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Public Procurement

Use of Official Automatic Exclusion Lists in Public Procurement

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Use of official automatic exclusion lists in public procurement – is this permitted?

In the context of this Brief, the term "official automatic exclusion list" means a centrally administered and published list of economic operators that are excluded from tendering for public procurement contracts.

Economic operators are added to the official automatic exclusion list on a range of grounds, primarily related to poor performance in connection with public procurement contracts. Exclusion on other grounds may also occur, such as offences related to corruption, money-laundering, participation in criminal organisations, bankruptcy or similar circumstances, as well as on the grounds of non-payment of taxes or social security contributions.

The exclusion is "automatic" because contracting authorities/entities have no choice; they are obliged to exclude the listed economic operators from public procurement tender procedures and to refuse their bids[1].

This Brief focuses on the issue of whether it is permitted under European Union (EU) law to use an official automatic exclusion list for reasons related to prior contract performance. On this specific question, the Brief concludes the following:

- The use of an official automatic exclusion list for reasons related to prior contract performance is not permitted under EU law.
- It is possible to exclude an economic operator for reasons related to prior contract performance, but the decision to exclude must be made by the contracting authority in each procurement procedure on a case-by-case basis.
- It may be permitted to maintain a central registry that provides information on the contract performance of economic operators, but it must be used only as a source of information. A contracting authority may consult the central registry for the purpose of decision making in relation to a particular procurement procedure, but it must not use it as a *de facto* automatic exclusion list.

The Brief also considers, but in much less detail, the use of official automatic exclusion lists on other grounds and the use of central registries and "positive" official lists in the public sector. Qualification systems in the utilities sector are also discussed.

The decision to exclude – general warning: The decision to exclude an economic operator from participation in a public procurement tender procedure is a serious decision and should never be taken lightly. The impact on the economic operator is potentially very significant, possibly affecting both the current and future prospects of the operator. The inappropriate exclusion of an economic operator can also adversely affect competition and have an impact on value-for-money outcomes for the purchaser.

A decision to exclude should only be made where there are well-founded and justified reasons, supported by evidence of good quality. These requirements are reflected in the provision of the Public Sector Directive (the Directive)[2] discussed below. Great care must be taken each time a decision is made to exclude an economic operator in order to ensure that the decision is made in a fair, transparent and proportionate manner, ensuring equal treatment and non-discrimination.

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1 See Annex 2: Note on terminology and models for information on automatic debarment and suspension lists operated by some international organisations in the context of bribery and corruption-related offences and on the UNCITRAL model law.

2 Directive 2014/24/EU on public procurement, repealing Directive 2004/18/EC, 26 February 2014.

Is the use of an official automatic exclusion list permitted under EU law? The general principles of EU law and the case law of the Court of Justice of the European Union (CJEU) indicate that the use of official automatic exclusion lists is generally not permitted under EU law. This Brief explains why this is the case.

What does the Public Sector Directive say?

The Directive does not deal with the specific issue of the use of official automatic exclusion lists. It does require contracting authorities to verify the suitability of the participation of economic operators in the public procurement procedure by first establishing whether grounds for exclusion apply to a particular economic operator[3]. The two types of grounds for exclusion are listed in the Directive:

- mandatory grounds for exclusion;
- discretionary grounds for exclusion.

Mandatory grounds for exclusion: Under Article 57(1) of the Directive, contracting authorities are obliged to exclude from participation in a public contract those economic operators that are known to have been convicted by final judgement for one or more of the following criminal activities[4]:

- participation in a criminal organisation;
- corruption;
- fraud relating to the protection of EU financial interests;
- terrorist offences or offences liked to terrorist activities;
- money laundering or terrorist financing;
- child labour and other forms of trafficking in human beings.

The mandatory grounds for exclusion support EU policies linked to the fight against fraud, corruption, terrorism and organised crime.

Exclusion on grounds of obligations to pay taxes and social contributions: Article 57(2) distinguishes between mandatory and optional grounds as follows:

Mandatory grounds – An administrative or judicial decision having final and binding effect has established that a breach of obligations relating to the payment of taxes or social security contributions has occurred.

In this case, a contracting authority is obliged to exclude the economic operator concerned from participation in a procurement procedure.

Optional grounds – No final and binding decision exists, establishing that a breach of obligations relating to the payment of taxes or social security contributions has occurred.

In this case, a contracting authority may exclude, or may be required by the Member State to exclude, an economic operator from participation in a procurement procedure if it can demonstrate, by any appropriate means, that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions. However, this exclusion will no longer apply and the contracting authority shall not exclude the economic operator once that economic operator has paid its obligations or entered into a binding arrangement with a view to paying the obligations due. All interest accrued and all fines must be paid as well.

