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Exclusion and Self-Cleaning in the 2014 Public Sector Directive

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Introduction

When government organizations spend public money, they want to make sure that contracts are only awarded to businesses that are trustworthy and reputable. Furthermore, to enhance fairness in competition it is important to create a level playing field, considering that non-compliance with legal rules can create an unfair advantage.¹ Dishonest and/or corrupt companies should therefore, in the view of most governments, be excluded from public procurement processes.

This idea can also be found in EU public procurement law. As has been the case in previous versions of the EU rules, the current public procurement directives govern the grounds for exclusion of economic operators.² Under

(1) Cf. Case C-226/04, *La Cascina* [2006] ECLI:EU:C:2006:94, opinion of AG Maduro.

(2) See in general: S. ARROWSMITH, *The Law of Public and Utilities Procurement*. Vol. I (London: Sweet & Maxwell, 2014), pp. 1184-1335; A. SANCHEZ-GRAELLS, "Exclusion, Qualitative Selection and Short-listing", in F. LICHÈRE, R. CARANTA and S. TREUMER (eds), *Modernising Public Procurement. The New Directive*, Vol. 6, European Procurement Law Series (Copenhagen: DJØF, 2014), pp. 97-129; S. DE MARS, *Exclusion and Self-Cleaning in Article 57: Discretion at the Expense of Clarity and Trade? Paper for UACES 45th Annual Conference, Bilbao, Spain, 7-9 September 2015*, 22 p.; L. BUTLER, "Selection, Qualification, and Exclusion of Tenderers in UK Public Procurement Law", in M. TRYBUS, R. CARANTA and S. TREUMER (eds) *Selection, Qualification and Exclusion of Tenderers in EU Public Contract Law* (Copenhagen: DJØF, 2015); K. COLPAERT and S. VAN GARSSE, *Wegwijs in de klassieke overheidsopdrachten*, (Brussels: Politeia, 2014) chapter 6; E. J. HJELMENG and T. SØREIDE, "Debarment in Public Procurement: Rationales and Realization", *University of Oslo Faculty of Law Legal Studies Research Paper Series*, No. 2014-32, 16 p.

stated conditions, businesses will not be allowed to bid for a contract. Some of the grounds for exclusion in the 2014 Public Sector Directive³ are mandatory, whereas other grounds for exclusion are discretionary. The approach of the Union legislature was historically and remains (largely) to adopt grounds for exclusion based on facts or conduct specific to the economic operator concerned, such as conduct that discredits its professional reputation or calls into question its economic or financial ability to complete the works covered by the public contract for which he is tendering.⁴ The stated exclusions grounds are consequently a finite list, rooted in factual findings of undesirable practices on the part of the economic operator.

In this contribution the regime of the 2014 Public Sector Directive on exclusion grounds will be set out, and its novelties (including self-cleaning) will be explained.⁵ The article will proceed as follows. The first section examines mandatory exclusions. The second section discusses discretionary/optional exclusion grounds. A third part elaborates on changes made in the 2014 Directive as a response to Court of Justice case law or a lack of clarity in the 2004 Public Sector Directive.⁶ The fourth part considers the newly introduced principle of self-cleaning. The article will then, in a fifth part, address the duration of the exclusions permitted and/or required by the 2014 Directive. The article finally summarizes the setup of the 2014 Public Sector Directive's exclusion regime in a brief conclusion.

(3) Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65.

(4) See Case C-213/07, *Michaniki AE v Ethniko Symvoulío Radiotileorasis and Ypourgos Epikrateias* [2008] ECLI:EU:C:2008:731, para 42 and compare S. ARROWSMITH above (n 2) 1266: some of the new exclusion grounds are different. “*These provisions appear to be concerned with exclusions from the procurement because of the need to ensure the proper procurement of that procurement, rather than with conduct giving rise to possible exclusions in general.*”

(5) See for similar grounds: Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L94/243; for other commentary, see H. PRIESS, “The rules on exclusion and self-cleaning under the 2014 Public Procurement Directive” (2014) 23 PPLR 112; A. SANCHEZ-GRAELLS above (n 2).

(6) 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 OJ [2004] L 134/114.

§ I. Mandatory exclusion grounds

I. Overview

The 2014 Public Sector Directive is generally similar to the prior rules with respect to exclusion based on mandatory grounds, although with some new additions. Mandatory exclusion grounds remain those of participation in a criminal organisation (Art. 57(1)(a)); corruption (Art. 57(1)(b)); fraudulent behaviour (Art. 57(1)(c)); and money laundering, which has been supplemented by a reference to terrorist financing but otherwise remains unchanged (Art. 57(1)(e)). Two newly added grounds are those relating to convictions for terrorist offences (Art. 57(1)(d)) and child labour and other forms of trafficking of human beings (Art. 57(1)(f)). Furthermore, a breach of tax or social security obligations by the economic operator, established by “*final and binding judicial or administrative finding*” is now a mandatory exclusion ground.⁷

