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BRIDGING THE RISK ASSESSMENT GAP: A CASE FOR EFFECTIVE COOPERATION IN PUBLIC PROCUREMENT BETWEEN THE EUROPEAN UNION AND THE UNITED STATES

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1. INTRODUCTION

In public procurement, risk assessment plays a pivotal role in safeguarding the efficient allocation of public funds and ensuring the delivery of high-quality products. Despite their shared commitment to effective risk management, the United States and European Union approach risk assessment in public procurement differently. These differences pose potential challenges for businesses operating in both markets, as they may face varying risk assessment requirements and uncertainties that limit cross-border procurement opportunities. By bridging the gap in risk assessment practices, the European Union and the United States can enhance the integrity, efficiency, and transparency of public procurement, fostering a more secure and competitive global procurement landscape.

This paper presents a comparative analysis of risk assessment practices in the United States and the European Union, emphasizing the key differences and exploring potential avenues for collaboration. While advocating for cooperation and acknowledging the unique characteristics of each region, this paper emphasizes that a collaborative effort is necessary to facilitate a meaningful exchange of information and establish a shared understanding of

risk assessment practices. Part II of this paper compares risk assessment approaches in the United States and European Union. This section identifies a common undesirable characteristic within both jurisdictions. Part III highlights recent developments within the United States and European Union that have an impact on risk assessment practices within both regions. Part IV concludes that regulatory cooperation in public procurement to promote mutually recognized objectives in risk assessment and safeguard against trade barriers constitutes an important step towards enhanced global economic integration. Identifying the exact parameters of such cooperation, however, remains the question that requires continued exploration and concerted efforts by both governments.

2. APPROACHES TO ASSESSING RISKS IN PUBLIC PROCUREMENT

In a public procurement system, contractor qualification assessment serves as a critical step, guaranteeing that only those entities possessing the necessary expertise, experience, and financial resources are entrusted with the undertaking government contracts[2]. The United States and European Union public procurement systems share the same common goals in contractor qualification assessment. Both strive to identify competent and qualified contractors capable of delivering high-quality products while adhering to ethical standards

[2] See FAR Part 9. See also C.R. YUKINS - M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, 19-2 UrT 47, 2019, 47-49 and 52. See also S. ARROWSMITH, *EU Public Procurement Law: An Introduction*, The EU Asia Inter University Network for Teaching and Research in Public Procurement Regulation 2010, 140-149.

and regulatory requirements[3]. However, the distinct emphases of each approach reflect the unique regulatory environments and procurement practices of these respective regions[4].

2.1 Risk Assessment in Public Procurement in the United States

The United States' contractor qualification system is built on a balance between reputation, performance, and fiduciary risks[5]. To uphold public trust, the United States prioritizes performance risk assessment while simultaneously safeguarding its reputation by excluding contractors with a record of questionable practices[6]. The United States views the selection of capable and qualified contractors as crucial to not only the successful execution

[3] See e.g., C. R. YUKINS - M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., 47-49. See also S. ARROWSMITH, *EU Public Procurement Law: An Introduction*, cit., 140-41. See also R. NOGUELLOU, *Scope and Coverage of the EU Procurement Directives*, in M. TRYBUS, R. CARANTA, G. EDELSTAM eds., *EU Public Contract Law: Public Procurement and beyond*, Bruylant, Bruxelles, 2014, 15-36. See also A. B. GREEN, *International Development Contract Law*, 1:19-1:28 (Thomson Reuters, Apr. 2022 Update). See generally S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, coll. Pub. Cont. L.J., 2016, 449. (Harutyunyan argues that the United States and the European Union have divergent systematic goals. However, she does not contest the ultimate goals of both public procurement systems. Her argument for harmonization of exclusion regimes presupposes that both the United States and the European Union aim at achieving the same goals in public procurement).

[4] See generally S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit.

[5] C.R. YUKINS-M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., 52.

[6] Id.

of contracts, but also to prudent allocation of public funds and upholding integrity of the whole process[7].

This approach to qualification assessment is largely predicated on the notion of achieving "the best value for money[8]". This concept is a central tenet of public procurement in the United States[9]. The focus on "the best value for money" makes the multifaceted qualification assessment by a United States' procuring official not simply about obtaining the lowest price. Rather, the best value for money is seen as maximizing the overall benefit and fulfilling designated roles in a broader governmental system by the U.S. Government to taxpayers[10].

2.1.1 Responsibility Determination

"A responsible offeror" is a term of art often used in the United Stated public procurement[11]. "A responsible offeror" represents a company or individual who has the

[7] Id. See also S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit., 454.

[8] S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit., 454. See also C. R. YUKINS - M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., 47. See also C.R. YUKINS, *The U.S. Federal Procurement System: An Introduction*, 2-3, UrT 69, 2017, 83.

[9] C.R. YUKINS, *The U.S. Federal Procurement System: An Introduction*, cit., 83. See also J. TILLIPMAN, *The Foreign Corrupt Practices Act & Government Contractors: Compliance Trends & Collateral Consequences*, Briefing Papers, 2011, 1.

[10] S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit., 454.

[11] W. NOEL KEYS, *Government Contracts Under The Federal Acquisition Regulations*, §9:1, Thomson Reuters, 2023.

capability to perform fully and reliably the contract requirements[12]. This means that the offeror must have the financial resources, experience, and expertise to complete a government contract successfully[13]. The offeror must also be able to meet all of the contract's terms and conditions, including any legal or regulatory requirements[14]. In some cases, the government may also consider the offeror's past performance when making a determination of responsibility[15]. If the offeror has a history of poor performance or ethical violations, it may be found not responsible[16]. This concept of "a responsible offeror" is important because it helps ensure that the government is getting the best possible value for its money[17]. By awarding contracts to responsible offerors, the government can minimize the risk of contract breaches, cost overruns, and improper practices, ultimately reducing inefficiencies in public procurement[18].

[12] FAR 9.104-1. See also C.R. YUKINS - M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., 47-48 and 52-56. See also C. R. YUKINS, *Cross-Debarment: A Stakeholder Analysis*, 45, coll. Geo. Wash. Int'l L. Rev., 2013, 219 226.

[13] FAR 9.104-1. See also C.R. YUKINS - M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., 47-48 and 52-56.

[14] FAR 9.104-1.

[15] FAR 9.104-3(c).

[16] FAR 9.103, FAR 9.104-3, and FAR 9.104-4. See also C.R. YUKINS - M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., 52.

[17] S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit., 454-455. See also J. TILLIPMAN, *The Foreign Corrupt Practices Act & Government Contractors: Compliance Trends & Collateral Consequences*, cit. 1.

[18] See e.g., C.R. YUKINS - M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., 52-53.

The important aspect of determining responsibility lies in evaluating the current corporate environment and capabilities of a potential contractor[19]. This approach does not mean that the past conduct of an offeror is immaterial. However, a contractor may demonstrate that despite past misconduct, the risk has been reduced or removed, making a non-responsibility determination or exclusion unwarranted[20].

A finding of non-responsibility and exclusion from a particular contract does not necessarily preclude an offeror from competing for other public contracts. Responsibility standards are specific to the needs of a procurement, such as the ability to meet identified milestones or having a requisite level of technical expertise or a record of corporate compliance[21]. However, a finding of non-responsibility in a procurement process may represent a de facto debarment if the contracting officer's decision is used to exclude the offeror from all future government contract opportunities[22].

[19] Id, at 48. See also S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit., 469-70.

[20] C.R. YUKINS - M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., 47-48.

[21] FAR 9.104-1.

[22] See e.g., *Phillips v. Mabus*, 894 F. Supp. 2d 71, 81 (D.D.C. 2012). See also J. CARLO, *Inc. v. Corps of Eng.*, 539 F.Supp. 1075, N.D.Tex. 1982, 1080. See also T. J. CANNI, *Shoot First, Ask Questions Later: An Examination and Critique of Suspension and Debarment Practice Under the FAR, Including a Discussion of the Mandatory Disclosure Rule, the IBM Suspension, and Other Noteworthy Developments*, in *Public Contract Law Journal*, vol. 38, no. 3, 2009, 547, 555.

2.1.2 Suspension and Debarment

The standards for suspension and debarment differ from the criteria for non-responsibility conclusion[23]. Debarment is defined as an administrative action implemented by a designated debarring official to exclude a contractor from participating in government contracts for a specified period[24], while suspension refers to a temporary disqualification of a contractor from engaging in government contracting and government-approved subcontracting initiated by an authorized suspending official[25]. Yet, both sets of standards are complementary guides for assessing risks posed by prospective contractors. Both suspension and debarment aim to safeguard the government from risks presented by individuals or firms exhibiting a lack integrity or having a record of subpar performance[26]. The Federal Acquisition Regulation ("FAR") reinforces this interconnectedness by stating that agencies should only award contracts to responsible contractors and that debarment or suspension "are appropriate means to effectuate this policy[27]".

The United States employs a centralized suspension and debarment system that is subject to judicial oversight[28]. Debarring and suspending officials typically hold senior

[23] Id, at 55. See also W. NOEL KEYS, *Government Contracts Under The Federal Acquisition Regulations*, Thomson Reuters, 2023, at 9:31. See also T. J. CANNI, *Shoot First, Ask Questions Later: An Examination and Critique of Suspension and Debarment Practice Under the FAR, Including a Discussion of the Mandatory Disclosure Rule*, cit., at 579-80.