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3 Article 56(1).

4 Article 57(1) defines the offences in more detail.

Derogations: The Directive permits Member States to decide whether to provide for derogation from the obligation of mandatory exclusion, on an exceptional basis, in a case where an overriding reason relating to the public interest, such as public health or protection of the environment, is involved.

Member States may also provide for derogation from the mandatory exclusion, where to exclude an economic operator would be clearly disproportionate. The Directive includes a specific reference to where mandatory exclusion may be disproportionate: where "only minor amounts of taxes or social security contributions are unpaid" or where "the economic operator was informed of the exact amount due following its breach of its obligations relating to the payment of taxes or social security contributions" and this was at a time when the economic operator did not have the possibility to take appropriate measures "before expiration of the deadline for requesting participation or, in open procedures, the deadline for submitting its tender".

Discretionary grounds for exclusion: Under Article 57(4) of the Directive, contracting authorities are permitted, but not obliged, to exclude economic operators that:

- have violated applicable obligations in the fields of environmental, social and labour law, proven by any appropriate means that the contracting authorities can demonstrate;
- are bankrupt or subject of insolvency or are under any analogous situation, in accordance with national laws or regulations[5];
- have been guilty of grave professional misconduct that renders their integrity questionable, proven by any means that the contracting authorities can demonstrate;
- have entered into agreements with other economic operators aimed at distorting competition, where the contracting authorities have sufficiently plausible indications to so conclude;
- are in a situation of conflict of interest[6] that cannot be effectively remedied by other, less intrusive measures;
- have prior involvement[7] in the preparation of the procurement procedure, which has led to a distortion of competition that cannot be remedied by other, less intrusive measures;
- have shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior utility contract or a prior concession contract, which led to early termination of that prior contract, damages or other comparable sanctions;
- have been guilty of serious misrepresentation in supplying information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria, have withheld such information, or are not able to submit the supporting documents;
- have undertaken to unduly influence the decision-making process of the contracting authority, to obtain confidential information that could lead to advantage in the

[5] Member States may require or may provide for the possibility that the contracting authority does not exclude an economic operator that is in this situation, where the contracting authority has established that the economic operator in question will be able to perform the contract, taking into account the applicable national rules and measures on the continuation of business in those cases.

[6] Article 24.

[7] Article 41.

procurement procedure, or to negligently provide misleading information that may have a material influence on decision making.

Member States may choose to make the above grounds mandatory.

Self-cleaning: Under Article 57(6) of the Directive, any economic operator that is in one of the situations that constitute mandatory or discretionary grounds for exclusion may provide evidence to the effect that the measures it has taken are sufficient to demonstrate its reliability, despite the existence of relevant grounds for exclusion.

Self-cleaning measures allow economic operators to rehabilitate themselves on the basis of strict conditions set forth in Article 57(6) and to take part in procurement procedures.

Self-cleaning measures can generally be regarded as effective where the economic operator proves that it has:

- paid or undertaken to pay compensation in respect of any damage caused by the criminal offence;
- clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities;
- taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences.

If such evidence is considered as sufficient by the contracting authority, the economic operator is not to be excluded from the procurement procedure. Measures taken by the economic operators have to be evaluated, taking into account the gravity and particular circumstances of the criminal offence or misconduct. If the measures taken are considered to be insufficient, the contracting authority must provide the economic operator with a statement of the reasons for that decision.

Self-cleaning is not available to those economic operators that have been excluded from participating in procurement or concession award procedures by way of a final judgement, for the period of exclusion resulting from that judgement.

Implementation of the grounds for exclusion

The Directive requires Member States to specify, in accordance with their national laws and in compliance with EU law, the conditions for implementation of the grounds for exclusion. This requirement intends to ensure the transparency of the system for the exclusion of economic operators. National implementing rules must, in particular, determine the period of exclusion in cases where no "self-cleaning" measures are taken by the economic operator. The Directive requires that the period of exclusion must not exceed: (1) five years from the date of the conviction by final judgement (where the period of exclusion has not been set by final judgement itself) in the case of mandatory grounds for exclusion; and (2) three years from the date of the relevant event in the case of discretionary grounds for exclusion.

The Directive specifies, in general terms, the means of proof that contracting authorities may require as evidence for the absence of grounds for exclusion[8]. It also requires Member States to keep up-to-date information concerning certificates and other forms of documentary evidence introduced in e-Certis[9].

[8] Article 60(2).

