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Exclusion and Self-Cleaning in Article 57: Discretion at the Expense of Clarity and Trade?

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Abstract:

This paper analyses the rules in Directive 2014/24/EU (the 2014 Public Procurement Directive) on exclusion of economic operators. In particular, it will focus on the aspects of the exclusion rules (relating to grounds for discretionary exclusion, self-cleaning and time limits for exclusion) that grant discretion to Member States and/or contracting authorities. The exclusion rules will be examined for the extent to which they encourage the *Single Market Act (I)* procurement goals of simplicity, flexibility and ease of access, particularly for SMEs. In considering the more general *Europe 2020* goals of efficiency in the use of public funds and maintaining an EU-wide procurement market, however, it will be argued that Article 57's extent of discretion may have negative repercussions for inter-state trade. The paper will conclude by weighing the benefits of Article 57 against the harm that a broad implementation in practice may result in, and will recommend that further guidance to the Member States than is available in the Directive's recitals is needed.

1. Introduction

The Commission's *Europe 2020* strategy aims to restore EU-wide economic growth and ensure that it takes place on innovative and sustainable terms.¹ The reworking of the Procurement Directives in 2014² is the main means by which the Commission strives to use procurement to attain the growth targeted in the *Europe 2020* communication and the first *Single Market Act* communication.³ As a means of assessing the feasibility of the *Europe 2020* package goals, this piece focuses on one particular area of EU public procurement law altered in the new 2014 Public Procurement Directive: the exclusion criteria set out in Article 57.

The paper will, first, analyse how procurement is envisaged to play a role in the *Europe 2020* strategy. Secondly, the paper will from there identify to what extent the Article 57 content (of mandatory exclusion grounds, discretionary exclusion grounds, self-cleaning processes, and the related requirements for documentary evidence of all three of these 'qualification' issues) correspond to *Europe 2020* goals. An overall assessment will be provided as a final part to the paper: do these revised exclusion rules support 'growth' as the Commission envisions it? The article will conclude that Article 57 contains many potential pitfalls and further guidance is not simply desirable but needed to ensure that the availability of discretion will result in concrete benefits to the Member States and the EU.

2. *Europe 2020, Single Market Act (I) and Procurement*

2.1 *The Europe 2020 Communication*

The Commission's *Europe 2020* strategy has put forward three 'mutually reinforcing' priorities, summarised as 'smart, sustainable and inclusive growth'.⁴ To give effect to those priorities, the Commission has announced a variety of 'Flagship Initiatives'. Public procurement is identified as of relevance in several of the flagship initiatives: for example, to stimulate a 'Resource efficient Europe',

¹ Commission, *Europe 2020: A strategy for smart, sustainable and inclusive growth* (2010) COM(2010)2020 final

² See 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; 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.

³ Commission, *Single Market Act: Twelve levers to boost growth and strengthen confidence* (2011) COM(2011)206 final.

⁴ Commission, *Europe 2020* (n 1) 3.

the *Europe 2020* communication suggests that procurement should be used to promote energy efficiency and 'green', resource-efficient purchasing.⁵

Some of the 'flagship initiatives' simply seek to promote economic growth in a general sense. These initiatives are of greater interest to this paper, which focuses on exclusion criteria: when can economic operators participate in a procurement process, and when can they not? That question, answered by the content of Article 57 of the 2014 Public Procurement Directive, is closely connected to the *Europe 2020* initiative titled 'An industrial policy for the globalisation era'. That initiative focuses on how the EU can act so as to support European-based industry (and particularly SMEs) survive in an era of globalisation.⁶

The Commission highlights procurement policy as being relevant to developing such an 'industrial policy' in two main ways. First, the Commission charges itself with developing a 'horizontal approach to industrial policy combining different policy instruments'. One of these is what it calls 'modernised public procurement'. This idea of 'modernised' procurement is the prequel to the goal set out in the 2011 *Single Market Act (I)* communication, which was to revise the procurement legislative framework.⁷

The second instruction regarding the establishment of an 'industrial policy for the globalisation era' is directed to the Member States, who are charged with improving the business environment 'especially for innovative SMEs, including through public sector procurement to support innovation incentives.'⁸

There are two distinct goals raised here: the first is to support what the Commission has termed 'innovation', while the second is to specifically support SMEs in participating in procurement. Of concrete interest to the present paper is the notion that Member States should make it easy *in particular* to support innovative SMEs. This suggests that there are particular entry barriers in the 2004 Public Sector Directive⁹ to SME participation in a procurement award process, and that ideally, the 2014 Directive will have removed these.

⁵ Ibid, 14.

⁶ Ibid, 15.

⁷ Ibid.

⁸ Ibid.

⁹ 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 (2004) OJ L 134/114.

