

# RELIABILITY UNDER EU PUBLIC PROCUREMENT LAW

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**Abstract:** *To exclude or not to exclude? A question asked by many contracting authorities when assessing bids submitted by tenderers, whose reliability might be compromised by their previous misbehaviour or even worst – a criminal offence. According to law, contracting authorities can exclude such tenderers. However, at the same time, tenderers should be allowed to adopt compliance measures aimed at remedying the consequences of their action. In this article the author analyses some aspects of discretionary exclusion of tenderers with doubted reliability in the public procurement process according to the 2014 European Union's Public Procurement Directive and the recent case law of the Court of Justice of the European Union.*

**Keywords:** *Misbehaviour, Proportionality, Optional exclusion, Compliance measures.*

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## 1. INTRODUCTION

Public procurement is an important part of the European Union's internal market. This can be proved, for example, by the volume of procured contracts. According to the European Commission, public authorities in the European Union spend yearly *around 14% of GDP on the purchase of services, works and supplies.*<sup>2</sup> This indeed presents a good motivation for economic operators to take part in public procurement and compete for public-contract awards. However, not every economic operator can compete for public contracts – this privilege is reserved only to those, who besides other criteria, prove their reliability. That is why reliability is so important. If the economic operator (or even its supplier) raises serious doubts regarding (mostly) tenderer's integrity, a contracting authority is entitled to consider, whether such tenderer, despite fulfilling personal, technical, and economic criteria, shall be accepted in the procurement procedure. A Public Procurement Directive<sup>3</sup> recognize in Article 57 both the obligation and the possibility of contracting authority to exclude a tenderer which has been proven unreliable.

**Contracting authorities shall mandatorily exclude** an economic operator which has proven unreliable by final judgement or administrative decision due to various criminal offences (e. g. corruption, fraud, money laundering, trafficking in human beings, terrorist offences), or backlogs of payments of taxes or social security contributions. Furthermore, contracting authorities must exclude a tenderer, which has been excluded by final judgement from participating in procurement procedures.

On the other side, in situations of **minor gravity** such are for example participation of tenderer in cartel agreement with tendering competitors, when the tenderer is guilty of grave professional misconduct which compromises its integrity or due to poor past performance by the tenderer, **contracting authorities may decide, whether or not they exclude** such tenderer from bidding.

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<sup>2</sup> [https://ec.europa.eu/growth/single-market/public-procurement\\_en](https://ec.europa.eu/growth/single-market/public-procurement_en)

<sup>3</sup> 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.

Decision on exclusion, however, must comply with the principle of proportionality and at the same time, the tenderer must be given a chance to adopt appropriate measures to demonstrate its reliability despite the existence of a relevant ground for exclusion and the right to prove it. Although contracting authorities, while assessing the sufficiency of reparatory measures adopted by doubted tenderer, enjoy wide discretion in their assessment, they must at the same time also consider the gravity and particular circumstances of the tenderers criminal misconduct or other misbehaviour.

Optional exclusion therefore presents a complex issue and brings various additional questions, e.g.: **How deep can contracting authorities dig in while verifying the reliability of a tenderer? How to solve the conflict of principle of proportionality versus principles of equal treatment and transparency when it occurs? Is the right of defence applicable during the proving of tenderer's reliability?**

In this article, the author focuses on selected aspects of optional exclusion regarding the relevant EU regulation as well as the case-law of the Court of Justice of the European Union. The author aims to point out the problematic issues related to this topic. During the research, a doctrinal analysis was the most used method besides the comparison, deduction and synthesis.

