



Public Procurement

Use of Official Automatic Exclusion Lists in Public Procurement

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

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

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

The exclusion is “automatic” because contracting authorities/entities have no discretion; they are obliged to exclude the listed economic operators from public procurement tender procedures and to refuse their bids¹.

Focus of this Brief: use of official automatic exclusion lists in relation to poor contract performance: The main focus of this Brief is the issue of whether it is permitted under EU law to use an official automatic exclusion list for reasons related to prior contract performance. On this specific question, the Brief concludes the following:

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

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

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

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

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

Question: Is the use of an official automatic exclusion list permitted under EU law?

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

What does the Public Sector Directive² (“the Directive”) say?

The Directive does not deal with the specific issue of the use of official automatic exclusion lists. It does require contracting authorities to verify the suitability of the participation of economic operators in the public procurement procedure by first establishing whether grounds for exclusion apply to a particular economic operator³. The two types of grounds for exclusion are listed in the Directive:

- Mandatory grounds for exclusion;
- Discretionary grounds for exclusion.

Mandatory grounds for exclusion: Under Article 45 (1) of the Directive, contracting authorities are obliged to exclude from participation in a public contract those economic operators that are known to have been convicted by final judgment for one or more of the following criminal activities⁴:

- Participation in a criminal organisation;
- Corruption;
- Fraud relating to the protection of financial interests of the European Communities;
- Money-laundering⁵.

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

The Directive permits EU Member States to decide whether to provide for a derogation from the obligation of mandatory exclusion in a case where an overriding requirement in the general interest is involved.

Discretionary grounds for exclusion: Under Article 45(2) of the Directive, contracting authorities are permitted, but not obliged, to exclude economic operators that:⁶

- are bankrupt or are under any analogous situation, in accordance with national laws or regulations;
- are the subject of proceedings for declaration of bankruptcy or similar proceedings, under national laws and regulations;

² Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public services contracts.

³ Article 44(1) of 2004/18/EC.

⁴ Article 45(1) of 2004/18/EC defines the offences in more detail.

⁵ In the new “draft directive”(“DD”) – final compromise text 11745/13 dated 12 July 2013) – there are additional offences of “terrorist offences or offences linked to terrorist activities”, “terrorist financing” and “child labour and other forms of trafficking in human beings” – (Article 55(1) DD).

⁶ In the new DD the discretionary grounds have been expanded to cover (a) violations of social, labour and environmental law; (b) distortion of competition and significant or persistent deficiencies in contract performance; and (c) undue influence – (Article 55(3) DD).

- have been convicted by a judgment that has the force of *res judicata* of an offence relating to their professional conduct, in accordance with the legal provisions of the country concerned;
- have been guilty of grave professional misconduct proven by any means that the contracting authorities can demonstrate;
- have failed to fulfil obligations relating to the payment of social security contributions in their country of establishment or in that of the contracting authority, in accordance with the legal provisions of the country concerned⁷;
- have failed to fulfil obligations relating to the payment of taxes in their country of establishment or in that of the contracting authority, in accordance with the legal provisions of the country concerned;
- have been guilty of serious misrepresentation in supplying information required for the purpose of the selection of economic operators or have not supplied such information.

EU Member States may choose to make these grounds mandatory.⁸

Implementation of the grounds for exclusion

The Directive requires EU Member States to specify, in accordance with their national laws and in compliance with EU law, the conditions for implementation of the grounds for exclusion. This requirement intends to ensure the transparency of the system for the exclusion of economic operators.

The Directive specifies, in general terms, the type of evidence that must be provided⁹. It also requires Member States to designate the authorities and bodies competent to issue the documents, certificates and declarations required as evidence and to duly notify the European Commission in this regard¹⁰.

The Directive does not deal in detail, or at all, with a number of issues. These issues are left to Member States to define. Issues not covered in detail, or at all, in the Directive include:

- Specific details of the evidential requirements, such as the particular source, the form in which this evidence should be submitted, and evidence in mitigation;
- The period of time during which criminal convictions or other judicial or administrative decisions or other situations may be considered relevant;

⁷ In the new DD for the discretionary grounds of failure to fulfil obligations relating to the payment of taxes or social security contributions where there is a final and binding jurisdiction or administrative decision to that effect constitute mandatory grounds for exclusion. When the contracting authority is aware of such a failure but there is no final and binding decision, this failure will then constitute discretionary grounds, subject to the proviso that this status will no longer be the case if the economic operator has entered into a binding agreement to make the payments due (Article 55(2) DD). EU Member States may also provide for a derogation where only minor amounts of taxes or social security contributions have not been paid (Article 55(2a) DD).

