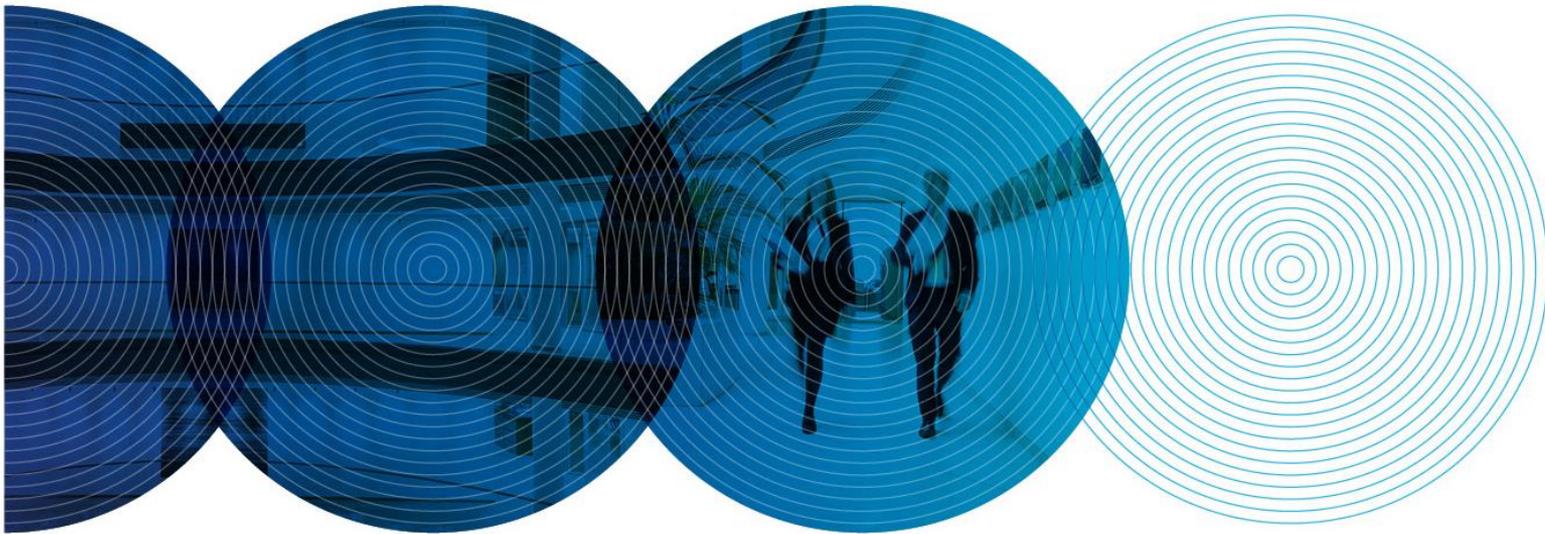


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# Exclusion from procurement procedures for previous poor performance

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## Three Questions

- When can you lawfully strike out a bid from an incumbent (or other bidder) who has not performed twice or more?
- What counts as evidence and when is it sufficiently serious?
- What if you “know” there is a problem (but it is personal rather than public knowledge)?

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# Overview

- Basic rules
- What can be taken into account?
- Exercising discretion
- Self cleaning
- Documenting the decision
- Verification

# What is the Basic Provision?

- Article 57 Public Sector Directive 2014/24/EU; Article 80 Utilities Directive 2014/25/EU; Article 38 Concessions Directive (2014/23/EU)
  - Transposed by Regulation 57 Public Sector Regulations; Regulation 89 Utilities Regulations (“may include”); Regulation 37 Concessions Regulations
  - Note public sector references throughout slides
- Reg 57(8)(g) *“a contracting [authority] **may** exclude from participation in a procurement procedure any economic operator.....where the economic operator has shown **significant or persistent deficiencies** in the performance of a **substantive requirement** under a prior **public contract**, a prior contract with a **contracting entity** or a prior **concession** contract, which **led to early termination** of that prior contract, **damages** or other comparable **sanctions**”*
- Discretionary exclusion (NB focus on exclusion, not past performance generally)

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## What is the Basic Provision? (2)

- Multiple components to be established
  - “the economic operator” (not group entities)
  - “significant or persistent deficiencies”
  - “substantive requirement”
  - “public contract” (public sector, utility, concession)
  - “early termination, damages, or other comparable sanctions”

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## What is the Basic Provision? (3)