[9] The online repository of certificates established by the European Commission is available at http://ec.europa.eu/markt/ecertis/login.do

At the time of submission of requests to participate or of tenders, contracting authorities are obliged to accept the European Single Procurement Document (ESPD)[10]. The ESPD consists of an updated self-declaration as preliminary evidence in replacement of certificates issued by public authorities or third parties confirming that an economic operator is not, among other things, in one of the situations that should result in exclusion. The ESPD also has to identify the public authority or third party responsible for establishing the supporting documents and include a formal statement to the effect that the economic operator will be able, upon request and without delay, to provide those supporting documents. It is important to note that, at any moment during the procedure, a contracting authority may ask an economic operator to submit all or part of the supporting documents if that is necessary to ensure the proper conduct of the procedures. Before awarding the contract, the contracting authority has to require the best-ranked tenderer to submit up-to-date supporting documents.

Rules on exclusion must respect Treaty[11] principles and general law principles: When Member States implement exclusion provisions, they must ensure that national legislation complies with the Directive as well as with relevant Treaty and general law principles. Where the Directive does not cover an issue, or does not cover an issue in detail, Member States must ensure that the rules and procedures that they implement are non-discriminatory, support the freedom of establishment and the freedom to provide services, ensure equal treatment and mutual recognition, and are transparent and proportionate.

Is it permissible to have an official automatic exclusion list of economic operators that are excluded on the grounds of "poor contract performance"?

Short illustration – is this type of approach permissible?

National law or regulations set out the conditions for adding economic operators to the official automatic exclusion list on the grounds of poor contract performance, including:

- nature of the poor contract performance;
- number of incidents of poor contract performance in a specified period, which is required in order to add the economic operator to the official automatic exclusion list;
- period of exclusion.

Contracting authorities must inform the central listing body when the specified types of poor contract performance occur. The central listing body considers the evidence submitted and, if the conditions are met, adds the economic operator to the list for the specified period.

Contracting authorities are required, for each public procurement procedure that they conduct, to check whether an economic operator applying to participate is listed on the automatic exclusion list. If the economic operator is listed, the contracting authority cannot accept a tender from that economic operator or permit that economic operator to participate in the procedure.

Note: This illustration is not a model recommended by SIGMA, nor is it an example taken from a particular country. It is a summary description to increase understanding of the issue. The illustration outlines some, but not all, of the possible features of an official automatic exclusion list system in which an economic operator may be excluded from a procurement procedure for reasons related to its prior contractual performance.

10 See Article 59.

11 Treaty on the Functioning of the European Union – consolidated version of the Treaty on the Functioning of the European Union, *Official Journal of the European Union*, C 326, 26 October 2012. The Treaty is referred to in the Procurement Brief as "TFEU" or "Treaty".

Comment: The exclusion of economic operators from tendering on the grounds of poor contract performance is based on the discretionary grounds for exclusion in paragraph (g) of Article 57(4) of the Directive. This provision permits exclusion in cases where an 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".

The CJEU has considered the specific issue of whether it is permissible for national legislation to require contracting authorities to automatically exclude economic operators from tendering on the grounds of poor contract performance. In this regard, the CJEU considered the wording of the previous public sector Directive 2004/18/EC (2004 Directive) as well as the relevant Treaty and general law principles.

Note: The Directive differentiates between the two discretionary grounds for exclusion: grave professional misconduct[12] and poor contract performance[13]. The case described below considered the compliance of the national law of a Member State with the 2004 Directive, which at the time specifically regulated the grave professional misconduct grounds but not poor contract performance. The CJEU considered poor contract performance according to the concept of professional misconduct.

"Polish Postal Services" case

In this case (C-465/11), the CJEU considered a provision of the Polish Public Procurement Law (PPL) requiring the automatic exclusion of candidates or bidders from a tender procedure on the grounds of grave professional misconduct, in specified circumstances.

Background

Poczta Polska (PP) is a company owned by the Polish Treasury, which is active in the postal services sector. *PP* is a contracting authority according to the meaning of the Utilities Directive. It conducted an open procurement procedure for the award of a public contract, in lots, for the delivery of certain postal services.

PP selected the tenders submitted by *Forposta SA (Forposta)* and *ABC Direct Contract sp. z o.o (ABC)* as the most favourable compared to the other tender lots. *PP* then proposed contracts to *Forposta* and *ABC*. On the day of the deadline for conclusion of the contracts, *PP* cancelled the tender procedure on the grounds that *Forposta* and *ABC* were subject to compulsory exclusion from the procedure under Article 24(1)(1a) of the Polish PPL.