⁸ The EU Utilities Directive requires contracting entities that are also contracting authorities to apply the mandatory grounds for exclusion. The application of the mandatory grounds to other contracting entities and of the discretionary grounds to all contracting entities is a matter for the member country to decide, or for the contracting entities to decide in the event that the member country has not made a specific provision in this regard.

⁹ See Article 45(3) of 2004/18/EC.

¹⁰ There is, however, no EC-wide, centralised public database of information.

- Information as to whether the exclusion should be permanent or temporary and, if temporary, for what duration¹¹;
- Circumstances in which an economic operator is entitled to have a decision on exclusion lifted, such as cases where self-cleaning or other mitigating measures have been taken¹²;
- Scope of the exclusion; for example, information as to whether the exclusion applies to each member of a group of economic operators/consortia or sub-contractors and information as to the actions taken when grounds for exclusion apply to a single company director.

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

Is it permissible to have an official automatic exclusion list of economic operators that are excluded on the grounds of “grave professional misconduct” due to poor contract performance?

Short illustration – is this type of approach permissible?

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

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

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

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

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

¹¹ The new Draft Directive requires EU Member States to specify the maximum period of exclusion (Article 55(4a)DD).

¹² The new Draft Directive foresees provisions on self-cleaning (Article 55(4)DD).

contractual performance.

Comment: The exclusion of economic operators from tendering on the grounds of poor contract performance is based on the discretionary grounds for exclusion provided in paragraph (d) of Article 45(2) of the Directive, in cases where economic operators “have been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate”.

The Court of Justice of the European Union (CJEU) has considered the specific issue of whether it is permissible for national legislation to require contracting authorities to automatically exclude economic operators from tendering on the grounds of poor contract performance. In this regard, the CJEU considered the wording of the Directive and the relevant EU Treaty and general law principles.

“Polish Postal Services” case

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

Background

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

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

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

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

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

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

Decision of the CJEU

The CJEU confirmed that the concepts of “professional”, “grave” and “misconduct”,

as stated in paragraph (d) of Article 45(2) of the Directive, could be “specified and explained” in national law, provided that the national law has regard for EU law. The CJEU then considered these concepts and the provisions of the Polish law in the light of EU law.

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

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

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

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

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

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

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

Application to utilities: The wording of the Utilities Directive 2004/17/EC in relation to grounds for exclusion is not the same as in the Public Sector Directive. The CJEU nevertheless made it clear that the grounds for exclusion relating to professional

qualities, including the grounds of grave professional misconduct, also apply to the utilities sector.

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

A centralised official automatic exclusion list requiring contracting authorities to automatically draw conclusions in relation to professional misconduct grounds, including prior poor performance of a public contract, does not permit each contracting authority to assess the nature and seriousness of the professional misconduct on a case-by-case basis. If the reasoning of the CJEU was applied, this approach would be in breach of EU law¹³.

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

The requirement for contracting authorities to consider the grounds used for exclusion on a case-by-case basis is not limited to exclusion on the grounds of grave professional misconduct. The CJEU has examined this issue in the context of other national laws that require automatic exclusion of economic operators in specified circumstances. The CJEU concluded in a number of cases that laws requiring automatic exclusion were disproportionate and unlawful.¹⁴ See the examples in Annex 1, “Note on Basic Safeguards”.

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

Is it permitted to have an official automatic exclusion list based on the mandatory grounds listed in Article 45(1) of the Directive?

The grounds for mandatory exclusion relate to specific criminal offences for which a conviction by final judgment has been made. The policy objectives behind the mandatory grounds and the seriousness of those offences indicate that the maintenance of a centrally administered list may be justifiable, subject to the “basic safeguards”.

Where the judgment also specifies a period of exclusion from participation in public procurement procedures, then it appears to be permissible for contracting authorities to maintain and rely on a centralised list of those judgments and the periods of exclusion.

¹³ The Draft Directive (DD) provides, however, that when an economic operator has been excluded by final judgment from participating in a procurement procedure, it is not able to submit evidence of mitigating circumstances. An effect of this provision is the establishment of an automatic exclusion for the fixed period dictated by the final judgment (Article 55(4), paragraph 4 DD).

¹⁴ In the context of the rejection of tenders, the Directive sets a requirement for individual contracting authorities to consider the particular circumstances on a case-by-case basis prior to the rejection of an abnormally low tender (Article 55 of 2004/18/EC).