In the 2014 Public Sector Directive, contracting authorities are required to exclude economic operators or persons with powers of representation, decision or control of economic operators, from participation in a procurement procedure when the operator has been the subject of a conviction by final judgment for any of the listed mandatory exclusion grounds. They are required to do so at any time during the procedure where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations of exclusion.⁸ A legislative missed opportunity is that the 2014 Directive remains silent on *where* this conviction by final judgment must have taken place: many Member States do not consider non-EU judgments as relevant, but Germany, Austria and the UK, for instance, do exclude tenderers who have been convicted outside of the EU.⁹

As noted above, an economic operator shall also be excluded from participation in a procurement procedure where an economic operator’s breach of its obligations relating to the payment of taxes or social security contributions has been established by a judicial or administrative decision. Such a decision must have final and binding effect in accordance with the legal provisions of the country in which the economic operator is established, or with those of the Member State of the contracting authority.¹⁰ Exclusion on the basis of

(7) Article 57(2).

(8) Article 57(1).

(9) H. PRIESS, above (n 5) 114; the UK *Public Contracts Regulations* 2015, SI 2015/102, reg. 57(1)(n), which explicitly recognises convictions in any jurisdiction. It could be argued that there is an *implicit* geographical limit in the 2014 Directive’s reference to EU legislation in Article 57(1), but such an ‘implied’ condition is likely to result in different approaches by national legislators.

(10) Article 57(2).

breaches of tax or social security obligations was, under the 2004 Directive, fully discretionary.¹¹ The 2014 Directive instead indicates that where a final, binding administrative or judicial decision has determined a failure to pay taxes and social contributions, exclusion is now mandatory. The discretion to exclude on grounds of violations of these obligations is retained in the 2014 Directive, but can now only apply where there is *no* such final, binding decision.

A violation of the obligation to pay taxes and social contributions, however, cannot be treated as a mandatory exclusion ground in two circumstances: first, Art. 57(2) makes clear that where the contributions and taxes have been paid, or an arrangement to pay these arrears has been entered into with the relevant national authority, exclusion is no longer possible. Art. 57(3) also makes explicit that an exclusion on the grounds of a failure to pay taxes and social contributions cannot be applied if doing so would be disproportionate. There are specific examples granted here – i.e., a minor amount of unpaid contributions, or an inability for the economic operator to settle its unpaid contributions because it was not told the full amount due before the procurement procedure deadline – that serve to clarify, rather than distinguish, this particular mandatory exclusion and how it is to operate in a proportionate manner. While Sanchez-Graells criticizes the vagueness of the examples – in that what is a ‘*minor amount*’ is unlikely to ever be specified by the Court of Justice, and will thus result in disparate national legislation – it can equally be held that the presence of the examples will simplify these decisions for contracting authorities, making it very explicit that they can ‘include’ certain economic operators without violating (frequently very technical and unclear) EU law.¹²

As in the past Member States may provide for a derogation from the mandatory exclusions on an exceptional basis, for overriding reasons relating to the public interest. It is not clear when this derogation can be applied. Some scholars think this exception can be applied when there is no other economic operator capable of fulfilling the contract.¹³ This interpretation raises the question if, for example, the derogation can then be applied when exclusion leads to a substantial increase in price or a significant delay.¹⁴ Others suggest

(11) 2004 Directive, Article 45(2)(e) and Article 45(2)(f).

(12) A. SANCHEZ-GRAELLS above (n 2) 107. On the lack of clarity of EU law, see S. ARROWSMITH above (n 2) 229.

(13) E.H. PIJNACKER HORDIJK, G.W. VAN DER BEND and J.F. VAN NOUHUYS, *Aanbestedingsrecht. Handboek van het Europese en het Nederlandse Aanbestedingsrecht* (The Hague: SDU, 2009) 269. Compare P. TREPTE, *Public Procurement in the EU* (Oxford: OUP, 2007) 341.

(14) S. WILLIAMS, “Coordinating public procurement to support EU objectives - a first step? The case of exclusions for serious criminal offences” in S. ARROWSMITH and P. KUNZIK (eds) *Social and Environmental Policies in EC Procurement Law* (Cambridge: CUP, 2009) 497; S. ARROWSMITH above (n 2) 1281.

this derogation should be interpreted in line with the exceptions found in the TFEU and the case law on free movement.¹⁵ The new Directive does not entirely resolve this debate, but clarifies to some extent how this provision should be interpreted, by stating that it relates to overriding reasons relating to the public interest “*such as public health or protection of the environment.*”¹⁶ It is likely, therefore, that the derogation is not intended to be used on account of the primarily economic grounds that the first interpretation suggests as ‘*overriding reasons*’.