[24] FAR 9.406-1 and FAR 9.406-4.

[25] FAR 9.407-1.

[26] R. YUKINS-M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 55.

[27] FAR 9.402(a). See also R. YUKINS-M KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 55.

[28] 5 U.S.C.A. §§ 702-704.

positions and maintain independence from contracting officers[29]. While they exercise a significant degree of discretion, their discretion may be constrained by statutory suspension and debarment mandates[30]. Absent a statutory mandate, debarring and suspending officials may choose any action they deem appropriate, to include taking no action at all[31]. They may also pursue an alternative resolution through an administrative agreement, which outlines specific terms and conditions that a contractor must adhere to in order to maintain its status as a responsible contractor under the FAR[32]. The fundamental principle governing suspension and debarment decisions is that they are only imposed when there is a clear determination that it is in the government's best interest[33].

Suspension and debarment represent a cross-agency action. Once a debarring or suspending official decides that shielding the government from a contractor is necessary to protect government interests, that contractor cannot pursue public contract opportunities

[29] FAR 9.403.

[30] See e.g., 42 U.S.C. §7401 et seq. (The Clean Air Act).

[31] See e.g., Department of Homeland Security, Department of Homeland Security Suspension and Debarment Case Management System, Department of Homeland Security Suspension and Debarment Official Management Directorate (Sept. 28, 2018) [hereinafter DHS Debarment Management]. Available at https://www.dhs.gov/sites/default/files/publications/privacy-pia-dhsall070-sdcms-september2018.pdf. See also, R. YUKINS-M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 58. Generally, debarments are for a period of three years. FAR 9.406-4. Suspensions are usually imposed for 12 months but may be extended for up to 18 months. FAR 9.407-4.

[32] FAR 9.406-3(f). See also R. YUKINS-M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 58 and 64-65. See also C. R. YUKINS, *Cross-Debarment: A Stakeholder Analysis*, cit., at 223. See also *DHS Debarment Management*, supra note 13.

[33] FAR 9.406-1(a) and FAR 9.406-1(b). See also N. E. CASTELLANO, *Suspensions, Debarments, and Sanctions: A Comparative Guide to United States and World Bank Exclusion Mechanisms*, Pub. Cont. L.J., 45, 2016, 403, 411.

across the whole federal government[34]. The exclusion information for the contractor gets posted on the System for Award Management ("SAM.gov") and becomes publicly available[35]. Such publicizing results not only in reputational harm and forfeiture of federal contract opportunities, but also triggers a series of corollary effects. Multiple state and local governments have implemented reciprocal exclusion policies or utilize federal grant funding for certain projects, effectively barring them from doing business with excluded entities listed on SAM.gov[36]. This means that an excluded contractor will face substantial hurdles in obtaining work, even outside the federal government domain[37].

Given the consequences of suspension and debarment decisions, the FAR indicates that debarment or suspension should be considered as options of last resort[38]. The purpose of the U.S. exclusion system is not to punish contractors[39]. Exclusions, whether based on the

[34] See C. R. YUKINS, *Cross-Debarment: A Stakeholder Analysis*, cit., at 223 (referencing Exec. Order No. 12,689, 3 C.F.R. 235 (1989).

[35] FAR 9.404 and FAR 9.405.

[36] J. A. BERRADA, *Suspension and Proposed Debarment in Federal Government Contracting: A Call for Pre-Exclusion Notice and Opportunity to Respond*, Pub. Cont. L.J., 48, 2018, 165, 173-74.

[37] D. ROBBINS, J. M. CRAWFORD, and L. J. MITCHELL BAKER, *A Scarlet Letter: Do the Exclusion Archives on SAM.gov Violate Contractors' Liberty Interests?*, 106 FED. CONT. REP. 317 (Sept. 27, 2016). Available at https://www.crowell.com/a/web/qNCwKmF3QqccZh8nxj8Ebp/4TtivV/20160927-Scarlet-Letter-Do-Exclusion-Archives-on-SAMgov-Violate-Contractors-Liberty-Interests.pdf. The General Service Administration has revised its procedures since this article was published. Currently, inactive exclusions may only be viewed by federal users. See General Service Administration, Searching Exclusions on Sam.gov, General Service Administration YouTube Channel (Mar. 8, 2022) [hereinafter GSA Searching Exclusions]. Available at https://www.youtube.com/watch?v=dJPuTufLN0c.

[38] FAR 9.406-1(a) and FAR 9.407-1(b).

[39] See R. YUKINS-M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 64. See also C. R. YUKINS, *Cross-Debarment: A Stakeholder Analysis*, cit., at 226.

contracting officer's qualification assessment or debarment/suspension, are tools to mitigate risk in public procurement[40]. The decision to exclude contractors from competing for federal contracts is typically considered a business judgment, rather than a punitive measure.

2.1.3 SAM.gov as a Contractor Information Repository

As indicated in the previous section, SAM.gov is a consolidated repository of contractor information managed by the General Service Administration ("GSA") that is accessible to the public[41]. The system publicizes contractor information through various means, including the "Contractor Opportunities" section, which lists all federal contracting opportunities, and the "Entity Information" section, which contains information about all businesses registered with SAM.gov[42]. Businesses are required to provide annual information to the GSA and SAM.gov through certifications and representations[43]. This self-reporting process allows the federal government to assess a contractor's responsibility by examining its integrity record, qualifications, volume of business with the U.S. Government, and other

[40] See R. YUKINS-M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 64. See also N. E. CASTELLANO, *Suspensions, Debarments, and Sanctions: A Comparative Guide to United States and World Bank Exclusion Mechanisms*, cit., at 406 (referencing Daniel Gordon's statement before the Senate Committee on Homeland Security and Governmental Affairs in 2011).

[41] FAR Subpart. 9.4. See also SAM.gov-Contract Data, General Service Administration (2023). Available at https://sam.gov/reports/awards/static.

[42] SAM.gov-Data Bank, General Service Administration (2023) [hereinafter SAM.gov-Data Bank]. Available at https://sam.gov/reports/ei/static.

[43] FAR 4.1201.

relevant information[44]. This self-reporting also forms the basis of the information made public[45].

Contractors may opt out of public search, but they are still required to complete the annual certifications and representations[46]. Opting out only means that their record will not be visible to the general public[47]. Opting out does not mean that a contractor gets a pass from the annual certifications and representations requirement. However, only government personnel with access to SAM.gov will be able to see the record for that contractor[48].

Suspensions and debarments are not part of the SAM.gov qualifications record for contractors. Instead, they are maintained in a separate database that only includes active suspension and debarment information[49]. The GSA no longer makes archived or inactive exclusions visible to the general public[50]. The exclusions information that is publicly

[44] See e.g., FAR 52.209-7. See also SAM.gov-Data Bank, supra note 41. See also SAM.gov-Help, General Service Administration (2023) [hereinafter SAM.gov-Help]. Available at https://sam.gov/content/help. See also Shane McCall, Back to Basics: Registering in SAM.gov, SmallGovCon (Feb. 9, 2023). Available at https://smallgovcon.com/federal-government-contracting/back-to-basics-registering-in-sam-gov/.

[45] See SAM.gov-Help, supra note 44. See also McCall, supra note 44.

[46] SAM.gov-Entity Information, General Service Administration (2023). Available at https://sam.gov/content/entity-information.

[47] Id (directing federal users to sign in with a federal email address or federal identification card if they want "to view registrants who have opted out of public search").

[48] Id.

[49] SAM.gov-Data Bank, supra note 42. See also GSA Searching Exclusions, supra note 37.

[50] GSA Searching Exclusions, supra note 37. See also SAM.gov-Entity Information/Exclusions, General Service Administration (As of Nov. 21, 2023). Available at https://sam.gov/search/?index=ex&sort=-relevance&page=1&pageSize=25&sfm%5BsimpleSearch%5D%5BkeywordRadio%5D=ALL&sfm%5BsimpleSearch%5D%5BkeywordEditorTextarea%5D=&sfm%5Bstatus%5D%5Bis_active%5D=true&sfm%5Bstatus%5D%5Bis_inactive%5D=false&sfm%5BexclusionType%5D%5BexclusionType%5D%5B1%5D=true&sfm%5Bexclusi

available divides excluded businesses into four types: ineligible (proceeding pending), ineligible (proceeding complete), prohibition/restriction, and voluntary exclusion[51]. For businesses that have had an active exclusion for a while and prior to the transition to these four types of exclusions, SAM.gov provides legacy codes that offer some detail about the nature of the exclusion[52]. Overall, the exclusions information is not comprehensive but gives a general idea of imposed exclusions.

2.2 Risk Assessment in Public Procurement in the European Union

Prior to delving into the specifics of risk assessment in the European Union, a caveat is necessary. The following analysis is framed along the risk assessment methodology employed by contracting officials in the United States. This chosen approach is not intended to diminish the complexity of or oversimplify the risk assessment conducted by contracting authorities in the European Union. Instead, this paper seeks to perform a comparative analysis along parallel lines, with the objective of evaluating potential interoperability in public procurement practices between the United States and the European Union.

onType%5D%5BexclusionType%5D%5B2%5D=true&sfm%5BexclusionType%5D%5BexclusionType%5D%5B3%5D=true&sfm%5BexclusionType%5D%5BexclusionType%5D%5B4%5D=true.