Is it permitted to have an official automatic exclusion list based on the discretionary grounds listed in Article 45(2) of the Directive (other than the grave professional misconduct grounds discussed above)?

The position is unclear. It could be argued that where there is a requirement under the Directive for evidence of a judgment that has the force of *res judicata* or for other specified evidence of a formal administrative decision by a competent authority, then the position is similar to the grounds for mandatory exclusion, and an official automatic exclusion list can therefore be used.

There is, however, a counter-argument that the nature, seriousness and impact of the potential grounds for exclusion (irrespective of the nature of evidence required) should always be assessed on a case-by-case basis, with particular attention being paid to the proportionality principle. This view is consistent with the case law of the CJEU discussed above¹⁵.

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

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

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

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

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

On the other hand, if the central registry is not carefully administered and operated in accordance with the relevant “basic safeguards” or with the EU Treaty and general law principles, then there is a danger that it will not be operating in a lawful manner.

If contracting authorities use information from a central registry in a simplistic manner and therefore apply it as a *de facto* official automatic exclusion list, without considering mitigating circumstances or other relevant information on a case-by-case basis, then this use will not be permissible in most cases¹⁶ for the reasons discussed above.

¹⁵ The DD seems to require consideration on a case-by-case basis, which includes taking mitigating circumstances into account.

¹⁶ The main exception will be when the information used constitutes evidence that an economic operator has been excluded from participation in procurement procedures by final judgment (see footnote 17).

See [Annex 2](#) concerning the Romanian centralised database, which provides both positive and negative information on contract performance and concerning the EU's own central exclusion database applying to expenditures from the EU budget.

Positive lists

The Directives include provisions permitting the use of “positive” lists of economic operators that meet the specified requirements for suitability to deliver public contracts. These lists are in contrast to the “negative” lists, discussed above, of economic operators that fail to meet the specified requirements.

Official lists of approved economic operators in the public sector: The Directive permits EU Member States to create official lists of approved economic operators that have submitted acceptable evidence of their suitability to deliver public sector contracts¹⁷.

An official list system allows economic operators to apply at any time for registration on an official list by supplying evidence to the public authority responsible for administering the list. The evidence submitted by economic operators is the evidence required in accordance with the Directive and with the member country's implementing legislation to demonstrate suitability for selection. This evidence may show that:

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

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

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

Qualification systems in the utilities sector: Contracting entities in the utilities sector can set up and operate qualification systems¹⁸. These systems must be operated on the basis of objective criteria, and the rules for qualification are to be established by the contracting authority/entity. In very general terms, a qualification system is a system set up by contracting authorities for their own use or for the use of other contracting authorities. Under this system, economic operators that are interested in entering into a contract with the contracting authority apply for registration as potential providers. The contracting authority assesses the evidence received from economic operators and, if qualified, the economic operators are registered in the qualification system. The registered economic operators then form a pool from which the contracting authority may select those operators that are to be invited to tender or to negotiate a contract.

¹⁷ See Article 52 of the Directive for further details on the creation and operation of official lists.

¹⁸ See Article 53 of the Utilities Directive for further details.

Annex 1: Note on Basic Safeguards

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

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

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

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

Example of the principle of transparency

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

Date for payment or regularisation must be specified: The CJEU found that where a member country uses the grounds of failure to pay taxes or social security contributions for exclusion, it must set the date by which the payment must be made or by which any regularisation must occur for an economic operator to avoid exclusion.

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

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

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

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

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

Brief examples of the requirement for proportionality

Exclusion of economic operators with prior involvement

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

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

Exclusion of economic operators with media connections

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

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

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

Exclusion of economic operators with specific relationships of control or affiliation

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

The CJEU held that economic operators could be excluded on this basis where the

connection represented a risk to transparency or equal treatment in a procedure. However, an absolute prohibition that prevented tenderers from demonstrating that the relationship did not represent a risk to the tender procedure did not comply with the proportionality principle.

