procurement in the EU’ SEC(2010) 1214 final October 10, 2010.

⁸ Commission (EC) ‘Evaluation of the 2004 Action Plan for Electronic Public Procurement Accompanying document to the Green Paper on expanding the use of e-Procurement in the EU’ SEC(2010) 1214 final October 10, 2010, 9. “The EU average figure is estimated to be less than 5% of total value, other than in Portugal, where the mandatory approach results in nearly 100% use of e-Procurement. France and Italy, notwithstanding being first mover countries in e-Procurement, estimate that only 4% and 2.5% respectively of their total procurement is conducted electronically

⁹ The Manchester ministerial declaration of 24 November 2005 defines the following target: “By 2010 all public administrations across Europe will have the capability of carrying out 100 % of their procurement electronically and at least 50 % of public procurement above the EU public procurement threshold will be carried out electronically”. The PEPPOL project is strongly supporting this target.

systems, “these objectives were always unlikely to be achieved in such a short time-frame – it is perhaps fairer to ask if greater progress could have been expected”.¹⁰

The importance of improving the use of IT solutions throughout the entire procurement process is more and more evident.

IT solutions in public procurement can be applied from a simple advertising to a complete on line award and execution procedures. It is possible to suggest that it was perhaps too ambitious to expect quick implementation of complete e-procurement procedures in particular in light of the fact that IT solutions have not yet been sufficiently improved as means for publicity and transparency of Public Contracts.

It should be stressed that electronic means of information and communication can greatly simplify advertising and increase the efficiency and transparency of the procurement processes.¹¹ They should therefore to the greatest extent possible be given precedence over traditional means of communication and information exchange. The use of electronic means also leads to savings in time and , in times of crisis, can also contribute to maximise the efficiency of public expenditure and favour economic growth. As a result, provision should be made for reducing the minimum periods when electronic means are used, subject, however, to the condition that they are compatible with the specific mode of transmission envisaged at EU level.

¹⁰ Commission (EC) ‘Evaluation of the 2004 Action Plan for Electronic Public Procurement Accompanying document to the Green Paper on expanding the use of e-Procurement in the EU’ SEC(2010) 1214 final October 10, 2010, 11.

¹¹ Commission (EC) ‘Proposal for a Directive of the European Parliament and of the Council on public procurement’, cit., whereas no. 23.

E-Procurement could provide the reduction of barriers and information gaps.¹² Moreover, the use of IT solutions allows collection of data and information on all transactions and connected payments to the economic operators involved.¹³ Such data could provide a precise map of the quality and quantity of public spending.¹⁴

¹² K. DOOLEY – S. PURCHASE ‘Factors Influencing E-Procurement Usage’ in Khi V. Thai (eds.) *International Handbook of Public Procurement*, cit., 461-462. In the same book see also: K. VAIDYA - G. C. CALLENDER - A.S.M. SAJEEV ‘Facilitators of Public E-Procurement: Lessons Learned from the U.K., U.S., and Australian Initiatives’, 478-479.

¹³ Italian law recently (d.l. 9 February 2012, n. 5, art. 20, c. I, lett. a, converted in Law n. 35 of 2012) implemented the “national database on public contracts” (Banca Dati Nazionale dei contratti pubblici) that will acquire the data of economic operators related to the technical, organizational, economic, financial and general requirements for the qualitative selection of tenderers in the procedures. See the Italian Authority for the Supervision of Public Contracts for works, services and supplies, Atto di Segnalazione n. 1 del 12 gennaio 2012, in http://www.avcp.it/portal/public/classic/AttivitaAutorita/AttiDellAutorita/_Atto?ca=4890. About the relevance of eProcurement in information processing see: M. ESSIG – M. AMANN ‘E-procurement and Its Role in Supply Management and supplier Valuation’ in C. Harland – G. Nissimbeni – E. Schneller (eds.) *The SAGE Handbook of strategic Supply Management* (SAGE, London, 2013), 425-426.

¹⁴ A. MERRILL - Procurement & Commercial Director - Scottish Government ‘PEPPOL & Public Procurement Reform’ speech at the 7th PEPPOL conference, Rome, 29 May 2012. In this perspective the experience of the ‘Scottish Management Information Hub’ seems very interesting. The Hub has been in existence since 2006 and is a centrally funded and sophisticated analytical tool provided with the Scottish Procurement Reform Programme. “The Hub allows organisations to: identify how much they are spending on external goods and services from third party suppliers, identify who the key suppliers are, ascertain how many transactions were made with each supplier, highlight commonality across suppliers and spend categories, identify spend with small and medium sized suppliers, highlight spend with local suppliers”. See also: Scottish Government, in <http://www.scotland.gov.uk/Topics/Government/Procurement/eCommerce/ScottishProcurementInformationHub>. Participating organisations are required provide a detailed annual extract from their

Obviously, the tools to be used for communicating by electronic means, as well as their technical characteristics, must be non-discriminatory, generally available and interoperable with the information and communication technology products in general use and must not restrict economic operators' access to the procurement procedure. Otherwise such electronic tools could create new e-barriers.¹⁵

2. THE CHALLENGE: OVERCOMING INERTIA AND FRAGMENTATION

The Digital Agenda of the European Commission is one of the seven elements of *Europe 2020 Strategy* which sets objectives for the growth of the European Union. The Digital Agenda proposes to better exploit the potential of Information and Communication Technologies tools (IT) in order to foster innovation, economic growth and progress.¹⁶

The 2004 Directives on public procurement put electronic and traditional means of communication and information exchange on the same level.¹⁷ New techniques (E-auction,

accounts payable system. The specification and example data extract templates can be downloaded by anyone with a log-in to <http://www.spikescavell.net/>.

¹⁵ S. KALLAS 'The challenge of e-signature for e-procurement' (2008) Conference on the cross-border use of e-signatures in the e-procurement process - Brussels, 18 September 2008.

¹⁶ Commission (EU) 'A Digital Agenda for Europe', COM(2010)245 final, 19 May 2010, where a lack of interoperability is identified and "weaknesses in standard-setting, public procurement and coordination between public authorities prevent digital services and devices used by Europeans from working together as well as they should".

¹⁷ Directive 2004/18/EC, whereas No. 35. See: S. ARROWSMITH 'Electronic reverse auctions under the EC public procurement rules: current possibilities and future prospects' (2002) in *P.P.L.R.*, 299-330; R. BICKERSTAFF 'E-communication Regulation in Public Procurement: the EC and UK perspective' in

Dynamic Purchasing System) and tools (e-Signatures, e-Catalogues, e-Notification, Buyer profiles, Electronic access to documents) were provided to favour the use of electronic communication to improve procurement outcomes.¹⁸ Nonetheless, the use of such instruments has been scarce.¹⁹

According to the European Commission's data, "*Contracting authorities and Public entities that have already implemented e-Procurement report savings of between 5% and 20% of their procurement expenditure. The total size of the EU's procurement market is estimated to be more than 2 trillion euro, so each 5% saved could result in about 100*

S. Arrowsmith (eds.) *Reform of the UNCITRAL model law on procurement* (Thomas Reuters/West, Danvers, 2009), 288 et seq.

¹⁸ R. BICKERSTAFF 'The New Directives' Rules on E-communication Mechanisms in Public and Utilities Procurement' (2004) in *P.P.L.R.*, 277; ID., 'Review: Commission Staff Working Document on the Requirements for Conducting Public Procurement Using Electronic Means' (2005) in *P.P.L.R.* NA17.

¹⁹ The actual percentage of less than 5% of total procurement budgets in the Member States awarded through electronic systems is very low if compared to US, Korea and Brazil Commission (EU) 'A strategy for e-procurement' 20 April 2012, COM(2012) 179 final, 1. "A full online procurement market place has already been achieved in Korea, which generated savings of US\$ 4.5 billion (about 8% of total annual procurement expenditure) annually by 2007; in Brazil 80% of public procurement is carried out electronically". Commission (EC) 'Evaluation of the 2004 Action Plan for Electronic Public Procurement Accompanying document to the Green Paper on expanding the use of e-Procurement in the EU' SEC(2010) 1214 final October 2010, 9. "The EU average figure is estimated to be less than 5% of total value, other than in Portugal, where the mandatory approach results in nearly 100% use of e-Procurement. France and Italy, notwithstanding being first mover countries in e-Procurement, estimate that only 4% and 2.5% respectively of their total procurement is conducted electronically. The Portugal Law advanced in this regard as use of e-Procurement tools is mandatory for phases from notification to tender award since November 1, 2009.

billion euro of savings per year”.²⁰ Considering that Electronic tools can assure such savings and are constantly improving in quality and ease of use, the question is why it is so difficult to achieve their application either as means of communications²¹ in the submission, or in the evaluation and award phase of Public Procurement.²²

²⁰ Commission (EU) ‘Delivering savings for Europe: moving to full e-procurement for all public purchases by 2016’, IP/12/389, 20 April 2012. See also: Deutsche Bank Research: E-procurement, February 2011. Concerning possible saving in Italy see: F. P. SCHIAVO ‘The role of eProcurement and PEPPOL in Italy’ speech at the *7th PEPPOL conference*, Rome, 29 May 2012.

²¹ 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, Article 1, § 12 e 13, “12. ‘Written’ or ‘in writing’ means any expression consisting of words or figures which can be read, reproduced and subsequently communicated. It may include information which is transmitted and stored by electronic means. 13. ‘Electronic means’ means using electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means”.

²² Commission (EU) ‘Green Paper on expanding the use of e-Procurement in the EU’, COM(2010) 571 final, 18 October 2010, 3. See also OECD ‘Discussion paper on public procurement performance measures. OECD Meeting of Leading Practitioners on Public Procurement’, 11-12 February 2012, 10, where the adoption of ICT solutions in public procurement (“e-procurement”) is justified “on the ground of speeding up processes and enlarging the set of potential participants”. R. BICKERSTAFF ‘E-communication Regulation in Public Procurement: the EC and UK perspective’ in S. ARROWSMITH (edited by) *Reform of the UNCITRAL model law on procurement* cit., 288 et seq., where the author put in evidence the risk of new e-barriers in cross-border trade. See also: K. VAIDYA - G. C. CALLENDER - A.S.M. SAJEEV ‘Facilitators of Public E-Procurement: Lessons Learned from the U.K., U.S., and Australian Initiatives’ in Khi V. Thai (eds.) *International Handbook of Public Procurement* (Auerbach Publications Taylor & Francis Group 2009), 475 et seq.

E-procurement can simplify the procurement procedures, reducing waste²³ and delivering lower price and better quality, by stimulating transparency and competition across the EU Internal Market.²⁴ Nonetheless, the main obstacle remains public officials' "inertia", resisting to any change of their ingrained habits. The need of an in-depth and intense retraining of the staff is evident.

The second related obstacle is the widespread "market fragmentation that can emerge from the existence of a wide variety of systems, sometimes technically complex, deployed across the EU (and sometimes within a single Member State) that can lead to increased costs for economic operators/suppliers".²⁵

²³ Directive 2004/18/EC, whereas No. 38.

²⁴ Directive 2004/18/EC, whereas No. 12. See also: Commission (EU) 'Proposal for a Directive of the European Parliament and of the Council on public procurement' COM(2011) 896 final, December 20, 2011, whereas No. 19 and 23. Commission (EU) 'The European eGovernment Action Plan 2011-2015. Harnessing ICT to promote smart, sustainable & innovative Government' 15 December 2010, COM(2010) 743 final. Commission (EU) 'Green Paper on expanding the use of e-Procurement in the EU', cit., 4, where the benefits of e-procurement are identified in: 1. increased accessibility and transparency, 2. benefits for individual procedures compared to paper based systems, 3. benefits in terms of more efficient procurement administration, 4. Potential for integration of EU procurement markets. See: S. CROOM – A. BRANDON JONES 'Key Issues in E-Procurement: Procurement Implementation and Operation in the Public Sector' in Khi V. Thai (eds.) *International Handbook of Public Procurement* cit., 447; A. DECKERS - Head of Unit for e-procurement and economic analysis of procurement markets 'New perspectives on e-procurement in Europe' speech at the 7th PEPPOL conference, Rome, 29 May 2012.

²⁵ Commission (EU) 'A strategy for e-procurement' 20 April 2012, COM(2012) 179 final, 5; R. BICKERSTAFF 'E-communication Regulation in Public Procurement: the EC and UK perspective' in S. ARROWSMITH (edited by) *Reform of the UNCITRAL model law on procurement* (Thomas Reuters/West, Danvers, 2009), 287 et seq. For a German law perspective see: M. BURGI 'The policy

Together with the market fragmentation there is demand-side fragmentation, considering the existence of 250,000 contracting entities²⁶ in EU, which does not allow the achievement of significant professional skills to tackle the use of IT solutions²⁷. Fragmentation of procuring entities is connected with markets fragmentation and the award of a relevant number of small contracts with evident limits to an effective competition throughout the internal market, and leads to a percentage of cross-border procurement of only 1.6 of contracts²⁸.

It is evident that any form of joint procurement²⁹ could limit below-threshold procurement since the award procedure is likely to be conducted under a framework agreement, or with the potential to split a contract into a number of lots according to the above threshold rules at least for goods and services procurement.

on regulating Electronic Communications in Germany' in S. ARROWSMITH (edited by) *Reform of the UNCITRAL model law on procurement*, cit. 305 et seq.