## 2. OPTIONAL GROUNDS FOR EXCLUSION

As pointed out by Sanchez Graells (2014, p. 115) qualitative selection criteria refer to the “suitability to pursue the professional activity concerned, the economic and financial standing, or the technical and professional ability of the economic operator and are related and proportionate to the subject-matter of the contract and kept to a minimum in order to take into account the need to ensure genuine competition.” Article 57:4 of the Public Procurement Directive then provides nine reasons for optional exclusion of tenderer from procuring procedure: (i) violation of obligations in the fields of environmental, social and labour law; (ii) bankrupt or insolvency of tenderer; (iii) grave professional misconduct; (iv) collusive behaviour with other tenderers; (v) conflict of interest; (vi) prior involvement in preparation of procedure; (vii) bad performance of previous contract; (viii) serious misinterpretation of in supplying information; (ix) unduly influence the decision-making process of the contracting authority. However, Member States are entitled to individually determine the implementing condition of the optional ground for exclusion of tenderer from procuring procedure. As the Court of Justice stated in *Tim* case (C-395/18, point 34), Public Procurement Directive “does not provide for uniform application at Union level of the exclusion grounds it mentions, since the Member States may choose not to apply those grounds, or to incorporate them into national law with varying degrees of rigour according to legal, economic, or social considerations prevailing at national level.” As pointed out by Steinecke and Vesterdorf (2018, p. 618) to this regard “some Member States have even extended the [above mentioned] list of exclusion grounds.”

Essential point for contracting authorities is, that they are free to use these optional grounds for exclusion when procuring the goods, services and works, while they ensure equal treatment during the procedure. Moreover, as procurement procedure is required to be transparent and must comply with the principle of transparency, **grounds for exclusion should be stated in the contract notice** (Steinecke and Vesterdorf, 2018, p. 631). Contracting authorities shall ensure the integrity of procurement procedure and therefore must assess reliability of each tenderer with due diligence. Such obligation of contracting authority is derived from the general princi-

ple of sound administration, towards which the General Court in *Vakakis Kai Synergates* case (2016, points 81, 82) stated that: “*the obligation of due diligence applies generally to the actions of the (...) administration in its relations with the public and obliges the relevant institution to examine carefully and impartially all the relevant facts of the case; and the finding of an irregularity which in comparable circumstances would not have been committed by a normally prudent and diligent administration permits the conclusion that the conduct of the institution constituted an illegality.*”

A multilevel approach of the contracting authority is therefore required. Firstly, (to ensure a transparency of procurement procedure) qualitative selection criteria must be clearly stated by the contracting authority in the tender notice in such form, that average eligible tenderer will understand its content. Secondly, it is for the contracting authority after submissions of bids to determine and verify “*the existence of a real risk of occurrence of practice capable to jeopardising transparency and distorting competition between tenderers*” (Vakakis Kai Synergates, point 100). If a tenderer is due to its action or omission either before or even during the ongoing procurement procedure, in situation falling to the scope of grounds for discretionary exclusion, a contracting authority may exclude such tenderer. However, such exclusion must be proportional to the gravity of reason, which led to it with regard to the procured contract.

Recently, the Court of Justice provide its assessment of proportionality substantively in cases relating exclusions due to the breach of labour law by tenderer’s subcontractor (Article 57:4.a of the Public Procurement Directive) and due to the bad performance of tenderer in previous public contract (Article 57:4.g of the Public Procurement Directive). Despite the limited scope of this article, these judgements are worth mentioning as they provide new answers to until now unanswered questions related to the consideration of reliability of tenderer’s subcontractor and to the interpretation of significantly bad performance of previous contract by the tenderer.

#### a. Case Tim (C-395/18)

In *Tim* (2020) a tenderer Tim SpA submitted a bid within a tender procedure called by an Italian contracting authority in 2016 for procurement of a contract for the supply on an optical system for the interconnection of the data processing centre. In its bid, Tim referred to three subcontractors, which it intended to use for pre-performance of the contract, in the case of winning the award of contract. However, the contracting authority during the procedure found out, that **one of the subcontractors breached the rules relating to the labour right of disabled persons** and therefore excluded Tim from tender. Such exclusion, despite its optional character according to the Public Procurement Directive, was mandatory according to Italian law. At the same time, Italian law did not oblige the tenderer to use subcontractors mentioned in its tender if it was awarded the contract, nor was the tenderer required to verify that its subcontractors were not affected by the grounds for exclusion referred to in Article 57:4 of the Public Procurement Directive. The subject of the preliminary ruling was the question of **whether such exclusion of tenderer was following the principle of proportionality?**