[51] SAM.gov-Exclusion Types, General Service Administration (2023). Available at https://sam.gov/content/entity-information/resources/exclusion-types.

[52] SAM.gov-Entity Information, General Service Administration (2023). Available at https://sam.gov/search/?index=ex&sort=-relevance&page=1&pageSize=25&sfm%5BsimpleSearch%5D%5BkeywordRadio%5D=ALL&sfm%5Bstatus%5D%5Bis_active%5D=true&sfm%5BexclusionType%5D%5BexclusionType%5D%5B0%5D=true&sfm%5BexclusionType%5D%5BexclusionType%5D%5B1%5D=true&sfm%5BexclusionType%5D%5BexclusionType%5D%5B2%5D=true&sfm%5BexclusionType%5D%5BexclusionType%5D%5B3%5D=true&sfm%5BexclusionType%5D%5BexclusionType%5D%5B4%5D=true. See also SAM.gov-Legacy CT Codes, General Service Administration (2023). Available at https://sam.gov/content/entity-information/resources/legacy-ct-codes.

The goals of the European Union's contractor qualification system are not inherently different from the goals of the United States' qualification process. The European Union balances reputation, performance, and fiduciary risks through a system that is designed to keep market polluters away from the European market[53]. The European Union, however, prioritizes market integration[54]. As such, the European Union places a greater emphasis on the interests of the private sector[55]. Although the European Union acknowledges the importance of ensuring value for money[56], prioritizing the interests of the private sector establishes the boundaries for pursuing other objectives[57]. This market-oriented approach also influences the mechanics of risk assessment within the EU.

[53] See R. YUKINS-M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 65-66. See also M. STEINICKE, *Qualifications and Shortlisting in EU Public Contract Law: Public Procurement And Beyond*, (M. TRYBUS, R. CARANTA and G. EDELSTAM eds.), Bruylant, 2014, 105-123.

[54] S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit., at 454-55. See also K. WAUTERS-S. BLEUX, *A New Generation of Public Procurement Directives: Background, Objectives and Results*, in *Eu Directive 2014/24 On Public Procurement: New Turn For Competition In Public Markets*, (Y. MARIQUE-K. WAUTERS eds.), Larcier, 2016, 8-10.

[55] S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit., at 454-55.

[56] Directive 2014/24, of the European Parliament and of the Council of 26 February 2014 on Public Procurement and Repealing Directive 2004/18/EC, 2014 O.J. (L 94) 65 (EU) [hereinafter *Public Procurement Directive*] (discussing the Most Economically Advantageous Tender as a method of evaluation that enables contracting entities to award a contract based on factors beyond price).

[57] S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit. at 455.

2.2.1 Exclusion from Procurement and Competition

In the context of the United States' exclusion determination, present responsibility factors significantly in decisions to exclude a contractor from competing for a solicited requirement in the United States[58]. The European Union's approach does not follow the exact same rationale. While non-selecting contractors based on economic and technical capabilities is not vastly different[59], proportionality of measures taken against contractors and the impact of such measures on market participation assumes a more prominent position in the European Union.

In the European Union's public procurement, proportionality means that the selection criteria and procedures used by contracting authorities must not be more restrictive than necessary to achieve the legitimate objectives of the procurement process[60]. The requirements imposed on contractors seeking to participate in public procurement must be proportionate to the value and complexity of the contract in question[61]. As applied to maintaining a proper level of competition between offerors, this condition is not intrinsically different from the

[58] See e.g., R. YUKINS-M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 52-53. See also S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit., at 469-70.

[59] See e.g., M. STEINICKE, *Qualifications and Shortlisting in EU Public Contract Law: Public Procurement And Beyond*, cit., at 109-122.

[60] *Public Procurement Directive, Art. 18.* See also P. KUNZLIK, *The 2014 Public Procurement Package: One-Step Forward and Two Back for Green and Social Procurement?*, in *EU Directive 2014/24 On Public Procurement: New Turn For Competition In Public Markets*, (Y. MARIQUE-K. WAUTERS eds.), Larcier, 2016, 192-95.

[61] P. KUNZLIK, *The 2014 Public Procurement Package: One-Step Forward and Two Back for Green and Social Procurement*, cit., at 192-93.

United States' approach[62]. However, the procedures taken by the European Union contracting officer to assess what the United States would call "responsibility" are more constrained. Unlike in the United States, requests for information to "demonstrate reliability despite the existence of an optional ground for exclusion" must be tied to the specifications identified in a solicitation or come from Member States' internal rules[63]. Thus, the contracting officer in the European Union does not have the same level of discretion that her counterpart in the United States has to assess the degree of risk in awarding a contract to a certain contractor. Considering the overarching goal of market integration, a European Union contracting official must adhere to a strict and clearly defined framework when making decisions about excluding contractors with a record of past misconduct, unless the contracting officer relies on mandatory exclusion grounds[64] or Member States choose to treat discretionary grounds as mandatory[65].

Admittedly, contracting officers in the European Union may exert practical autonomy and use the procurement system to de facto exclude a contractor from future

[62] See e.g., 10 U.S.C. § 2304 and 41 U.S.C. § 3301 (Full and open competition is the norm in U.S. public procurement. However, U.S. law permits restricting competition in certain circumstances). See also FAR 11.002 (stating the policy that chosen specifications should promote full and open competition and should not be unduly restrictive).

[63] See RTS infra BVBA, Aannemingsbedrijf Norré-Behaegel v. Vlaams Gewest, Case-387/19, ECJ (Jan. 14, 2021) (holding that self-cleaning (i.e., corrective) measures taken to rectify past conduct or non-compliance have direct effect, and offerors may be required to provide evidence of corrective actions when submitting offers if this requirement: (i) is explicitly specified in national legislation or (ii) "is brought to the attention of the economic operator concerned by means of the tender specifications").

[64] *Public Procurement Directive, Art. 57 (providing several grounds for mandatory exclusion).*

[65] J. KOHLEN, *Competition Law and Public Procurement – One Cannot Do Without the Other or Potentially Diverging Rules*, Bird & Bird Attorneys Ltd. (Oct. 12, 2021). Available at https://www.twobirds.com/en/insights/2021/global/antitrust-and-anticorruption-never-the-twain-shall meet#section7.

contract opportunities. However, the notion of de facto debarment or suspension takes a very different form in the European Union than in the United States. In the United States, the contracting officer's finding of non-responsibility may form the basis for debarment or suspension[66]. In the European Union, a finding that a contractor lacks capability to perform in a specific procurement does not lead to exclusion from public procurement opportunities per se. But "handicapping" the same contractor through "harsh evaluation" might become a de facto debarment[67] if past performance is used as a threshold to enter competition[68].

Because the European Union sees disqualification of a contractor from public procurement as a different normative measure[69], the limitation on agency discretion in assessing whether to award a public contract to a contractor, as compared to the United

[66] See e.g., T. J. CANNI, *Shoot First, Ask Questions Later: An Examination and Critique of Suspension and Debarment Practice Under the FAR, Including a Discussion of the Mandatory Disclosure Rule*, cit., at 55.

[67]See e.g., G. L. ALBANO, B. CESI, and A. IOZZI, *Public Procurement with Unverifiable Quality: The Case for Discriminatory Competitive Procedures*, SOAS Research Online (Oct. 24, 2016). Available at https://eprints.soas.ac.uk/31030/6/Albano_Public%20Procurement%20with%20Unverifiable%20Quality.pdf.

[68] According to *Public Procurement Directive, Art. 57(4)(g):* "Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator… where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions." However, Article 87 of the Treaty Establishing the European Community raises an issue of whether past performance may be used as a discriminative criterion in proposal evaluation. See Consolidated Version of the Treaty Establishing the European Community, Art. 87, 2006 O.J. C 321 E/37. Therefore, contracting authorities may only consider past performance in their decision of whether a contractor may submit an offer in response to a solicitation.

[69] As discussed in Part II.A, the United States requires an "affirmative determination of responsibility" before awarding a contract. FAR 9.103(b).

States' approach, underwrites the intent to conduct what effectively is the evaluation of continuing market participation potential[70].

The assessment of this potential is not made entirely before making awards. The European Union law provides for self-cleaning mechanism when a contracting authority uncovers a contractor's misconduct. Self-cleaning enables a contractor, who has engaged in behavior that would otherwise warrant suspension or debarment, to take remedial actions to mitigate the consequences by implementing corporate controls after the misconduct has been discovered[71]. The European Union's emphasis on rehabilitation is not fundamentally different from the United States' focus in present responsibility assessment. In the United States, rehabilitation plays a role in determining present responsibility[72]. In the European Union, however, failure to implement rehabilitation measures and make specific self-cleaning commitments results in exclusion[73]. The European Union, therefore, takes a retroactive approach to misconduct that has already occurred and demands specific positive actions to demonstrate responsibility.

[70] See e.g., S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit., at 469 (arguing that the European Union effectively does a rehabilitation assessment to determine whether contractors will qualify for future awards). See also discussion of self-cleaning in Section B.2. below.