Polish law: Article 24(1)(1a) of the Polish PPL, which applies to both the public sector and the utilities sector, stipulates:

"The following shall be excluded from procedures for the award of public contracts:

(1a) economic operators with which the contracting authority concerned annulled, terminated, or renounced a public contract owing to circumstances for which the economic operator is responsible, where the annulment, termination or renouncement occurred in the three-year period before the procedure was initiated and the value of the non-performed part of the contract amounted to at least 5% of the contract's value."

The two companies appealed against the decision to cancel the tender procedure. They claimed that the national provision was contrary to paragraph (d) of Article 45(2) of the Directive. The companies argued that the scope of the conditions laid down in the national provision was much broader than the conditions laid down in EU law and that there was no grave professional misconduct in this case.

12 See Article 57(4)(c).

13 See Article 57(4)(g).

Decision of the CJEU

The CJEU confirmed that the concepts of "professional", "grave" and "misconduct", as stated in paragraph (d) of Article 45(2) of the Directive, could be "specified and explained" in national law, provided that the national law respects EU law. The CJEU then considered these concepts and the provisions of the Polish law in light of the EU law.

What is professional misconduct? The CJEU confirmed that "professional misconduct" covered all misconduct that has an impact on the professional credibility of the economic operator. Professional misconduct is not limited to violations of ethical standards established by a professional disciplinary body or by a judgement that has the force of *res judicata*. In that context, the CJEU referred to the requirement for the contracting authority to prove professional misconduct "by any demonstrable means". The CJEU held that the failure of an economic operator to abide by its contractual obligations could, in principle, be considered as professional misconduct.

What is "grave misconduct"? The CJEU found that the concept of "grave misconduct" should normally be understood as conduct with "a wrongful intent or negligence of a certain gravity". It was of the view that incorrect, imprecise or defective performance of all or part of a contract could, potentially, demonstrate limited professional competence, but such performance did not automatically amount to "grave misconduct".

The CJEU stated that "in order to find whether 'grave misconduct' exists, a specific and individual assessment of the economic operator concerned must, in principle, be carried out". It noted that the Polish legislation, which establishes parameters requiring a contracting authority to exclude an economic operator due to previous wrongful conduct, deprived the contracting authority of the power to assess, on a case-by-case basis, the seriousness of the alleged wrongful conduct.

Polish Public Procurement Law (PPL): The CJEU held that the concept in the Polish PPL of "circumstances for which the economic operator concerned is responsible" was very broad and could extend to other situations besides the conduct denoting wrongful intent or grave negligence. The CJEU concluded that the concept of "grave misconduct" could not be replaced by the concept in the Polish PPL of "circumstances for which the economic operator concerned is responsible".

The CJEU decided that Article 24(1)(1a) of the Polish PPL, which imposed on the contracting authority mandatory requirements and automatic conclusions in specific circumstances, exceeded the discretion available to Member States in implementing the conditions for the grounds for exclusion, as set out in Article 45(2) of the Directive.

The grounds for exclusion in Article 24(1)(1a) of the Polish law extended beyond the scope of the exhaustive list, could not be justified on the grounds of the protection of the public interest, the legitimate interests of the contracting authorities or the maintenance of fair competition between economic operators, and was not permissible under the principles or other rules of EU public procurement law.

Exhaustive list of grounds for exclusion relating to professional qualities: The CJEU also confirmed that the list of grounds for exclusion relating to an economic operator's professional qualities, as set out in Article 45(2) of the Directive, was an exhaustive list. Member States are precluded from adding to the list of grounds for exclusion relating to professional qualities.

Application to utilities: The wording of the previous Utilities Directive 2004/17/EC in relation to the grounds for exclusion is not the same as in the Directive. The CJEU nevertheless made it clear that the grounds for exclusion relating to professional qualities, including the grounds of grave professional misconduct, also applied to the utilities sector.

Comments and conclusion: The CJEU confirmed that, when the exclusion of an economic operator is decided on the basis of its previous conduct, which is considered to be "grave professional misconduct", the contracting authority must assess the nature and seriousness of the professional misconduct on a case-by-case basis.

A centralised official automatic exclusion list requiring contracting authorities to automatically draw conclusions in relation to professional misconduct grounds, including prior poor performance of a public contract, does not permit each contracting authority to assess the nature and seriousness of the professional misconduct on a case-by-case basis. If the reasoning of the CJEU is applied, this approach would be in breach of EU law.

Contracting authorities must be able to assess the particular circumstances in each case. The process used and decision made by a contracting authority in relation to the exclusion of an economic operator on the grounds of poor contract performance must be subject to the relevant "basic safeguards" outlined below.