Court of Justice to this regard stated, that “Member States enjoy some discretion in determining the implementing conditions of the optional grounds for exclusion” (point 34) and “that ground is drafted impersonally, without specifying who is responsible for the failure to fulfil the obligations [relating to environmental, social and labour law]” (point 35). As those obligations constitute “a cardinal value which the Member States must ensure compliance” (point 38),

Member States must be granted power to consider “that the party responsible for the failure to fulfil obligations may be not only the economic operator, who submitted the tender but also the subcontractor which the latter intends to use” (point 39). Member States therefore may provide in their national legislation, that the **contracting authority is entitled or even obliged to exclude a tenderer, whose subcontractor failed to fulfil the environmental, social and labour law obligations.**

However, as the Court of Justice reminded, that contracting authority must pay “particular attention to the principle of proportionality, taking into account in particular the minor nature of the irregularities committed or the repetition of minor irregularities. That **attention must be even greater** where the exclusion provided for by national legislation is imposed on the economic operator who submitted the tender for a **failure to fulfil obligations committed not directly by that operator** but by a person outside his undertaking, in relation to the control of whom the operator may not have all the authority required or all the necessary means at his disposal” (point 48). As Italian legislation did not allow the contracting authority such assessment, the Court of Justice considered it, due to the text providing automatic nature of the exclusion, violating the principle of proportionality.

#### **b. Case Delta (C-267/18)**

In this case, the Court of Justice set standards of assessment of reliability in case for exclusion due to significant deficiency shown by tenderer while performing the previous public contract. From 2014, Delta performed awarded works contract for Romanian contracting authority 1. In 2017, contracting authority 1 terminated Delta’s works contract due to the fact, that it had used a subcontractor without prior authorisation of contracting authority 1 which caused the damage of amount 521 000 €. Shortly after that (still in 2017) Delta submitted a tender in a call opened by contracting authority 2 for construction project for widening a national road. Subsequently, it was excluded from the procedure due to the fact, that contracting authority 2 assessed the early termination of previous contract due to the unauthorised use of subcontractor as a significant deficiency in the performance of a substantive requirement under a prior public contract. The Court of Justice was in preliminary rulings to decide, **whether using unauthorised subcontractors, which led to early termination of previous contract, constitutes a significant or persistent deficiency shown in the performance of a substantive requirement under that public contract, and justifies excluding a tenderer from participation in a subsequent procurement procedure?**

The Court of Justice explained (point 26) that, “the option available to any contracting authority to exclude a tenderer from a procurement procedure is particularly intended to enable it to assess the integrity and reliability of each of the tenderers. In particular, the optional ground for exclusion mentioned in Article 57(4)(g) of Directive 2014/24 [bad performance of previous contract], read in conjunction with recital 101 of that directive, is based on an essential element of the relationship between the successful tenderer and the contracting authority, namely the reliability of the successful tenderer, on which the contracting authority’s trust is founded.” The Court of Justice pointed out that **contracting authority 2 must realise its own assessment of presumed bad performance** of Delta in previous contract, **as automatic reception of the opinion of contracting authority 1 would be considered not proportional.** To this regard the Court of Justice in points 30-34 of the judgement set the standards of such assessment when it explicitly bound the contracting authority 2:

- **to determine** whether **in its view** Delta's use of unauthorised subcontractor constituted a significant deficiency and, if so whether that deficiency affected the performance of a substantive requirement imposed on Delta under previous contract;
- **to evaluate** the significance of the part of the previous contract, which was subcontracted and determine, whether the subcontractor's involvement had an adverse impact on the performance of that contract;
- **to examine** whether the actual contract included an obligation which had to be performed by the successful tenderer itself or whether it made using a subcontractor conditional upon obtaining prior authorisation from the contracting authority I;
- **to assess** whether or not the use of a subcontractor is likely to constitute a substantial amendment of the tender submitted by the successful tenderer;
- **to assess** whether or not, in failing to inform it of the early termination of previous contract, Delta is guilty of serious misinterpretation in supplying the information required for the verification of the grounds for exclusion.

