Exclusion, Qualitative Selection and Short-listing in the New Public Sector Procurement Directive 2014/24

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1. Introduction

Following the 2011 proposal of the European Commission for the adoption of a new set of public procurement Directives, and after intense negotiations at the Council, a Compromise Text was published on 12 July 2013 for submission to the European Parliament for a first reading, with a view to the adoption of new public procurement rules by the end of 2013. The final text of the Directive was approved by the European Parliament on 15 January 2014 and its final official version has been published in the Official Journal of the European Union on 28 March 2014 as 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 (hereinafter, the ‘new Directive’). The reform of legislation on public procurement was one of the twelve priority actions set out in the Single Market Act adopted in April 2011. As the Com-

mission made clear: 'the efficiency of public tendering has become a priority for all Member States, in view of the current budgetary constraints. We therefore need flexible, simple instruments which allow public authorities and their suppliers to conclude transparent, competitive contracts as easily as possible and at the best value for money'.

Therefore, the main aims of the European Commission with its initial proposal were to simplify the current rules and to provide contracting authorities with more flexibility in the carrying out of their procurement activities, without restricting the opportunities for competition and with a view to enhance access to small and medium enterprises (SMEs). In parallel, the European Commission also aimed to facilitate a qualitative improvement in the use of public procurement by ensuring greater consideration for social and environmental criteria such as life-cycle costs or the integration of vulnerable and disadvantaged persons.

On the basis of such a background to public procurement reform in the EU, this paper is concerned with the modifications that the new Directive contains in relation to the general principles (rectius, rules) for the choice of participants and award of contracts (section 2) and, more specifically, on the rules for the exclusion of economic operators (section 3), the qualitative selection of candidates and tenderers (section 4), and the short-listing of candidates, tenders and solutions (section 5), including the particular technique of technical dialogue (section 6). It will also offer some brief conclusions (section 7). The assessment is based on a comparison with the equivalent rules under current Directive 2004/18/EC, as well as on the problems and implementation difficulties that the author envisages in the new Directive, and always subject to the specific decisions of each Member State in the transposition of the new rules into their domestic public procurement systems—which shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 18 April 2016.


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2. General principles (rectius, rules)

2.1. Cumulative compliance of criteria concerned with tenderers and their tenders, regardless of the order in which they are assessed

The new Directive creates a new Article 56 on general principles (rectius, general rules) for the choice of participants and the award of contracts that expands and modifies significantly the rules in current Article 44(1) of Directive 2004/18. Article 56(1) of the new Directive condenses the content of Article 44(1) of Directive 2004/18 and changes its drafting significantly in order to clarify that contracts can only be awarded where both the tenderer and its tender comply with all applicable requirements under the relevant procurement documents. This clarification may not have been necessary, as the application of the rules under Directive 2004/18 surely led to the same conclusion. By the change of drafting, it also suppresses the reference to a mandatory sequence of evaluation that required that 'Contracts shall be awarded [...] after the suitability of the economic operators not excluded [...] has been checked', which seemed to require that exclusion and qualitative selection of economic operators was conducted prior to the analysis of their tenders in accordance with award criteria. This is the logical sequence, in any case. Nonetheless, in order to clarify this flexibility, Article 56(2) of the new Directive expressly foresees, subject to Member States transposition decision to exclude it or to restrict it for certain types of procurement or specific circumstances, the possibility for contracting authorities to 'examine tenders before verifying the absence of grounds for exclusion and the fulfillment of the selection criteria' but, in such case, 'they shall ensure that the verification of absence of grounds for exclusion and of fulfillment of the selection criteria is carried out in an impartial and transparent manner so that no contract is awarded to a tenderer that should have been excluded [...] or that does not meet the selection criteria set out by the contracting authority'. This rule, which has no equivalent under Directive 2004/18, will only be applicable in connection with open procedures because in the rest of the procedures, a reversal of the sequence selection-award is not feasible.

This provision seems to anticipate itself the problems that such sequence can generate, given that contracting authorities will always have an incentive to 'twist' exclusion and selection criteria to be able to retain the best offer they have received. Moreover, unless the procurement is carried out under rare circumstances that make the assessment of the tender (both in technical and economic terms) simpler and quicker than the general assessment of the tenderers, there seems to be an advantage in proceeding first to exclude non-suitable or non-qualified tenderers in order to avoid the costs (in terms of
time, at least) of evaluating their tenders. Moreover, the contracting authority can significantly reduce the cost of exclusion and selection analyses both for tenderers and for itself by resorting to the acceptance of the European Single Procurement Document and other facilitating measures under Article 59 of the new Directive (below section 4.5). Therefore, the practical impact of this new provision can be doubted, as contracting authorities may only find an advantage in the reversal of the assessment sequence in a limited number of open procedures and, even in those cases, they may want to avoid any potential challenge on the basis of discrimination derived from the ex post assessment of the tenderer that has submitted the best tender against exclusion grounds and qualitative selection criteria.