The requirement for contracting authorities to consider the grounds used for exclusion on a case-by case basis is not limited to exclusion on the grounds of poor contract performance. The CJEU examined this issue in the context of other national laws that require automatic exclusion of economic operators in specified circumstances. The CJEU concluded in a number of cases that laws requiring automatic exclusion were disproportionate and unlawful[14]. See the examples in Annex 1, Note on basic safeguards.

Local exclusion lists: The same conclusions apply when there is no centralised official exclusion list, and an individual contracting authority then seeks to establish an exclusion list of its own. An automatic exclusion list will not be permitted, as a contracting authority must assess the particular circumstances on a case-by-case basis. There are also significant dangers that the "basic safeguards" will not be respected in the establishment of a "local" list for exclusion on the grounds of poor contract performance or on other grounds, whether they be mandatory or discretionary.

Official automatic exclusion list based on mandatory grounds

Is it permitted to have an official automatic exclusion list based on the mandatory grounds listed in Article 57(1) of the Directive? The grounds for mandatory exclusion relate to specific criminal offences for which a conviction by final judgement has been made. The policy objectives behind the mandatory grounds and the seriousness of those offences indicate that the maintenance of a centrally administered list may be justifiable, subject to the "basic safeguards".

Where the judgement also specifies a period of exclusion from participation in public procurement procedures, then it appears to be permissible for contracting authorities to maintain and rely on a centralised list of those judgements and the periods of exclusion. Where the judgement does not specify a period of exclusion, then the self-cleaning measures imply that automatic exclusion is not permissible.

Official automatic exclusion list based on discretionary grounds

Is it permitted to have an official automatic exclusion list based on the discretionary grounds listed in Article 57(4) of the Directive (other than the poor contract performance grounds discussed above)? It could be argued that where there is a requirement under the Directive for evidence of a judgement that has the force of *res judicata* or for other specific evidence of a

[14] In the context of the rejection of tenders, the Directive sets a requirement for individual contracting authorities to consider the particular circumstances on a case-by-case basis prior to the rejection of an abnormally low tender (Article 69).

formal administrative decision by a competent authority, then the position is similar to the grounds for mandatory exclusion, and an official automatic exclusion list can therefore be used.

However, a counter-argument considers that the nature, seriousness and impact of the potential grounds for exclusion (irrespective of the nature of evidence required) should always be assessed on a case-by-case basis, with particular attention being paid to the proportionality principle. This view is consistent with the case law of the CJEU discussed above. Self-cleaning measures also imply that automatic exclusion is not permissible in these circumstances.

Central Registry of Information

Is it permitted to operate a central registry of information related to grounds for exclusion?

In the context of this Brief, the term "central registry" means a centrally administered list of economic operators in respect of which contracting authorities have submitted proven documentary evidence of the existence of grounds that could potentially lead to a decision to exclude those economic operators.

Contracting authorities conducting a public procurement procedure are required to check the central registry. Where an economic operator that has expressed interest in participating in a tender procedure or has submitted a tender is listed in the central registry, the contracting authority must investigate further by obtaining any additional, necessary information and evidence from the economic operator and then it must decide whether, in the specific circumstances and in accordance with EU law, the economic operator should be excluded from the tender procedure.

The lawfulness of a central registry and of the way in which the information that it provides is used may well depend on the way in which the registry is operated and used in practice.

If the central registry is a carefully administered, up-to-date source of information that is operated in accordance with the relevant "basic safeguards", the Treaty and general law principles, the registry is likely to be permitted under EU law.

On the other hand, if the central registry is neither carefully administered nor operated in accordance with the relevant "basic safeguards", the Treaty and general law principles, then there is a danger that the registry will not be operating in a lawful manner.

If contracting authorities use information from a central registry in a simplistic manner and therefore apply it as a *de facto* official automatic exclusion list, without considering any mitigating circumstances or other relevant information on a case-by-case basis, then the use of this information will not be permissible in most cases, for the reasons discussed above.

See Annex 2, Note on terminology and models concerning the Romanian centralised database, which provides both positive and negative information on contract performance, and the EU's own central exclusion database, which applies to expenditures from the EU budget.

Positive Lists

The directives include provisions permitting the use of "positive" lists of economic operators that meet the specified requirements for suitability to deliver public contracts. Such lists would be the exact opposite of the "negative" lists, discussed above, of economic operators that fail to meet the specified requirements.

Official lists of approved economic operators in the public sector: The Directive permits Member States to establish official lists of approved economic operators that have submitted acceptable evidence of their suitability to deliver public sector contracts[15].