²⁶ Commission (EU) 'Evaluation Report - Impact and Effectiveness of EU Public Procurement Legislation' 27 June 2011, SEC(2011) 853 final, vi.

²⁷ Significantly, in Italy it has been recently provided (even though it is not yet enforced) that municipalities with a population not exceeding 5,000 inhabitants must either entrust the acquisition of works, services and supplies to a single central purchasing body or purchase through joint procurement: Law decree December 6, No. 201, converted in law December 22, 2011, No. 214, Article 23, § 4, implementing Article 33 of Italian Public Contracts Code.

²⁸ EU Commission, 'Green Paper on the modernisation of EU public procurement policy - Towards a more efficient European Procurement Market', COM(2011) 15.

²⁹ G.M. RACCA - S. PONZIO 'La mutualisation des achats dans le secteur de la santé publique: les centrales d'achat et les accords-cadres dans une perspective comparative' (2011) *Droit Administratif*, 2011, 7 et seq.

The EU Commission provided some non-legislative initiatives to clarify and encourage the use of e-Procurement³⁰ to overcome administrative and technical barriers to cross-border e-Procurement (Pan-European Public Procurement Online - PEPPOL,³¹ e-CERTIS³² and open e-PRIOR³³).

Progress has been made in the electronic publication and dissemination of information about procurement opportunities. However, the developing of common approaches, standards or templates for the on-line submission and processing of tenders is delayed. It has been underlined that “while solutions have been engineered for individual e-Procurement platforms, no attention has been devoted to aligning methods or approaches

³⁰ Commission (EU) ‘Action plan for the implementation of the legal framework for electronic public procurement’ 29 December 2004, SEC(2004)1639.

³¹ The Pan-European Public Procurement Online (PEPPOL) project is completed at the end of August 2012. Now the Open PEPPOL association promote European businesses to easily deal electronically with any European public sector buyers in their procurement processes. See <http://www.peppol.eu/>.

³² Commission (EU) ‘Proposal for a Directive of the European Parliament and of the Council on public procurement’ COM(2011) 896 final, December 20, 2011, whereas No. 33. “Commission provides and manages an electronic system — e-Certis, which is updated and verified on a voluntary basis by national authorities. The aim of e-Certis is to facilitate the exchange of certificates and other documentary evidence frequently required by contracting authorities. Experience acquired so far indicates that voluntary updating and verification is insufficient to ensure that e-Certis can deliver its full potential for simplifying and facilitating documentary exchanges for the benefit of small and medium-sized enterprises in particular. Maintenance should therefore be rendered obligatory in a first step; recourse to e-Certis will be made mandatory at a later stage”.

³³ F. G. MORAN ‘Pan-European interoperable electronic public procurement: enabling its implementation within the European Union institutions, agencies and other bodies, and facilitating its adoption across the member States’ (2012) *5th International Public Procurement Conference*, in <http://www.ippa.org/IPPC5/Proceedings/Part2/PAPER2-4.pdf>.

for submitting tenders electronically”.³⁴ The use of electronic means in public procurement in Europe requires standardisation³⁵ and interoperability³⁶ among the systems used in different Member States and in the phases of the awarding procedure.³⁷ Otherwise, as already pointed out³⁸, the risk is to build new electronic barriers.

The recent Green Paper on expanding the use of e-procurement in the EU has highlighted the need to identify solutions to improve and enhance interoperability between local, regional and national e-Procurement systems. Member States should participate in a "collaborative process, in which independent systems belonging to unrelated parties interact

³⁴ Commission (EU) ‘Green Paper on expanding the use of e-Procurement in the EU’, cit., 17.

³⁵ The standardisation refers to tender and contract documents and also to technical specifications. An example it’s provided by the Common Procurement Vocabulary (CPV) that was adopted by Regulation (EC) No 2195/2002, which is a hierarchically structured nomenclature, divided into divisions, groups, classes, categories and subcategories.

³⁶ Commission (EC) ‘Requirements for conducting public procurement using electronic means under the new

public procurement Directives 2004/18/EC and 2004/17/EC’ 8 July 2005, SEC(2005) 959, 8. ‘Interoperability’ is used here to refer to the capability of ICT systems (and of the business processes they support) to exchange information or services directly and satisfactorily between them and/or their users, so as to operate effectively together.

³⁷ Directive 2004/18/EC, whereas No. 35, where it is stated “As far as possible, the means and technology chosen should be compatible with the technologies used in other Member States”.

³⁸ G. M. RACCA ‘The role of IT solutions in the award and execution of public procurement below threshold and list B services: overcoming e-barriers’ in D. DRAGOS – R. CARANTA (eds. By) *Outside the EU Procurement Directives - inside the Treaty?*, cit., 376 et seq.

through the exchange of business information".³⁹ To achieve such goals, the EU Commission has established an e-Tendering Expert Group (e-TEG) tasked with defining a blueprint for pre-award e-procurement that provides a basis for the development of “best of breed” solutions. The objective is to promote solutions that achieve the optimal balance between usability and other attributes, such as security. An essential task for the e-TEG is to define an effective model for e-submission, as this is currently the main bottleneck for the wider implementation of e-procurement. On-going standards work, such as that carried out by the CEN BII workshop, will be leveraged by the e-TEG.⁴⁰

A case-book on the best practices on the implementation of e-procurement platforms that assure accessibility, ease of use and cost-effectiveness has been published recently.⁴¹ The costs of e-procurement facilities require investments that cannot be

³⁹ Commission (EU) ‘Green Paper on expanding the use of e-Procurement in the EU’, cit., 13.

⁴⁰ Commission (EU) ‘A strategy for e-procurement’ 20 April 2012, COM(2012) 179 final, 8. the e-TEG will also present recommendations on actions to be taken by the EU institutions and Member States to ensure the roll-out of eprocurement platforms that guarantee cross-border access and facilitate use by all economic operators in particular SMEs, whilst nonetheless preserving Member State autonomy to design solutions that best fit national requirements and can be integrated with existing platforms. See the recommendations provided by the Expert Group on e-tendering (e-TEG) in the ‘High level Report - Part I’, in http://ec.europa.eu/internal_market/publicprocurement/docs/eprocurement/conferences/121214_e-tendering-expert-group-draft-report-part1_en.pdf and in the ‘Operational Recommendations – Part II’, in http://ec.europa.eu/internal_market/publicprocurement/docs/eprocurement/conferences/121214_e-tendering-expert-group-draft-report-part2_en.pdf.

⁴¹ Pwc, ‘Golden Book of e-Procurement good Practice’ 5 December 2012, in http://ec.europa.eu/internal_market/publicprocurement/docs/eprocurement/conferences/121214_e-procurement-golden-book_en.pdf. The outcome of this work will be used to promote convergence

supported by all contracting authorities.⁴² New organizational models are required to overcome fragmentation.

The new Directive proposal recognizes that the use of electronic solutions⁴³ can deliver significant savings and improve procurement outcomes, reducing waste and errors.⁴⁴ The proposal aims at helping Member States to achieve the switchover to e-procurement, enabling suppliers to take part in online procurement procedures across the internal market. It provides for the mandatory transmission of notices in electronic form, the mandatory electronic availability of the procurement documentation and imposes full electronic communication on Central Purchasing Bodies.⁴⁵ The Central Purchasing Bodies,

towards and take-up of such good practices by Member States and public authorities investing in e-procurement infrastructure.

⁴² Commission (EU) ‘Green Paper on expanding the use of e-Procurement in the EU’, cit., 5. The ability to perform procurement electronically requires investment throughout the procurement chain to build the necessary capacity and manage the change-over. Investment costs in national and regional e-Procurement facilities – spanning e-portals to more comprehensive solutions – range from 0.5m€ to 5m€.

⁴³ Commission (EC) ‘Proposal for a Directive of the European Parliament and of the Council on public procurement’ COM(2011) 896 final, December 20, 2011, see artt. 19, 31-38, 51, 58, 59.

⁴⁴ Commission (EC) ‘Proposal for a Directive of the European Parliament and of the Council on public procurement’ COM(2011) 896 final, December 20, 2011, whereas 19.

⁴⁵Central Purchasing bodies are “*contracting authority which: acquires supplies and/or services intended for contracting authorities, or awards public contracts or concludes framework agreements for works, supplies or services intended for contracting authorities*”.⁴⁵ The strategic role of CPBs was already underlined in G.M. RACCA ‘Aggregate Models of Public Procurement and Secondary Considerations: An Italian Perspective’ in R. CARANTA and M. TRYBUS (eds) *The Law of Green and Social Procurement in Europe* (Djøf publishing, Copenhagen 2010), 165 et seq.

as professional contracting entities can play a significant role in the conversion to the use of IT solutions in public procurement whenever they possess adequate skills and IT tools.⁴⁶

3. EFFICIENCY AND TRANSPARENCY THROUGH E-PROCUREMENT SOLUTIONS

The principle of transparency is connected to other principles of the Treaty such as the principle of freedom of movement of goods, freedom of establishment and freedom to provide services.⁴⁷ Transparency assures impartiality and non-discrimination and favours the participation of economic operators in the selection for the award of public contracts.⁴⁸

⁴⁶ N. DIMITRI, F. DINI, G. PIGA ‘When should procurement be centralized?’ in N. DIMITRI, G. PIGA, G. SPAGNOLO (edited by) *Handbook of procurement* (2006) Cambridge, 47; Commission (EC) ‘Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts’ COM(2011) 897 final, December 20, 2011.

⁴⁷ Directive 2004/18/EC, whereas No. 2. See also art. 2 and S. ARROWSMITH ‘EC Regime on Public Procurement’ in Khi V. Thai (eds.) *International Handbook of Public Procurement* (Auerbach Publications Taylor & Francis Group 2009) 267-268.

⁴⁸ Case C-260/04, *Commission v. Italy* [2007] E.C.R. I-7083; Case C-231/03, *Consorzio Aziende Metano (Coname) Comune di Cingia de’ Botti (Coname)* [2005] E.C.R. I-7316; Case C-275/98, *Unitron Scandinavia A/S v. Ministeriet for Fodevarer e Landbrug og Fiskeri*, [1999]. Concerning a contract of certain cross-border-interest see: Case C-412/04 *Commission v. Italy* [2008] E.C.R. I-619, § 66 – 78. Concerning a below threshold contract see: Case C-220/06 *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración General del Estado* [2007] E.C.R. I-12175. See: A. BROWN ‘Transparency Obligations Under the EC Treaty in Relation to Public Contracts that Fall Outside the Procurement Directives: A Note on C-231/03, *Consorzio Aziende Metano (Coname) v Comune di Cingia de’ Botti*’ in *PPLR* 2005, NA153-NA159. See also: G. SKOVGAARD ØLYKKE ‘How Should the Relation between Public Procurement Law and Competition Law Be Adressed in the New Directive?’ in G. Skovgaard Ølykke – C. Risvig Hansen – C. D.

Transparency seems also relevant to improve monitoring contracts in all the phases of “procurement cycle”, from the definition of needs to the end of the contract performance, avoiding conducts aimed at distorting competition in the relevant market. The advertising of the will to award a contract has the aim to favour competition between the economic operators and to facilitate control of the compliance with the award criteria.⁴⁹

Transparency provides “a system of openness into public purchasing in Member States, so a greater degree of accountability should be established and potential direct discrimination on grounds of nationality should be eliminated”.⁵⁰ Transparency in public procurement is achieved through community-wide publicity and advertisement of public

Tvarnø, *EU Public Procurement – Modernisation, Growth and Innovation* (Djof publishing, Copenhagen, 2012), 62 – 63 and 67.

⁴⁹ Opinion of AG Stix-Hackel in Case C-247/02, *Sintesi S.p.A. v Autorità per la Vigilanza sui Lavori Pubblici* [2004] E.C.R. 1-9215, par. 39 where it is stated that “A minimum degree of transparency is required to guarantee competition. To that end, the directives on the award of contracts lay down a number of obligations concerning publicity. The obligation placed on the contracting authority to define the criteria in advance and also to adhere to them thereafter serves competition. On the other hand, in certain cases the need to ensure competition makes it necessary to withhold certain information about an undertaking from other undertakings”.

⁵⁰ C. H. BOVIS ‘EU Public Procurement Law’ (Cheltenham 2007), 65, where are also examined the effects of the Principle of Transparency. S. ARROWSMITH – J. LINARELLI – D. WALLANCE ‘Regulating Public Procurement: National and International Perspectives’ (Kluw Law International London 2000) 72-73 where the authors suggested that the concept of transparency can in fact be broken down into four distinct aspect: Publicity for contract opportunity, publicity for the rules governing each procedure, a principle that limits the discretion of procuring entities, the possibility for verification of the fact that the rules have been followed. See also: C. LOYOLA – M. ORTÍZ ‘The experience of information acquisition in chilean public market via bi implementation’ (2012) *5th International Public Procurement Conference*, in <http://www.ipca.org/IPPC5/Proceedings/Part9/PAPER9-10.pdf>.

procurement contracts over certain thresholds”.⁵¹ The EU case-law on transparency in public procurement, implies an obligation to provide “a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procurement process to be reviewed”.⁵² All potential tenderers have to be in a position of equality⁵³ as regards the scope of the information in a contract notice.⁵⁴ In the pre-award phase the principle of transparency “implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and,

⁵¹ C. H. BOVIS ‘EU Public Procurement Law’ cit., 65, where are also examined the effects of the Principle of Transparency.

