



# MAPLES

## Exclusion - Past Performance

Mary Dunne, Partner  
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- What is a tangible methodology for excluding a bidder for significant or persistent deficiencies?
- What evidence, beyond criminal convictions, can you rely upon?

## Mandatory and discretionary exclusions

- Article 57 Public Sector Directive 2014/24
- Regulation 57 Public Sector Regulations
- Regulation 80 Utilities Directive 2014/25
- Regulation 89 Utilities Regulations
- Recitals 100 – 102 of Directive 2014/24

## Mandatory and discretionary exclusions

- Overriding derogation for public interest
- EU Treaty principles apply

### **Case C – 358/12 - Consorzio Stabile Libor Lavori Pubblici v Comune di Milano (10 July 2014)**

- Emphasis on proportionality (Recital 101/Reg 57/7)
- "Self-cleansing" applies to all exclusions

## Mandatory Exclusions

- Membership of criminal organisation /conspiracy
- Corruption
- Bribery
- Fraud
- Terrorist offences
- Money laundering / terrorist financing
- Child labour / human trafficking
- Failure to pay tax or social security

## Mandatory Exclusions

- Must be convicted [by final judgment]
- Applies to economic operator
- + *"a member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control therein"*.

## Discretionary Exclusion

- CA can demonstrate by any appropriate means, violation of **environmental, social and labour law**
- Bankruptcy/insolvency
- Where the CA can demonstrate by appropriate means, grave professional misconduct which renders its integrity questionable
- Where the CA has sufficiently plausible indication to conclude collusion

## Discretionary Exclusion

- Conflict of interest where no less intrusive measure can be taken
- Where bidder gains material advantage by involvement in the procurement procedure where no less intrusive measures are available
- Serious misrepresentation in supply PQQ info
- Undue influence in decision making process and/or obtaining confidential information giving undue advantage
- Where CA can demonstrate breach of obligations to pay tax and social security

## Discretionary Exclusion – Past Performance

- *"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"*

## Recital 101

- “[CAs] should also be able to exclude candidates or tenderers whose performance in earlier public contracts has shown 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 behaviour that casts serious doubts as to the reliability of the economic operator....”

## Self-Cleansing

- Where a bidder is subject to a mandatory or discretionary ground of exclusion it may provide evidence showing measures it has taken sufficient to demonstrate its reliability
- If sufficient, bidder shall not be excluded
- Evidence to be evaluated taking account of gravity and circumstances of the offence or misconduct
- If evidence is insufficient, a statement of reasons must be supplied
- No self-cleansing during a period of exclusion imposed by a judgment

## Self-Cleansing

- To satisfy self-cleansing bidder must show:
  - It has paid compensation
  - It actively collaborated with investigating authorities
  - It has taken concrete technical, organisational and personnel measures appropriate to prevent further criminal offences or misconduct

## EU Treaty Principles

### **Case C – 358/12 - Consorzio Stabile Libor Lavori Pubblici v Comune di Milano (10 July 2014)**

- A below threshold contract was awarded to Libor who had failed to pay €278 in social security payments
- An Italian law mandated exclusion for failure to make contributions of €100 or more or 5% or more of what was owed

## EU Treaty Principles

- The court held that the Italian law was not in breach of EU principles on the following reasoning:-
  - The objective of exclusion is to ensure reliability, diligence and responsibility of the Tenderer and proper conduct towards its employees; This is a legitimate objective in the public interest
  - Failure to pay social security shows a lack of reliability, diligence and responsibility
  - Establishing a precise threshold ensures equal treatment and legal certainty. This is needed to ensure the restrictive measures are proportionate

Thank you