The *Europe 2020* strategy concludes with the overarching goal to pursue ‘smart budgetary consolidation for long-term growth’. It here singles out procurement, noting that:

‘Public procurement must ensure the most efficient use of public funds and procurement markets must be kept open EU-wide.’¹⁰

Striving for efficient use of public funds, however efficiency is to be defined, is not controversial per se; value-for-money in public purchasing has long been recognized as one of the central goals of public procurement policy.¹¹ However, whether the EU has the power to regulate public procurement *for* the sake of producing value-for-money is doubtful.¹² The EU’s legislative power in the field of procurement stems from the Single Market project, meaning that the main push behind EU public procurement legislation really *should* be the idea of ‘EU-wide’, cross-border procurement – the second overarching goal stated there.

The reality of the EU’s regulation of procurement, however, has historically presented a compromise between the goals of trade and efficiency. As Arrowsmith has put it, ‘the directives do not impose uniform award procedures. Rather ... they provide a framework within which Member States implement their own national policies.’¹³ While the EU arguably only has the competence to regulate procurement for cross-border trade purposes, most Member States do have as a primary concern in procurement policy the idea that they are spending taxpayers’ money in the best way possible.¹⁴ A legislative setup that exclusively caters towards trade, consequently, would find no approval in the Member States. Furthermore, the frequent revision of the EU procurement directives is normally triggered by combined concerns on the parts of the Member States that the rules contained in the directives are too burdensome (or ‘non-modern’), *and* the fact that a genuine ‘single market’ in public procurement has not to date manifested.¹⁵ These overarching goals thus appear to reflect both domestic and EU-wide concerns, though they do so in a very idealistic manner: they do not consider that

¹⁰ Ibid, 24.

¹¹ See, inter alia, Steven L. Schooner, ‘Desiderata: Objectives for a System of Government Contract Law’ (2002) 11 Public Procurement Law Review 103; Peter Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (OUP 2004); Sue Arrowsmith, *The Law of Public and Utilities Procurement* (3rd edn, Vol I, Sweet & Maxwell 2014) 2-6,

¹² For a discussion, see Arrowsmith, *ibid* 167-174.

¹³ Ibid 174-175.

¹⁴ Schooner (n 11).

¹⁵ Arrowsmith (n 11) 180-201, 219-225 provides a concise overview of the EU’s history of regulating procurement and the extent to which it has been ‘successful’ in opening up trade.

there are circumstances in which efficiency trade-promoting rules are mutually exclusive, as frequently stressed by the literature critiquing the EU development of procurement regulation.¹⁶

2.2 The Single Market Act (I) Communication

The 2010 *Europe 2020* strategy sets out only very broad goals, but does little to establish how to concretely achieve those goals – in other words, it stresses that procurement *should* be efficient and cross-border in nature, but does not indicate what needs changing in the 2004 Procurement Directives to further attain these goals. In a follow-up communication titled the *Single Market Act (I)*, it consequently stressed that the *Europe 2020* objectives ‘can be achieved only if the Union and the Member States carry out urgent structural reforms.’¹⁷ The *Single Market Act (I)* communication sets out twelve ‘priority levers’ for achieving the kinds of structural reforms and measures that ought to make the overarching *Europe 2020* goals attainable.

The twelfth ‘lever’ is public procurement regulation, where the EU is to establish a:

‘Revised and modernised public procurement legislative framework, with a view to underpinning a balanced policy which fosters demand for environmentally sustainable, socially responsible and innovative goods, services and works. **This revision should also result in simpler and more flexible procurement procedures for contracting authorities and provide easier access for companies, especially SMEs.**’¹⁸ (emphasis added)

Consequently, the 2014 Public Procurement Directive’s content should be assessed against three targets. Procurement should become, first of all, *simpler*; secondly, it should become *more flexible*; and thirdly, it should become *easier to access*, particularly for SMEs. These are generally applicable targets, fully separate from the type of purchase a contracting authority may be trying to make: not all procurement will be innovative, nor will all procurement require sustainability considerations, but all procurement processes can in principle be (more) simple, flexible, and easy to access, particularly for SMEs.

Exclusion grounds are most obviously related to the ‘ease of access’ goal; however, the amount of flexibility contracting authorities have in applying the exclusion grounds, and how easy they are to apply

¹⁶ Ibid 226-230 and the literature cited there.

¹⁷ Commission, *Single Market Act (I)* (n 3) 3.

¹⁸ Ibid 19.

or to understand by both procurement authorities and economic operators is equally relevant to an assessment of how Article 57 contributes to the overarching *Europe 2020* goals. In principle, value-for-money in procurement is supported by having simple, flexible and accessible procedures, and similarly, simple and accessible procurement can assist in establishing an EU-wide procurement market. That said, flexible procurement processes may work towards one goal but not necessarily the other: while leaving significant discretion to contracting authorities may result in innovative, efficient procurement, it may also create complexity and discourage cross-border participation.¹⁹ The next section of this article will consider the extent to which these three targets have been met in Article 57 of the revised 2014 Public Procurement Directive.