⁵² Case C-324/98, *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG*, [2000], E.C.R. I-10745 § 61-62. See also: Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213, § 81, and Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] ECR I-1559, § 26. See: Directive 2004/18/EC, art. 42(2), where are provided the rules concerning the general availability and non discrimination in the use of the selected electronic means.

⁵³ Case C-213/07 *Michaniki* [2008] ECR I-0000, § 44 and 45; Case C-231/03, *Consorzio Aziende Metano (Coname) Comune di Cingia de’ Botti (Coname)* [2005] E.C.R. I-7316, §17; C-315/01 *GAT* [2003] ECR I-6351, § 73; Case C-470/99, Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527, § 47, *Universale-Bau and Others* [2002] ECR I-11617, § 93; Case C-19/00 *SIAC Construction* [2001] ECR I-7725, § 34. R. CARANTA ‘Transparence et concurrence’, in R. Noguellou – U. Stelkens (eds.) *Droit comparé des Contrats Publics* (Bruxelles, Bruylant, 2010), 149.

⁵⁴ Case C-199/07 *Commission v. Greece*, [2009] ECR I-10669 §38 ; Case C-231/03, *Consorzio Aziende Metano (Coname) Comune di Cingia de’ Botti (Coname)* [2005] E.C.R. I-7316, §18 and 21. P. TREPTE ‘Transparency and accountability as tools for promoting integrity and preventing corruption in procurement: possibilities and limitations’ Expert Group Meeting on Integrity in Public Procurement, 20-21 June 2005, Château de la Mouette, Paris.

secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract”.⁵⁵ The electronic instruments can greatly improve the effectiveness of the principle of transparency and efficiency.

The correct use of interoperable IT solutions can improve the accessibility of the call for tenders and increase the participation of SMEs, also in cross-border procurement.⁵⁶

It is important to remove barriers that currently discourage newcomers from undertaking onerous registration or authentication procedures required by some platforms – in some cases requiring the use of tools and assets only available in the country concerned.

4. PRE-AWARD ELECTRONIC ADVERTISING: THE EVOLUTION TOWARDS FULL ELECTRONIC MEANS FOR THE SUBMISSION OF THE REQUIREMENTS AND OF THE OFFERS

In the procurement process, the electronic means have been, so far, one of the ways provided by EU directives to give economic operators information of an award procedure.⁵⁷ The 2004 Directives, in some cases, limited the right of contracting authorities

⁵⁵ Case C-496/99 EU Commission v. CAS Succhi di Frutta SpA [2004] E.C.R. I-3801, § 111; Case T-437/05 Brink’s Security Luxembourg v. Commission [2009] E.C.R. II-3233, 114-115.

⁵⁶ Directive 2004/18/EC, whereas No. 35.

⁵⁷ Directive 2004/18/EC, art. 42, where it is also specified that “the means of communication chosen must be generally available and thus not restrict economic operators’ access to the tendering procedure”.

to choose the means of communication and imposed the electronic one.⁵⁸ Tender documents can be either made available or sent to economic operators by electronic means.⁵⁹ In the case of Dynamic Purchasing System, it is mandatory to offer unrestricted and full direct electronic access from the date the notice setting up the system is published, until the expiry of the DPS.⁶⁰ Where the contracting authority offers unrestricted and full

⁵⁸ Commission (EC) ‘Requirements for conducting public procurement using electronic means under the new public procurement Directives 2004/18/EC and 2004/17/EC’ 8 July 2005, SEC(2005) 959, 6 and 7, Where it is also stated that “Technical problems within the contracting authority’s network, service disruptions and system failures may impede access to contract documents, or may disrupt the procurement process at a critical moment (e.g. during the transmission of requests for clarification or the corresponding answers, during receipt of tenders or requests to participate, or during auctions). Problems within the public or open network and problems specific to the device or the platform of the contracting authority should be distinguished: only in the latter case must the contracting authority remedy the failure by, for example extending the deadlines and providing the relevant information to all interested parties. The contracting authority is not responsible for the open network failure and is not obliged to take any remedial actions, even though it may do so where this seems appropriate (respective disclaimers may be included in an appropriate location)”.

⁵⁹ F. LICHÈRE ‘The Regulation of Electronic Reverse Auctions in France’ in S. Arrowsmith (edited by) *Reform of the UNCITRAL model law on procurement*, (Thomas Reuters/West, Danvers, 2009), 459-463 and M. BURGI ‘The Policy on Regulating Electronic Communications in Germany’ in S. Arrowsmith (edited by) *Reform of the UNCITRAL model law on procurement*, cit., 323 – 324.

⁶⁰ Directive 2004/18/EC, art. 33(3)(c) and Directive 2004/17/EC, art. 15(3)(c). See also: Directive 2004/18/EC, art. 42(5)(d) and Directive 2004/17/EC, art. 48(5)(d) where it is provided that the receipt of documents, certificates and declarations that do not exist in electronic format must be organised following the traditional procedures on paper. Directive 2004/18/EC, art. 1(7) second indent and 1(6) “some procuring methods/instruments such as auctions and dynamic purchasing systems may only be conducted by electronic means”. Commission (EC) ‘Requirements for conducting public procurement using electronic means under the new public procurement Directives 2004/18/EC and 2004/17/EC’ 8 July 2005, SEC(2005) 959, 7. When there are reasons to believe that, due to the volume and/or complexity of the data to be submitted, the communication, exchange and storage of it cannot be

direct access by electronic means to the contract documents and any supplementary documents from the date of publication of the notice, the time limits for receipt the tenders may be reduced by five days.⁶¹ Electronic means can be used to send and receive tenders and requests to participate, as well as plans and projects in design contests.⁶²

All types of notices are published by the Publications Office of the EU. Within twelve days (or five days in the case of the accelerated form of restricted or negotiated procedures), the Publications Office publishes the notices in the Supplement to the Official Journal and via the TED (*Tenders Electronic Daily*) database.⁶³ Two notices are published: in full in their original language only, and in summary form in the other Community

properly handled by electronic means, and therefore the requirements of Articles 42(3) and 48(3) are not satisfied, they should be handled by traditional means of communication. In such cases data shall be exchanged on physical supports like paper or generally used supports for electronic storage of data such as floppy disks, CD-ROMs or memory sticks.

⁶¹ Directive 2004/18/EC, art. 38(6) and Directive 2004/17/EC, art. 45(6). In open procedures it is possible to cumulate the two possibilities of reduction, the one for electronic transmission of the notice and the one for the unrestricted and full direct access to tender documents, leading to a total reduction of the deadline for submitting tenders of twelve days.

⁶² Directive 2004/18/EC, art. 42(5) and Directive 2004/17/EC, art. 48(5) determine the key rules and refer to Annexes X and XXIV for the specific minimum requirements for the security and confidentiality of electronic reception devices.

⁶³ TED is a single, accepted and well-used system for the publication of above threshold notices across the EU, supported by compatible infrastructures at national level. See: Commission (EU) ‘Green Paper on expanding the use of e-Procurement in the EU’, cit., 8, where it is reported that “in 2009 just over 90% of forms sent to TED (Tenders Electronic Daily) were received electronically and in a structured format. The electronic publication of notices for below threshold procurement has also advanced at national or regional level”.

languages.⁶⁴ Where notices are drawn up and transmitted by electronic means, the time limits for the receipt of tenders and for the receipt of requests to participate can consequently be shortened by seven days.⁶⁵

The use of a common database ensures the accessibility of information but it lacks the idea of translating all the content of the notices in a common language, as the translation of a summary in all languages seems insufficient to assure a wider participation. As well known, the EU language issue in the field of public procurement risks undermining opportunities of participation and of growth of European economic operators. The use of IT solutions can be simplified by standard forms for the publication of notices, as provided by EU rules.⁶⁶

4.1 Electronic advertising in some EU Member States

A first step can be the use of IT solutions for the drawing up, and transmission of, notices and for sending and publishing data with the aim of advertising an intention to award a contract, regardless of the need of the publication of a formal notice in the OJEU.

The use of websites for publicity could be extremely useful if the data can be easily found, also for public contracts that fall outside the scope of the directives. However, the problem is that often there is not a single institutional designated web portal in each

⁶⁴ C. H. BOVIS 'EU Public Procurement Law' cit., 66, where is reported that the Publications Office takes responsibility for the translations and summaries.

⁶⁵ Directive 2004/18/EC, art. 38(5) and Directive 2004/17/EC, art. 45(3).

⁶⁶ Regulations EU No 842/2011 of 19 August 2011 establishing standard forms for the publication of notices in the field of public procurement and repealing Regulation (EC) No 1564/2005.

country and contracts may be published on an individual institutional website or on a non-governmental, business run, website. The latter can be particularly expensive for a procuring entity, and more importantly does not provide an absolute assurance that all possible interested tenderers are made aware of the contract opportunities.

According to recent research,⁶⁷ below threshold contract notices are published in official publications (hard copy) and in national portals or websites in some Member States. In Romania, about 66,000 invitations were published by contracting entities on the electronic system for public procurement (ESPP) in 2008.⁶⁸ In Poland, contracting authorities are also required to publish notices on their websites for both contracts above and below the national thresholds. In Denmark, the regulation⁶⁹ sets out requirements for notices for goods and services contracts, but there are no specific rules for publication, which is either online or in newspapers; commercial website on the other hand are very expensive for the procuring entities. In Germany there is no requirement to publish notices for below threshold contracts on electronic media.⁷⁰ In France, the contracting entities can,

⁶⁷ in Austria, Cyprus, Italy, Lithuania and Spain. Bulgaria, the Czech Republic, Finland, Hungary, Latvia, Luxembourg, Romania and the Slovak Republic only publish their notices on national online portals in electronic formats. Such data are reported on OECD (Sigma papers) 'Public Procurement in EU Member States: The Regulation of Contract Below the EU Thresholds and in Areas not Covered by the Detailed Rules of the EU Directives' (2010) 16.

⁶⁸ See DACIAN C. DRAGOS 'Public Procurement Outside Eu Directives In Romania: Is Voluntary Compliance Leading To Effectiveness?' in *Outside the Procurement Directives - inside the Treaty?*, Djøf: Copenhagen 2012, 221 et seq.

⁶⁹ See S. TREUMER 'On the Development of a Danish Public Procurement Regime outside the Scope of the EU Public Procurement Directives: EU Principles of Law do not Come Easy' in *Outside the Procurement Directives - inside the Treaty?*, cit., 335 et seq.

⁷⁰ See M. BURGI – F. KOCH 'Contracts below the thresholds and list B services from a German Perspective' in *Outside the Procurement Directives - inside the Treaty?*, cit., 119 et seq.

below a threshold of 90,000 euro, decide how to publish; above that threshold, notices have to be published by public authorities in the Official Bulletin (BOAMP) or in a newspaper entitled to publish legal notices.⁷¹ It is provided that after January 1st 2012, contracting authorities may not refuse to receive the bidder's documents transmitted electronically for contracts above € 90,000.00.⁷² There are many different websites and the procuring entity must only ensure adequate access. In the Netherlands, contracting authorities can decide where to publish and usually do so on their own website. In Sweden, publication on “generally accepted databases” with free admission is required.

In Italy,⁷³ for contracts below threshold, the procuring entity has the choice as to the means of publicity. Procuring entity may just publish the post-award notice on the buyer profile website but they may also use electronic catalogues through a previous notice, using a kind of market analysis to identify an appropriate economic operator to invite.⁷⁴ For

⁷¹ See F. LICHÈRE ‘Public procurement contracts below EU thresholds and Annex II. B services in France’ in *Outside the Procurement Directives - inside the Treaty?*, cit., 97 et seq..

⁷² Décret n° 2011-1000 August 25, 2011, amending Article 56 of the *Code des marchés publics*.

⁷³ A. MASSERA – M. SIMONCINI ‘Basic of public contracts in Italy’ (2011) in *Ius Publicum Network Review* <http://www.ius-publicum.com/repository/uploads/21_02_2011_14_41_Massera%20inglese.pdf>.

⁷⁴ P.R.d. October 5, 2010, No 207, concerning “il regolamento di attuazione ed esecuzione del codice dei contratti pubblici di lavori, servizi e forniture”, replaced the P.R.d. December 21, 1999, No 554 (referring to L. February 11, 1994, No. 109 on public works), Article 331 (for goods and services) related to “acquisti in economia” excludes the application of the publicity requirements established in the Article 124 of the Italian Public Contract Code, requiring only the compliance with the principle of transparency, balancing the interest of efficiency of the contracting authority with the principles of equal treatment, non-discrimination and competition among economic operators. The regulation of Article 173 (for “in economia” works), § 2 and 331 (for “in economia” goods and services), § 3 requires only the publication of the post award notice in the ‘buyer profile’.

contracts worth more than €150,000.00, Italian contracting entities have to send to the *Autorità di vigilanza sui contratti pubblici* data on the content of the contract notice, minutes of the award procedure, the economic operators participating in the award procedure, the amount of the contract and the name of the contractor.⁷⁵ An “*Osservatorio*” has been created to collect data on all Italian public procurement in order to consolidate them in an electronic archive.⁷⁶ A recent Italian provision concerning the fight against corruption provide a full electronic transparency of the award and execution of public procurement, requiring the online publishing of any related payments⁷⁷.