II. Background to the new exclusion grounds

It seems that the new mandatory exclusions reflect some recent EU priorities. In recent years the EU has taken several measures for tougher action against criminals responsible for child sexual abuse and human trafficking.¹⁷ At the same time, fighting terrorism has remained high on the EU’s agenda since the adoption of the EU Counter-Terrorism Strategy in 2005.¹⁸ The same is true for money laundering and terrorist financing, where the Commission took several measures implementing, *inter alia*, recommendations of the Financial Action Task Force, an inter-governmental body that sets standards and promotes effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system.¹⁹

It should therefore not come as a surprise to find specific exclusions grounds relating to terrorist offences or offences linked to terrorist activities, money laundering or terrorist financing, as defined in Article 1 of Directive 2005/60/EC of the European Parliament and of the Council and child labour and other forms of trafficking in human beings as defined in Article 2 of Directive 2011/36/EU of the European Parliament and of the Council. However, the extent to which these will be relevant to procurement processes has been questioned by Priess, who rightly suggests that they are there to promote these general EU goals rather than to achieve specific procurement-related objectives.²⁰

(15) S. ARROWSMITH above (n 2) 1281.

(16) Article 57(3).

(17) http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/index_en.htm (accessed 29 September 2015).

(18) <http://www.consilium.europa.eu/en/policies/fight-against-terrorism/> (accessed 29 September 2015).

(19) <http://www.fatf-gafi.org/> (accessed 29 September 2015).

(20) PRIESS above (n 5) 115.

§2. Discretionary grounds for exclusion

I. Overview

The Public Sector Directive, much like its predecessor, contains several grounds for exclusion based on what are called ‘discretionary grounds’. Existing discretionary exclusion grounds from the 2004 Directive are those relating to bankruptcy and insolvency (now combined in Art. 57(4)(b)), grave professional misconduct (Art. 57(4)(c)) and misrepresentation in the course of procurement proceedings (Art. 57(4)(h)). As discussed above, in the absence of a final, binding decision, a violation of obligations to pay taxes and social contributions can still be treated as a discretionary ground for exclusion. The discretionary grounds for exclusion are in the 2014 Directive extended to cover cases relating to violations of environmental, social and labour laws (Art. 57(4)(a)); the distortion of competition (Art. 57(4)(d)); conflicts of interests or prior involvement (Art. 57(4)(e)); deficiencies in the performance of a public contract (Art. 57(4)(g)); and, finally, undue influence on the decision making process (Art. 57(4)(i)).

Furthermore, the new rules now make explicit that Member States may choose to require authorities to exclude economic operators for the reasons set out in the directive, making the otherwise discretionary exclusion grounds actually mandatory.²¹ As before Member States can also leave it up to the contracting authorities who then may decide to use those exclusion grounds for (some of) their tenders. However, if a discretionary ground is made mandatory, contracting authorities shall at any time during the procedure exclude an economic operator where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in the situation requiring exclusion. If the exclusion ground is implemented as a discretionary ground, on the other hand, individual contracting authorities may decide at any point during a tender procedure to exclude an economic operator who has violated a discretionary exclusion ground – but the contracting authorities will not be required to do so.²²

Note that if a Member State opts for implementing an exclusion ground as a discretionary ground, it cannot preclude a contracting authority from applying the ground or restrict/limit the application of the use of that ground. Moreover Member States are no longer able to restrict the availability of these discretionary exclusion grounds to contracting authorities.²³ This follows from the wording of the 2014 Directive. It clearly indicates that a “*contracting authority may exclude*”, effectively meaning that under the 2014 Directive, contracting

(21) Art. 57(4).

(22) Art. 57(4).

(23) *La Cascina* above (n 1), para 21.

authorities have a right to exclude an economic operator on the specified ground(s).²⁴ However, this ‘right’ must be read in line with the EU’s general principle of proportionality, which would require the contracting authority to apply discretionary exclusions in a manner that is transparent and proportionate. The Recitals of the Public Sector Directive confirm this, stressing that “*minor irregularities should only in exceptional circumstances lead to the exclusion of an economic operator*”.²⁵ Unfortunately, the 2014 Directive does not emphasize this specifically in Article 57(4), but as this is an unchanged position from 2004 and the principle of proportionality is now stated in Article 18(1) of the Directive, contracting authorities should be aware of their responsibilities.

On the other hand, where a contracting authority indicates that it will apply discretionary exclusion grounds in the tender documentation made available to economic operators, the ‘discretionary’ exclusion in principle operates as a ‘*mandatory*’ exclusion. Such choices may even be ‘*safer*’ for contracting authorities to pursue: where exclusion grounds are clearly presented in tender documentation, contracting authorities’ behavior is far less likely to involve disproportionate exercises of discretion or be non-transparent. All the same, the factual decision-making processes regarding whether or not economic operators have violated one of these discretionary exclusion grounds would themselves need to satisfy the proportionality principle: even when clearly advertised in the tender documentation as an exclusion ground, then, a very minor violation of that ground should not result in exclusion, as was observed above regarding mandatory exclusions.

In general, scholars have noted that Article 57(4) is not an ideal setup for discretionary exclusion grounds. The fact that Member States can now choose to centrally apply *some* discretionary exclusion grounds will result in what Priess calls ‘*regulatory fragmentation*’; he correctly observes that different policies on which discretionary exclusion grounds are discretionary and which are mandatory in all 28 Member States will not ‘*further the single European procurement market*’.²⁶ A harmonized approach to discretionary exclusion would have been preferable from the perspective of encouraging cross-border trade – but in concluding that, it must be remembered that the 2004 Directive’s position was to only explicitly permit *contracting authority level* discretion. Where a Member State makes a discretionary exclusion ground mandatory, this will be information that an economic operator will need to obtain the first time they enter a bid in that Member State, but thereafter, they will be aware; conversely, where a Member State makes a discretionary ground fully discretionary, this requires per-procurement investigation of the exact conditions applied for exclusion, and consequently will be significantly more costly

(24) See also S. ARROWSMITH above (n 2) 1239.