3. An Analysis of Article 57²⁰

3.1 The Content of Article 57

Article 57 of the 2014 Directive deals specifically with non-technical and non-financial qualification criteria. It covers the mandatory exclusion criteria—ie, conditions under which a contracting authority *cannot* permit an economic operator to participate in a procurement—as well as various discretionary exclusion criteria, which Member States and/or contracting authorities *may* use as grounds to exclude a bidder from the procurement process. Both mandatory and discretionary exclusion criteria were found in Article 45 of the 2004 Public Sector Directive, but their substantive content and procedural operation has undergone changes in 2014.

Article 57 also introduces a novelty in European procurement regulation: the possibility for a bidder who would otherwise be excluded from a procurement procedure to demonstrate having ‘self-cleaned’, and thus be permitted to participate in the award process in spite of an existing exclusion ground. The below analysis will consider mandatory and discretionary exclusions as well as self-cleaning to see to what extent the rules as written in the 2014 Public Procurement Directive achieve simplicity, flexibility and ease of access.

¹⁹ See on this point Arrowsmith (n 11) 227-230, arguing that the procurement directives inhibit flexibility but not in a way that actually encourages trade; however, restricting flexibility so as to encourage trade even more would make efficient procurement impossible.

²⁰ See generally Hans-Joachim Priess, ‘The rules on exclusion and self-cleaning under the 2014 Public Procurement Directive’ (2014) 23 PPLR 112; Albert Sanchez-Graells, ‘Exclusion, Qualitative Selection and Short-listing in the New Public Sector Procurement Directive 2014/24’ in Francois Lichere, Roberto Caranta and Steen Treumer (eds) *Novelties in the 2014 Directive on Public Procurement* (Djøf 2014).

Finally, the actual application of both the exclusion criteria and self-cleaning measures is not regulated in Article 57 itself, but instead subject to the general documentary rules set out in Art 59 and 60 of the Directive. The *process* of evaluation of exclusion grounds or self-cleaning measures is as important as the actual substantive grounds for exclusion or evidence required for self-cleaning when considering if the 2014 Directive has made procurement simpler, more flexible, and easier to access; the rules on process will consequently also be considered.

3.2 Mandatory Exclusion Criteria

3.2.1 General Conditions

The first condition applied to mandatory exclusion grounds is the requirement for a conviction by *final judgment* of one of the listed offences. The conviction must apply to either the economic operator as a whole, or to a ‘member of the administrative, management or supervisory body of the entity or [a person] who has powers of representation of decision or control’.²¹ In general, there is a very uniform regime in place here, leaving very little discretion to the Member States. A legislative missed opportunity, however, 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.²² In terms of the Europe 2020 goals, this is unfortunate: while considerate of Member State practice, this silence does not simplify the procurement process for individual economic operators, who will have to investigate this on a per-jurisdiction basis.

The issue is further confused by the fact that the exclusion ground of corruption refers to convictions related to corruption as defined by both the national law of the contracting authority (which would, by definition, be an EU Member State definition and conviction), *and* by the national law of the economic operator. The mandatory exclusion on corruption thus *does* require a consideration of “foreign” conviction, but the other mandatory exclusions do not.²³

²¹ Article 57(1).

²² Priess (n 20) 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.

²³ Article 57(1)(b).

In other areas, fortunately, the 2014 Directive does present an improvement to simplicity and clarity. For one, the 2014 Directive makes clear that mandatory exclusion grounds may serve as grounds enabling contracting authorities to terminate *awarded contracts*. This is at the discretion of contracting authorities; Article 73(b) makes clear that national law must make the option for termination available, but exercise of the option is fully down to contracting authorities.²⁴ While arguably the authority-level discretion will discourage foreign participation in procurement processes, the fact that the 2014 Directive is explicit on whether or not awarded contracts can be terminated on the basis of mandatory exclusion grounds provides much needed certainty to contracting authorities. A clearer legal position will, in any event, lead to a simpler procurement process.

Finally, an unchanged condition that corresponds to the goals of *Europe 2020* is that contracting authorities can be permitted to derogate from applying mandatory exclusions where *either* overriding reasons of the public interest—ie, public health, public safety and public order, which serve as general exceptions to the four freedoms under the EU Treaties²⁵—or where the principle of proportionality²⁶ requires non-exclusion.²⁷ Where, for instance, the facts related to a conviction indicate that the misconduct related to a relatively minor offense, it may be deemed disproportionate by a contracting authority to apply the full possible five years of exclusion.²⁸ This is an important measure of flexibility granted to contracting authorities; while perhaps not simplifying the procurement process, it can improve access for tenderers and may also result in improved value-for-money in purchasing. This reinforcement of the principle of proportionality, furthermore, is consistent with the 2014 Directive's provisions on the possibility for self-cleaning, which suggest in general that the purpose of exclusion is not punitive in nature, but rather to ensure the integrity of the procurement process and all its participants.²⁹

3.2.2 Mandatory Exclusion Grounds

²⁴ This choice to exercise discretion is subject to general principles of EU procurement law and the duty of good administration, however, so may be limited in practice. (See Albert Sanchez-Graells, 'Termination of Contracts under Reg. 73 Public Contracts Regulations 2015' (22 June 2015) <<http://howtocrackanut.blogspot.co.uk/2015/06/termination-of-contracts-under-reg-73.html>>)

²⁵ See Art. 36 TFEU.