In order to increase transparency and also possibly cross-border participation for below threshold contracts, it should be provided that any Member States should designate

⁷⁵ Legislative Decree No. 163 of 2006, cit., Article 7,§ 8. President of Authority for public contracts, December 14, 2010, ‘trasmissione dei dati dei contratti pubblici di lavori, servizi e forniture – settori Ordinari e Speciali – estensione della rilevazione ai contratti di importo inferiore o uguale ai 150.000 Euro, ai contratti “esclusi” di cui agli artt. 19, 20, 21,22, 23, 24 e 26 del D.lgs n. 163/2006, di importo superiore ai 150.000 Euro, e agli accordi quadro e fattispecie consimili’, <http://www.avcp.it/portal/public/classic/AttivitaAutorita/AttiDellAutorita/_Atto?ca=4457>. The submission of data about the award of the contract of work between 40,000 and 150,000 euro, and contracts for goods and services between 20,000 and 150,000 euro, are required too, within 60 days from the date of the signature of the contract.

⁷⁶ Legislative Decree No. 163 of 2006, italian public contracts code, Article 7,§ 4, let. a). G. M. Racca ‘Public contracts. Annual Report - Italy’ (2010) in *Ius Publicum Network Review* <http://www.ius-publicum.com/repository/uploads/06_12_2010_10_17_Raccaeng.pdf>.

⁷⁷ Law 6 November 2009, No. 190, art. 1, § 16 (b) and 32. Where is stated that contracting authority are obliged to publish on their institutional websites: the structure proponent, the subject matter of the contract and the list of economic operators invited to tender; the successful tenderer and the amount awarded; timing of completion of the work, service or supply and the amount of the sums paid.

specific websites where economic operators can easily access information relating to the publication of the contract.

The recent UK experience with *contract finder* could potentially be an example of a unique portal for below threshold contracts, even though indications suggest that it is not yet being used as an exclusive point of reference for below threshold contracts.⁷⁸

As recently reported by the Commission,⁷⁹ there is now a single accepted and established system for the publication of above threshold notices across the EU (Tenders Electronic Daily), supported by compatible infrastructure at national level. In 2009, just over 90% of forms sent to TED were received electronically and in a structured format. “The electronic publication of notices for below threshold procurement has also advanced at national or regional level”,⁸⁰ but substantial efforts are still required. Such efforts could be coordinated to improve transparency and competition below threshold and for list B services too.

An important issue concerns the consequences of such extension of advertising through websites. Does it allow any economic operator to be admitted to the negotiation or to submit an offer? One could say not; it is only a means by which the procuring entity can achieve a greater degree of transparency than when it publishes the notice in a paper

⁷⁸ See LUKE R.A. BUTLER ‘Below Threshold and Annex II B Service Contracts in England, Wales and Northern Ireland: A Common Law Approach’ in this volume.

⁷⁹ Commission (EC) ‘Evaluation of the 2004 Action Plan for Electronic Public Procurement Accompanying document to the Green Paper on expanding the use of e-Procurement in the EU’ SEC(2010) 1214 final October 10, 2010, 54.

⁸⁰ Commission (EC) ‘Evaluation of the 2004 Action Plan for Electronic Public Procurement Accompanying document to the Green Paper on expanding the use of e-Procurement in the EU’ SEC(2010) 1214 final October 10, 2010, 9.

bulletin. Outside the scope of the Directives the key problem is that the procuring entity can choose the contractor among the invited tenderers, the market can be closed and the undertakings not invited have no right to be invited and to submit an offer.

Transparency concerning the choices made by the procuring entity with regard to contract conditions and prices could be one way to let other economic operators and end-users or the public more generally know whether best value for money was achieved. In the long term such effects can improve the sound and efficient use of public funds.

In Italy for example, the Authority for public contracts⁸¹ provides that even when the negotiated procedure is allowed without the publication of a notice, it is good practice to publish the contract conditions on an institutional website. This could allow an economic operator to ask to be invited to the negotiation. It is evident that this could become similar to an open procedure, losing the benefits of simplification, but can also open markets and limit, if not prevent, possible favouritism. In any event, the procuring entity can always provide reasons as to why a tender has not been admitted and could be challenged, including in an infringement procedures. In this regard, transparency is improved, particularly for high value list B services contracts.

As observed in the OECD documents, an unsuccessful tenderer should have a role in checking the execution phase of the contract together with associations of end-users and public representatives.⁸² By automating and strengthening the flow of information about

⁸¹ Authority for Public Contracts ‘Indicazioni operative inerenti la procedura negoziata senza previa pubblicazione del bando di gara nei contratti di importo inferiore alla soglia comunitaria dopo le modifiche introdotte dal decreto-legge 13 maggio 2011, n. 70, convertito in legge dalla legge 12 luglio 2011, n. 106’ Determinazione n. 8 December 14, 2011.

⁸² Organisation for Economic Co-operation and Development, ‘Guidelines for fighting bid rigging in public procurement’ (2009), <<http://www.oecd.org/dataoecd/27/19/42851044.pdf>>; Organisation for Economic Co-operation and Development, ‘Principles for integrity in Public procurement’ (2009),

individual tender opportunities, providing greater publicity, it could be possible to increase participation by economic operators and as a consequence, increase competition.⁸³

The experiences of Member States that have adopted and developed specific IT-facilities indicate that there is at least a perception that use of web sites/portals has meant that a substantial proportion of below threshold procurement is subject to transparent competition, to the extent that this is possible. For instance, the UK position is that there seems little need to further clarify public authority obligations with regard to below threshold contracts and there is clearly no political or legal policy initiative to adopt specific legislation in this field. Experiences of this kind suggest that it may be helpful if a link could be made from the OJEU to below-threshold opportunities advertised on various portals and internet sites in each Member State.

4.2 The electronic submissions of tenders and of e-signatures

Most concerns encountered in the submission of tenders relate to the authentication through means such as electronic signatures and recognition of electronic identification. Such issues are not specific to the e-Procurement context but arise in any situation where authentication/signatures are required. The EU Commission has adopted measures to allow authorities to identify the origin/certification of partner countries signatures. The PEPPOL project developed solutions to provide on-line tools permitting automatic recognition of electronic signatures from other Member States to be used in a

<http://www.oecd-ilibrary.org/governance/oecd-principles-for-integrity-in-public-procurement_9789264056527-en> , 70.

⁸³ Commission (EC) 'Evaluation of the 2004 Action Plan for Electronic Public Procurement Accompanying document to the Green Paper on expanding the use of e-Procurement in the EU' SEC(2010) 1214 final October 10, 2010, 7.

procurement context. Other concerns arise from the requirement for contracting authorities to assess documents submitted by tenderers to prove eligibility for selection. These documents are issued at national/local level in accordance with the relevant conventions, formats and languages. E-Procurement was expected to find ways to increase efficiency and to reduce such repeated burden on economic operators. Many solutions developed go some way to fulfilling these objectives, without relying on complicated high-tech solutions. In some countries, economic operators provide a statement (often a simple electronic document which may or may not be electronically signed) in which they maintain that they are not in breach of any of the set criteria. Only the winning bidders are asked to provide the actual documents and this may be done electronically or on paper.

The 2004 Directives provide that Member States may regulate the level of electronic signature required and restrict the choice of contracting authorities to qualified signatures.⁸⁴ “In 2010, 18 countries expressly require the use of electronic signatures in e-Procurement procedures, while 13 countries do not explicitly require them. In terms of the type of signature required, 13 out of the 27 Member States have introduced a legal requirement specifying the use of advanced e-Signatures. The regulatory choices of Member States in regard to e-Signatures may indicate their preferences in relation to security and trust but also need to be considered from a cross-border and inter-operability perspective”.⁸⁵

⁸⁴ Directive 2004/18/EC, art. 42(5)(b) and Annex X. For utilities sector see Directive 2004/17/EC, art. 48(5)(b) and Annex XXIV. The device for the electronic receipt of tenders and requests to participate must guarantee that the electronic signatures used are in conformity with the national provisions adopted pursuant to Directive 1999/93/EC.

⁸⁵ Commission (EC) ‘Evaluation of the 2004 Action Plan for Electronic Public Procurement Accompanying document to the Green Paper on expanding the use of e-Procurement in the EU’ cit., 35.

The Commission's evaluation of the e-Procurement Action Plan reveals concerns that the preference for qualified electronic signatures may constitute an unnecessary entry barrier to e-Procurement – particularly for partner country suppliers in the absence to date of operational tools for the recognition of different electronic signatures.⁸⁶ Given this assessment, it may be useful to revisit the assumption in favour of qualified electronic signatures provided for in EU procurement legislation. The Digital Agenda for Europe foresees a review of e-signatures legislation and a stepping up of work in the area of e-identification.⁸⁷

The proposal for a Directive on public procurement provides some simplification concerning administrative burdens deriving from tenderers requirements (the need to produce attestations, certificates or other documents evidencing tenderer's suitability).⁸⁸ The production of documentary evidence will be facilitated by a standardised document, the "European Procurement Passport" which is a means of proof for the absence of grounds for exclusion. The passport shall be provided exclusively in electronic form.⁸⁹ The passport shall seek the relevant information directly from the competent authorities, except where

⁸⁶ Commission (EC) 'Action plan for the implementation of the legal framework for electronic public procurement' 13 December 2004.

⁸⁷ Commission (EU) 'A Digital Agenda for Europe', cit.

⁸⁸ G. M. RACCA 'The role of IT solutions in the award and execution of public procurement below threshold and list B services: overcoming e-barriers' in D. DRAGOS – R. CARANTA (eds. By) *Outside the EU Procurement Directives - inside the Treaty?*, cit., 382-383.

⁸⁹ Commission (EU) 'Proposal for a Directive of the European Parliament and of the Council on public procurement' cit., Article 59, § 2. For the content of the European Procurement Passport see Annex XIII. The same provision is also reported in the recent compromised version of the proposed directive.

prohibited by national rules on the protection of personal data⁹⁰ and shall be recognised by all contracting authorities.

5. THE ELECTRONIC EVALUATION OF THE TENDERERS REQUIREMENTS

One of the main obstacles in participating in public procurement consists in administrative burdens deriving from the need to produce a substantial number of attestations, certificates or other documents evidencing the tenderer's suitability. Some Member States have already endorsed pre-qualification services to avoid repeating the evaluation of the participation requirements. For instance, in the U.K. certain public-private partnerships have created specific websites with regard to the management of pre-qualification requirements.⁹¹ Italy has just approved the creation of a database to be operated by the Authority for public contracts that will update such data in order to facilitate the procurement process.⁹²

The prior evaluation of most of the qualification requirements of the suppliers could eliminate the burden, costs and delays imposed on procuring entities for all types of public procurement. National official lists of approved economic operators can be very

⁹⁰ Commission (EU) 'Proposal for a Directive of the European Parliament and of the Council on public procurement' cit., Article 59, § 3. See also the compromise amendments of 11 December 2012 provided by European Parliament, art. 59.

⁹¹ See LUKE R.A. BUTLER 'Below Threshold and Annex II B Service Contracts in England, Wales and Northern Ireland: A Common Law Approach' in this volume.

⁹² Law decree February 9, 2012, Article 20, providing Article 6 *bis* in the Italian Public Contract Code.

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 of contractors convicted for corruption, providing lists of offences falling within the definition of the Directive.⁹³

At the EU level, the recent introduction of the e-CERTIS project, a free on-line information tool indicates the increased focus on this issue, providing details of the various certificates and attestations frequently requested in procurement procedures across the 27 Member States.⁹⁴

It aims to help interested parties to understand what information is being requested or provided and to identify mutually acceptable equivalents. Initiatives of this kind also reveal how complicated and variable tenderer requirements can be within Europe.

It is clear that self declaration and a drastic simplification and standardization of such documents would be more desirable to facilitate participation. The voluntary up-dating and verification by national authorities has been insufficient to ensure that e-Certis delivers its full potential for simplification and facilitation of documentary exchanges for the benefit of both the contracting authorities and the suppliers. Constant updating should therefore be made mandatory so that recourse to e-Certis may become mandatory at a later stage.⁹⁵

⁹³ S. WILLIAMS, 'The mandatory exclusion for corruption in the new EC Procurement directives' (2007), in http://www.nottingham.ac.uk/pprg/documentsarchive/fulltextarticles/sope_exclusions_in_proc.pdf, 38.

⁹⁴ Report on the "Uptake of pre-awarding phases in eProcurement" Workshop – Vienna, February 22, 2010, http://www.epractice.eu/files/eProc%20Ws%20Vienna%202010-%20Report_2010.pdf, 6

⁹⁵ Commission (EC) 'Proposal for a Directive of the European Parliament and of the Council on public procurement' cit., Article 58.