(25) Recital 102.

(26) H. PRIESS above (n 5) 113; S. ARROWSMITH above (n 2) 1239.

and burdensome for all economic operators, including those from other Member States.

II. Background to the new exclusion grounds

Similar to the new mandatory exclusion grounds, the permissible or discretionary grounds reflect the evolving political priorities of the EU.

A clear example is the new explicit exclusion ground for violation of obligations in the field of environmental law, social law and labour law. The increased focus on horizontal policy goals such as environmental and social policy goals, as well as a desire within the EU to firmly tackle violations in the area of paying social and environmental contributions/taxes, is made very explicit by these new rules in the 2014 Directive. Beyond this exclusion ground, the EU's focus on environmental and social concerns is also made clear in Articles 18 and 56 of the new Directive, and very firmly reiterated in recitals 2, 37 and 97:

With a view to an appropriate integration of environmental, social and labour requirements into public procurement procedures it is of particular importance that Member States and contracting authorities take relevant measures to ensure compliance with obligations in the fields of environmental, social and labour law...²⁷

Where the contracting authority can demonstrate by any appropriate means a violation in the field of environmental law, social law and labour law, the economic operator will or can be excluded. The Directive does not define what 'appropriate means' are. Each contracting authority will therefore need to decide on a case-by-case basis whether any evidence it has is enough to be described as 'appropriate means'. As discussed above, such determinations must themselves comply with the principle of proportionality; in other words, the decision-making process of the contracting authority must be transparent and reasonable.

This new exclusion ground is, in some ways, superfluous – in that existing exclusion grounds, such as those related to grave professional misconduct, would have covered the behaviour in question²⁸; however, that only emphasises the extent to which the EU's political leadership truly wished to focus on social and environmental issues.²⁹

Further examples of exclusion grounds that reflect EU political priorities are the exclusion grounds on conflicts of interest and on undue influence on the

(27) Recital 37.

(28) See Case C-465/11 *Forposta and ABC Direct Contact sp z o.o. v Poczta Polska SA* [2012] ECLI:EU:C:2012:801, para 27.

(29) See further P. KUNZLIK, "The 2014 public procurement package – one-step forward and two back for green and social procurement?", pp. 139-196 in this collection.

procurement decision-making process. These two exclusion grounds appear to have been included to emphasize the EU's focus on the fight against corruption, which is made clear by EU involvement in the United Nations Convention against Corruption³⁰ and various initiatives on the part of the OECD regarding conflicts of interest and corruption.³¹ Much like the environmental and social exclusion ground discussed above, the Court of Justice's case law has already made clear that conflicts of interest and undue influence could form exclusion grounds for the sake of preserving equal treatment.³² Including them in the 2014 Directive explicitly is thus again a firm statement on the part of the EU legislature that stopping corruption is a particular priority within the EU.

§3. Clarifications of the existing rules

As highlighted in the preceding two sections, the number of new '*exclusion grounds*' introduced by the 2014 Directive is limited. However, the Directive furthermore (to an extent) represents an effort on the part of the EU legislature to clarify the existing exclusion grounds, and to codify Court of Justice case law on their application.

A first example is the exclusion ground relating to distortion of competition, which covers violations of both EU competition rules and national competition law. This exclusion ground confirms that breaches of competition law can be grounds for excluding economic operators from procurement processes. The 2004 Directive did not contain any specific provisions on the relationship between competition law and public procurement in excluding economic operators, but commentators have assumed that breaches of competition law were captured by the '*grave professional misconduct*' exclusion ground.³³ Recent case law from the Court of Justice has confirmed that breaches of competition law were caught by grave professional misconduct under the

(30) United Nations Convention Against Corruption, adopted by the United Nations General Assembly by Resolution 58/4 of 31 October 2003.

(31) S. VAN GARSSE, "Belangenconflicten vanuit een internationaal en Europees perspectief" in C. DE KONINCK (eds) *Chronique des Marchés Publics 2014-2015* (Brussels: EBP, 2015) 419-428; also J.B. AUBY, E. BREEN and T. PERROUD (eds.), *Corruption and conflicts of interest. A Comparative Law Approach* (Cheltenham: Edward Elgar, 2014).

(32) *Michaniki* above (n 4); Case C-538/07 *Assitur v Camera di Commercio, Industria, Artigianato e Agricoltura di Milano* [2009] ECLI:EU:C:2009:317.

(33) See, *inter alia*, S. ARROWSMITH above (n 2) 1267; A. BROWN, "The Permissibility of Excluding an Economic Operator From a Tendering Procedure on the Ground that it has Previously Committed an Infringement of Competition Law: Case C-470/13 *Generali-Providencia Biztosító Zrt v Közbeszerzési Hatóság Közbeszerzési Döntőbizottság*" (2015) 24 PPLR NA51.