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

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

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

Annex 2: Note on Terminology and Models

- A variety of terms are used to describe a centrally administered list of excluded economic operators. Terms used include “debarment lists”, “blacklists”, or “negative reference lists”.
- A number of models of centrally administered exclusion lists exist, but these models are primarily used in the context of tackling fraud, corruption and similar offences. For example, the World Bank operates a “debarment” system, using a well-documented administrative process, and publishes a list of economic operators that are ineligible to be awarded contracts funded by the World Bank. In this case debarment, resulting from the detection of prohibited practices, may be indefinite or for a fixed period, and the period of debarment is also published on the debarment list. Prohibited practices in that context are corrupt, fraudulent, collusive, coercive or obstructive practices¹⁹. The World Bank debarment list has a wider reach than just the prevention of listed economic operators from tendering for World Bank contracts, because the World Bank and other international financial institutions, including the European Bank for Reconstruction and Development (EBRD), have cross-debarment arrangements²⁰ besides the operation of their own debarment lists²¹. Such arrangements mean that economic operators on the debarment list of one institution will also be debarred from participation in contracts funded by the other participating institutions.
- The term “suspension” may also be used, although it is generally understood to refer to a situation where an economic operator is suspended or excluded from participating in a specific tender procedure rather than in all public sector tender procedures.
- The UNCITRAL Model Law 2011 includes a provision for the exclusion of economic operators and suppliers from specific procurement procedures, but not from procurement procedures in general, where there is evidence of inducement or other forms of undue influence as well as where the supplier or economic operator has an unfair competitive advantage or a conflict of interest.
- The European Union’s 2012 *Regulations on the Financial Rules applying to the General Budget of the European Union* include provisions for the setting up and operation by the European Commission of a central exclusion database. The Regulations also contain provisions for exclusion (suspension) of economic operators from specific contract procedures²². The central exclusion database and procedure-specific exclusion are to be used in the context of EU budget expenditure. The central exclusion database will contain details of economic operators in breach of the mandatory grounds for exclusion listed in the Regulations, which include: specified criminal convictions, administrative

¹⁹ See *World Bank Procurement Guidelines and Sanctions Committee Procedures* for the detailed definitions of these prohibited practices and further information on the operation of the debarment list: <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT>

²⁰ Cross-debarment, in accordance with the Agreement for Mutual Enforcement of Debarment Decisions dated 9 April 2010, has been made effective as from 1 July 2011 by the World Bank, Asian Development Bank, EBRD, Inter-American Development Bank and African Development Bank.

²¹ The EBRD defines prohibited practices as coercive, collusive, corrupt or fraudulent practices – see the EBRD’s *Enforcement Policy and Procedures* for further details.

²² Title V, Chapter 1, Articles 106 to 109 of Regulation (EU, EURATOM) No. 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No. 1605/2002 and Commission Delegated Regulation (EU) No. 1268/2012 of 29 October 2012

penalties (imposed on economic operators)²³, bankruptcy and similar situations, and grave professional misconduct. In most, but not all, cases the mandatory grounds will not apply where economic operators demonstrate that adequate remedial measures have been taken. The EU institutions and other specified bodies are to have access to the central exclusion database and may take the information in the database into account, as appropriate and on their own responsibility, when awarding contracts associated with the implementation of the budget.

- Romania operates a central registry that contains information about on both positive and negative contract performance of economic operators. The process for the registry's operation is as follows: after the completion of each contract, contracting authorities issue a document containing information on how the economic operator has fulfilled its contractual obligations, which can be positive or negative based on whether or not the economic operator has properly performed the contract. The document is issued to the contractor and a copy is placed on the procurement file. A further copy is sent to the National Authority for Regulating and Monitoring Public Procurement (Public Procurement Authority – PPA).

The PPA thus receives copies of all positive and negative documents relating to contract performance from all contracting authorities countrywide. The PPA organises a database containing this information. The database is not posted on the PPA website, but the contracting authorities may ask the PPA for information related to one or more economic operators during the tender procedure. Following such a request, the PPA sends to that contracting authority all of the available documents (both “positive” and “negative”), without any comments or suggestions. The final decision – to exclude or not to exclude an economic operator – remains with the contracting authority. The contracting authority may also contact other contracting authorities in order to obtain more information or evidence regarding cases where the tenderer concerned failed to fulfil its contractual obligations.

- EU Member States tend to leave the decision as to whether or not to exclude economic operators to the contracting authorities themselves, to be decided on a case-by-case basis, subject to national legislative provisions implementing the Directives, which may set some parameters for that decision making.

²³ An administrative penalty can include the exclusion of the economic operator from contracts and grants financed by the EU budget for up to five years (ten years when it is a repeat offence) and/or a financial penalty. An administrative penalty can only be imposed after the economic operator has had an opportunity to present its observations, and the penalty must be proportionate to both the importance of the contract and the seriousness of the misconduct. The publication of a decision to impose an administrative penalty is not automatic.