- “significant or persistent deficiencies” - recital 101
- “substantive requirement” – recital 101
  - *“major deficiencies with regard to substantive requirements, for instance **failure to deliver or perform, significant shortcomings of the product or service delivered, making it unusable for the intended purpose, or misbehaviour that casts serious doubts as to the reliability of the economic operator**”*
  - *“minor irregularities should only in exceptional circumstances lead to the exclusion of an economic operator. However **repeated cases of minor irregularities can give rise to doubts about the reliability of an economic operator which might justify its exclusion**”*

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## What is the Basic Provision? (4)

- So not just any breach of contract – breach of a **substantive requirement**
- Breach can be significant **or** not significant but persistent (provided it's of a substantive requirement)
- Recital seems to set the bar fairly high for “substantive requirement” – product/service unusable, failure to perform (total failure?), serious doubts as to reliability

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## What is the Basic Provision? (5)

- In addition, breach must have led to early termination, damages, or “other comparable sanctions”
- Need case law guidance on this
  - de-scoping
  - performance deductions
  - LADs
- Authorities will be reluctant to go outside explicit wording in regulation until clarity from courts
- Need prompts for participants in documentation, if going beyond bare words?

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## What is the Basic Provision? (6)

- Finally, time limit on power to exclude
  - Reg 57(20) “...*the power under [paragraph 8] to exclude an economic operator...shall not be exercisable where the contracting authority establishes that 3 or more years have elapsed since the date that the economic operator concerned was in the relevant situation...*”
- What is “*the date that the economic operator concerned was in the relevant situation*”?

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# What is the Basic Provision? (7)

- Not clear – multiple options
  - when the deficiency happened?
    - how would persistent deficiencies fit in?
  - when the early termination happened?
  - when the “comparable sanction” was imposed?
    - how would ongoing performance deductions fit in?
- C-124/17 *Vossloh Laeis GmbH* (AG Opinion 16 May 2018)
  - 2011 qualification system - participant in cartel up to 2011 - fined for cartel activity March 2016 – didn't notify authority at any point – excluded November 2016
  - when does time start to run? When grounds for exclusion fulfilled, or when authority has “certain and reliable knowledge” of existence of ground for exclusion?

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## “Finding Out”

- How do you know exclusion coming into play?
- Reg 57 declaration – standard element in all procurement procedures
- Bidder discloses (likely to be accompanied by self-cleaning statements)
- Bidder doesn't disclose, but you know something

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## “Finding Out” (2)

- Can you use information you know?
- Reg 57 has a number of different formulations of “authority has info about X having happened” eg
  - Reg 57(1) *“has established by verifying in accordance with Regs 59, 60, 61 or is otherwise aware”*
  - Reg 57(4) *“can demonstrate by any appropriate means”*
  - Reg 57(8)(c) *“can demonstrate by appropriate means”*
- Nothing for 57(8)(g) – just factual situation (“economic operator has shown...deficiencies”)

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## “Finding Out” (3)

- Reg 57(11) “...*authority may, at any time during the procurement procedure, exclude an economic operator where the authority **becomes aware** that that economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraph (8)*”
- No explicit constraints on **what** authority needs to know, or **how** it knows it

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## “Finding Out” (4)

- C-178/16 *Mantovani*
- Bidder declaration 4 & 16 Dec 2013 – director not guilty of criminal conviction
- 6 Dec 2013 – article in local paper – director had negotiated plea involving conviction for fraud
- Authority obtained criminal record – sentence 5 Dec 2013, became final 29 March 2014
- Mantovani given opportunity to explain in May 2014, said not public record till 3 Feb 2014 – authority decided to exclude

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## “Finding Out” (5)

- Court did not comment on means of becoming aware – presumably had no difficulty with it
- AG *“when it comes to the optional grounds of exclusion in respect of which no official method of recording a finding is specified...discretion is not confined to any particular document or certificate...misconduct can be assessed on the basis of the contracting authority’s knowledge of the relevant facts, however that knowledge was obtained”* (Opinion, para 78 )

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## “Finding Out” (6)

- NB not the same exclusion grounds (and 2004 Directive) and case heavily dependent on Italian rules on duty to update authority – but helpful for authorities in terms of flexibility of info sources
- Breach of equal treatment if you “know” about one bidder?
- Carve-out in docs if clear rules about prior knowledge/only being marked on info submitted?
- Reg 56(4) – power to clarify where info submitted is or appears to authority to be “incomplete or erroneous” – but better to make clear in documents