[71] *Public Procurement Directive, Art. 57(6). See also* S. ARROWSMITH, H. J. PRIESS, and P. FRITON, *Self-Cleaning- An Emerging Concept in EC Public Procurement Law?,* in *Self-Cleaning In Public Procurement Law*, 4 (H. PüNDER, H. J. PRIESS and S. ARROWSMITH eds.), C. H. VERLAG, 2009, 6-11. See also S. SCHOENMAEKERS, *Self-Cleaning and Leniency: Comparable Objectives but Different Levels of Success?*, coll. 13 Eur. Procurement & Pub. Private Partnership L. Rev., 3, 2018, 6-8.

[72] See e.g., FAR 9.406-3(f) and FAR 9.407-3(e). Self-cleaning is not entirely different from administrative agreements in the United States. By entering into an administrative agreement with the government, the contractor typically concedes to its wrongdoing and may consent to various remedial measures.

[73] *Public Procurement Directive, Art. 57(6) (*Art. 57(6) requires: (i) collaboration with the investigating authorities; (ii) compensation for damages; (iii) removal of bad actors; and (iv) enactment of measures to prevent similar misconduct in the future).

2.2.2 Suspension and Debarment

In contrast to the prescriptive and uniform U.S. system of debarment and suspension, the European Union exclusion regime exhibits greater flexibility and variation among Member States. Article 57 of the Public Procurement Directive establishes a distinction between mandatory and discretionary grounds for exclusion[74]. These grounds largely mirror the criteria considered by suspending or debarring officials in the United States for assessing performance, reputational, and fiduciary risks[75]. The European Union, however, grants Member States the discretion to deviate from mandatory exclusion grounds under exceptional circumstances or when exclusion would be deemed disproportionate to the objectives of EU treaties[76]. Similarly, Member States have the authority to apply stricter exclusion measures and designate discretionary grounds under Article 57 as mandatory[77].

The European Union's decentralized approach creates varied application of suspension and debarment measures. The Public Procurement Directive lacks specificity regarding the delegation of decision-making authority for suspending or debarring a

[74] DIRECTIVE 2014/24/EU *of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, Art. 57* (on mandatory grounds, contractors may be excluded up to five years; on discretionary grounds, contractors may be excluded for three years). See also S. ARROWSMITH, H. J. PRIESS, and P. FRITON, *Self-Cleaning-An Emerging Concept in EC Public Procurement Law?,* cit., at 6-11.

[75] Compare DIRECTIVE 2014/24/EU *of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, Art. 57 to FAR. 9.406-1, FAR 9.406-2, FAR 9.407-1, and FAR 9.407-2.*

[76] DIRECTIVE 2014/24/EU *of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, Art. 57.*

[77] See J. KOHLEN, *Competition Law and Public Procurement – One Cannot Do Without the Other or Potentially Diverging Rules*, cit.

contractor. Article 57 mandates that contracting authorities make exclusion decisions on a case-by-case basis[78]. Essentially, decisions to exclude are left to contracting officers unless Member States' national legislation identifies a specific authority for making exclusion decisions[79]. This approach produces divergent application not only among Member States, but also within agencies[80]. Additionally, this approach raises concerns about the availability of the necessary expertise to assess the potential risk posed by a contractor[81].

The European Union's approach to self-cleaning also pre-determines the parameters of suspension and debarment. The European Union treats self-cleaning as a factor to readmit a contactor back into public competition[82]. Such a contractor may continue fulfilling existing contracts and compete for future public contracts if its "reliability is sufficiently established[83]". The Public Procurement Directive does not specify who is responsible for determining the contractor's reliability or to whom the evidence demonstrating the contractor's self-cleaning measures must be submitted. Article 57 delegates the responsibility

[78] See R. YUKINS-M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 68-69.

[79] Id, at 69-70 (referring to Recital 102 of *Public Procurement Directive and describing the approach to debarment/suspension in Germany and Hungary)*.

[80] See E. HJELMENG-T. SØREIDE, *Debarment In Public Procurement: Rationales And Realization*, in *Integrity and Efficiency in Sustainable Public Contracts*, (G. M. RACCA-R. YUKINS eds.), Bruylant, 2014, 12-14. Avaialable at https://papers.ssrn.com/sol3/papers.cfm?abstract_ id=2462868.

[81] See C.R. YUKINS - M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, at 68. See also S. SCHOENMAEKERS, *Self-Cleaning and Leniency: Comparable Objectives but Different Levels of Success?*, cit., at 8.

[82] *Public Procurement Directive, Art. 57(6)*. See also R. YUKINS-M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 62 and 67.

[83] *Public Procurement Directive, Art. 57(6).*

for making reliability assessments to contracting authorities and individual EU Member States[84].

2.2.3 European Single Procurement Document

In 2016, the European Commission introduced the European Single Procurement Document ("ESPD") to streamline the procurement process and reduce the administrative burden on contracting authorities and contractors[85]. The use of the ESPD is mandatory for all public procurement procedures above certain thresholds, which vary by the type of procurement[86]. However, the ESPD may also be used for procedures below the thresholds[87]. The ESPD became an exclusively online platform on April 18th, 2018[88].

[84] *Public Procurement Directive, Art. 57(6).* See also J. KOHLEN, *Competition Law and Public Procurement – One Cannot Do Without the Other or Potentially Diverging Rules*, cit.

[85] Commission Implementing Regulation of 5 January 2016 Establishing the Standard Form for the European Single Procurement Document, 2016 O.J. (L 3) (EU) [hereinafter ESPD Implementing Regulation]. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0007.

[86] ESPD Implementing Regulation, supra note 85, at L 3/18. See also EU Commission, *Thresholds*, (2023) (providing information on thresholds for different types of procurements and procedures). Available at https://single-market-economy.ec.europa.eu/single-market/public-procurement/legal-rules-and-implementation/thresholds_en.

[87] ESPD Implementing Regulation, supra note 85, at L 3/18.

[88] European Commission, European Single Procurement Document (ESPD) (2023). Available at https://ec.europa.eu/isa2/solutions/european-single-procurement-document-espd_en/.

The ESPD effectively dispenses with a pre-qualification questionnaire solicited from contractors as part of the public procurement process[89]. The ESPD allows contractors to self-certify that they meet eligibility criteria for public procurement contracts by providing information about their commercial capability, qualification for a specific procurement procedure, and existence of exclusion grounds[90]. Additionally, contractors may provide information on quality assurance plans or environmental practices[91]. Contracting authorities must accept contractors' self-declaration[92].

Self-cleaning also factors into the information provided in the ESPD. Through self-certification in the ESPD, a contractor may reveal grounds for exclusions. However, such disclosure will not automatically make the contractor ineligible for participation in a procurement. The contractor may include in its ESPD self-certification the measures it has taken or is taking to self-clean[93]. In essence, the contractor provides the type of information

[89] See ESPD Implementing Regulation supra note 85. See also Understanding the ESPD: A Guide for Suppliers, Achilles Industry Insights (2023). Available at https://www.achilles.com/industry-insights/understanding-espd-guide-suppliers/.

[90] ESPD Implementing Regulation, supra note 86, at L 3/20-3/21.

[91] Id.

[92] See A. SUNDSTRAND, *International Procurement Developments in 2016-Part III: The European Union's New Procurement Rules*, Gov't Contracts Year in Rev. Br. 5 (Thomson Reuters, 2017).

[93] See Guide to Self-Cleaning in European Public Procurement Procedures, Dentons, 38 and 45 (2021) [hereinafter Dentons Guide to Self-Cleaning]. Available at https://www.dentons.com/en/insights/guides-reports-and-whitepapers/2021/april/13/guidetoselfleaningineuropeanpublicprocurementprocedures#:~:text=Drawing%20on%20the%20knowledge%20and,focus%20on%20what%20%20in%20practice%20–. While discussing the use of ESPD in the case of Poland, Dentons makes an interesting observation about arguments proffered by parties in European courts: "It is also considered by a strong majority of experts to be a general rule that a self-cleaning should be performed at the stage of submitting the ESPD. However, in newer case law a stance to the contrary is sometimes presented, arguing that the contractors should be allowed to perform a self-cleaning procedure at a later stage, as

similar to what the U.S. government would ordinarily negotiate with contractors in an administrative agreement, albeit without the formality of having both parties specifying the measures to ensure compliance[94].

The European Union does not centrally manage the ESPD database. Member States administer their own ESPD platforms, which allow for access for entities or individuals from outside of the Member State[95]. The European Union sees integration with national databases as a major benefit in transitioning to eProcurement[96]. Unlike SAM.gov in the United States, however, the ESPD is still in development stages but is largely seen as having a major facilitator of "cross-border participation in public procurement procedures[97]".

In the interest of comparing the European exclusion approach to the United States' system and presenting a fuller picture of the European approach to publicizing exclusions, it should be noted that the ESPD does not have a database that lists excluded entities or individuals[98]. The European Union accomplishes what a U.S. practitioner would call

preventing the contractor from carrying out a self-cleaning procedure after a ground for exclusion is established would essentially lead to automatic exclusion."

[94] FAR 9.406-3(f). See R. YUKINS-M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 64 (describing administrative agreements). See also R. YUKINS, *Cross-Debarment: A Stakeholder Analysis*, cit., at 223. See also *DHS Debarment Management*, supra note 14.