An official list system allows economic operators to apply at any time for registration by supplying evidence to the public authority responsible for administering the list. The evidence to be submitted by economic operators is the evidence required, in accordance with the Directive and with the Member State's implementing legislation, to demonstrate their suitability for selection. This evidence may demonstrate the following:

- Grounds for mandatory exclusion do not apply to the economic operator.
- Grounds for discretionary exclusion do not apply to the economic operator.
- The economic operator meets requirements related to economic and financial standing and to technical and professional ability.
- The economic operator has the necessary "Quality Assurance and Environmental Management Standards" certification.

An economic operator that is registered on an official list may, in the context of a specific procurement procedure, submit to the contracting authority a certificate of registration issued by the competent body administering the official list. The contracting authority can rely on that certificate as evidence of suitability in relation to the grounds specified. Registration on official lists of other Member States must be accepted.

It is important to note that contracting authorities must not make registration on an official list of approved economic operators a condition for participation in the tender procedure or in the award of the contract. Contracting authorities must accept other equivalent means of proof of suitability for participation in procurement procedures.

Utilities

The Utilities Directive[16] requires contracting entities that are also contracting authorities to apply the mandatory grounds for exclusion.

The application of the mandatory grounds to other contracting entities and of the discretionary grounds to all contracting entities is a matter for the Member State to decide, or for the contracting entities to decide in the event that the Member State has not made a specific provision in this regard.

Qualification systems in the utilities sector: Contracting entities in the utilities sector can set up and operate qualification systems. These systems must be operated on the basis of objective criteria, and the rules for qualification are to be established by the contracting authority/entity. In very general terms, a qualification system is a system set up by contracting authorities for their own use or for the use of other contracting authorities. Under this system, economic operators that are interested in entering into a contract with the contracting authority apply for registration as potential providers. The contracting authority assesses the evidence received from economic operators and, if qualified, the economic operators are registered in the qualification system. The registered economic operators then form a pool from which the contracting authority may select those operators that are to be invited to tender or to negotiate a contract. See SIGMA Public Procurement Brief 16, *Procurement by Utilities.*

15 See Article 64 of the Directive for further details on the establishment and operation of official lists of approved economic operators.

16 Directive 2014/25/EU on procurement by entities in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, 26 February 2014.

Annex 1: Note on basic safeguards

Any public procurement process that may potentially lead to the exclusion of an economic operator must be open and fair, and it must comply with basic safeguards ensuring non-discrimination, transparency and proportionality in the process and in decision making. The same applies to the process used to consider applications for removal from the exclusion list. The process must be:

Non-discriminatory: This requirement means that the process must operate in a manner that ensures that an economic operator from one EU Member State is not treated in a different manner – either less favourably or more favourably – than an economic operator from another Member State. All economic operators must be treated equally.

Transparent: This requirement means that the process must be determined with absolute certainty and made public so that economic operators understand how and in what circumstances they may be excluded or removed from the exclusion list. The requirement of transparency means that, for example:

- The grounds for exclusion to be applied by the contracting authority must be indicated in the contract notice published in the *Official Journal of the European Union – OJEU* (in procedures where an *OJEU* contract notice is required).
- The way in which the grounds for exclusion will be applied must be described clearly, so that there is no room for doubt about how and when they will be applied.
- The process to be followed, evidence required, and criteria to be applied must be clear and published in advance.

Example of the principle of transparency

In the La Cascina case (C-226/04 and C-228/04), the Court of Justice of the European Union (CJEU) considered the situation where an EU Member State, in this case Italy, decided to use as grounds for exclusion the failure to pay taxes or social security contributions. These grounds are discretionary grounds under the previous Directive, and so Member States are not obliged to use them as grounds for exclusion, but they may choose to do so. The CJEU made it clear that implementing arrangements must nevertheless be clear and unequivocal and that they must be made known to economic operators.

Date for payment or regularisation must be specified: According to the CJEU, where a Member State uses as grounds for exclusion the failure to pay taxes or social security contributions, it must set the date by which the payment must be made or by which any regularisation must occur for an economic operator to avoid exclusion.

The CJEU commented that Member States had the flexibility to decide the date by which the payment had to be made or the regularisation concluded. This flexibility could concern, for example, the deadline for announcing the invitation to participate, for issuing invitations to tender, or for receipt of tenders. The relevant date needs to be made public (either in legislation or by the contracting authority if no provision is made in the legislation).

Proportionate: The effect of the exclusion must be reasonable and proportionate to the nature and seriousness of the grounds for exclusion. For example:

- It may not be appropriate to set the same period of exclusion for each of the grounds specified. The impact of some grounds may be more (or less) severe than others, and they would therefore justify a longer (or shorter) period of exclusion that is proportionate to the misconduct.
- Some breaches may be *very* minor in nature, and it may therefore be disproportionate to exclude an economic operator on that basis.

