

# When can you be confident in applying the mandatory and discretionary exclusion grounds?

Ciara Kennedy-Loest

2020

# Introduction

---

- Exclusion grounds have long featured in the procurement Directives.
- Intended to “encourage” good behaviour and/or at least save Authorities from dealing with “bad” suppliers.
- 2014 Directive introduced major amendments.

# Introduction

---

- Amendments have not (seemingly) led to greater use of exclusion grounds by UK authorities.
- Problems include:
  - Complexity of grounds themselves;
  - Ease of circumvention by suppliers;
  - Recent case law.

# Mandatory Grounds

---

- A57 Directive 2014/24/EU requires Authority to exclude an economic operator where it has established via the qualification process, or is “otherwise aware”, that the operator has been convicted by final judgment, in the last five years, of one from a list of specified offences.
- Regulation 57(1) PCRs is in equivalent terms, but omits reference to “final judgment.”

# “Final Judgment”

---

- Means one from which no appeal is possible.
- Many Continental jurisdictions have lengthy appeals processes. Authority cannot rely on conviction as a mandatory ground until appeals are completed.
- Authority may seek to exclude on basis of “grave professional misconduct” instead, but difficult if supplier is appealing on facts as well as penalty? NB: also 3 years, not 5.

# “Economic Operator”

---

- Obligation to exclude applies where “economic operator” has a conviction.
- In the case of consortium candidates, the consortium and its constituent members will be economic operators (see *Nuclear Decommissioning Authority* from 2017)...
- ... at least where all the members are established entities, offering goods or services etc on the market (see *Community R4C* from 2020)

# Which other entities are relevant?

---

- In any event, the criteria apply not just to the immediate “economic operators.”
- See A57(1) & Regulation 57(2):-
  - *“The obligation to exclude an economic operator applies where the person convicted is a member of the administrative, managerial or supervisory body of the economic operator.”*
- Potentially catches directors and senior managers, but also parent and grandparent entities etc.

# Which other entities are relevant?

---

- Confirmed in the 2019 Procurement Policy Note:

*“... for example, if an intermediate parent company had a relevant conviction it would be excluded from bidding, as would any subsidiary in which that company had powers of decision, representation or control and if the ultimate parent was convicted it would be excluded from bidding, as would any companies in its corporate group in which that company has powers of decision, representation or control.”*

# Which other entities are relevant?

---

- In practice, this provision is easily evaded.
- Only applies to “current” parents/grandparents, so tainted parent company can be shunted to different part of group structure and replaced by a “clean” parent.
- Likewise, directors and senior managers affected by convictions can be moved to different roles and/or leave the candidate’s employment entirely.

# Which convictions are relevant?

---

- PQQs often very broadly drawn, catching fraud, corruption, money laundering etc convictions anywhere in the world. This is not consistent with A57 and may be challenged!
- A57(1) lists the relevant offences very precisely. Eg, not any 'fraud' conviction, but only convictions for fraud: "*within the meaning of Article 1 of the Convention on the Protection of the European Communities' Financial Interests.*"
- Generally, the list catches only convictions under the laws of a Member State for the relevant behaviour (terrorism, money laundering etc.)

# Which convictions are relevant?

---

- The form of those Member State laws have been dictated by EU law and so will normally catch:
  - i. Behaviour by nationals of the Member State concerned anywhere in the world;
  - ii. Behaviour by nationals of another country, but committed within that Member State's jurisdiction.
- Only the “corruption” category is drawn more broadly. That catches any conviction for corruption as that term is defined by the laws of the Authority's Member State or the laws of the state of the candidate concerned.

# Which convictions are relevant?

---

- So, a French conviction of a French company for offending behaviour in Africa would be relevant. But the conviction of an Italian company for behaviour in Africa, under the US Foreign Corrupt Practices Act, would not be.
- Non-Member State convictions might still be relevant under “grave professional misconduct”.

# Which convictions are relevant?

---

- PCRs have taken a slightly different approach but arrive at the same result.
- Reg 57 lists specific UK offences but also: *“Any other offences within the meaning of A57(1) of the Public Contracts Directive ... as defined by the law of any jurisdiction outside England, Wales and Northern Ireland”*.
- That’s to say: any other offences which fall within A57 and (aside from corruption) that is only offences created by other Member States.

# Self-cleaning

---

- Even a relevant, final, conviction is not the end of the story!
- Authorities must always consider self-cleaning under A57(6) i.e. whether the supplier can prove that it has:-
  - Paid or undertaken to pay compensation re any damage caused by the criminal offence/misconduct;
  - Clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities;
  - Taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

# Self-cleaning

---

- Does A57(6) require measures under all three categories?
- Not clear, but 2019 PPN contains helpful list of possible self-cleaning measures and does not suggest that measures from all three categories are required:-
  - “*In practice, the specific and detailed actions will depend on the individual circumstances, such as the nature of the exclusion ground and the particular situation of the Bidder, but may include several or all of the following...” [emphasis added]*
- If a candidate has self-cleaned to an Authority’s satisfaction, it must not be excluded.

# Proportionality:

---

- But even in the absence of satisfactory self-cleaning, Authority must not exclude a candidate if to do so would be disproportionate in all the circumstances.
- Proportionality tempers exclusion decisions under mandatory and discretionary grounds. See Gruppo Torinese (2019), for example:-

*“In accordance with the principle of proportionality, the finding of grave professional misconduct requires, in principle, a specific and individual assessment of the conduct of the economic operator to be carried out.”*

- Rarely disproportionate to exclude candidate with criminal conviction, but there may be more issues where conviction is more remote e.g. relates to grandparent and was acquired before subsidiary candidate joined the group etc.?