[95] See e.g., European Commission, List of European Single Procurement Directive (ESPD) Providers (Feb. 16, 2022). Available at https://ec.europa.eu/docsroom/documents/48856.

[96] European Commission, European Single Procurement Document and eCertis (2023). Available at https://single-market-economy.ec.europa.eu/single-market/public-procurement/digital-procurement/european-single-procurement-document-and-ecertis_en.

[97] ESPD Implementing Regulation, supra note 85, at L 3/16.

[98] Virtual Discussion with M. SHMIDT (Policy Officer and eProcurement Expert at the European Commission), R. YUKINS (Lynn David Research Professor in Government Procurement Law at the George Washington University Law School), G. M. RACCA (Professor of Administrative Law at the University of Turin), P. A. ARANDA

blacklisting via the Early Detection and Exclusion System ("EDES")[99]. The function of the EDES overlaps with the ESPD, in that the EDES aims at preventing fraudulent actors from receiving public funds[100]. However, the EDES depends on shared management between the European Commission and Member States[101]. And Member States are not transparent about their exclusion practices[102]. The number of blacklisted entities in the EDES is extremely small[103]. The scarcity of data on exclusions from Member States stems partly from the discretion they hold in applying exclusions to public funds they manage[104].

(Knowledge Management Assistant, Publications Office of the European Union), and F. GORGERINO (PhD Student at the University of Turin) via Zoom (Nov. 22, 2023) [hereinafter Virtual Discussion Nov. 22, 2023).

[99] European Commission, Early Detection and Exclusion System (EDES) (2023) [hereinafter EDES Database]. Available at https://commission.europa.eu/ strategy-and-policy/eu-budget/how-it-works/annual-lifecycle/ implementation/antifraudmeasures/edes_en#:~:text=The%20purpose%20of%20the%20EDES,%2C%20bodies% 2C%20offices% 20or%20agencies. Unlike the ESPD, which derives its basis from Directive 2014/24/EU, the European Financial Regulation provides the rules for the EDES. See Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the Financial Rules Applicable to the General Budget of the Union, Amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012. 2018 O.J. (L 193) (EU), Art. 136 [hereinafter Financial Regulation].

[100] Financial Regulation, supra note 97.

[101] See Special Report 11-22, Protecting the EU Budget-Better Use of Blacklisting Needed, European Court of Auditors (2022) [hereinafter EU Court of Auditors Special Report]. Available at https://www.eca.europa.eu/Lists/ ECADocuments/SR22_11/SR_Blacklisting_economic_operators_EN.pdf.

[102] Id.

[103] As of November 22nd, 2023, the EDES contained only five listed entities. Available at https://commission.europa.eu/strategy-and-policy/eu-budget/how-it-works/annual-lifecycle/implementation/anti-fraud-measures/edes/edes-database_en.

[104] EU Court of Auditors Special Report, supra note 101, at 40-44.

2.3 Comparative summary of Risk Assessment in the United States and the European Union

The United States and the European Union public procurement systems differ in how they prioritize public procurement goals in risk assessment. The United States aims at promoting public trust and integrity to achieve best value[105], while the European Union places more focus on promoting a single European market and recognizing Member States as subsidiary sovereigns with distinct public procurement systems[106]. In furtherance of its goals, the United States relies on a multifaceted approach to assessing responsibility prior to awarding a contract. The concept of responsibility consists of qualification assessment and integrity assessment by ensuring that contractors have adequate compliances systems[107]. The European Union, on the other hand, maintains a system of risk assessment that is largely dependent on proportionality of measures applied to contractors[108]. In other words, the

[105] See e.g., R. YUKINS and M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 52. See also S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit., at 454-55.

[106] See e.g., EU Court of Auditors Special Report, Executive Summary, supra note 101, at 4-6. See also S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit., at 454-55 and 469.

[107] See e.g., FAR 9.402(a). See also R. YUKINS-M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 55.

[108] See S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit., at 455-56 (discussing the Treaty on the Functioning of the European Union ("TEFU"), the concepts of proportionality and subsidiarity, and Directive-prescribed exclusions). See also *Public Procurement Directive, Art. 18.* See also P. KUNZLIK, *The 2014 Public Procurement Package: One-Step Forward and Two Back for Green and Social Procurement?*, in *EU Directive*

measures chosen to exclude must be proportionally related to the clearly denoted contract specifications or methods of procurement. In fact, a European contracting authority would look at the commonly recognized minimum standards for exclusion (i.e., mandatory grounds for exclusion) first and then would conduct what a United States counterparts usually characterizes a qualification assessment[109]. Any decision to exclude in the European Union also takes into consideration a contractor's corrective measures to overcome past misconduct and commitment to ethical and compliant practices[110].

Because the European Union's policies may not be overly prescriptive towards national practices, the European Union's suspension and debarment system includes only the fundamental minimum elements necessary to maintain and promote the goals of its exclusion system[111]. Member States may still enact provisions on exclusion that differ from other Member States, contributing to non-uniform procurement systems throughout Europe[112]. By contrast, the United States' centralized suspension and debarment system is highly prescriptive by design and provides procedural, blacklisting, and due process

2014/24 On Public Procurement: New Turn For Competition In Public Markets, at 192-93. See also RTS infra BVBA, Aannemingsbedrijf Norré-Behaegel v. Vlaams Gewest.

[109] Virtual Discussion Nov. 22, 2023.

[110] *Public Procurement Directive, Art. 57(6).* See also Dentons Guide to Self-Cleaning, supra note 92. See also S. ARROWSMITH, H. J. PRIESS, and P. FRITON, supra note 70, at 6-11. See also [110] C.R. YUKINS-M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, at 67. See also S. SCHOENMAEKERS, *Self-Cleaning and Leniency: Comparable Objectives but Different Levels of Success?*, cit., at 7.

[111] See e.g., S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit.at 456 (discussing the TEFU, Article 57 of the *Public Procurement Directive outlining* the minimum exclusion grounds Member States must incorporate in national legislation, and Member States enacting provisions on exclusion that differ from other EU states).

[112] Id.

requirements[113]. The United States also assigns suspension and debarment decisions to senior personnel who function independently of contracting personnel[114]. Retaining such decision-making within more experienced and independently-functioning personnel ensures uniformity in approach without restricting the discretion vested in debarring and suspending officials. The European Union, on the other hand, largely relies on decisions of contracting authorities made on a case-by-case basis[115].

These differences in approaches do not necessarily indicate that the European Union and the United States have inherently dissimilar public procurement systems. Divergent approaches on incentivizing compliance, agency discretion, responsibility assessment (i.e., present in the United States versus evolving in the European Union), and debarment or suspension regimes do not provide compelling evidence that conceptually both procurement systems differ significantly. The methods or procedures employed to safeguard the integrity of the public procurement process are what set the two systems apart.

Both procurement systems, however, share the undesirable characteristic of lacking meaningful transparency, which hinders the removal of market barriers that impede cross-Atlantic competition. SAM.gov in the United States is meant to serve as a transparent hub for contractor qualification and integrity information[116]. In practice, it is not. The opt-out

[113] See FAR Subpart 9.4. See also R. YUKINS-M. Kania, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 59-65.

[114] See R. YUKINS-M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 58. See also S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit., at 458.

[115] See *Public Procurement Directive, Art. 57.* See also R. YUKINS-M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 68-69.

[116] See e.g., System for Award Management/Non-Federal User Guide-v.2.7, General Service Administration (Jan. 25, 2020). See also FAR Subpart. 9.4.

option provided to certain contractors on this database is difficult to reconcile[117]. This practice contradicts existing statutory mandates. The Open, Public, Electronic and Necessary (OPEN) Government Data Act ("OPEN Data Act") explicitly requires that agencies make data available in a machine-readable and open format, meaning they must publicly disclose data that would otherwise be made available under the Freedom of Information Act ("FOIA")[118]. Certifications and representations submitted by contractors to the GSA do not invoke FOIA exemptions[119]. Furthermore, any administrative agreement negotiated between the U.S. Government and a contractor must be published on SAM.gov[120]. This requirement for public disclosure of administrative agreements, coupled with the publicly available exclusion list on SAM.gov and the provisions of the OPEN Data Act, suggests that contractors' records of integrity and other information necessary to assess their qualifications must be made accessible through public search, unless proprietary or confidential information is involved.

The European Union's exclusion database, integrated within the EDES system, is also strikingly deficient and lacking in content. This lack of information on excluded contractors and the limited number of listed entities reflect the delicate balancing act between the European Commission and Member States[121]. Absent meaningful input from Member

[117] One plausible explanation is the GSA's attempt to reduce transaction costs. But the result is the same: the GSA limits access to information that is supposed to be in the public domain.

[118] Pub. L. No. 115-435 (2019) (OPEN Data Act is also referred to as Title II of the Foundations for Evidence-Based Policymaking Act of 2018). See also U.S Congressional Research Service, The OPEN Government Data Act: A Primer (Dec. 29, 2022). Available at https://sgp.fas.org/crs/secrecy/IF12299.pdf.

[119] See 5 U.S.C. § 552 (containing several exemptions, to include exemptions for releasing contractor confidential and proprietary information). See also U.S Congressional Research Service, The Freedom of Information Act (FOIA): A Legal Overview (Aug. 24, 2020). Available at https://crsreports.congress.gov/ product/pdf/R/R46238.