²⁶ On general principles of EU law, see Takis Trimidas, *The General Principles of EU Law* (2nd edn, OUP 2006).

²⁷ Article 57(3); the principle of proportionality underpins all aspects of the procurement procedures and is stated in Article 18(1) and Recital 101.

²⁸ This would not be out of line with existing Court of Justice case law; see, inter alia, Joined Cases C-21/03 and C-34/03 *Fabricom SA v Etat belge* [2005] ECLI:EU:C:2005:127 [32-34].

²⁹ See section 3.4 below.

In terms of the actual grounds for exclusion, not much has changed from the 2004 Directive. 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)). Priess notes that these are likely included to reflect a general EU policy drive to push for awareness of both of these pressing global issues, but they are unlikely to factor in most procurement procedures.³⁰ They consequently are unlikely to particularly complicate or cause added expense to the procurement process, not least of all because of self-certification possibilities offered under the 2014 Directive.³¹

Finally, one of the potential mandatory exclusion grounds has been separated out of Article 57(1) and is instead found in Article 57(2): exclusions on the ground of violations of obligations to pay taxes and social contributions. These were, under the 2004 Directive, fully discretionary³²; 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 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. While this may encourage efficiency in procurement, and most definitely improves ease of access for economic operators, it is undoubtedly not a simplification of the EU's overall regulatory approach: if a failure to pay taxes and social contributions is now deemed to be a serious enough transgression to require mandatory exclusion, why is it not deemed a serious enough transgression to require rigorous organisational 'self-cleaning' in the way that the other mandatory exclusions do?³³

³⁰ Priess (n 20) 115.

³¹ See section 3.5 below.

³² 2004 Directive, Article 45(2)(e) and Article 45(2)(f).

³³ See on this point also Priess (n 20) 117, and section 3.5 below; for a contrasting view see Arrowsmith (n 11) 1262.

More consistently, 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—ie, 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 legislation³⁴--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.³⁵

3.3 Discretionary Exclusion Criteria

3.3.1 General Conditions

Discretionary exclusion criteria have undergone substantial changes since 2004. The starting point for analysis is in assessing the changed wording of the new Article 57(4):

‘Contracting authorities may exclude or **may be required by Member States to exclude** from participation in a procurement procedure any economic operator in any of the following situations...’ (emphasis added)

Member States are thus presented with two separate choices in operating discretionary exclusion. They can either implement the directive in a way that maximizes flexibility, leaving the right to apply discretionary exclusion grounds to contracting authorities, *or* they can implement in a way that maximizes consistency of approach *within* Member States, by specifying if any of the discretionary grounds for exclusion will operate as mandatory.

Where discretion is exercised, under EU law this must be done in a way that respects the general principles of proportionality and transparency; very minor incidents, consequently, should not result in procurement blacklisting, and the discretionary exclusion grounds operated in any particular procurement procedure must be clearly announced to all potential bidders.³⁶ Unfortunately, the 2014

³⁴ See Case C-358/12 *Consorzio Stabile Libor Lavori Pubblici v Comune di Milano* [2014] EU:C:2014:2063 [37].

³⁵ Sanchez-Graells (n 20) 107. On the lack of clarity of EU law, see Arrowsmith (n 11) 229.

³⁶ Arrowsmith (n 11) 1243-1244.

Directive does not emphasize this in Article 57(4), but as this is an unchanged position from 2004, it can be hoped that many contracting authorities are aware of their responsibilities under the general procurement principles.

In general, Article 57(4) is not ideal. 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’.³⁷ 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 and burdensome for all economic operators, including those from other Member States.

Globally, then, it appears that the new wording can support the *Europe 2020* goals: contracting authorities are granted flexibility insofar as their Member States permit this, and there is a possibility that Member States will simplify access to procurement for both domestic and foreign economic operators by making some of the discretionary grounds for exclusion mandatory. However, and this will become a frequent observation, much depends on the actual implementation of Article 57 in domestic law, and the more centralized this implementation is, the more ‘simple’ and ‘easy to access’ procurement in that jurisdiction becomes.