The draft of the new Directive⁹⁶ provides for a European Procurement passport, that is a standardized document, which is a means of proof of absence of the grounds for exclusion. According to the proposed provision, “[n]ational authorities shall issue, upon request of an economic operator established in the relevant Member State and fulfilling the necessary conditions, a European Procurement Passport in the format of the standard form adopted by the Commission”.⁹⁷ The European Procurement Passport must be recognised by all contracting authorities as proof for the fulfilment of the conditions for participation covered by it and may not be questioned without justification. The simplification potential of such a document is evident and can be reached only through fully interoperable electronic solutions.

Devices for the electronic transmission and receipt of tenders and for electronic receipt of requests to participate will have to assure information on specifications for the electronic submission of tenders and requests to participate. This must include the

⁹⁶ Commission (EC) ‘Proposal for a Directive of the European Parliament and of the Council on public procurement’ COM(2011) 896 final, December 20, 2011, annex XIII, *Content of European procurement passport*, “The European Procurement Passport contains the following particulars: (a) Identification of the economic operator; (b) Certification that the economic operator has not been the subject of a conviction by final judgment for one of the reasons listed in Article 53 (1); (c) Certification that the economic operator is not the subject of insolvency or winding-up proceedings as referred to in Article 53 (3) (b); (d) Where applicable, certification of enrolment in a professional or trade register prescribed in the Member State of establishment, as referred to in Article 54 (2); (e) Where applicable, certification that the economic operator possesses a particular authorisation or is member of a particular organisation within the meaning of Article 54 (2); (f) Indication of the period of validity of the Passport, which shall be not less than 6 months”.

⁹⁷ Commission (EC) ‘Proposal for a Directive of the European Parliament and of the Council on public procurement’ cit., Article 59, *European Procurement Passport*.

availability of encryption and time-stamping to interested parties as well as devices and methods for authentication and electronic signatures.⁹⁸

The new draft Directive provides that the use of electronic means of communication may be rendered obligatory for the submission of tenders for some or all award procedures when the technological development is sufficiently advanced in the Member States.⁹⁹ This recognises that actually this state of development is not yet the case throughout the EU.

6. E-PROCUREMENT SOLUTIONS FOR THE AUTOMATIC EVALUATION OF BIDS AND TENDERS: THE LOWEST ELECTRONIC PRICE AND THE MOST ECONOMICALLY ADVANTAGEOUS ELECTRONIC TENDER

Contracting authorities can choose¹⁰⁰ between the criteria of the lowest price and the most economically advantageous tender according to the characteristics of the subject

⁹⁸ Commission (EC) ‘Proposal for a Directive of the European Parliament and of the Council on public procurement’ cit., Article 19, § 5.

⁹⁹ Commission (EC) ‘Proposal for a Directive of the European Parliament and of the Council on public procurement’ cit., Article 19.

¹⁰⁰ Commission (EU) ‘Proposal for a Directive of the European Parliament and of the Council on public procurement’ COM(2011) 896 final, December 20, 2011, whereas No. 37. “Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment. These criteria should guarantee that tenders are assessed in conditions of effective competition, also where contracting authorities require high-quality works, supplies and services that are optimally suited to their needs, for instance where the chosen award criteria include factors linked to the production process. As a result, contracting authorities

matter of the contract.¹⁰¹ The evaluation of bids and tenders could take place through electronic means as well. Such step in the use of electronic tools seems to be one of the most challenging, especially in the case of the criteria of the most economically advantageous tender.

When the lowest price is the award criterion, contracting authorities will not refer to any other qualitative element in the award of the contract. The lowest price is the sole quantitative benchmark that can differentiate the offers submitted by the tenderers.¹⁰²

The criterion of the lowest price is appropriate when the subject matter of the contract is ordinary in relation to the widespread presence of economic operators on the market able to provide the requested product/service/work. The standardization of the product/service makes it easier to define the requirements of the subject matter of the contract. Nonetheless, through an intense and detailed preliminary work it is possible to define the exact quality standard required and consider the possible different options submitted by the tenders irrelevant; in such cases, the precise previous definition of the quality required enables to receive and evaluate on a price basis only offers that assure all such level of quality. Such previous work can open a wider room for the adoption of the criterion of the lower price without sacrificing quality and facilitates the use of electronic evaluation. Obviously, if there are no preferences concerning the different quality variants

should be allowed to adopt as award criteria either ‘the most economically advantageous tender’ or ‘the lowest cost’, taking into account that in the latter case they are free to set adequate quality standards by using technical specifications or contract performance conditions”. About the equivalence of two award criteria see.: Authority for the Supervision of Public Contracts for works, services and supplies, Determinazione, 24 November 2011, n. 7, in http://www.avcp.it/portal/public/classic/AttivitaAutorita/AttiDellAutorita/_Atto?ca=4846.

¹⁰¹ Case C-247/02, Sintesi S.p.A. v Autorità per la Vigilanza sui Lavori Pubblici [2004], cit..

¹⁰² Directive 2004/18/EC, art. 53(1)(b)

of the same good, service or work, the economic operators in the relevant market will offer the most cost-effective solution of the contract request. However, contracting authorities can reject a tender if the price is considered abnormally low.

The contracting authority should analyze and define its needs and therefore specify the subject-matter of the contract performance. Significant professional skills are required to properly pinpoint such needs and the quality level required. Otherwise, an improper definition of the needs and of the quality standards required will lead to an unsatisfactory award.

When the contracting authority fails to define the object of the contract performance precisely, the only criterion for the award of the contract is the most economically advantageous tender. Specific concerns arise in the electronic evaluation of such set of criteria, in the attribution of scores and in the sum of them. In such cases, different elements linked to the subject-matter of the contract must be evaluated, e.g. quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion.¹⁰³ As well-known, the above-listed criteria are not exhaustive. The technical specifications of the services and goods or works required (quality of the bid)¹⁰⁴ must obviously be distinguished from the

¹⁰³ Directive 2004/18/EC, art. 53(1) and Directive 2004/17/EC, art. 55(1). Concerning the scoring rules provided from the contracting authority see: F. DINI, R. PACINI, T. VALLETTI 'Scoring rules', in N. Dimitri – G. Piga – G. Spagnolo (eds.) *Handbook of procurement* (Cambridge University Press, Cambridge, 2006), 294 et seq.

¹⁰⁴ Case C-532/06, Emm G. Lianakis AE v. Alexandroupolis, (2008) E.C.R. I-251; On this ECJ case law see: 'Application and Implications of the ECJ's Decision in Lianakis on the Separation of Selection and Award Criteria in EC Procurement Law' (2009) in *P.P.L.R.* (special issue) 103. For a general EU perspective, see S. TREUMER 'The Distinction Between Selection and Award Criteria in EC Public Procurement Law: A Rule Without Exception?' (2009) in *P.P.L.R.*, 103.

criteria for the qualitative selection of participants (quality of bidder) evaluated electronically in the future through databases.

The contracting authority must specify the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender in the contract notice or in the contract documents. This weighting may be expressed as a range with a minimum and maximum weighting, where the authority considers this appropriate.¹⁰⁵ Those weightings can be expressed by providing a range with an appropriate maximum spread. Whenever the weighting is not possible for demonstrable reasons, the contracting authority must indicate the criteria in descending order of importance in the contract documents. The implementation of such criteria in an electronic system of evaluation require to define only objectively measurable qualitative element that can receive an automatic score in case of relevant changes or amelioration proposed.

The electronic evaluation of the tender, whichever the award criteria, is provided through the instrument defined as eAuctions to be applied in open or restricted procedures or in different kinds of framework agreements¹⁰⁶ and Dynamic purchasing-systems, as already provided by the 2004 Directive on public procurement.

¹⁰⁵ Directive 2004/18/EC, art. 53(2) and Directive 2004/17/EC, art. 55(2). For example, an authority could perhaps assign in the documents a weighting of 80% to price and 20% to quality; or state in the documents that the weighting will be 80-85% for price and 15-20% for quality, and later decide on the more precise weighting.

¹⁰⁶ L. FOLLIOT-LALLIOT 'The French Approach to Regulating Frameworks under the New EC Directives' in S. Arrowsmith (eds.) *Reform of the UNCITRAL model law on procurement*, (Thomas Reuters/West, Danvers, 2009), 198 et seq. on French rules on framework agreements.

6.1 Electronic auctions as a tool for electronic evaluation of tenders

The significant step in the use of electronic tools is the electronic evaluation of the tenders that implies an automatic processing of the offers according to the evaluation criterion.¹⁰⁷

The electronic auction (electronic reverse auction or eAuction)¹⁰⁸ is not an autonomous awarding procedure, in addition to the open, restricted and negotiated procedure, but it is a procurement tool that emerged as a result of progress in electronic technology.¹⁰⁹ In this perspective, e-Auctions merely allow to carry out the award process

¹⁰⁷ A. EYO 'Electronic auctions in EU procurement: reflections on the auction rules from the United Kingdom' (2012) *P.P.L.R.*, 1-17.

¹⁰⁸ Directive 2004/18/EC, art. 54(1) and Directive 2004/17/EC, art. 56(1), where it is stated that Member States may regulate and limit the resort to e-auctions. See also Directive 2004/18/EC, art. 54(3) and Directive 2004/17/EC, art. 56(3), where is stated that contracting authorities which decide to hold an electronic auction shall provide information about the electronic equipment used and the arrangements and technical specifications for connection. See also: Commission (EC) 'Evaluation of the 2004 Action Plan for Electronic Public Procurement Accompanying document to the Green Paper on expanding the use of e-Procurement in the EU' cit., 32, where is stated that "in 2004, seven countries reported some experience with e-Auctions, while 23 countries expressed the intention to introduce e-Auctions. In 2010, 26 countries support its use. Among the six countries that have not transposed the e-Auctions provisions, only two countries do not intend to do so (DE and LI)". For US experience on eAuctions: C. YUKINS 'Use and Regulation of Electronic Reverse Auctions in the United States' in S. Arrowsmith (eds.) *Reform of the UNCITRAL model law on procurement*, (Thomas Reuters/West, Danvers, 2009), 471 et seq.

¹⁰⁹ eAuction constitute a particular step of the awarding stage of the procurement procedure and as such they shall always be preceded by the full evaluation of the tenders received, which will result in a score (notation) that enables the contracting authority to rank the tenders using automatic evaluation methods.

electronically in one of the ordinary procedures. Electronic auctions¹¹⁰ may be used as part of open, restricted or negotiated procedures,¹¹¹ and also in case of framework agreements or dynamic purchasing systems.

Electronic auctions¹¹² imply automatic evaluations, which are possible whenever services and works contracts have not intellectual performances - such as the design of

¹¹⁰ Directive 2004/18/EC, art. 54(3) and Directive 2004/17/EC, art. 56(3). Contracting authorities have to announce their intention to hold e-auctions in the contract notice. Once the e-auction has been announced it becomes mandatory to hold it, unless only one valid tender is received.

¹¹¹ Directive 2004/18/EC, art. 54(2) and Directive 2004/17/EC, art. 56(2). In open, restricted or negotiated procedures in the case referred to in Article 30(1)(a), the contracting authorities may decide that the award of a public contract shall be preceded by an electronic auction when the contract specifications can be established with precision.

¹¹² In open, restricted, negotiated procedures with prior publication of a contract notice justified by the presence of irregular or unacceptable tenders in the case of Article 30(1)(a), on the reopening of competition among the parties of a framework agreement and on the opening of competition under a DPS if it is possible to establish the contract specifications with precision (Art. 54(2) of Directive 2004/18/EC); in open, restricted or negotiated procedures with a prior call for competition and on the opening for competition of contracts to be awarded under a DPS (Article 56(2) of Directive 2004/17/EC).

works¹¹³ - as their subject-matter., Some Member States (like France) have already identified further limits on the use of e-Auctions.¹¹⁴

Through e-Auctions economic operators compete to win contract opportunities, submitting a bid and subsequently proposing a rebate, or revise their tender on an electronic platform.¹¹⁵ Anyway, the subsequent rebate phase is considered optional.

The e-Auction can be based either solely on prices (whether award criteria is the lowest price) or on prices and/or new values for other features that are indicated in the specification (in case of most advantageous tender).¹¹⁶ As usual, the award criteria is

¹¹³ Directive 2004/18/EC, art. 1(7) second indent and Directive 2004/17/EC, art. 1(6). See also whereas No. 14 “provision should be made for such electronic auctions to deal only with contracts for works, supplies or services for which the specifications can be determined with precision. Such may in particular be the case for recurring supplies, works and service contracts..

¹¹⁴ F. LICHÈRE ‘The Regulation of Electronic Reverse Auctions in France’ in S. ARROWSMITH (edited by) *Reform of the UNCITRAL model law on procurement*, cit., 459-463. Where is stated that the decree of September 18, 2001 “limited the use of electronic auctions to goods available on the general market”. The author take into account the perspective of the code des marchés publics.

¹¹⁵ Directive 2004/18/EC, art. 1(7) and Directive 2004/17/EC, art. 1(6). A. EYO ‘Electronic auctions in EU procurement: reflections on the auction rules from the United Kingdom’ (2012) *P.P.L.R.*, 1-17, in 2008 only 38 contract notices published on OJEC used such tool. In other member States the use of eAuctions seems even much lower: Denmark (1); France (1); Hungary (1); Netherlands (3); Poland (8) and Romania (10).