[120] See FAR 9.406-3(f) and 9.407-3(e). See also FAR 52.203-13. See also R. YUKINS-M. KANIA, *Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement*, cit., at 71.

[121] See e.g., EU Court of Auditors Special Report, supra note 99.

States, the EDES exclusion list's minimal content provides negligible utility to contracting professionals on both sides of the Atlantic.

Moreover, both the United States and European Union do not provide a comprehensive list of underlying reasons for exclusions on SAM.gov or the ESPD or the ESPD[122]. Considering divergent mechanisms embedded within integrity assessment in both procurement systems, understanding the underlying grounds for being on an exclusion list or being allowed to continue participating in public procurement via an administrative agreement or implemented self-cleaning measures is crucial in both jurisdictions.

The absence of clear and consistent reasoning behind exclusion decisions – as well as of shared understanding of the distinctions outlined in the previous sections – poses a significant obstacle to the liberalization of trade in the public procurement domain between the United States and the European Union. Consider, for example, a U.S. contracting officer looking at the ESPD and seeing an affirmative statement about grounds for exclusion that were established after the award and during the course of contract performance. Now let us add into the equation the lack of a corresponding administrative agreement and compound confusion of the U.S contracting officer by the fact that the contractor is still performing under its current contract. To make matters even more confusing, the ESPD may also contain a self-certifying statement from the same contractor that it had no exclusion grounds to report. Unless the U.S. contracting officer understands what self-cleaning is and how it allows contractors to avoid exclusion even when they have engaged in misconduct or made an incorrect affirmative representation in the ESPD, she may conclude that the European contractor is not responsible or qualified for the award. Self-cleaning may incentivize

[122] See GSA Searching Exclusions, supra note 37. See also SAM.gov-Exclusion Types, supra note 51. See also, SAM.gov-Legacy CT Codes, supra note 51. See also SAM.gov-Entity Information, supra note 52. See also Virtual Discussion Nov. 22, 2023. See also EDES Database, supra note 98.

contractor compliance in the European Union, but this remedial and rehabilitation measure is not present in the U.S. system in the same form[123].

Conversely, European contracting officers may encounter similar challenges when accessing information on SAM.gov. Consider, for instance, an entry for a company listed on the exclusion list with a voluntary exclusion or an ineligible status (proceeding pending). Further complicating this scenario is the absence of information in the "Additional Comments" section or the use of boilerplate language copied from an existing U.S. regulation for some contractors[124]. For contracting officers – and not only European contracting officers, but all contracting officers in general – such entries on SAM.gov are meaningless, as they provide insufficient information to make informed decisions regarding the company's eligibility for participation in public procurement. In essence, the information on SAM.gov, while potentially raising additional questions about contractors, fails to provide the necessary guidance for contracting officials to make sound judgments regarding market participation. The outcome in both scenarios is likely similar. At best, contracting officers may resort to requesting further information from contractors, leading to delays in award issuance. At worst, they may reach erroneous conclusions. This lack of translatable standards and consistency in information exchange can hinder cross-Atlantic competition and impede efficient public procurement processes.

[123] See S. HARUTYUNYAN, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, cit., at 460-476 (discussing incentivizing compliance and using self-cleaning in what the United States calls responsibility assessment).

[124] See e.g., SAM.gov-Search-Entity Information-Exclusions, General Services Administration (2023) (with "Voluntary Exclusions" and "Ineligible Status (Proceeding Pending)" filters chosen). Available at https://sam.gov/search/?index=ex&sort=relevance&page=1&pageSize=25&sfm%5BsimpleSearch%5D%5BkeywordRadio%5D=ALL&sfm%5Bstatus%5D%5Bis_active%5D=true&sfm%5BexclusionType%5D%5BexclusionType%5D%5B0%5D=true&sfm%5BexclusionType%5D%5BexclusionType%5D%5B2%5D=true&sfm%5BexclusionType%5D%5BexclusionType%5D%5B4%5D=true.

3. RECENT DEVELOPMENTS IN PUBLIC PROCUREMENT IN THE UNITED STATES AND THE EUROPEAN UNION

Notwithstanding the identified distinctions in risk assessment in the United States and European Union, both regions recognize the importance of ensuring efficient public procurement practices. In fact, recent developments in the United States and the European Union reveal a parallel trajectory in their approaches to identifying and mitigating persistent or emerging risks in public procurement, while also navigating the challenges posed by the modern economy.

3.1 Procurement Collusion Strike Force in the United States

In November 2019, the Department of Justice established the Procurement Collusion Strike Force ("PCSF"), a multi-agency collaboration comprising of the Department of Justice ("DOJ") Antitrust Division and U.S. Attorney's Offices, the Federal Bureau of Investigation, the Department of Defense, and Inspector General Offices[125]. The PCSF's mission is to prevent, identify, investigate, and prosecute antitrust offenses linked to government procurement, grants, or other public funding programs[126]. The Biden Administration's

[125] Press Release, Justice Department Announces Procurement Collusion Strike Force: A Coordinated National Response to Combat Antitrust Crimes and Related Schemes in Government Procurement, Grant and Program Funding, Department of Justice Office of Public Affairs (Nov. 5, 2019), Available at https://www.justice.gov/opa/pr/justice-department-announces-procurement-collusion-strike-force-coordinated-national-response.

[126] Id.

substantial resource allocation to the PCSF underscores the high priority placed on investigating collusive conduct in public procurement[127].

The PCSF has rapidly emerged as a robust enforcement mechanism. Since its inception, the PCSF has launched over 100 criminal investigations and prosecuted more than 65 companies and individuals, involving more than $500 million worth of public contracts[128]. The DOJ has reported the PCSF's prosecution of anticompetitive offenses in industries ranging from construction and defense contracting to transportation, poultry, aerospace, and healthcare.[129] Additionally, the PCSF has pursued anticompetitive conduct across federal, state, and local procurements[130].

Moreover, the PCSF has expanded its work beyond the U.S. borders and sought cooperation with other governments to eradicate collusive practices from public procurement. In a significant move to uphold fair competition, the United States, Mexico, and Canada have launched a joint initiative against collusive schemes related to the provision of goods and services associated with the upcoming 2026 FIFA World Cup[131]. Alongside

[127] M. A. FREEMAN-E.A.N. HAAS, *Procurement Collusion Strike Force Acts Broadly and Often in 2022*, Foley and Lardner, LLP (Oct. 20, 2022). Available at https://www.foley.com/insights/publications/2022/10/ procurement-collusion-strike-force-2022/.

[128] Press Release, Justice Department's Procurement Collusion Strike Force Holds Its First Summit to Discuss Strategies to Combat Emerging Threats, Department of Justice Office of Public Affairs (Nov. 17, 2023), Available at https://www.justice.gov/opa/pr/justice-departments-procurement-collusion-strike-force-holds-its-first-summit-discuss.

[129] M. A. FREEMAN-E.A.N. HAAS, *Procurement Collusion Strike Force Acts Broadly and Often in 2022*, cit.

[130] Speech, Assistant Attorney General Jonathan Kanter of the Antitrust Division Testifies Before the Senate Judiciary Committee Hearing on Competition Policy, Antitrust, and Consumer Rights, Department of Justice Office of Public Affairs (Sept. 20, 2022). Available at https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-testifies-senate-judiciary.

[131] Press Release, United States, Mexico, and Canada Launch Joint Initiative to Detect Collusive Schemes to Exploit the 2026 FIFA World Cup, Department of Justice Office of Public Affairs (Sept. 22, 2023), Available at

Mexico's Federal Economic Competition Commission and Canada's Competition Bureau, the DOJ aims to deter, detect, and prosecute any potential anti-competitive activities that may hinder the seamless organization of this sporting event[132]. This initiative underscores the commitment of the United States to not only safeguarding the integrity of the 2026 FIFA World Cup, but also to ensuring fair competition for businesses seeking to participate in the event. This collaboration also fosters stronger ties between the enforcement agencies, enhancing their ability to tackle cross-border antitrust violations.

3.2 2021 Notice on Tools to Fight Collusion and on Guidance on How to Apply Related Exclusion Grounds in the European Union

In March 2021, the European Commission adopted the Notice on Tools to Fight Collusion in Public Procurement and on Guidance on How to Apply the Related Exclusion Grounds ("Notice")[133]. In the introduction, the Notice expressly identified collusion as "a recurring phenomenon… that poses a major risk for efficient public spending, undermines the benefits of a fair procurement market, and discourages participation in" public

https://www.justice.gov/opa/pr/united-states-mexico-and-canada-launch-joint-initiative-detect-collusive-schemes-seeking.

[132] Id.

[133] Notice on Tools to Fight Collusion in Public Procurement and on Guidance on How to Apply the Related Exclusion Grounds 2021/C91, 2021 O.J. C.91 (EU) [hereinafter Notice].

procurement[134]. The Notice recognized that the Public Procurement Directive offered no guidance on the interpretation of Article 57(4)(d)[135] and attempted to clarify its application[136]. The Notice provides various examples of potential indicators of collusion for contracting authorities[137]. It also outlines a set of factors to consider, to include ongoing investigations by Member States[138]. Additionally, it encourages the examination of exclusion decisions made by other contracting officers[139]. While exclusion decisions made in other jurisdictions are not binding and insufficient by themselves to warrant exclusion, they may be considered as relevant evidence[140].