Therefore, the contracting authority 2 is entitled to exclude tenderer only in the situation, when it, following its own assessment, objectively found that the tenderer really provided in previous public contract a significantly bad performance.

### 3. RESTORATION OF RELIABILITY

The right of contracting authority to exclude a tenderer is balanced by the right of the tenderer to provide evidence, that it had adopted measures remedying its reliability. According to Article 57:6 of the Public Procurement Directive any tenderer that is in the situation which allows the contracting authority to (both mandatorily and optionally) exclude it, may provide evidence, that it adopted measures sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. For this purpose, the tenderer shall prove that it has comprehensively clarified the facts and circumstances by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct. Such measures, as stated in para. 102 of the Preamble of the Public Procurement Directive, might consist of the severance of all links with persons or organisations involved in the misbehaviour, appropriate staff reorganisation, the implementation of reporting and control systems, the creation of an internal audit structure to monitor compliance and the adoption of internal liability and compensation rules. However, a tenderer that has been excluded by final judgement from participating in procurement, shall not be entitled to make use of the possibility to restore its reliability during the banned period.

Although conditions for liability might appear to be clear, some application problems have arisen. In *RTS infra* (2021) case, the Court of Justice dealt with the question of **whether the evidence of reliability remedying measures should be submitted by the tenderer at the time of submitting the tender or it may be submitted even later upon the request of the contracting authority?** Firstly, it recalled, that the Public Procurement Directive did not specify "how and at what stage of the procurement procedure the evidence of corrective measures can be provided" (point 27). Therefore, the possibility for tenderers to provide such evidence may just as well "be exercised on their own initiative or on the initiative of the contracting authority, as well as at the time of submission of the request to participate or of tenders or at a later stage of the procedure" (point 28). Finally, the Court stated **that Article 57:6 of the Public Procurement Directive has a direct effect** (point 43) and must be interpreted as precluding a practice of contracting author-

ity whereby a tenderer is required, at the time of submission of its tender, to provide voluntarily evidence of the corrective measures taken to demonstrate its reliability despite the existence, in respect of that operator, of an optional ground for exclusion, where such an obligation does not arise either from the applicable national rules or from the tender specifications. However, as the Court of Justice followed on, the same provision does not preclude such an obligation where it is laid down in a clear, precise, and unequivocal manner in the applicable national rules and is brought to the attention of the tenderer by means of the tender specifications.

**How deep can contracting authority to dig in while verifying the reliability of tenderer? From when the banned period for participation in tendering begin to run?** Those are the questions answered by the Court of Justice in *Vossloh Laeis* (2018) case. Vossloh Laeis was the tenderer who in 2011 participated in cartel agreement, for which he was imposed fine in 2016, while at the same time took the benefits from the leniency program, as it cooperated with the competition authority during the cartel investigation. Due to this situation, reliability of Vossloh Laeis was doubted in 2016 in tender called by the contracting authority, which was concerned by the above-mentioned cartel agreement from 2014. In this regard, contracting authority required tenderer to submit the relevant decision of competition authority, which tenderer refused to comply. It reasoned that its cooperation with the competition authority was sufficient for the purposes of voluntary remediation. To this regard, the Court of Justice stated that “in order to verify the existence of certain grounds for exclusion, the contracting authorities may, in given circumstances, be led to carrying out searches and verifications” (point 24). Clarification of facts and circumstances by the investigation does not follow the same objective as does the tenderer’s reliability assessment (point 27). “A tender is required to prove that it clarified comprehensively, the facts and circumstances of the cartel in which it participated by actively collaborating with the competition authority entrusted with investigating such facts and the contracting authority must be able to ask a tenderer which has been held responsible for a breach of competition law to provide the decision of the competition authority concerning it” (points 29,30). Contracting authority therefore is entitled to require from the tenderer to “clarify the facts and circumstances relating to the criminal offence or the misconduct committed comprehensively by actively cooperating not only with the investigating authority, but also with the contracting authority, in the context of the latter’s specific role, in order to provide it with proof of the re-establishment of its reliability, to the extent that that cooperation is limited to the measures strictly necessary for that examination” (point 33). At the same time, the Court pointed out, that while the existence of behaviour distorting the competition might be regarded as proved only after adoption of a final decision in that matter, the period of exclusion begins to run from the date of such decision (points 39, 41).