2004 Directive³⁴ – which suggests that this new explicit exclusion ground is correctly read as a specific application of that concept.³⁵

A second example of an attempt to clarify or encode case law relates to the exclusion ground regarding significant or persistent deficiencies in the performance of previous public contracts. Whether or not contracting authorities could exclude economic operators who had failed to perform on a previous public contract was an issue on which the 2004 Directive was silent, and on which contracting authorities wanted clarification from the Commission.³⁶ Before the adoption of the 2014 Directive, the *Forposta* judgment from the Court of Justice already made clear that grave professional misconduct *could* encapsulate a situation where a contracting authority had failed to perform on a previous public contract; however, it gave little clarity on the scope of ‘*failure to perform*’ that would warrant an exclusion.³⁷ As discussed above, the proportionality principle suggests that a minor failure in performance would not warrant an exclusion; but clarity on this was nonetheless desired by procuring entities throughout Europe. The 2014 Directive supplies such clarity, by making clear that the deficiency in contract performance has to have been ‘*major*’ – and Recital 101 provides examples of what a major deficiency would look like:

...for instance failure to deliver or perform, significant shortcomings of the product or service delivered, making it unusable for the intended purpose, or misbehaviour that casts serious doubts as to the reliability of the economic operator...

This is a particularly welcome development, as it gives guidance to the individual contracting authorities who will have to make decisions on exclusion in practice, and might consequently result in greater uniformity in application of the exclusion grounds throughout the EU.

A third example of clarification and codification is the exclusion ground relating to prior involvement, where the only means to ensure equal opportunity is to exclude an economic operator who was involved in the procurement preparation process, or was the incumbent holder of the contract in question. The *Fabricom* case has made clear that in exceptional cases, where there is no other way to equalize competitive opportunity in the procurement process, such exclusion is permitted – and the Directive now permits this.³⁸

(34) Case C-470/13, *Generali-Providencia Biztosító v Közbeszerzési Hatóság Közbeszerzési Döntőbizottság* [2014] EU:C:2014:2469, para 35.

(35) See also Recital 101.

(36) Commission, *Synthesis of responses to the consultation* (2011) <http://ec.europa.eu/internal_market/consultations/docs/2011/public_procurement/synthesis_document_en.pdf> accessed 29 September 2015, p. 11.

(37) *Forposta* above (n 28).

(38) Joined Cases C-21/03 and C-34/03, *Fabricom SA v Etat belge* [2005] ECLI:EU:C:2005:127.

Moreover, it is submitted that general observations can be made about exclusion grounds in the 2014 Directive: a number of them represent specific instances of what could generally be called ‘grave professional misconduct’. The *Forposta* case has defined professional misconduct as covering ‘all wrongful acts which have an impact on the professional credibility of the economic operator’.³⁹ Such a definition would cover all violations of environmental, social and labour laws, as well as misrepresentation in the course of procurement proceedings, in that both would negatively affect the credibility of the bidder in question. Similarly, the ‘undue influence’ exclusion can refer to instances where an economic operator attempts to bribe or coerce the contracting authority, which would of course also be a form of professional misconduct. Recital 101 of the 2014 Directive then also confirms that distortion of competition is a form of ‘grave professional misconduct’, thus broadening the scope of that concept even further.

It could be argued that in giving such specific examples of particular forms of ‘grave professional misconduct’, the 2014 Directive can facilitate ease of access, simplicity and flexibility in the procurement process. For instance, Member States that want to particularly prohibit participation by economic entities who, for instance, attempt to bribe a contracting authority can single out that discretionary ground in a very clear manner; this provides certainty to economic operators and, if centrally legislated for, contracting authorities alike. However, with ‘grave professional misconduct’ still there as a distinct exclusion ground, the possibilities for very disparate version of this exclusion ground appearing in different Member States, or (worse), in different contracting authorities in either the same or different Member States, remain intact.⁴⁰

§4. Self-cleaning

The final and perhaps most major innovation of the 2014 Directive is the inclusion of provisions on ‘self-cleaning’. The 2004 Directive did not provide a clear legal basis for the recognition of self-cleaning on the part of economic operators (so as to ‘un-exclude’ them from procurement processes). This resulted in significant discussion amongst academics, focusing both on whether and if so, to what extent, self-cleaning was a permitted defence to exclusion.⁴¹

(39) *Forposta* above (n 28) paras 35-37.

(40) See similarly, S. ARROWSMITH above (n 2) 1265-1266.