[134] Id, para. 1.1, at C 91/3.

[135] DIRECTIVE 2014/24/*EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, Art. 57(4)(d), states: "Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator...where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition."*

[136] Notice, paras. 5.2-5.4, at C 91/12-17. See also J. KOHLEN, *Competition Law and Public Procurement – One Cannot Do Without the Other or Potentially Diverging Rules*, cit. See also W. HARTUNG-K. KUZNA, *EC Notice on How to Tackle Collusion in Public Procurement: A Step Forward or a Stall for Time?,* coll. 16 Eur. Procurement & Pub. Private Partnership L. Rev. 110, 11-12 (2021).

[137] Notice, para. 5.4, at C 91/15-17.

[138] Id, at C 91/15. See also J. KOHLEN, *Competition Law and Public Procurement – One Cannot Do Without the Other or Potentially Diverging Rules*, cit.

[139] Id, at C 91/15. See also J. KOHLEN, *Competition Law and Public Procurement – One Cannot Do Without the Other or Potentially Diverging Rules*, cit. See also W. HARTUNG-K. KUZNA, *EC Notice on How to Tackle Collusion in Public Procurement: A Step Forward or a Stall for Time?,* at 113-14.

[140] See also J. KOHLEN, *Competition Law and Public Procurement – One Cannot Do Without the Other or Potentially Diverging Rules*, cit., (referring to *Delta Antrepriză* de Construcţii şi Montaj, C*ase C-267/18*, ECJ (May. 8, 2019)).

In fairness, some commentators criticized the Notice for not providing a more concrete guidance and not going sufficiently far to address collusion[141]. However, the true impact of the Notice lies not in its professed simplification of Article 57 of the Public Procurement Directive for contracting authorities. Rather, the Notice underscores the importance of a comprehensive approach to combating collusion in public procurement. By drawing the focus of contracting authorities to addressing collusion, the Notice contributes to safeguarding the integrity of public procurement. The success of this approach will depend on the collaboration between relevant stakeholders, working together to uphold fair competition and efficient allocation of public resources.

3.3 Initiatives to Address Climate Change in Public Procurement

3.3.1 Increased Focus on Sustainability in the United States

The Biden Administration's initiatives expressed in several executive orders have directed the focus of federal agencies to reorienting the federal procurement process towards more sustainable procurement[142]. These executive orders aim at establishing science-based

[141] See e.g., J. KOHLEN, *Competition Law and Public Procurement – One Cannot Do Without the Other or Potentially Diverging Rules*, cit. See also W. HARTUNG-K. KUZNA, *EC Notice on How to Tackle Collusion in Public Procurement: A Step Forward or a Stall for Time?,* cit.

[142] See e.g., Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 20, 2021). See also Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021). See also Exec. Order No. 14030, 86 Fed. Reg. 27967 (May 25, 2021). See also Exec. Order No. 14075, 86 Fed. Reg. 70935 (Dec. 8, 2021). See also N. GREEN-R. YUKINS, *The Inflation Reduction Act: A New Role for Green Procurement*, 64 No. 33 Gov't Contractor 260 (Aug. 31, 2022). See also R. YUKINS, *Understanding Biden's 'Green' Federal Procurement Order*, Bloomberg Law (Jan. 7, 2022). Available at https://news.bloomberglaw.com/ environment-and-energy/understanding-bidens-green-federal-procurement-order. See also R. YUKINS, *International Procurement Law: Key Developments 2020-Part I: Assessing the Trade Agenda for Government Procurement in the Biden Administration*, Government Contracts Year in Review (Thomson Reuters, 2021) (discussing challenges and initiatives to address global warming through procurement). Available at https://publicprocurementinternational. com/2021/01/29/biden-trade-policy-procurement/. See also President Issues

greenhouse gas ("GHG") emission reduction targets, requiring large federal contractors to disclose their emissions, and overall leveraging federal procurement spending to advance sustainability goals[143].

Notably, the Biden Administration issued a directive on September 21, 2023, instructing federal agencies to integrate interim social cost of GHG estimates into various agency actions, including procurement activities[144]. This directive aligns with Executive Order 13990 and facilitates the Federal Acquisition Regulatory Council's ("FAR Council") efforts to finalize proposed modifications to the FAR aimed at minimizing the risk of climate change impacts from major federal procurements.[145] While the FAR Council has not yet issued a proposed rule, Executive Order 14030 directed the FAR Council to, "*where*

EOs on Contract Prisons, Racial Equity, Climate Change, Pandemic Supplies, 63 No. 5 Gov't Contractor 30 (Feb. 3, 2021).

[143] Exec. Order No. 13990. See also Exec. Order No. 14008. See also Exec. Order No. 14030. See also Exec. Order No. 14075. See also Implementing Instructions for Executive Order 14057 Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability, The White House Council on Environmental Quality (Aug. 2022). Available at https://www.sustainability.gov/pdfs/EO_14057_Implementing_Instructions.pdf.

[144] Presidential Statement, Fact Sheet: Biden-Harris Administration Announces New Actions to Reduce Greenhouse Gas Emissions and Combat the Climate Crisis, The White House (Sept. 21, 2023). Available at https://www.whitehouse.gov/briefing-room/statements-releases/2023/09/21/fact-sheet-biden-harris-administration-announces-new-actions-to-reduce-greenhouse-gas-emissions-and-combat-the-climate-crisis/. This directive also compels the Interagency Working Group on the Social Cost of GHG, established under Executive Order 13990, to substantially increase the monetary valuation of damages associated with each component emission contributing to the social cost of GHG.

[145] See Exec. Order No. 13990, Sec. 5. See also Federal Acquisition Regulations: Minimizing the Risk of Climate Change in Federal Acquisitions, 86 Fed, Reg. 57404 (Oct. 15, 2021) (opening FAR Case 2021-16) [hereinafter Proposed FAR Rule]. See also P. FREEMAN and L. M. CAMPOS, *Biden Administration Moves Closer to Establishing Framework for Giving Preference to Bids and Contractors with Lower GHG Emissions*, Crowell & Morning, LLP (Oct. 3, 2023). Available at https://www.crowell.com/en/insights/client-alerts/biden-administration-moves-closer-to-establishing-framework-for-giving-preference-to-bids-and-contractors-with-lower-ghg-emissions.

appropriate and feasible, giv[e] preference to bids and proposals from suppliers with a lower social cost of GHG emissions[146]". In other words, sustainable considerations will likely become part of qualification and responsibility assessment in the U.S. federal procurement process. There is a growing consensus within the U.S. Government recognizing importance of sustainable procurement and stricter regulations for federal contractors to procure environmentally friendly goods and services[147].

3.3.2 Increased Focus on Sustainability in the European Union

The European Union has adopted a comprehensive approach to environmental sustainability in public procurement, guided by its treaty-based commitment to environmental protection[148]. Procuring authorities leverage public procurement to achieve

[146] Exec. Order No. 14030, Sec. 5. See also Proposed FAR Rule, supra note 144.

[147] See e.g., R. YUKINS, *International Procurement Law: Key Developments 2020-Part I: Assessing the Trade Agenda for Government Procurement in the Biden Administration*, cit. See also P. FREEMAN and L. M. CAMPOS, *Biden Administration Moves Closer to Establishing Framework for Giving Preference to Bids and Contractors with Lower GHG Emissions*, cit.

[148] See Consolidated Version of the Treaty on the Functioning of the European Union, Dec. 26, 2012 O.J. (C326/49), Art. 7 and Art. 11 [hereinafter TFEU]. When read together with Article 11, Article 7 necessitates balancing of various objectives against the fundamental EU objective of sustainable development. Consequently, the EU must ensure that policies and institutional actions are implemented with consideration of impacts on environmental quality. See also B. SJÅFJELL, *The Legal Significance of Article 11 TFEU for EU Institutions and Member States*, in *The Greening of European Business Under EU Law: Taking Article 11 TFEU Seriously*, (B. SJÅFJELL-A. WIESBROCK eds.), 2014, 51-72. See also M. ANDRECKA-K. P. MITKIDIS, *Sustainability Requirements in EU Public and Private Procurement – a Right or an Obligation?*, Nordic J. Com. L, 1, 2017, 56 (arguing that sustainability represents an obligation in EU law).

environmental benefits by prioritizing the acquisition of goods and services with minimal environmental impact[149]. This necessitates businesses to adapt to meet these requirements.

To encourage businesses to adopt sustainable practices, the European Union has implemented new corporate sustainability reporting regulations in alignment with the European Green Deal[150]. These regulations aim to achieve a net GHG emission reduction of at least 55% by 2030[151]. The Corporate Sustainability Reporting Directive ("CSRD"), effective January 5, 2023, mandates companies to disclose their environmental risks and the environmental impact of their operations[152]. The CSRD applies not only to EU companies, but also to non-EU entities with substantial operations within the European Union or seeking

[149] See M. WREDE, Sustainable Purchasing in the Aftermath of the ECJ's "Max Havelaar" Judgement, 7-2 Eur. Procurement & Pub. Private Partnership L. Rev. 110 (2012) (discussing the development of sustainable purchasing in the ECJ's case law). See also B. M. ROMERO-R. CARANTA, *EU Public Procurement Law: Purchasing Beyond Price in the Age of Climate Change*, Eur. Procurement & Pub. Private Partnership L. Rev., 12-3, 281, 284-92, 2017 (discussing integration of climate change objectives into EU law).