Mitigating circumstances, such as "self-cleaning" actions taken by the economic operator to remedy the breach, internal compliance, and self-reporting, must be taken into account when making a decision related to exclusion.

The effect of the exclusion must go no further than the objective that it is seeking to achieve.

Brief examples of the requirement for proportionality

Exclusion of economic operators with prior involvement

In the Fabricom case (C-21/03 and C-34/03), the CJEU ruled that national legislation that prohibited (excluded) from tendering for a contract all persons who had been involved in preparatory work for that contract, even when those persons could demonstrate that competition would not be affected, was not proportionate.

The CJEU considered that the national legislation extended beyond what was necessary to achieve the objective of ensuring equal treatment. This objective could be achieved and competition safeguarded by applying a less restrictive measure. It could be achieved by giving economic operators the opportunity to demonstrate that their participation represented no risk to competition and by prohibiting only those that were unable to prove that their participation was not a risk.

Exclusion of economic operators with media connections

In the Michaniki case (C-213/07), the CJEU ruled that national legislation that automatically excluded firms with media connections from public procurement was not proportionate.

The objective of the national legislation was to achieve transparency and equal treatment by excluding firms with media connections, as the Member State considered that these firms might use their influence with the media to influence award decisions or to criticise decisions that were not in their favour.

The CJEU held that the national legislation extended beyond what was necessary to achieve the objective and was a breach of the proportionality principle. The CJEU considered that the effect of such legislation was to totally exclude economic operators with media connections and to offer them no opportunity to demonstrate that these connections in the particular circumstances did not in fact represent a risk to equal treatment.

Exclusion of economic operators with specific relationships of control or affiliation

In the Assitur case (C-538/07), the CJEU ruled that national legislation that automatically excluded firms from participating in the same tender procedure where specific relationships of control or affiliation existed – such as ownership of one firm by the other – was in breach of EU law.

The CJEU held that economic operators could be excluded on this basis where the connection represented a risk to transparency or equal treatment in a procedure. However, an absolute prohibition that prevented tenderers from demonstrating that the relationship did not represent a risk to the tender procedure did not comply with the proportionality principle.

Exclusion in the event of simultaneous and competing tenders submitted by a consortium and by one or more companies forming part thereof

In the Serrantoni case (C-376/08), the CJEU considered that national legislation that provided that both a consortium and its member companies were to be automatically excluded from participating in a procurement procedure where the member companies had submitted tenders in competition with the consortium's tender in the context of the same procedure. The CJEU ruled that automatic exclusion in this case was not proportionate.

The objective of national legislation was to combat possible collusion between the consortium concerned and its member companies.

The CJEU held that a rule of that kind involved an irrebuttable presumption of mutual interference. The consortium and the companies concerned were not given the opportunity to show that their tenders had been drawn up independently and that there had therefore been no risk of influencing competition between tenderers.

The CJEU considered that an absolute obligation of the contracting authorities to exclude the entities concerned went beyond what was necessary to achieve the objective of ensuring the application of the principles of equal treatment and transparency.

Fair and equal treatment: The process must be applied and the decisions must be made consistently, in a manner that treats all economic operators equally and does not favour a particular economic operator.

Due process and right of review: Due process must be applied to the entire listing and de-listing process, which would include ensuring that timescales are fair and that economic operators:

- are notified of the initiation of the process or of the proposed decision to exclude them, including the grounds and evidence upon which the process or proposed decision is based;
- are notified of the relevant timescales for decision making and right of appeal;
- have the opportunity to deny, correct or clarify the facts;
- are informed of a decision and the reasons for a decision;
- have the right to apply to be de-listed in accordance with clear criteria, rules and procedures, taking into account mitigating circumstances;
- have the right to an effective independent review of a decision to exclude them or a refusal to de-list them.