(41) See, among others, H. PRIESS and S. ARROWSMITH (eds), *Self-Cleaning in Public Procurement Law* (Cologne: Carl Heymanns Verlag 2009); S. ARROWSMITH, H. PRIESS and P. FRITON, “Self-cleaning as a defence to exclusions for misconduct: an emerging concept in EC public procurement law?” (2009) 18 PPLR 257; H. PRIESS above (n 5) 121-122; *contra* M. STEINICKE, “Qualification

Practices in the Member States regarding the acceptance of self-cleaning were very divergent. The point was clearly noted in the 2011 Green Paper on Public Procurement,⁴² explaining that the 2004 Directives failed to clarify if ‘self-cleaning’ measures, meaning those steps taken by economic operators to re-qualify for procurement procedures, could be accepted. The Green Paper stressed that “[t]heir effectiveness depends on their acceptance by Member States. The issue of «self-cleaning measures» stems from the need to strike a balance between the implementation of the grounds for exclusion and respect for proportionality and equality of treatment. The consideration of self-cleaning measures may help contracting authorities in carrying out an objective and fuller assessment of the individual situation of the candidate or tenderer in order to decide its exclusion from a procurement procedure.”⁴³ The Green Paper suggested that the 2004 Directive permitted Member States to accept self-cleaning measures “as far as such measures show that the concerns about professional honesty, solvency and reliability of the candidate or tenderer have been eliminated”, but noted that the lack of uniformity in Member State practice on the issue of self-cleaning was problematic.⁴⁴

The new self-cleaning provision is applicable to both the mandatory and the discretionary grounds, except in the case of exclusions for non-payment of tax or social security contributions. Article 57(6) states that an excluded economic operator may provide evidence to demonstrate its reliability despite the existence of an exclusion ground. Where such evidence is deemed ‘sufficient’, the economic operator may be admitted to the procurement process. Self-cleaning measures, under Article 57(6), require an economic operator to prove that a) compensation for the harm rendered by the ‘wrong’ (whether criminal or more general misconduct) has been paid; and b) the economic operator has actively cooperated with any investigative authorities in order to clarify the facts of the transgression; and c) appropriate ‘concrete technical, organisational and personnel measures’ have been taken to prevent repeat offences or misconduct.

Recital 102 offers further detail on how self-cleaning measures can be effectively demonstrated; the measures in category (c), for instance, may require “the severance of all links or persons or organisations involved in the misbehaviour, appropriate staff reorganisation measures, the implementation of reporting and

and shortlisting”, in R. CARANTA, G. EDELSTAM, e.a. (eds.) *EU Public Contract Law, Public Procurement and Beyond*, (Brussels: Bruylant, 2013) 113.

(42) Commission, *Green Paper on the Modernization of EU Public Procurement Policy* (2011) COM(2011)15 final.

(43) *Ibid.*, p. 52.

(44) *Ibid.* Compare: *Analysis of Responses to Questionnaire issues to PPN contacts in EU member States the Implementation of article 45*, www.publicprocurement.org (accessed 29 September 2015).

control systems, the creation of an internal audit structure to monitor compliance and the adopting of internal liability and compensation rules". However, these are merely *examples* of what kind of policies economic operators *may* adopt or be asked to adopt in order to self-clean; Article 57(6)'s content fully leaves open to the Member States (whether at central, regional, or contracting authority level) to establish whether or not *enough* 'self-cleaning' has taken place, noting only that contracting authorities will evaluate self-cleaning "*taking into account the gravity and particular circumstances*" of the misconduct.

The contracting authority (or designated authority) is obliged to evaluate the measures taking into account the gravity and particular circumstances of the criminal offence or misconduct. By way of example one can consider that for the relatively minor acts of crime it might be sufficient for the supplier to introduce codes of conduct, improved internal compliance systems, whistleblower channels and training for employees.⁴⁵ When it comes to more serious offences, from which the firms have profited substantially, the self-cleaning initiatives might also have to (for example) involve external actors who monitor the firms' internal and external operations.⁴⁶ For the gravest crimes, one can imagine that the firm's owners may be required to replace the whole management on top of other initiatives for the supplier to become sufficiently trustworthy for participation in public tenders.⁴⁷

Where the measures are considered to be insufficient, the contracting authority has to supply the economic operator with a statement of the reasons for the decision not to accept the self-cleaning defence.

It is clear from the above that in order to re-establish its eligibility, an economic operator will need to take a combination of measures. First of all, as to the clarification of facts and circumstances the operator will have to prove that he has collaborated with the investigating authorities. It is suggested that the operator will also be required to collaborate with the contracting authorities in clarifying what happened, as the contracting authority is obliged to evaluate the measures taking into account the gravity and particular circumstances of the criminal offence or misconduct.⁴⁸ Otherwise, the contracting authority will be unable to assess if the measures are appropriate and comprehensive to eliminate the wrongdoing in the future.

(45) E.L. HJELMENG and T. SØREIDE, "Debarment in Public Procurement: Rationales and Realization" in G. M. RACCA and C. YUKINS (eds.) *Integrity and Efficiency in Sustainable Public Contracts* (Brussels, Bruylant, 2014).

http://fr.bruylant.larciergroup.com/titres/130420_2/integrity-and-efficiency-in-sustainable-public-contracts.html and University of Oslo Faculty of Law Legal Studies, Research Paper Series, No. 2014-32.

(46) *Ibid.*

(47) *Ibid.*

(48) S. ARROWSMITH, H. PRIESS and P. FRITON above (n 41) 259.