[150] The European Green Deal, European Commission (2023) [hereinafter EU Green Deal]. Available at https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en. See also Briefing-Implementation Appraisal, Non-Financial Reporting Directive, European Parliament (2021). Available at https://www.europarl.europa.eu/RegData/ etudes/BRIE/2021/654213/EPRS_BRI(2021)654213_EN.pdf.

[151] See EU Green Deal.

[152] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 Amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as Regards Corporate Sustainability Reporting, 2022 O.J. (L 322) EU) [hereinafter *CSRD*]. Prior to the CSRD, the European Union required reporting of scope 1 and 2 emissions by publicly traded companies. The CSRD introduced reporting of scope 3 emissions, which involve indirect emissions (excluded from scope 2) in the value chain of the reporting company, upstream and downstream. Scope 1 emissions include direct emissions. Scope 2 emissions include indirect emissions from controlled energy generators. See FAQ, Greenhouse Gas Protocol (2023). Available at https://ghgprotocol.org/sites/default/files/standards_supporting/ FAQ.pdf

to establish substantial operations in the region[153]. The new rules will be implemented gradually, commencing in 2024 for applicable companies[154].

A noteworthy feature of the CSRD is a significant shift in corporate reporting practices by broadening its application beyond a company's immediate operations to encompass the environmental and social impacts of its material value chain partners[155]. This expanded reporting obligation applies to value chain partners who are not directly subject to CSRD reporting requirements[156]. To ensure the availability of relevant data, the CSRD thus empowers contracting authorities to request information, including the potential introduction of contractual terms specifically mandating the provision of this data[157].

4. CONCLUSION: TOWARDS A MEANINGFUL COOPERATION

The overarching objective of this paper was to advocate for cooperation in risk assessment within public procurement between the United States and the European Union. By conducting a comparative analysis of risk assessment methodologies employed in both systems, the paper highlighted that both systems pursue similar goals, albeit through distinct

[153] CSRD. See also G. NORMAN, S. TOMS, and K. GAMBLE, *The EU Corporate Sustainability Reporting Directive: To Whom Does it Apply and What Should EU and Non-EU Companies Consider?*, Skadden, Arps, Slate, Meagher & Flom LLP (Jan. 9, 2023) [hereinafter Skadden Analysis], Available at https://www.skadden.com/insights/publications/2023/01/qa-the-eu-corporate-sustainability-reporting-directive. See also Client Alert-Commentary, The EU Corporate Sustainability Reporting Directive – How Companies Need to Prepare, Latham & Watkins LLP (Ja. 27, 2023) [hereinafter Latham & Watkins Commentary]. Available at https://www.lw.com/admin/upload/SiteAttachments/Alert%203059.pdf.

[154] CSRD. See also Skadden Analysis, supra note 152. See also Latham & Watkins Commentary, supra note 153.

[155] CSRD. See also Latham & Watkins Commentary, supra note 153.

[156] CSRD. See also Latham & Watkins Commentary, supra note 153.

[157] Latham & Watkins Commentary, supra note 153.

mechanisms. One common shortcoming identified in both systems is the absence of meaningful transparency in the implementation of publicly accessible digital platforms designed to facilitate translation of standards and information essential for informed risk assessment decisions. Subsequently, the paper examined recent developments on both sides of the Atlantic that have ramifications for risk assessment approaches and are poised to shape future practices. These parallel developments exhibit remarkable similarities and have evolved in tandem. Considering this backdrop, regulatory cooperation in public procurement to foster mutually recognized objectives in risk assessment and prevent the erection of trade barriers through the distortion of public procurement practices represents a crucial step forward.

However, the precise form of such cooperation remains an open question. Further research is warranted to assess the feasibility of establishing a system that enables seamless and transparent data exchange between the United States and the European Union. Encouragingly, progress towards creating an information-sharing database has already been initiated. The European Union has developed a system to provide information on third-country procurement practices through Access2Markets, a tool designed to facilitate enhanced cross-border transactions[158]. Similarly, the University of Cambridge and University College London have established Tender-X with the aim of compiling summaries of public procurement data for entities involved in public procurement activities[159]. Neither platform provides a comprehensive solution to the concerns expressed in this paper. However, these

[158] Access2Markets, Exporting from the EU, Importing into the EU – All You Need To Know, European Commission (2023). Available at https://trade.ec.europa.eu/access-to-markets/en/home.

[159] Tender-X Overview, Tender-X Risk Consultancy (2023). Available at https://www.tenderx.eu. Tender-X generates reports on businesses and public organizations. These reports essentially make a risk assessment for each analyzed entity and assign overall scores based on collected data. Some of this data seems to be transposed from the Tenders Electronic Daily, a European Union electronic platform that provides public access to procurement notices and other public procurement information.

initiatives could serve as a foundation to expand from for a potential information-sharing database.

Moreover, cooperation between the United States and the European Union could manifest in the form of a bilateral treaty. Both governments may consider reviving the negotiation of the Transatlantic Trade and Investment Partnership ("TTIP"). The TTIP sought to enhance market access through regulatory cooperation that promoted the harmonization of standards between the European Union and the United States[160]. Alternatively, both governments could look to the Comprehensive Economic and Trade Agreement ("CETA") between Canada and the European Union[161]. The CETA fosters a more open, transparent, and efficient public procurement environment, potentially leading to increased competition, reduced costs, and greater value for governments and taxpayers[162].

[160] See e.g., C. R. YUKINS - H. J. PRIESS, *Feature Comment: Breaking the Impasse in the Transatlantic Trade and Investment Partnership (TTIP) Negotiations: Rethinking Priorities in Procurement*, 56-27 Gov't Contractor 235 (Jul 24, 2014). See also C. R. YUKINS, *The European Procurement Directives and the Transatlantic Trade and Investment Partnership (TTIP): Advancing U.S.-European Trade and Cooperation in Procurement*, Gov't Contracts Year in Review Briefs 3 (Thomson Reuters, 2014).

[161] Comprehensive Economic and Trade Agreement Between Canada of the One Part, and the European Union and its Member States, of the Other Part, Can.-E.U., Oct. 30, 2016 [hereinafter CETA]. Available at https://www.international.gc.ca/tradecommerce/tradeagreementsaccordscommerciaux/agracc/cetaaecg/texttexte/toc-tdm.aspx?lang=eng. See also CETA Chapter by Chapter, European Commission (2023). Available at https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-andregions/canada/eucanada-agreement/ceta-chapter-chapter_en. See also P. LALONDE, *International Procurement Developments in 2017-Part III: the Comprehensive Economic Trade Agreement (CETA) Between Canada and the European Union as a Model for International Procurement Agreements Between Most Developed Nations*, Gov't Contracts Year in Review Briefs 5 (Thomson Reuters, 2018). See also E. HUSH, *Where No Man Has Gone Before: The Future of Sustainable Development in the Comprehensive Economic and Trade Agreement and New Generation Free Trade Agreements*, 43 Colum. J. Envtl. L. 93 (Ja. 11, 2018).

[162] CETA. P. LALONDE, *International Procurement Developments in 2017-Part III: the Comprehensive Economic Trade Agreement (CETA) Between Canada and the European Union as a Model for International Procurement Agreements Between Most Developed Nations,* cit. See also EU Commission, *The EU-Canada Agreement Explained,* (2023). Available at

Further research may inform specific means by which both governments can reconcile the fragmented approach to risk assessment among European Union Member States with the centralized yet occasionally impenetrable risk assessment practices in the United States. What is evident is that the parallel developments in both regions and the persistent issues surrounding transparency should not be overlooked.

Abstract. *In public procurement, risk assessment plays a pivotal role in safeguarding the efficient allocation of public funds and ensuring the delivery of high-quality products. Despite their shared commitment to effective risk management, the United States and European Union approach risk assessment in public procurement differently. These differences pose potential challenges for businesses operating in both markets, as they may face varying risk assessment requirements and uncertainties that limit cross-border procurement opportunities. By bridging the gap in risk assessment practices, the European Union and the United States can enhance the integrity, efficiency, and transparency of public procurement, fostering a more secure and competitive global procurement landscape. This paper presents a comparative analysis of risk assessment practices in the United States and the European Union, emphasizing the key differences and exploring potential avenues for collaboration. While advocating for cooperation and acknowledging the unique characteristics of each region, this paper emphasizes that a collaborative effort is necessary to facilitate a meaningful exchange of information and establish a shared understanding of risk assessment practices. Part II of this paper compares risk assessment approaches in the United States and European Union. This section identifies a common undesirable characteristic within both jurisdictions. Part III highlights recent developments within the United States and European Union that have an impact on risk assessment practices within both regions. Part IV concludes that regulatory cooperation in public procurement to promote mutually recognized objectives in risk assessment and safeguard against trade barriers constitutes an important step towards enhanced global economic integration. Identifying the exact parameters of such cooperation, however, remains the question that requires continued exploration and concerted efforts by both governments.*

https://policy.trade.ec.europa.eu/eutraderelationshipscountryandregion/countriesandregions/canada/eu-canada-agreement/agreement-explained_en.