3.3.2 Discretionary Exclusion 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) lit c) and misrepresentation in the course of procurement proceedings (Art. 57(4) lit h). As discussed in section 3.2.2 above, in the absence of a final, binding decision, a violation of obligations to pay taxes and social contributions can now be treated as a discretionary ground for exclusion. New grounds relate to

³⁷ Priess (n 20) 113; Arrowsmith *ibid* 1239.

exclusion for violations of environmental, social and labour laws (Art. 57(4) lit a); the distortion of competition (Art. 57(4) lit d); conflicts of interests or prior involvement (Art. 57(4) lit e); deficiencies in the performance of a public contract (Art. 57(4) lit g); and, finally, undue influence on the decision making process (Art. 57(4) lit i).

General observations can be made about these exclusion grounds: 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'.³⁸ 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 even suggests that distortion of competition is a form of 'grave professional misconduct', thus broadening the scope of that concept even further.³⁹ 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

Exclusion on the grounds of distortion of competition has been subject to academic debate, because the 2014 Directive adopts a narrower definition of 'anti-competitive behavior' than Article 101(1) TFEU does. Priess notes that this is presumably not simply a 'mere legislative oversight', in which case not *all* anti-competitive behavior caught by Article 101(1) TFEU should be grounds for discretionary exclusion.⁴¹

³⁸ Case C-465/11 *Forposta and ABC Direct Contact sp z o.o. v Poczta Polska SA* [2012] ECLI:EU:C:2012:801 [27].

³⁹ See also Case C-470/13 *Generali-Providencia Biztosító v Közbeszerzési Hatóság Közbeszerzési Döntőbizottság* [2014] EU:C:2014:2469 [35-37].

⁴⁰ See similarly, *Arrowsmith* (n 11) 1265-1266.

⁴¹ Priess (n 20) 119; *Arrowsmith* (n 11) 1268 suggests a broad reading of the exclusion ground is nonetheless appropriate.

Additionally, Sanchez-Graells argues convincingly that there is no reason as to why bid rigging does not warrant mandatory exclusions, which in general suggests that while the *idea* of including anti-competitive behaviour as an exclusion grounds was undoubtedly a positive one, the actual wording of this exclusion ground has resulted in very needless complexity.⁴²

Another discretionary ground that stands apart is the one relating to bankruptcy, which has been revised since 2004. The provision in the 2014 Directive makes clear that contracting authorities *can* exclude an economic operator who has gone bankrupt or is in winding-up proceedings, but it simultaneously stresses that contracting authorities do not *have to* exclude on this ground. Contracts may be awarded to economic operators, even when bankrupt or insolvent, when it is clear that they can still perform the contract in question. Priess notes that this amendment recognizes that insolvency proceedings do not necessarily mean that an economic operator will actually ‘go under’; consequently, this promotes flexibility, competition, and can result in more efficient use of public funds, in that a most economic advantageous bid made by an entity experiencing liquidity problems can nonetheless be accepted.⁴³

Exclusion on grounds of deficiencies in the performance of a public contract has been made available as a consequence of the *Forposta* case, where a national rule permitting this was examined by the Court of Justice.⁴⁴ It is an exclusion that contains its own strict proportionality test: consequently, only ‘significant’ or ‘persistent’ deficiencies in contract performance, resulting in ‘termination or damages or comparable sanctions’, can result in an exclusion.⁴⁵ The wording is clearly an attempt to limit the discretion exercised at the national level – ‘unreasonable’ exclusion on the ground of a minor deficiency or a dispute about a deficiency in performance of a public contract is in principle precluded by it. However, the fact that Member States can devolve the power to exclude to contracting authorities will make it difficult to enforce any such limits. This provision thus demonstrates a significant concession to the flexibility of procedures, but will do little to promote ease of access or simplicity.

While exclusion on the grounds of conflict of interest or prior involvement is technically available as a discretionary exclusion ground, it is in many ways a very distinct one from the other grounds for exclusion. These exclusion grounds have very little to do with the actual behavior of the economic

⁴² Sanchez-Graells (n 20) 109-110.

⁴³ Ibid 118.

⁴⁴ *Forposta* [22].

⁴⁵ Article 57(4)(g).

operator, and instead attempts to level the competitive playing field for the procurement process as a whole; furthermore, they can only be used where there are no *other means* of ensuring such a level playing field. Proportionality here thus requires that less limiting solutions to prior knowledge or an ‘advantage’ be sought, which is clearly not the case for the other discretionary exclusion grounds.⁴⁶ In general, this aspect of Article 57(4) is clearly a means of implementing the Court’s case law, which will improve the clarity of the EU’s legal requirements: while individual contracting authorities are unlikely to be aware of the ins and outs of case law, they will be aware of the rules in the Directive. For the sake of efficiency in public procurement as well as for ease of access, the limited nature of these exclusion ground can also be appreciated. However, their placement amidst the other exclusion grounds has been understandably questioned, not least of all because the provisions on rejoining the procurement process (discussed next) cannot possibly be applied to them.⁴⁷ Article 57 as a whole has thus not become ‘simpler’ on account of this addition.