¹¹⁶ S. ARROWSMITH – P. BORDALO FAUSTINO – B. HEUNINCKX – S. TREUMER – J. FEJO ‘EU public procurement law: an introduction’ cit., 255. “A procuring entity using both price and quality criteria in an auction for motor vehicles will need to establish before the auction the financial value to entity of the different quality aspects of the vehicles offered by different tenderers. The prices offered by tenderers will be subject to revision during the auction, and as the prices are changed the auction

published in the contract notice or tender documents. An equal and transparent treatment towards tenderers is required.¹¹⁷ Moreover, “in order to guarantee compliance with the principle of transparency, only the elements suitable for automatic evaluation by electronic means, without any intervention and/or appreciation by the contracting authority, may be the object of electronic auctions, that is, only the elements which are quantifiable so that they can be expressed in figures or percentages. On the other hand, those aspects of the tenders which imply an appreciation of non-quantifiable elements should not be the object of electronic auctions”.¹¹⁸

A full evaluation of the tenders based on the award criteria and their relative weighting published in the contract notice must precede the auction.¹¹⁹ At the end of the

software must automatically re-rank the tenders taking into account both the current prices tendered and quality features as evaluated prior to the auction”

¹¹⁷ S. ARROWSMITH ‘Electronic Reverse Auctions under the EC Public Procurement Rules’ (2002) in *P.P.L.R.*, 299.

¹¹⁸ Directive 2004/18/EC, whereas No. 14. See also Directive 2004/18/EC, art. 54(2) and Directive 2004/17/EC, art. 56(2).

¹¹⁹ Directive 2004/18/EC, art. 54(5) and Directive 2004/17/EC, art. 56(5). When the contract is to be awarded on the basis of the most economically advantageous tender the invitation shall indicate the result of the full initial evaluation by communicating the notation (i.e. the number of points allocated to the individual tenderer). See also: Commission (EC) ‘Requirements for conducting public procurement using electronic means under the new public procurement Directives 2004/18/EC and 2004/17/EC’ 8 July 2005, SEC(2005) 959, 19, where is stated that there is no obligation to communicate at this stage the precise ranking (i.e. the relative position of the individual tenderer compared to the other participants) so long as this is done when the auction starts.

full initial evaluation, all tenders who have been submitted as admissible tenders shall be invited¹²⁰ simultaneously to submit new prices and/or values¹²¹, whenever provided.

The award criteria must permit to establish the respective ranking of the tenderers at any stage of the electronic auction.¹²² The rules provide only auctions in which suppliers can ascertain their ranking during the auction, and thus can establish at any time whether they have submitted the best tender. This is an important feature of e-Auctions under the EU provisions which should motivate suppliers at a later stage to improve their tenders to the level necessary to win the contract, enhancing value for money for the procuring entity. New prices, revised downwards, or the improvement of elements of the tenders other than prices can be submitted electronically.¹²³

The procuring entity may also communicate other information concerning other prices or values submitted, provided that that is stated in the specifications. They may also - at any time - announce the number of participants in that phase of the auction. In no case,

¹²⁰ Invitations shall be sent individually by electronic means to each admissible tenderer.

¹²¹ Directive 2004/18/EC, art. 54(4) and Directive 2004/17/EC, art. 56(4). A full evaluation of the tenders based on the award criteria published in the notice or in the specification and their relative weighting must precede the auction. At the end of the full initial evaluation, all tenderers who have submitted admissible tenders shall be invited simultaneously to submit new prices and/or values

¹²² Directive 2004/18/EC, whereas No. 14.

¹²³ S. ARROWSMITH – P. BORDALO FAUSTINO – B. HEUNINCKX – S. TREUMER – J. FEJO ‘EU public procurement law: an introduction’ in <http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/eupublicprocurementlawintroduction.pdf>, 255.

however, may they disclose the identities of the tenderers during any phase of an electronic auction.¹²⁴

In case of the lowest price, e-Auctions enable contracting authorities to ask tenderers to submit new prices, revised downwards.¹²⁵ The 2004 Directives defines the conditions of integrity and security of the data that contracting authorities have to fulfil by the chosen means of communication during the communication, exchange and storage of information.¹²⁶

In the awarding phase, contracting authorities shall take appropriate steps to give evidence of the progress of award procedures conducted by electronic means.¹²⁷ This

¹²⁴ Throughout each phase of an electronic auction the contracting authorities shall instantaneously communicate to all tenderers at least sufficient information to enable them to ascertain their relative rankings at any moment. Directive 2004/18/EC, art. 54(6) and Directive 2004/17/EC, art. 56(6). Cfr. S. ARROWSMITH – A. EYO ‘Electronic Auctions in the EC Procurement Directives and a perspective from UK Law and Practice’ in S. ARROWSMITH (edited by) *Reform of the UNCITRAL model law on procurement* (Thomas Reuters/West, Danvers, 2009), 422. This seems to indicate that tenderers need to know where they are ranked overall in the competition, and arguably how many tenderers are participating, and not merely whether or not the tenderer is the highest-ranked. In the empirical study referred to earlier two electronic service providers interviewed expressed concern that providing such detailed information creates greater scope for collusion and considered that a rule allowing for disclosure only of whether the tender is the first ranked bidder would be preferable”.

¹²⁵ Directive 2004/18/EC, whereas No. 14.

¹²⁶ Directive 2004/18/EC, art. 42(3) and Directive 2004/17/EC, art. 48(3). These are not typically conditions specific to electronic means, because they also apply traditionally to paper -based communication. The Secure channels (https, SSL) and/or encryption may be used to preserve the data integrity and the confidentiality of tenders and requests to participate, although encryption may require higher levels of ICT literacy from economic operators.

¹²⁷ Directive 2004/18/EC, art. 43, second indent and Directive 2004/17/EC, art. 50(1) last indent.

requirement of traceability refers to each stage of the procurement process conducted electronically. “There should be equipment and functionalities in place to maintain the original version of all documents and a true and faithful record of all exchanges with economic operators in order to provide any of the evidence which might be needed in case of litigation”.¹²⁸

The evaluation of tenders in e-Auctions requires the use of a mathematical formula in order to sum the scores and define the ranking. This one, stated in the invitation of tenderer, will be used “to determine automatic re-rankings on the basis of the new prices and/or new values submitted”.¹²⁹ Such formula shall incorporate the weighting of all the criteria fixed to determine the most economically advantageous tender, as indicated in the contract notice or in the specifications. The ranges shall however be reduced beforehand to a specified value. Where variants are authorised, a separate formula shall be provided for each variant.¹³⁰

¹²⁸ Commission (EC) ‘Requirements for conducting public procurement using electronic means under the new public procurement Directives 2004/18/EC and 2004/17/EC’ 8 July 2005, SEC(2005) 959, 10. Where it is also stated that “Traceability should make it possible to verify what message/data has been transmitted or made available, by whom, to whom, and when, including the duration of the communication. It should also be possible to reconstitute the sequence of events including any automatic data processing or automated calculations”. See also: Directive 2004/18/EC, whereas No. 30.

¹²⁹ Directive 2004/18/EC, art. 54(5) and Directive 2004/17/EC, art. 56(5). The purpose of the formula is to calculate a single score for each tender submission and will determine the automatic re-ranking of participants on the basis of the new prices and/or new values submitted. In the initial contract specification, some features may be stated as ranges. These will have to be reduced to a single value for use within the formula.

¹³⁰ Directive 2004/18/EC, art. 54(5) and Directive 2004/17/EC, art. 56(5).

The use of electronic means permits to evaluate only measurable quality and requires a significant effort to define *ex ante* the parameters that are really significant and whose improvement assures a concrete value added to the contracting entity. Such instrument could assure a greater degree of objectivity of the evaluation, as it reduces the discretionary power of the contracting authority renouncing to the evaluation of non-measurable quality elements. The objectively measurable technical and qualitative criteria , (e.g. the delivery can be measured in days, the distance between the supplier's warehouse and the place of delivery and measured in kilometers, saving energy in Kw/h, etc.) will be the only ones to evaluate, while other non-objectively measurable criteria (technical merit, aesthetic characteristics) could not be taken into account.¹³¹

The discretionary power of technical assessment of the jury, whenever provided, or directly of the contracting authorities in the evaluation of qualitative elements of the tenders, must ensure to be reasonable, consistent and not illogical in order to avoid discriminations.

The electronic evaluation could provide more transparency and predictability of the evaluation but it can also be used in a distorted and discriminatory way.

Some Member States¹³² provide for the use of a mathematical formula in the traditional award of public procurement as well, to sum up quality evaluation.¹³³ The

¹³¹ In addition to these quality characteristics a “non-negotiable” quality has been pointed out. This quality is observable but difficult to evaluate and define *ex ante* and therefore defined as “non-negotiable”: G. L. ALBANO, G. CALZOLARI, F. DINI, E. IOSSA, G. SPAGNOLO ‘Procurement contracting strategies’, in N. Dimitri – G. Piga – G. Spagnolo (eds.) *Handbook of procurement*, cit., 101 et seq.

¹³² The Italian Public Procurement Code: d.lgs. No 163 of 2006, art. 83 § 5, where in the specification of the rules concerning the most economically advantageous tender the use of methodology that allows to identify, with a single numeric parameter end the most advantageous offer is provided for. See also: the Government regulation enforcing the IPPC (d.P.R. 5 October 2010, n. 207), Annex P.

contracting authority shall determine a mathematical formula to represent the different criteria and their relative weightings used to determine the most economically advantageous tender.¹³⁴ The independent mathematical formulae take into account elements of each single offer evaluated, while the interdependent formulae in addition to the evaluated tender are taken in account together with the elements of other tenders. The use of interdependent mathematical formulae could lead to distortion of competition between economic operators since a collusion between economic operators can drive the result of the evaluation.¹³⁵

The mathematical formulae solely translate the scores given by the evaluation committee (jury) into a ranking. The problem is often not the formula itself but the subjectivity of the scores, which can cover the will to orient the award. In such case, the assessment of the jury continues to have a discretionary content and the mathematical formulae are used only to give a semblance of objectivity to a subjective evaluation.

¹³³ F. DINI, R. PACINI, T. VALLETTI ‘Scoring rules’, in N. Dimitri – G. Piga – G. Spagnolo (eds.) *Handbook of procurement*, cit., 304 et seq.

¹³⁴ P. S. STILGER ‘Formulas for Choosing the Most Economically Advantageous Tender - a Comparative Study’ (2011) in <http://igitur-archive.library.uu.nl/student-theses/2012-0327-200536/StilgerPSMA2011Part%20I.pdf>.

¹³⁵ Cons. Stato, sect. VI, 2 March 2004, No. 926, concerning an awarding procedure carried out by Consip S.p.A. for substitute services to canteen meal vouchers. About this case see also the investigation activity provided by the Italian Competition Authority in <http://www.agcm.it/component/domino/open/41256297003874BD/934143B3AF9C783AC125705F002CBAF3.html>. See also: Authority for the Supervision of Public Contracts for works, services and supplies, Determinazione, 24 November 2011, n. 7, in http://www.avcp.it/portal/public/classic/AttivitaAutorita/AttiDellAutorita/_Atto?ca=4846; F. DINI, R. PACINI, T. VALLETTI ‘Scoring rules’, in N. Dimitri – G. Piga – G. Spagnolo (eds.) *Handbook of procurement*, cit., 309-310.

7. IMPLEMENTATION OF ELECTRONIC AWARDS IN SOME EU MEMBER STATES

As already pointed out the most significant change in public procurement procedures occurs when the entire process is on line, and the submission and evaluation of tenders is entirely done through electronic tools.¹³⁶ Whilst the provision of such instruments has been implemented in the Member States, routine recourse to such methods is still generally very poor.¹³⁷

Many Countries, such as Austria, Cyprus, the Czech Republic, Finland, Luxembourg, Latvia, Romania, Slovenia, the Slovak Republic and Sweden have similar rules for electronic procurement for above and below threshold.¹³⁸ Bulgaria provides for the use of e-auctions and dynamic purchasing systems in its Public Procurement Law under

¹³⁶ C.H. BOVIS *EU Public Procurement Law* (Elgar European Law, Cheltenham, 2007), 99; S. ARROWSMITH 'Electronic Auctions under the EC Procurement Rules: Current Possibilities and Future Prospects' (2002) *PPLR* 299 et seq.; O. SOUDRY 'Promoting Economy: Electronic Reverse Auctions under the EC Directives on Public Procurement' (2004) *JPP*, 340. With specific reference to the electronic markets, P. TREPTE 'Electronic Procurement Marketplaces: The Competition Law Implications' (2001) *PPLR*, 260 et seq.

¹³⁷ A. EYO 'Electronic auctions in EU procurement: reflections on the auction rules from the United Kingdom' (2012) *PPLR*, 1-17, in 2008 only 38 contract notices published on OJEC used such tool . In other member States the use of eAuctions seems even much lower: Denmark (1); France (1); Hungary (1); Netherlands (3); Poland (8) and Romania (10).