Secondly, the company will have to repair financial damage caused. Compensation need not to be paid at the time of applying for self-cleaning as a defence, but the economic operator has to be able to demonstrate that it has undertaken to pay compensation in the future.

Thirdly, concrete technical, organisational and personnel measures need to be taken that are appropriate to prevent further criminal offences or misconduct. This means (for example) dismissing executives and employees responsible for the infringement, installing new internal control procedures to prevent further or new misconducts and to ensure that wrongful acts will not occur in the future, or installing a monitoring service for a given period to ensure that compliance measures are effectively carried out.⁴⁹

Last but not least, as to the scope and application of the self-cleaning defence, some remarks can be made. First of all, an economic operator which has been excluded by final judgment from participating in procurement procedures cannot self-clean during the period of exclusion resulting from that judgment in the Member States where the judgment is effective.⁵⁰

Secondly, it seems that the self-cleaning exception cannot be applied in case of the exclusion for non-payment of tax or social security contributions. It seems this was done to simplify the text and because it is very easy to remedy such situations by simple payments.⁵¹ The general self-cleaning provisions in any event do not apply to non-payment of taxes and social security, as recovery from these is regulated in Article 57(2), setting out a need for repayment.

Thirdly, the self-cleaning defence can give rise to divergent interpretations and practices.⁵² One of the main concerns expressed by academics is the fact that decisions are taken by the contracting authorities which will lead to unequal treatment of economic operators. In fact, the same situations may be treated differently by different contracting authorities. The contracting authorities are considered by some not best placed to decide on the 'self-cleaning' measures. From the point of view of legal certainty, such divergent interpretations would be difficult to accept. It is true that any authority that is to judge whether the self-cleaning is 'sufficient' will have to consider a range of aspects, including whether the actions taken by the economic operator are sufficiently comprehensive and credible,⁵³ and thus whether the efforts should lead to full exemption or a reduction in the debarment period, etc. Some scholars argue that under the current legislation and typical enforcement, there are few reasons to expect that these considerations will be made in an unbiased and

(49) Compare N. LORD, *Regulating Corporate Bribery in International Business: Anti-corruption in the UK and Germany*, (Farnham: Ashgate Publishing Ltd, 2014) 125.

(50) Article 57(6).

(51) Article 57(2).

(52) S. ARROWSMITH above (n 2) 1272.

(53) E.L. HJELMENG and T. SØREIDE above (n 44) 4.

predictable way, and the intended trust-generating effects of the exclusion rules are far from guaranteed.⁵⁴ It is therefore suggested that Member States should elaborate the rules and provide guidance on them.

The Directive foresees potential problems stemming from excessive discretion on ‘self-cleaning’ being granted to contracting authorities, and consequently appears to oblige Member States to set out clear rules on how ‘self-cleaning’ should operate. The Directive thus requires that by law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for ‘self-cleaning’ measures: “*Economic operators should have the possibility to request that compliance measures taken with a view to possible admission to the procurement procedure be examined. However, it should be left to Member States to determine the exact procedural and substantive conditions applicable in such cases. They should, in particular, be free to decide whether to allow the individual contracting authorities to carry out the relevant assessments or to entrust other authorities on a central or decentralised level with that task.*”⁵⁵

In light of the potential for arbitrary decision-making where individual contracting authorities take decisions on the ‘sufficiency’ of self-cleaning measures, various authors, including Arrowsmith, consequently argue for the use of a central authority charged with investigating the quality of self-cleaning measures.^{56,57}

(54) *Ibid.* 5.

(55) Recital 102.

(56) S. ARROWSMITH above (n 2) 1272.

(57) See also E.L. HJELMENG and T. SØREIDE above (n 44) 6: “*Despite prospective longer term benefits, there are many reasons for procurement officials to deviate from the debarment rules. The supplier supposed to be debarred may for instance deliver unique products or services of high quality, for instance, and might be preferred regardless of the offences committed by employees or a branch of its organization. The conclusion might be similar if the supplier is an important employer in the local community. Under other circumstances, there might be a willingness to debar the given supplier but difficult in practice if for instance the supplier has substantial market dominance and is the only one able to deliver the goods or services within a reasonable price frame. Undeniably, there is a risk that procurement entities will prefer more exemptions than what is optimal given the desired market consequences of the rules on debarment. At the local or institutional level, the entities are likely to focus primarily on their procurement needs given their budget constraints and be less concerned about how the rules work for society at large over time. This is not because they don’t see the trade-off between short run costs and long term benefits of debarment, but rather due to their mandated focus on their institutional needs; finding alternative suppliers may simply become too expensive or politically costly, as mentioned above. For these reasons, the question of whether self-cleaning is “good enough” or whether deviation from the mandatory debarment can be justified, should not be up to the individual procurement agency to decide. The procurement official should describe the need for exemption or for accepting self-cleaning, but the decision should be made elsewhere – by a separate unit or centrally.*”