3.4 Rejoining Procurement: Maximum Exclusion Periods and Self-Cleaning Measures

Article 57 does not only deal with grounds for excluding operators, but also incorporates provisions that make clear that exclusion is meant to be impermanent. First, Article 57(7) establishes maximum exclusion periods. While the Directive precludes extending the exclusion period for mandatory exclusions past five years from the date of final judgment, a shorter period of mandatory exclusion is not precluded. Similarly, discretionary exclusion grounds can at most be applied for three years from ‘the date of the relevant event’. However, any shorter chosen period must be set out (in ‘law, regulation or administrative decision’), meaning that this is an area where flexibility is offered to the Member States but without any obvious negative effects on economic operators. That said, 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?⁴⁸ 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?

⁴⁶ See *Fabricom*.

⁴⁷ Priess (n 20) 119-120.

⁴⁸ See also Arrowsmith (n 11) 1254.

In considering these exclusion periods, a larger issue with the flexibility granted to Member States in setting out discretionary exclusions become 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 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*.⁴⁹ 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. This undoubtedly will hamper the establishment of a single EU-wide procurement market where the same values are being promoted, and is likely to make procurement procedures more difficult and costly for both contracting authorities and economic operators.

The idea that exclusion is meant to be temporary is further supported by the explicit recognition of the possibility for 'self-cleaning'⁵⁰ in Article 57(6). While it has been argued that 'self-cleaning' was permissible, if not to be encouraged, under the 2004 Directive⁵¹, 2014 marks the first time that EU procurement regulation explicitly recognises the possibility that economic operators can change their own behaviour in order to regain access to procurement processes before exclusion periods have expired. Perhaps unsurprisingly, as EU law proposals on this front have to fit alongside existing national practice in member states such as Germany and Austria⁵², the Article 57(6) provisions are very generally worded and in some ways, a little sparse on the concrete rehabilitation efforts that would suffice for an economic operator to prove themselves 'clean'.

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

⁴⁹ For an illustration of this issue, see *ibid*, 1273.

⁵⁰ See, on self-cleaning generally, Hermann Puender, Hans-Joachim Priess and Sue Arrowsmith (eds), *Self-Cleaning in Public Procurement Law* (Carl Heymanns Verlag 2009); Sue Arrowsmith, Hans-Joachim Priess and Pascal Friton, 'Self-cleaning as a defence to exclusions for misconduct: an emerging concept in EC public procurement law?' (2009) 18 PPLR 257; Priess (n 20) 121-122.

⁵¹ Arrowsmith, Priess and Friton *ibid*.

⁵² See Axel Reidlinger, Stephan Denk and Hanna Steinbach, 'Austria' and Hans-Joachim Priess, Hermann Puender and Roland M. Stein, 'Germany' in Puender, Priess and Arrowsmith (n 50).

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 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. Clearly, as in other areas where the 2014 Directive enables the exercise of discretion by contracting authorities, this may result in very different practices not only between Member States, but perhaps even *within* Member States. In terms of the goals of retaining an ‘EU-wide market’, this is unlikely to be helpful.⁵³

Indeed, the extent of discretion extended by Article 57(6) is such that it does not preclude somewhat arbitrary standards being applied to each individual ‘self-cleaning’ process. It is not only general on what behaviour can demonstrate self-cleaning having taken place, but places very few procedural requirements on the decision-making authority at the time that they decide whether to include or exclude a ‘self-cleaning’ candidate. While the contracting authority will have to state reasons for having decided to deny a ‘self-cleaned’ economic operator’s participation request, and while such stated reasons would be subject to judicial review proceedings, the 2014 Directive is problematically silent on what would justify excluding a ‘self-cleaned’ economic operator. The burden of proof of self-cleaning is placed fully on the economic operator, who can be asked to provide substantial documentary evidence (see section 3.5 below) so as to attest to its ‘self-cleaning’; but there is nothing in Article 57(6) that makes explicit, for instance, that decisions on whether effective ‘self-cleaning’ has taken place are subject to the principles of proportionality, equal treatment and transparency. While these principles underpin all of EU law, it would have helped both contracting authorities and economic operators to, for

⁵³ Arrowsmith (n 11) 1272 consequently argues for centralized decision-making on self-cleaning.

example, require expressly that the contracting authority make transparent its evaluation processes.⁵⁴ The provision on self-cleaning as it stands, however, prioritises the possibility of flexibly admitting and excluding contractors to such an extent that it may result in obscure, localized decision-making in a way that is unlikely to help establish a single EU procurement market where simplicity and cost-effectiveness dominate.