¹³⁸ OECD (Sigma papers) 'Public Procurement in EU Member States: The Regulation of Contract Below the EU Thresholds and in Areas not Covered by the Detailed Rules of the EU Directives' (2010), 18.

certain rules and conditions.¹³⁹ In addition, it is provided that contracting authorities and entities may perform e-auctions in design contests where the technical specifications are clearly defined.¹⁴⁰ In Estonia, all notices are made available on the central electronic register, and plans are underway for e-auctions and dynamic purchasing systems. The Lithuanian law on public procurement obliges contracting authorities to conduct at least 50% of public procurement electronically. Poland provides an option for a special electronic auction procedure but it only applies below the EU thresholds. The procedure is launched by the contracting authority through the placement of a notice on its website and on the website of the Public Procurement Bulletin. Economic operators can then use an online form to submit successive, more advantageous tenders.¹⁴¹

Italy adopted an e-procurement regulation in 2002 allowing the public sector to perform below-threshold acquisitions of good and services through the e-procurement platform electronic marketplace (MEPA),¹⁴² established by the Italian Central Purchasing

¹³⁹ OECD (Sigma papers) ‘Public Procurement in EU Member States: The Regulation of Contract Below the EU Thresholds and in Areas not Covered by the Detailed Rules of the EU Directives’ (2010), 18.

¹⁴⁰ In the Small Value Ordinance (OASPC).

¹⁴¹ OECD (Sigma papers) ‘Public Procurement in EU Member States: The Regulation of Contract Below the EU Thresholds and in Areas not Covered by the Detailed Rules of the EU Directives’ (2010), 18.

¹⁴² P.R.d. April 4, 2002, No 101, Regulation laying down the criteria and procedures for e-procurement procedures for goods and services, Article 11. L. BERTINI, A. VIDONI ‘Il Mercato Elettronico della Pubblica Amministrazione - MEPA. Scenario, funzionalità e linee di tendenza’ (2007) in Quaderni Consip <<http://www.consip.it/online/Home/Pressroom/QuaderniConsip/QuaderniConsip2007.html>>.

Body (CONSP).¹⁴³ The marketplace is open to qualified suppliers based on non-restrictive selection criteria. Following qualification, suppliers' catalogues are uploaded on the MEPA and displayed on a dedicated website, which renders them available to the entire community.¹⁴⁴ Contracting authorities can browse catalogues, compare products and prices, and request quotations or purchase directly from the e-catalogue. The MEPA allows for both direct purchase orders, or requests for quotations. In the first case the goods offered in the e-catalog are irrevocable for the supplier and can be purchased online through the issuance of the purchase order. In the second case requests can be sent to suppliers selected from those qualified for products with particular characteristics or conditions of supply which differ from the standard.¹⁴⁵ The entire transaction process is digital and digital signatures are required.¹⁴⁶ The value of such contracts in 2011 was € 243 million (0.18 % of Italian contracts for goods and services); over 70.000 contracts involving more than 3000

¹⁴³ G.M. RACCA 'Public contracts. Annual Report - Italy' (2010) in *Ius Publicum Network Review* <http://www.ius-publicum.com/repository/uploads/06_12_2010_10_17_Raccaeng.pdf>; G.L. ALBANO, F. DINI, R. ZAMPINO and M. FANA 'The determinants of Suppliers' Performance in E-Procurement: Evidence from the Italian Government's E-Procurement Platform' (2008) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1151505>, 5 et seq.; G.M. RACCA 'Collaborative procurement and contract performance in the Italian healthcare sector: illustration of a common problem in European procurement' cit.

¹⁴⁴ P.R.d. October 5, 2010, No 207, Article 328 and 335. M.S. MAROTTA 'Le best practice Consip nel contesto del Codice dell'Amministrazione Digitale' (2011) in *Quaderni Consip* <<http://www.consip.it/on-line/Home/Pressroom/QuaderniConsip/QuaderniConsip2011.html>>, 76 et seq.

¹⁴⁵ <http://www.acquistinretepa.it/>.

¹⁴⁶ OECD (Sigma papers) 'Public Procurement in EU Member States: The Regulation of Contract Below the EU Thresholds and in Areas not Covered by the Detailed Rules of the EU Directives' (2010), 19.

suppliers (98% are SMEs) and more than 10.000 procuring entities were awarded through MEPA.¹⁴⁷

In Germany, the platform *evergabe-online.de* permits full management of the procurement process electronically, also requiring a digital signing of the contract.¹⁴⁸

In Spain, *Contratacion* provides the platform for publicizing notices of award procedures carried out in either electronic or in traditional format.

Achatpublic.com is one of the French platforms that offers a full range of online coverage of the selection process (award procedure documents, legal publicity, documents relating to complaints, exchange of administrative and financial documents and e-archives). France has also carried out an experiment for the dematerialization of the award procedures which ended in December 2009. The *Direction des affaires juridiques* (DAJ) in the *Ministère de l'Economie* published at the end of May 2010 the first version of a practical guide for the electronification of award procedures.

A significant problem is the persisting differences between Member States' national e-procurement systems and solutions that may “create barriers for economic

¹⁴⁷ D. CASALINO ‘Obiettivi e prospettive per la razionalizzazione degli acquisti della PA’ [2012] < <http://www.sspa.it/wp-content/uploads/2012/01/Intervento-CASALINO.pdf> > accessed 2 February 2012. For the official data of 2010 Consip S.p.A. ‘Bilancio Consip relativo all'esercizio 2010’ <http://www.consip.it/on-line/Home/Pressroom/Pubblicazioniistituzionali.html>. N. HATZIS ‘The legality of SME development policies under EC procurement law’ in S. ARROWSMITH and P. KUNZLIK (eds.) *Social and Environmental Policies in EC Procurement Law* (Cambridge University Press, Cambridge, 2009), 345 et seq.

¹⁴⁸ Siemens ‘Study on the evaluation of the Action Plan for the implementation of the legal framework for electronic procurement (Phase II). Country Profiles’ [2010] < http://ec.europa.eu/internal_market/consultations/docs/2010/e-procurement/siemens_country_profiles_en.pdf >, accessed February 2012, 133 et seq.

operators to participate in electronic procedures, especially from across the borders”. This necessitates the adoption of common standards and requirements for formats as well as processes and messaging in procurement procedures conducted using electronic means of communication.¹⁴⁹

Limited cross border participation (1.6% according to EU data)¹⁵⁰ could be overcome through specific administrative assistance to economic operators intending to participate in an award procedure in another Member State. Such assistance should cover linguistic aspects, compliance with administrative requirements in the Member States of reference, as well as possible obligations related to e-procurement. Language can be a significant barrier. E-advertising and e-procurement intelligent systems providing translations in another language could strongly encourage participation in below threshold award procedures.

E-Procurement could also promote cross-border procurement, not just through greater publicity of contracts, but also by enabling a certain degree of language independence (through the use of e-Catalogues for example) and standardising certain practices. Equally, e-procurement presents an opportunity to introduce greater scrutiny

¹⁴⁹ Commission (EC) ‘Proposal for a Directive of the European Parliament and of the Council on public procurement’ cit., Whereas no. 54.

¹⁵⁰ Commission (EC) ‘Green Paper on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market’ COM(2011) 15 final January 27, 2011. “Only 1.6% of public contracts are awarded to operators from other Member States. Indirect cross-border participation – via corporate affiliates or partners situated in the Member State of the contracting authority – is more frequent. Nevertheless, even the rate of indirect cross-border awards remains relatively low (11%)”.

within procurement systems, providing ways to apply more objectivity in selecting suppliers and support better governance.¹⁵¹

This set of tools should improve the use for example of Dynamic Purchasing Systems (DPS)¹⁵² that were virtually unused because of flawed and unnecessarily onerous procedural rules, such as the obligation to advertise every specific contract under the DPS in the OJEU, regardless of its value (which would include below thresholds contracts of very low value e.g. € 1000). It seems inappropriate and unhelpful for such low value contracts to be required by law to be advertised in the OJEU even with a simplified notice.

The proposal for a revised Directive streamlines and improves Dynamic Purchasing Systems and electronic catalogues, full electronic procurement tools that are specifically adapted to highly aggregated procurement done by Central Purchasing Bodies.¹⁵³ The role of Central Purchasing bodies, as with any form of joint procurement, becomes strategic for the implementation of new IT solutions and the establishment of new award procedures.

It is no coincidence that the new Directive provides that contracting authorities will have at their disposal a set of six specific procurement techniques and tools intended for aggregated and electronic procurement: framework agreements, dynamic purchasing systems, electronic auctions, electronic catalogues, central purchasing bodies and joint

¹⁵¹ Commission (EC) ‘Evaluation of the 2004 Action Plan for Electronic Public Procurement Accompanying document to the Green Paper on expanding the use of e-Procurement in the EU’ SEC(2010) 1214 final October 10, 2010, 7.

¹⁵² C.H. BOVIS ‘EU Public Procurement Law’ cit., 99-101.

¹⁵³ Commission (EC) ‘Proposal for a Directive of the European Parliament and of the Council on public procurement’ cit., Article 32, 34 and 35. A. SÁNCHEZ GRAELLS *Public Procurement and the EU Competition Rules* (Oxford University Press, Oxford, 2011), 299 – 301.

procurement. Compared to the existing Directive, these tools have been improved and clarified with a view to facilitating e-procurement.

8. IT SOLUTIONS IN THE EXECUTION OF THE CONTRACT: E-ORDERING, E-INVOICING AND E-PAYMENT

The real, often hidden, limit to cross border participation concerns the different rules regarding the performance phase, invoicing and payment, that could be addressed through e-documents.

The Commission is aware of this and has recently strengthened the commitment to achieve a single digital market¹⁵⁴ ensuring the removal of the regulatory and technical barriers which prevent widespread adoption of e-invoicing.¹⁵⁵

The need to enforce such instruments is becoming clear. For instance, the recent draft of the new Directive provides that:

“Member States shall in particular make sure that interested economic operators have easy access to appropriate information on the obligations relating to taxes, to environmental protection, to the employment protection provisions and to the working conditions which are in force in the Member State, region or locality in which the works are

¹⁵⁴ According to the Europe 2020 strategy, for a digital agenda for Europe.

¹⁵⁵ Commission (EC), ‘Communication from the commission to the European parliament, the council, the European economic and social committee and the committee of the regions. Reaping the benefits of electronic invoicing for Europe’ COM(2010) 712 final.

to be carried out or services are to be provided and which shall be applicable to the works carried out on site or to the services provided during the performance of the contract”.¹⁵⁶

***8.1 Towards the standardisation of the entire procurement procedure:
PEPPOL***

A standardization of the entire procedure through e-documents is essential and the EU pilot project PEPPOL (*Pan-European Public eProcurement On-Line project of Borderless e-procurement*) is representative of the direction of recent developments. PEPPOL is a major cross-border project intended to provide large-scale, standards-based IT infrastructure and services to set up and run on-line pan-European public procurement operations. The aim of this project is to create a pan-European pilot solution to facilitate EU-wide interoperable public e-Procurement for SMEs and to improve the opening of the market for goods and services in light of the fact that the lack of common standards for electronic data exchange is considered an obstacle at present to cross-border participation. The goal of the project is to offer European companies the ability to provide goods or services to any public sector buyer, anywhere in Europe. The project has created software specifications, open source software sample implementations, establishing standards-based business processes and an open transport infrastructure for electronic documents. Such electronic solution could become the fundamental structure for e-Procurement in Europe and could assure annual savings of more than 50 billion euro.¹⁵⁷

¹⁵⁶ Commission (EC) ‘Proposal for a Directive of the European Parliament and of the Council on public procurement’ cit., Article 87, § 3.

¹⁵⁷ As an open standardised platform, PEPPOL's infrastructure has been designed to interconnect existing networks and bridge individual eBusiness islands in Europe. PEPPOL increases business opportunities for participants and supports interoperability across borders. It facilitates electronic

The obstacles to effective e-Procurement have been the lack of common business process standards and solutions that can make e-procurement complex and costly. Market fragmentation has resulted in technologically isolated experiences in Europe, hampering interoperability¹⁵⁸ and creating e-barriers. Differing legal requirements make tendering across borders difficult for suppliers, in particular SMEs, and lead to the reduced percentage of cross border procurement.

Since 2008, the PEPPOL project has been developing and implementing the validation of eSignatures issued by certifying authorities from any European country; a Virtual Company Dossier to provide standardised company information and mutually recognised evidences; eCatalogues to exchange information about goods and services in a standardised format and eOrdering and e-Invoicing¹⁵⁹ using a defined set of processes to share common business information.¹⁶⁰ The PEPPOL Transport Infrastructure (eDelivery)

communication among European companies and government institutions in the pre-award and post-award procurement process: http://www.peppol.eu/about_peppol.

¹⁵⁸ S. SHEPPARD 'The new European interoperability framework: opening competition in public procurement to both proprietary and open source software solutions and reinstating compliance with European Union procurement and competition law' (2012) *PPLR*, 47-67.

¹⁵⁹ Commission (EC), 'Communication from the commission to the European parliament, the council, the european economic and social committee and the committee of the regions. Reaping the benefits of electronic invoicing for Europe' COM(2010) 712 final.