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# Deciding to exclude/include

- Found out about situation and all components established – what's next?
- Discretionary exclusion – so must make judgment call
- Principle of proportionality (specifically mentioned in recital 101 as relevant in applying the discretionary exclusions)
  - Don't go beyond what's necessary to achieve goal – always choose least onerous measure

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## Deciding to exclude/include (2)

- C-465/11 *Forposta* – Polish law – automatic exclusion in circumstances very similar to Reg 57(8)(g)
  - automatic nature not compatible with EU law
  - did not allow for “*specific and individual assessment of the conduct of the economic operator concerned*” and the “*gravity*” of that conduct
- Right of reply?
  - T-91/12 *Flying Holding NV*
  - Not directly applicable (Commission procurement) but similar concepts
  - Bidder failed to provide required aviation authority safety audit – Commission wrote on 2 December 2011 to seek and remind of consequences of not providing

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## Deciding to exclude/include (3)

- Bidder responded 6 Dec – no audits available
- Commission contacted aviation authority directly 8 Dec and obtained audits from them 12 Dec
- Bidder excluded 15 Dec – failure to provide info and misrepresentation
- Bidder challenged on a number of grounds incl no right of reply
- GC – “right to be heard” a general principle and applicable here because process “liable to culminate in a measure adversely affecting the bidder” – Commission in breach
- Saved by fact that right of reply would have made no difference in this specific case

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# Self cleaning

- Reg 57(12) – bidder in situation in 57(8) *“may provide evidence to the effect that measures taken by the [bidder] are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion”*
- Bidder “shall show” it has
  - paid /undertaken to pay compensation in respect of any damage caused by the conduct concerned;
  - clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities; **and**
  - taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences/misconduct

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## Self cleaning (2)

- Recital 102 – examples of self cleaning measures
  - severance of all links with persons or organisations involved in the misbehaviour;
  - appropriate staff reorganisation measures;
  - implementation of reporting and control systems;
  - creation of an internal audit structure to monitor compliance;
  - adoption of internal liability and compensation rules
- *“Where such measures offer sufficient guarantees...the [bidder] should no longer be excluded on those grounds alone”*

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## Self cleaning (3)

- Reg 57(15) – authority shall, when evaluating the measures, take into account the gravity and particular circumstances of the criminal offence or misconduct concerned
- If measures considered sufficient by authority, bidder “shall not” be excluded (Reg 57(13))
- Reg 57(16) – where authority considers that the measures insufficient, it shall give the bidder a statement of the reasons for its decision
- So – proportionality again - same rules apply around making a judgment call

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# Documentation

- As with all discretionary judgments – open to challenge as to how discretion exercised (regardless of whether decision is to include or exclude – just different attackers)
- Don't just **be** proportionate and reasonable – **document it** contemporaneously
- Audit trail very important (and probably required under Reg 84 report)

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# Verification

- Reg 56(1) – contracts shall be awarded...where the authority **has verified**...that the tender has been submitted by a tenderer that is not excluded in accordance with Regulation 57...”
- So bear in mind verification a necessary step – other bidders could challenge failure
- Reg 59(8) – can ask for info supporting self-declarations “at any time” provided necessary for proper conduct of procedure
- Open procedure – can wait till have identified winning bidder (provided impartial & transparent – Reg 56(3))
- Two-stage procedure – Recital 84 suggests makes sense to do before shortlisting

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## Three Questions Revisited

- When can you lawfully strike out a bid from an incumbent (or other bidder) who has not performed twice or more?
  - incumbent status irrelevant
  - number of times failed to perform may be relevant (proportionality? “serious doubts”? self cleaning?)
  - to be “lawful” – follow all the rules discussed

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# Three Questions Revisited

- What counts as evidence and when is it sufficiently serious?
  - “evidence” – arguably whatever authority aware of, at any time, however it becomes aware
  - “sufficiently serious” not a concept expressed in the rules (may be relevant to significance of breach or whether it’s of a substantive requirement, probably relevant to proportionality, and relevant to assessment of self-cleaning measures)

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## Three Questions Revisited

- What if you “know” there is a problem (but it is personal rather than public knowledge)?
  - seems to be no constraint on how authority becomes aware of the info – although query what is meant by personal knowledge
  - express power to check in documents?
  - right of reply – you may not have the full facts

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# Questions?



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