3.5 Proving Article 57: Articles 59 and 60

Article 57 covers exclusion grounds in detail, but does not address how economic operators can prove that they are not subject to exclusion grounds. Articles 59 and 60 of the 2014 Directive offer clarification on these issues, setting out what contracting authorities *can* require economic operators to demonstrate. First, and extremely significant in terms of simplifying ease of access to procurement procedures, Article 59 introduces the so-called “European Single Procurement Document”, which is a self-declaration to be filled in by economic operators that covers all exclusion grounds in Article 57. The contracting authority has the option of requesting supporting documentation to corroborate the winning bidder’s self-declaration, but otherwise, there is no requirement that every participant in a tendering procedure obtains, *inter alia*, supporting documentation to prove that they should not be excluded. This clearly simplifies the procurement process, or at the very least the costs involved in it: the ‘certificates, statements or other means of proof’ set out in Article 60, as testifying that no exclusion grounds apply, only have to be obtained by a single bidder. Particularly in jurisdictions where there are few centralised databases that can produce a single statement of compliance with exclusion grounds, this will make participating in procurement significantly more appealing for SMEs.⁵⁵ More generally, however, where centralised databases of this type *do* exist, Article 59(5) requires contracting authorities to obtain information *from* those centralised databases, and further requires the Member States to ensure that such databases can be accessed by contracting authorities from other Member States. This again simplifies (and cheapens) the procurement process significantly for economic operators, and will particularly benefit SMEs.⁵⁶

⁵⁴ Court of Justice case-law on weighting of award criteria (and sub-criteria) has in fact required that where contracting authorities apply more detailed evaluation systems than required by the Directives, they must publicize this (see, *inter alia*, Case C-532/06 *Lianakis v Dimos Alexandroupolis* [2008] ECLI:EU:C:2008:40 [34]; it can be argued that the same principle applies to the interpretation of ‘evidence’ in the case of self-cleaning, but the Directive does not explicitly demand this.

⁵⁵ See recital 84 of the 2014 Directive; Arrowsmith (n 11) 1304.

⁵⁶ See Arrowsmith *ibid* 1309.

Finally, contracting authorities have significant discretion in many aspects of the exclusion process, but not in terms of evidence they must accept regarding the non-existence of exclusion grounds. Article 60(2) indicates types of certificates, or—where such certificates do not exist in the Member State of establishment—the declarations that an economic operator can make to testify to their compliance with Article 57. Arrowsmith flags up that the concept of a ‘certificate’ is not defined in the Directive and appears to be used at various points to refer to different types of documentation, and that this again may lead to confusion⁵⁷; this is particularly concerning because, given the discretion that contracting authorities (may) have to exclude on the basis of discretionary grounds, economic operators should be very clear on the documentary evidence required from them so as to avoid an unintentional exclusion. However, this is by no means the greatest oversight in Article 57: given that there are clear examples of documentation listed in Article 60(2) regarding qualification criteria generally, it is very surprising that Article 60 is silent on what documentation economic entities can provide to prove they have ‘self-cleaned’ effectively. The broad description of self-cleaning measures in Article 57(6) makes clear that Member States, if not contracting authorities, again have significant discretion in operating this regime – and there is not a single restraint in Article 60 on how they handle this discretion, which again appears to prioritise a more ‘flexible’ qualification process over one that is clear, predictable and easy to access.

4. Conclusions: Simple, Flexible and Accessible Procurement for *Europe 2020*?

When we consider Article 57, has the 2014 Directive succeeded in promoting both the ‘efficient use of public funds’ and ‘EU-wide open procurement’? This is asking for an overall evaluation of just how simple, flexible and easy to access procurement is; complex procurement processes are likely to be expensive and wasteful, as are inflexible processes. If procurement is difficult to access, or perhaps *too flexible* – leaving too much discretion to contracting authorities in different Member States – it is, on the other hand, unlikely to be ‘EU-wide’. Value-for-money in procurement and the encouragement of cross-border trade thus do appear to be somewhat mutually exclusive procurement goals: efficient procurement processes are likely to be local, very flexible, and perhaps not even widely advertised, whereas EU-wide procurement processes are likely to require more harmonized rules that are applied predictably, wide advertising of opportunities and procedures alike, and far less scope for impromptu action on the part of the purchaser.

⁵⁷ Ibid 1305.

The EU regulation of procurement, given that it remains a form of ‘framework’ regulation, thus at most can attempt to produce a form of balance between domestic and EU level goals in procurement; it is whether or not it succeeds at balancing these goals that the 2014 Directive should be measured against. Has the 2014 Directive set out relatively simple exclusion grounds that promote accessibility, and will this result in efficient and EU-wide procurement? In part, the 2014 Directive represents an improvement on the 2004 Directive, and may stimulate both efficiency and EU-wide purchasing. The specific exclusion grounds, on the whole, are clear, and the new exclusion rules *do* in certain ways encourage SMEs to participate. Self-certification simplifies procurement and makes it more accessible across the board; while a procedural change rather than a substantive one, Article 59 generally represents one of the most successful areas of ‘modernisation’ found in the 2014 Directive’s provisions on qualification.