Annex 2: Note on terminology and models

- A variety of terms are used to describe a centrally administered list of excluded economic operators. Terms used include "debarment lists", "blacklists", or "negative reference lists".
- A number of models of centrally-administered exclusion lists exist, but these models are primarily used in the context of tackling fraud, corruption and similar offences. For example, the World Bank operates a "debarment" system, using a well-documented administrative process, and publishes a list of economic operators that are ineligible to be awarded contracts funded by the World Bank. In this case, debarment resulting from the detection of prohibited practices may be indefinite or for a fixed period, and the period of debarment is also published on the debarment list. Prohibited practices in that context are corrupt, fraudulent, collusive, coercive or obstructive practices[17]. The World Bank debarment list has a wider reach than just the prevention of listed economic operators from tendering for World Bank contracts, because the World Bank and other international financial institutions, including the European Bank for Reconstruction and Development (EBRD), have cross-debarment arrangements[18] besides the operation of their own debarment lists[19]. Such arrangements mean that economic operators on the debarment list of one institution will also be debarred from participation in contracts funded by the other participating institutions.
- The term "suspension" may also be used, although it is generally understood to refer to a situation where an economic operator is suspended or excluded from participating in a specific tender procedure rather than in all public sector tender procedures.
- The UNCITRAL Model Law 2011 includes a provision for the exclusion of economic operators and suppliers from specific procurement procedures, but not from procurement procedures in general, where there is evidence of inducement or other forms of undue influence as well as where the supplier or economic operator has an unfair competitive advantage or a conflict of interest.
- The document, Regulations on the Financial Rules applying to the General Budget of the European Union (Regulations), published by the European Union (EU) in 2015, includes provisions for the setting up and operation by the European Commission of a central exclusion database. The Regulations also contain provisions for the exclusion of economic operators from specific contract procedures[20]. The central exclusion database and procedure-specific exclusion are to be used in the context of EU budget expenditure. The central exclusion database is to contain details of economic operators in breach of the mandatory grounds for exclusion listed in the Regulations, which include: specified criminal convictions, administrative penalties

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17 See *World Bank Procurement Guidelines and Sanctions Committee Procedures* for the detailed definitions of these prohibited practices and further information on the operation of the debarment list: http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,pagePK:84271~theSitePK:84266,00.html

18 Cross-debarment, in accordance with the Agreement for Mutual Enforcement of Debarment Decisions dated 9 April 2010, has been made effective as from 1 July 2011 by the World Bank, Asian Development Bank, EBRD, Inter-American Development Bank and African Development Bank.

19 The EBRD defines prohibited practices as coercive, collusive, corrupt or fraudulent practices – see the EBRD's *Enforcement Policy and Procedures* for further details.

20 Title V, Chapter 1, Articles 106 to 109 of Regulation (EU, EURATOM) No. 2015/1929 of the European Parliament and of the Council of 28 October 2015 amending Regulation (EU, Euratom) No. 966/2012 on the financial rules applicable to the general budget of the Union.

(imposed on economic operators)[21], bankruptcy and similar situations, grave professional misconduct, etc. In most, but not all, cases, the mandatory grounds will not apply where economic operators demonstrate that adequate remedial measures have been taken. The EU institutions and other specified bodies are to have access to the central exclusion database and may take the information in the database into account, as appropriate and on their own responsibility, when awarding contracts associated with the implementation of the budget.

- Romania operates a central registry that contains information on both the positive and the negative contract performance of economic operators. The process for the registry's operation is as follows: After the completion of each contract, contracting authorities issue a document containing information on how the economic operator has fulfilled its contractual obligations, which can be positive or negative depending on whether or not the economic operator has properly performed the contract. The document is issued to the contractor, and a copy is placed in the procurement file. A further copy is sent to the National Authority for Regulating and Monitoring Public Procurement (Public Procurement Authority – PPA).
- The PPA thus receives copies of all positive and negative documents relating to contract performance from all contracting authorities countrywide. The PPA organises a database containing this information. The database is not posted on the PPA website, but the contracting authorities may ask the PPA for information related to one or more economic operators during the tender procedure. Following such a request, the PPA sends to that contracting authority all of the available documents (both "positive" and "negative"), without any comments or suggestions. The final decision – to exclude or not to exclude an economic operator – remains with the contracting authority. The contracting authority may also contact other contracting authorities in order to obtain more information or evidence regarding cases where the tenderer concerned failed to fulfil its contractual obligations.
- Member States tend to leave the decision as to whether or not to exclude economic operators to the contracting authorities themselves, to be decided on a case-by-case basis, subject to national legislative provisions implementing the Directives, which may set some parameters for that decision making.

[21] An administrative penalty can include the exclusion of the economic operator from contracts and grants financed by the EU budget for up to five years and/or a financial penalty. An administrative penalty can only be imposed after the economic operator has had an opportunity to present its observations, and the penalty must be proportionate to both the importance of the contract and the seriousness of the misconduct. The publication of a decision to impose an administrative penalty is not automatic.

Further information

Publications

SIGMA (2015), *Public Procurement Training Manual* – Module E3, OECD Publishing, Paris, http://www.sigmaweb.org/publications/public-procurement-training-manual.htm

Public Procurement Briefs

http://www.sigmaweb.org/publications/key-public-procurement-publications.htm

SIGMA (2016), *Procurement by Utilities*, Brief 16, OECD Publishing, Paris

SIGMA (2016), *Selecting Economic Operators*, Brief 7, OECD Publishing, Paris