¹⁶⁰ PEPPOL opens up a new dimension in public eProcurement with extended market connectivity and EU-wide interoperability, facilitating seamless electronic communication across borders. PEPPOL defines 3 user groups as typical PEPPOL pilot participants. Together, they form an eProcurement community: A contracting authority means a state, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law; an economic operator: in the PEPPOL context means a company which supplies goods and/or services to contracting authorities in the EU; an ICT solution or service

interconnects eProcurement systems. Access to the PEPPOL infrastructure takes place through access points, which are currently provided by both government agencies and private companies. From spring 2011, PEPPOL started its production pilot phase with organisations using PEPPOL enabled solutions and components in real life transactions. It is expected that PEPPOL usage will continue to expand through a combination of public and private sector adoption. The Italian Central purchasing Body Consip has sought to implement such a system as a standard feature.¹⁶¹ Nonetheless, it is worth noting that PEPPOL project does not focus on electronic evaluation of tenders, but mainly on dematerialization of documents, also concerning the execution of the contract that is not addressed by European Directives.

The European Commission has also developed and deployed e-PRIOR¹⁶² pilot project to allow the exchange of structured e-Catalogues, e-Ordering and e-Invoicing documents between the Commission and its suppliers. Open e-PRIOR publicly provides this solution in a re-usable open-source format.

provider: providing software or services to support the PEPPOL technology. For more information see: http://www.peppol.eu/about_peppol/user_groups.

¹⁶¹ Consip S.p.A. 'Cataloghi e ordini elettronici: due gare Consip aprono le porte agli standard PEPPOL' (2011) < <http://www.consip.it/on-line/Home/articolo1774.html> >.

¹⁶² Open e-PRIOR is a cross-border e-procurement solution developed by the European Commission (DIGIT) for the European Union Member State Administrations. These MSAs can use Open e-PRIOR to exchange catalogues, orders, invoices and credit notes with their suppliers over the PEPPOL infrastructure. For MSAs, Open e-PRIOR is an opportunity to reuse the open-source version of a solution that is already operational at the EC. It is also a great way to share practical experiences and lessons learned with the aim of accelerating uptake of e-procurement across Member States. http://forge.osor.eu/docman/?group_id=188

Such IT solutions are important to overcome effective e-barriers and requires that the EU does not shut its eyes as to what happens after the award of a public contract even though at present there is not presently a necessary degree of political consensus to ensure their effective adoption and implementation.¹⁶³

An additional advantage of IT solutions is related to the required *ex post* publicity of the award. Whenever such obligation is fulfilled through electronic tools it would be possible to map the undertakings who are awarded such contracts in each country. Especially for below threshold procurements such publicity could also enable the gathering of significant data on the type and value of such contracts. Further, such instruments could also put in evidence the possible infringements connected with an artificial splitting of contracts.¹⁶⁴

9. CONCLUSIONS

The use of IT tools appears to offer a strategic advantage in public procurement. In advertising an intention to award a contract electronic media can ensure a stronger implementation of transparency. Awards through IT procedures can break down barriers to participation and competition thereby increasing the otherwise extremely low percentage of actual cross border procurement.

¹⁶³ Commission (EC) ‘Evaluation Report Impact and Effectiveness of EU Public Procurement Legislation Part 1’, cit.; Commission (EC) ‘A strategy for e-procurement’ April 20, 2012 COM(2012) 179 final. G. M. RACCA, R. CAVALLO PERIN, G. ALBANO ‘Competition in the execution phase of public procurement’ (2011) PCLJ, 99.

¹⁶⁴ See LUKE R.A. BUTLER ‘Below Threshold and Annex II B Service Contracts in England, Wales and Northern Ireland: A Common Law Approach’ in this volume.

In this regard networks of central purchasing bodies could play a significant role in ensuring change which could foster a real internal market by using their purchasing power to drive the market toward efficient, sound and sustainable procurement¹⁶⁵ which favours the grow of innovative European SMEs. The challenge is to develop a stronger political commitment and adequate professional skills to mandate and implement the changes that electronic procurement necessitates.

Electronic means in public procurement can assure a higher degree of traceability which can strengthen the accountability of public officials involved.

Nonetheless, IT tools makes more evident some criticalities related to the objectivity of the public procurement award. The advantages of such tools are clear whenever technical specifications are well defined and there are accepted standards. Whenever e-Evaluations occur through the most advantageous economic tender, it is necessary to stress the relevance of reasonableness and proportionality in the allocation of weights to the elements involved, in order to avoid discrimination in the award. Recourse to e-Auctions can contribute to highlight such problems, but not necessarily to solve them. E-Auctions seem to assure the advantage of limiting evaluation only to measurable quality, which could assure further *ex post* control over the evaluation in order to guarantee a higher

¹⁶⁵ Framework agreements awarded by CPBs can assure a “social” value for money, in compliance with the discretionary choices of the member States and in a more efficient way compared to individual procuring entities: G.M. RACCA ‘Aggregate Models of Public Procurement and Secondary Considerations: An Italian Perspective’ cit., 165; G. M. RACCA ‘Professional Buying Organisations, Sustainability and Competition in Public Procurement’(2010) <http://www.ippa.org/IPPC4/Proceedings/18TransparencyAccountabilityinProcurement/Paper18-13.pdf>; S. ARROWSMITH - P. KUNZLIK (EDITED BY) *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge, 2009), 34 et seq., where it is precised that the directive do not ensure efficient expenditure

degree of objectivity. Nonetheless, the other quality elements cannot be evaluated and this may be considered sometimes a limit for contracting entities.

The reform of public procurement legislation is one of the twelve priority actions set out in the Single Market Act¹⁶⁶. Indeed, the efficiency of public tendering has become a priority for all Member States in view of the current budgetary constraints. It is essential to conclude transparent, competitive contracts as easily as possible and at the best value for money. Further, IT tools can ensure a broader control by a wider principal (not only unsuccessful tenderers, but also citizens, and public interest organizations, social witnesses) over the efficient and sound use of public resources by its agents (the procuring entities).¹⁶⁷

Ambitious measures on electronic procurement aiming at full electronic communication in public procurement within a limited period are therefore essential to foster accountability efficiency and integrity.

¹⁶⁶ Commission (EC) 'Single Market Act. Twelve levers to boost growth and strengthen confidence "Working together to create new growth" April 13, 2011 COM(2011) 206 final, 19.

¹⁶⁷ G. M. RACCA, R. CAVALLO PERIN, G. ALBANO 'Competition in the execution phase of public procurement' (2011) PCLJ, 99. C. Yukins 'A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model' (2010) PCLJ, 63 et seq. S. L. Schooner – D. I. Gordon – J. L. Clark 'Public Procurement Systems: Unpacking Stakeholder Aspirations and Expectations' in *George Washington University Law School Working paper*, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1133234>.

Bibliography

G. L. ALBANO, G. CALZOLARI, F. DINI, E. IOSSA, G. SPAGNOLO 'Procurement contracting strategies', in N. Dimitri – G. Piga – G. Spagnolo (eds.) *Handbook of procurement*, (Cambridge University Press, Cambridge, 2006) 82 et seq.;

S. ARROWSMITH – A. EYO 'Electronic Auctions in the EC Procurement Directives and a perspective from UK Law and Practice' in S. Arrowsmith (edited by) *Reform of the UNCITRAL model law on procurement* (Thomas Reuters/West, Danvers, 2009), 422;

S. ARROWSMITH 'Electronic reverse auctions under the EC public procurement rules: current possibilities and future prospects' (2002) in *P.P.L.R.*, 299-330;

S. ARROWSMITH – J. LINARELLI – D. WALLANCE *Regulating Public Procurement: National and International Perspectives* (Kluw Law International London 2000);

R. BICKERSTAFF 'E-communication Regulation in Public Procurement: the EC and UK perspective' in S. Arrowsmith (eds.) *Reform of the UNCITRAL model law on procurement* (Thomas Reuters/West, Danvers, 2009), 288 et seq.;

R. BICKERSTAFF 'The New Directives' Rules on E-communication Mechanisms in Public and Utilities Procurement' (2004) in *P.P.L.R.*, 277;

R. BICKERSTAFF, 'Review: Commission Staff Working Document on the Requirements for Conducting Public Procurement Using Electronic Means' (2005) in *P.P.L.R.* NA17;

C. H. BOVIS 'EU Public Procurement Law' (Cheltenham 2007);

A. BROWN 'Transparency Obligations Under the EC Treaty in Relation to Public Contracts that Fall Outside the Procurement Directives: A Note on C-231/03, Consorzio

Aziende Metano (Coname) v Comune di Cingia de' Botti' in *P.P.L.R.* 2005, NA153-NA159;

M. BURGI 'The Policy on Regulating Electronic Communications in Germany' in S. Arrowsmith (edited by) *Reform of the UNCITRAL model law on procurement*, cit., 305 et seq.;

R. CARANTA 'Transparence et concurrence', in R. Noguellou – U. Stelkens (eds.) *Droit comparé des Contrats Publics* (Bruxelles, Bruylant, 2010), 149;

S. CROOM – A. BRANDON JONES 'Key Issues in E-Procurement: Procurement Implementation and Operation in the Public Sector' in Khi V. Thai (eds.) *International Handbook of Public Procurement* cit., 447;

A. DECKERS - Head of Unit for e-procurement and economic analysis of procurement markets 'New perspectives on e-procurement in Europe' speech at the *7th PEPPOL conference*, Rome, 29 May 2012;

F. DINI, R. PACINI, T. VALLETTI 'Scoring rules', in N. Dimitri – G. Piga – G. Spagnolo (eds.) *Handbook of procurement*, (Cambridge University Press, Cambridge, 2006), 293 et seq.;

K. DOOLEY – S. PURCHASE 'Factors Influencing E-Procurement Usage' in Khi V. Thai (eds.) *International Handbook of Public Procurement*, cit., 461-462;

M. ESSIG – M. AMANN 'E-procurement and Its Role in Supply Management and supplier Valuation' in C. Harland – G. Nissimbeni – E. Schneller (eds.) *The SAGE Handbook of strategic Supply Management* (SAGE, London, 2013), 425-426;

A. EYO 'Electronic auctions in EU procurement: reflections on the auction rules from the United Kingdom' (2012) *P.P.L.R.*, 1-17;

L. FOLLIOT-LALLIOT ‘The French Approach to Regulating Frameworks under the New EC Directives’ in S. Arrowsmith (eds.) *Reform of the UNCITRAL model law on procurement*, (Thomas Reuters/West, Danvers, 2009), 193-213;

F. LICHÈRE ‘The Regulation of Electronic Reverse Auctions in France’ in S. Arrowsmith (eds.) *Reform of the UNCITRAL model law on procurement*, (Thomas Reuters/West, Danvers, 2009), 455-467;

C. LOYOLA – M. ORTÍZ ‘The experience of information acquisition in Chilean public market via bi implementation’ (2012) 5th International Public Procurement Conference, in <http://www.ippa.org/IPPC5/Proceedings/Part9/PAPER9-10.pdf>;

A. MERRILL ‘PEPPOL & Public Procurement Reform’ speech at the 7th PEPPOL conference, Rome, 29 May 2012;

F. G. MORAN ‘Pan-European interoperable electronic public procurement: enabling its implementation within the European Union institutions, agencies and other bodies, and facilitating its adoption across the member States’ (2012) 5th International Public Procurement Conference, in <http://www.ippa.org/IPPC5/Proceedings/Part2/PAPER2-4.pdf>;

G. M. RACCA ‘The role of IT solutions in the award and execution of public procurement below threshold and list B services: overcoming e-barriers’ in D. DRAGOS – R. CARANTA (eds. By) *Outside the EU Procurement Directives - inside the Treaty?*, (Djøf, Copenhagen, 2012), 373;

G. SKOVGAARD ØLYKKE ‘How Should the Relation between Public Procurement Law and Competition Law Be Addressed in the New Directive?’ in G. Skovgaard Ølykke – C. Risvig Hansen – C. D. Tvarnø, *EU Public Procurement – Modernisation, Growth and Innovation* (Djøf publishing, Copenhagen, 2012), 62 – 63 and 67;

P. S. STILGER 'Formulas for Choosing the Most Economically Advantageous Tender - a Comparative Study' (2011) in <http://igitur-archive.library.uu.nl/student-theses/2012-0327-200536/StilgerPSMA2011Part%20I.pdf>;

P. TREPTE 'Transparency and accountability as tools for promoting integrity and preventing corruption in procurement: possibilities and limitations' Expert Group Meeting on Integrity in Public Procurement, 20-21 June 2005, Château de la Mouette, Paris;

S. TREUMER 'The Distinction Between Selection and Award Criteria in EC Public Procurement Law: A Rule Without Exception?' (2009) in *P.P.L.R.*, 103;

C. YUKINS 'Use and Regulation of Electronic Reverse Auctions in the United States' in S. Arrowsmith (eds.) *Reform of the UNCITRAL model law on procurement*, (Thomas Reuters/West, Danvers, 2009), 469-489;

K. VAIDYA - G. C. CALLENDER - A.S.M. SAJEEV 'Facilitators of Public E-Procurement: Lessons Learned from the U.K., U.S., and Australian Initiatives' in Khi V. Thai (eds.) *International Handbook of Public Procurement* (Auerbach Publications Taylor & Francis Group 2009), 475 et seq.