However, Article 57(1)’s contradictory attitude towards foreign convictions – where Directive is generally silent on whether they apply, but forces application in the case of corruption only – is at best confusing and at worst, limiting accessibility to procurement (or at least complicating it needlessly) in a way that runs contrary to the *Europe 2020* goals of accessibility for SMEs and, ultimately, promoting cross-border trade. Similar objections can be raised regarding the ‘maximum’ time limits for exclusion: a lack of harmonization on these general conditions applicable to mandatory exclusions clearly promotes Member State flexibility, but does not necessarily encourage trade, nor does it necessarily make procurement processes simpler or more efficient.⁵⁸ As discussed in sections 3.3 and 3.4, the discretionary exclusion criteria and the rules on self-cleaning suffer from similar problems, in that where discretion is offered, it is offered so generously that the idea of 28 different processes on exclusion and self-cleaning in the EU is a *best case scenario*: the reality, given that several Member States (such as the UK⁵⁹ and the Netherlands⁶⁰) are proposing to or have transposed the Directive into national law without substantial legislative supplementation, is likely to be a plethora of different processes, determined at local authority level alone. Centrally produced guidance may supplement these rules, but, in both countries mentioned, history suggests that such guidance will only be issued where further

⁵⁸ Sanchez-Graells (n 20) 127 similarly concludes that the amount of flexibility made available is not ‘without risk’.

⁵⁹ See the Public Contracts Regulations 2015, which retain all possibilities for discretion at contracting authority level in reg. 57 on exclusion criteria.

⁶⁰ See Conceptwetvoorstel Wijziging van de Aanbestedingswet 2012 in verband met de implementatie van aanbestedingsrichtlijnen 2014/23/EU, 2014/24/EU en 2014/25/EU (2 April 2015) <<http://www.internetconsultatie.nl/implementatiewetaanbestedingsrichtlijnen/document/1578>> (the Dutch proposal for amending the existing Dutch procurement law), which in section 2.3.5.1 appears to retain all possibilities for discretion at contracting authority level.

interpretations of the Directive have been offered at the EU level.⁶¹ Where the actually binding national rules are set at levels as low as “per individual contracting authority”, the procurement process is without question going to be opaque to foreign bidders.

Indeed, the majority of the rules in Articles 57, 59 and 60 permit flexibility to a point where, it seems, the exclusion process has become geared more at *efficiency* than it has at encouraging an *EU-wide* procurement process. In principle, at a time of recession and when all Member State economies are struggling with public debt, it can be seen as a positive development that either at Member State or at contracting authority level, the 2014 Directive enables that the most economically advantageous tender can be accepted *even* when the exclusion-related qualification criteria are not *completely* satisfied. However, and equally positively, the 2014 Directive can accommodate a changed focus in domestic procurement policy. One could think here of the (public) construction fraud scandal uncovered in the Netherlands in the early 2000s, which resulted in a rewriting of Dutch procurement law but (at the time) without the possibility now offered by the 2014 Directive to single out anti-competitive behaviour as being a distinct ground for exclusion.⁶² The 2014 Directive, in other words, permits the sending out of a more specific message, which will benefit domestic procurement policy where it is focused on accountability and fair use of public funds. The possibility for flexibility in blacklisting processes is thus not categorically destined to be a negative – but it does not appear to promote EU-wide procurement in most instances, which suggests that only half of the *Europe 2020* goals for procurement are likely to be aided by the changed exclusion criteria.

Moreover, there is such a thing as *too much* flexibility in what is nonetheless binding EU law; already under the 2004 Directives, there were situations where the EU requirements were so unclear that Member States failed to legislate or even offer guidance on them, out of fear of interpreting them wrongly.⁶³ The provisions on self-cleaning in particular may prove to be deemed ‘dangerous’ by contracting authorities or Member States in which self-cleaning has not historically taken place: the Directive appears to enable that contracting authorities accept *anything* as evidence of self-cleaning, and have full freedom to decide to exclude or include a self-cleaned economic operator, but the application of principles like transparency, equal treatment and proportionality are likely to mean that

⁶¹ See Sylvia de Mars, ‘The Limits of General Principles: A Procurement Case Study’ (2013) 38 *European Law Review* 316, 328-330.

⁶² Erik Pijnacker Hordijk, Bommel van der Bend and Frederik van Nouhuys, *Aanbestedingsrecht* (4th edn, SDU 2009) 3.

⁶³ de Mars (n 61) 332-333.

this is not how the Court of Justice will interpret Article 57(6). Until either the Commission or the Court provides greater clarity on how some of these areas of new or increased discretion will operate, it is very possible that they will not be taken advantage of by contracting authorities in practice, at which point these 'modernised' exclusion criteria will not result in *either* more 'efficient' or 'EU-wide' procurement. It can be hoped that despite this not being an explicit part of the strategy, the Commission's *Europe 2020* plans do include offering substantial and much-needed guidance on the limits of flexibility offered by the 2014 Directive.