§5. Duration of the exclusion

One final amendment made to the 2004 rules is that the 2014 Directive does not permit unlimited exclusion: it requires Member States to specify maximum exclusion periods. A distinction is made between two situations. If the duration of exclusion for a conviction was set by a court of tribunal, that period of exclusion will be paramount.⁵⁸ In the absence of a specified period of exclusion, economic operators can rely on the self-cleaning defence to demonstrate their reliability before the exclusion period ‘*runs out*’, so as to shorten it.⁵⁹ According to the 2014 Directive, exclusion should in any case end after no more than five years in case of mandatory grounds, starting from the time of conviction.⁶⁰ When it comes to discretionary grounds, the maximum exclusion period is three years, starting from the moment that the relevant ‘event’ occurred.⁶¹ Where behavior is discovered *after* the maximum exclusion period has passed, exclusion is no longer possible, and there is consequently also no need for economic operators to ‘*self-clean*’ in those instances. Member States are, regardless, able to shorten the ‘*maximum*’ exclusion periods if they wish to; given that the Directive sets out maximum periods of three and five years, exclusion periods shorter than those would by definition not be deemed disproportionate under EU law.

Certain aspects of Article 57(7) will need express clarification in domestic law: for instance, what is the ‘relevant event’ for a discretionary exclusion – the occurrence of the conduct, or its discovery?⁶² Relatedly, obtaining a final judgment is not an instantaneous process – the ‘event’ and the ‘judgment’ relating to a mandatory exclusion may be years apart, which is an issue that domestic law should consider. Given that the exclusion can only apply *after* a final judgment has been found, should there be a limit to the start date of an exclusion period?

In considering these exclusion periods, a larger issue with the flexibility granted to Member States in setting out discretionary exclusions becomes apparent. After all, prior to a final judgment, any ‘*relevant event*’ that testifies to grave professional misconduct (such as factual evidence demonstrating corruption or participation in a criminal enterprise) could result in a discretionary three year exclusion. It may do so in certain Member States; but it will not in others. Given that the speed of legal proceedings in different Member States will also undoubtedly vary, the consequence of the flexibility inherent

(58) Art. 57(7).

(59) Art. 57(6).

(60) Unless a court-imposed exclusion is longer; see Art. 57(7).

(61) *Ibid.*

(62) See also S. ARROWSMITH above (n 2) 1254.

to Article 57 may mean that economic operators in different jurisdictions may be subject to exclusion periods of between three years and five years, starting either from the date of the event or the date of a judgment, for the *exact same behaviour*.⁶³ Not only will this complicate procurement for economic operators, but if decisions on applying discretionary exclusions are left entirely to contracting authorities, these authorities will have to make difficult decisions on how to treat similar if not identical behaviour on a case-by-case basis.

Conclusion

The 2014 Directive, in Article 57, sets out to both clarify existing grounds for exclusion of candidates and tenderers, and to add new ones. This article has demonstrated that where additions have been made to both the mandatory and discretionary exclusion grounds, they are a clear reflection of changing political priorities within the EU. Where provisions in the Directive have been clarified, meanwhile, this is largely in response to either explicit requests for clarification from contracting authorities, or as a means of codifying key Court of Justice case law in the field of procurement. The result, generally, is an Article 57 that contains more explicit and clear exclusion grounds than Article 45 of the 2004 Directive did. However, Article 57 introduces significant discretion to the Member States in how they actually operate these clearer, more explicit exclusion grounds; the above article has thus highlighted that there is a risk of regulatory fragmentation in the EU, particularly where different Member States take different approaches to discretionary exclusion grounds.

Real innovation in the 2014 Directive is found in its inclusion of the possibility of a ‘*self-cleaning*’ defence. The 2014 Directive makes clear that contracting authorities may accept candidates or tenderers in spite of the existence of an exclusion ground if they have taken appropriate measures to remedy the reason for exclusion. The rules on ‘*self-cleaning*’ are a very helpful clarification of whether or not accepting ‘*cleaned*’ tenderers is permitted under EU law, and they should be welcomed for that reason; however, procedurally, they are very open-ended, and the Member States should be encouraged to set out clear national rules for how an assessment of ‘*self-cleaning*’ is to operate. Finally, the 2014 Directive also puts clear limits to exclusion of tenderers; unless a final judgment by a court requires otherwise, the maximum exclusion periods for violations of mandatory grounds have been capped at five years, and for violations of discretionary grounds have been capped at three years.

(63) For an illustration of this issue, see *ibid*, 1273.

Member States can, however, legislate so as to decrease these ‘maximum’ grounds, again potentially resulting in different rules in different Member States.

The rules in Article 57 are reflective of the general aim of the 2014 Directive to treat public procurement as both a genuinely economic *and a* governmental activity. The exclusion grounds themselves result in the clear non-participation of corrupt, dishonest and unreliable economic entities, but even those entities will not be ‘*punished*’ for their mistakes forever: either through self-cleaning, or through the maximum exclusion periods, they can re-enter the procurement processes. This balances the desire for competitive tendering with the public sector goal of ‘*honest spending*’ in a generally appropriate way, providing that the Member States and contracting authorities exercise the discretion they have been given by the 2014 Directive with due care.