In *Connexion Taxi Services* case the Court of Justice dealt with the **conflict between principle of proportionality and principles of equal treatment and transparency**, which arise when contracting authority hesitate to exclude a tenderer from the procuring procedure due to disproportionality of such act, despite such procedure was noticed in tender conditions. The Court of Justice prioritised the latter with establishing, that Public Procurement Directive read in the light of principle of equal treatment and the obligation of transparency must be interpreted as “precluding a contracting authority from deciding to award a public contract to a tenderer which has been guilty of grave professional misconduct on the ground that the exclusion of that tenderer from the award procedure would be contrary to the principle of proportionality, even though, according to the tender conditions of that contract, a tenderer which has been guilty of grave professional misconduct must necessarily be excluded, without consideration of the proportionality of that sanction” (point 44).

#### 4. CONCLUSION

The limited scope of this article does not provide the space for a deeper analysis of this interesting topic. However, even from such brief insight into this field of law raises many questions – both substantive and procedural, on how to deal with quality assessment in public procurement. Some of these questions were already answered by the Court of Justice. On the other side, the case-law relating to the application of the discretionary exclusion according to the Article 57:4 of the Public Procurement Directive is still at the beginning, as it comprises only seven judgements (five of them were mentioned in this article). Nevertheless, they present a good inspiration and solid ground for further academic research and discussions. Further research should focus mainly on proportionality and limits of discretion of contracting authorities while excluding tenderers from bidding in public procurement.

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#### REFERENCES

- Sanchez-Graells, A. (2014). Exclusion, Qualitative Selection and Short-listing in the New Public Sector Procurement Directive 2014/24. In F. Lichere, R. Caranta and S. Treumer (Eds.), *Novelties in the 2014 Directive on Public Procurement* (pp. 97-129), vol. 6 European Procurement Law Series, Djøf Publishing, Copenhagen, Denmark. <https://dx.doi.org/10.2139/ssrn.2279114>
- Sanchez-Graells, A. & Telles, P. (2016). *Commentary to the Public Contracts Regulations 2015*, available at: <http://pcr2015.uk/regulations/regulation-57-exclusion-grounds/>
- Steinicke, M, & Vesterdorf, P. L. (2018). *EU Public Procurement Law. Brussels Commentary*. Baden-Baden/Germany: Nomos Verlagsgesellschaft

#### LEGAL DOCUMENTS, CASE-LAW

- 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 (OJ L 94, 28. 3. 2014, p. 65-242)
- Judgement of the Court of Justice of 14 January 2021 in case *RTS infra BVBA and Asnnemingsbedrijf Norré-Behaegel v Vlaams Gewest*, C-387/19, ECLI:EU:C:2021:13
- Judgement of the Court of Justice of 30 January 2020 in case *Tim SpA – Direzione e coordinamento Vivendi SA Consip SpA v Ministero dell'Economia e delle Finanze*, C-395/18, ECLI:EU:C:2020:58
- Judgement of the Court of Justice of 3 October 2019 in case *Delta Antrepriză de Construcții și Montaj 93 SA v Compania Națională de Administrare a Infrastructurii Rutiere SA*, C-267/18, ECLI:EU:C:2019:826
- Judgement of the Court of Justice of 24 October 2018 in case *Vossloh Laeis GmbH v Stadtwerke München GmbH*, C-124/17, ECLI:EU:C:2018:855
- Judgement of the Court of Justice of 14 December 2016 in case *Connexion Taxi Services BV v Staat der Nederlanden (Ministerie van Volksgezondheid, Welzijn en Sport), Transvision BV, Rotterdamse Mobiliteit Centrale RMC BV, Zorgvervoercentrale Nederland BV*, C-171/15, ECLI:EU:C:2016:948
- Judgement of the General Court of 28 February 2018 in case *Vakakis Kai Synergates – Symvouloi gia Agrotili Anaptixi AE Meleton v European Commission*, T-292/15, ECLI:EU:T2018:103