# Discretionary Grounds: prior contract breaches

---

- Applies 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.”*
- Applies in respect of events/behaviour anywhere in the world in preceding three years (mandatory grounds are five years.)

# Timing

---

- What has to have happened in the previous three years? Is it the breach itself or the consequences of the breach?
- Vossloh Laeis (2018) is relevant, although decided under “anti-trust breaches” ground. Court decided that ground arose when Authority had “*sufficiently plausible indications*” of anti-trust breach i.e. normally from the finding of the competition authority, not the date of the conduct itself.

# Timing

---

- By analogy: the prior contract breaches ground may not spring from the breach itself but from the consequence (termination, damages etc) so three years could run from that point.
- That may entail two distinct starting points:
  - (i) Early termination; or
  - (ii) Damages

So supplier's exposure may last longer than three years in total!

# Relevance of appeals?

---

- What if supplier is contesting the early termination etc?
- There is no equivalent of the “conviction by final judgment” concept, but was thought for years that an appeal would suspend the exclusion ground.
- Recent cases have firmly squashed this (see *Croce Amica* (2014), *Meca* (2019), *Delta Antrepriza* (2019))

# Relevance of Appeals?

---

- Meca concerned school meals contract awarded by municipality of Naples to Sirio. After multiple failures, Sirio was sacked and Meca stepped in.
- Sirio competed for next school year and won some lots. Meca said Naples should have excluded Sirio on grounds of the prior breach. Naples objected this was not possible while Sirio was appealing.
- CJEU disagreed: each Authority must form its own view as to whether exclusion grounds are made out in the context of its own procurement procedure. It should not wait for a court to decide whether the earlier termination was justified. It should arrive at its own views.
- Easier said than done!

# What are “significant or persistent deficiencies”?

---

- Assumption might have been that if problems had led to early termination etc, they were always “*significant or persistent deficiencies.*”
- *Delta Antrepriza (2019)* suggests not. Case concerned roads contract; Authority excluded consortium which included Delta, because Delta had been early-terminated from unrelated contract with another Authority for unauthorised sub-contracting.
- Delta challenged its exclusion, saying earlier events did not amount to “*significant or persistent deficiencies*”, simply a minor irregularity.

# What are “significant or persistent deficiencies”?

---

- CJEU agreed that Roads Authority could not regard exclusion ground as made out just because there had been early termination of previous contract, but rather must reach its own decision on whether the underlying events were “*significant or persistent deficiencies*”.
- Court drew distinction between circumstance where Delta had sub-contracted in face of absolute prohibition, as opposed to failing to seek prior consent to identity of particular sub-contractor, but left Authority to decide.

# What are “significant or persistent deficiencies”?

---

- Effectively requires second Authority to examine facts of previous incident and extent to which it undermines Authority’s confidence in supplier for its own procurement.
- Easier said than done, especially if earlier Authority is not co-operative or is slow to respond etc.

# Misrepresentation

---

- CJEU also criticised Delta for failing to alert Roads Authority to the earlier termination. It raised the possibility of exclusion for misrepresentation.
- Advocate General also emphasised that Delta should have disclosed the circumstances even though protesting its innocence:-

*“In a case such as this, where there has been a formally declared prior termination of contract, the principle of fair dealing compelled Delta to notify the contracting authority of that objective fact at the outset, a course of action which would not have prevented it from providing as much information as it might have thought necessary to demonstrate that in its view the breach of obligations did not exist or was of scant significance.”*

# Conclusion

---

- Exclusion grounds are much more complicated for Authorities to apply than they seem.
- They are reasonably easily evaded by a determined supplier.
- Even where grounds appear to be relevant, faced with strong arguments from the supplier concerned, patchy co-operation from authorities involved in earlier events and a need to get on with the procurement, Authorities probably tempted to “turn a blind eye.”

# Case References

---

- Energy Solutions EU Limited v Nuclear Decommissioning Authority [2017] UKSC 34.
- Community R4C Limited v Gloucestershire County Council [2020] EWHC 1803.
- Consorzio Nazionale Servizi Societa Cooperativa (CNS) v Gruppo Torinese Trasporti GTT SpA [2019.] Case C-425/18.
- Vossloh Laeis Gmbh v Stadwerke Munchen [2018.] Case C-124/17.
- Croce Amica Italia Srl v Azienda Regionale Emergenza Urgenza [2014.] Case C-440/13.
- Meca Srl v Comune di Napoli [2019.] Case C-41/18.
- Delta Antrepriza Constructii si Montaj 93 SA v Compania Nationala de Administrare a Infrastructuri Rutiere SA [2019.] Case C-267/18.
- Applying Exclusions in Public Procurement, Managing Conflicts of Interest and Whistleblowing. Procurement Policy Note of February 2019.



[www.hoganlovells.com](http://www.hoganlovells.com)

"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses.

The word "partner" is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing.. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members.

For more information about Hogan Lovells, the partners and their qualifications, see [www.hoganlovells.com](http://www.hoganlovells.com).

Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney advertising. Images of people may feature current or former lawyers and employees at Hogan Lovells or models not connected with the firm.