2.2. Exclusion possible at any point of the tender procedure

Still as a matter of general rules, Article 57(5) of the new Directive introduces a much needed clarification on the possibility or duty for contracting authorities to exclude economic operators at any moment during the procedure. This clarifies that exclusion grounds (both those that are mandatory as a matter of EU law, and those that Member States make mandatory in their jurisdictions) should be considered unavailable [ie mandatory because they represent the 'public interest', unless some of them are configured in a discretionary manner by domestic law, as allowed for by art 57(4) new dir] and that contracting authorities should be aware of them and check for compliance throughout the tender procedure. Equally, contracting authorities are now given express legal support for the exclusion of tenderers at late stages of the tender procedure, therefore nullifying any claims based on the potential (legitimate?) expectations derived from not having been excluded at the beginning of the procedure. According to Article 57(5) of the new Directive, it is now clear that a contracting authority would not be going against its own prior acts and thus not be estopped from excluding tenderers previously admitted to (or not excluded from) the tender procedure.

More specifically, Article 57(5) of the new Directive establishes that contracting authorities 'shall at any time during the procedure exclude an economic operator where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure,' convicted by final judgment of one of the qualified crimes of Article 57(1), or where the contracting authority is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions and where this has been established by a judicial or administrative decision having final and binding effect [Art 57(2) new dir, and below section 3.1]. Moreover, 'contracting authorities may exclude or may be required by Mem-
ber States to exclude an economic operator where it turns out that the 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 4. Indeed, and as we shall see in further detail (below section 3), in some cases, contracting authorities are simply able to exclude, but not obliged to exclude, economic operators that have incurred in certain (mandatory) grounds for exclusion. Hence, this new provision is due to generate significant legal effects and may be open to litigation to test its boundaries against the general principles of equal treatment, protection of legitimate expectations and legal certainty—which can raise ‘constitutional’ law issues in some of the domestic jurisdictions.

2.3. Exclusion and rejection possible on the basis of non-compliance with (EU, domestic and international) social, labour and environmental law

Linked to the possibility that contracting authorities actually award the contract to a tenderer not having submitted the best tender (but for reasons other than lack of compliance with exclusion grounds or qualitative selection criteria, discussed above section 2.1), it is worth noting that Article 56(1) in fine of the new Directive opens the door to the use of public procurement decisions as a lever to promote enforcement of (or sanction the lack thereof) social, labour and environmental law—thereby strengthening the possibilities to use procurement for the pursuit of such ‘secondary’ or ‘horizontal policies’.4

In more detail, the provision contemplates that ‘Contracting authorities may decide not to award a contract to the tenderer submitting the most economically advantageous tender where they have established that the tender does not comply with the applicable obligations referred to in Article 18(2)—that is, ‘obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X’—which can be modified by the Commission from time to time, according to Article 56(4) of the new Directive.

This should be connected to the provision of Article 57(4)(a) of the new Directive, which indicates that ‘Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement

procedure any economic operator […] (a) where [they] can demonstrate by any appropriate means a violation of applicable obligations referred to in Article 18(2)’ (further discussed below section 3.4). It is important to stress that such exclusion could take place at any moment (above section 2.2), which includes the exclusion right at the point of making an award decision.

In my view, both Article 56(1) in fine and 57(4)(a) of the new Directive serve exactly the same function—ie the strengthening of the social, labour and environmental aspects of the public procurement function, although in a manner that can seriously diminish its economic effectiveness and that can impose a burden difficult to discharge on contracting authorities (which could now be in a difficult position where they will need to assess tenderers’ and tenders’ compliance with an increased set of diverse rules of a social, labour and environmental nature). Indeed, both provisions aim at the same outcome, with the only apparent difference that Article 56(1) in fine is concerned with the tender specifically, whereas Article 57(4)(a) is concerned with the tenderer more generally—and, consequently, Article 57(4)(b) may be seen as a rule that looks at the past and present general compliance of the economic operator with social, labour and environmental law, whereas Article 56(1) in fine allows the contracting authority to make a prognosis of compliance and reject a tender if its future implementation would imply non-compliance with social, labour and environmental law requirements. In any case, their effectiveness will largely depend on the transposition decisions of the Member States and, ultimately, on the actual capacity of contracting authorities to engage in such possibly complex assessments of compliance with EU, domestic and international social, labour and environmental rules.

2.4. More scope for a power/duty to seek clarifications and additional information from tenderers

On a different note (but possibly related if the contracting authority needs further information to assess compliance with eg social, labour or environmental rules, above section 2.3), it is also relevant that Article 56(3) of the new Directive is extending the powers of contracting authorities to seek clarifications or additional information from candidates and tenderers. Currently, Article 51 of Directive 2004/18 simply foresees that contracting authorities ‘may invite economic operators to supplement or clarify the certificates and documents’ concerned with their personal situation—ie the documents and certificates concerned with the (lack of) grounds for exclusion and compliance with qualitative selection criteria (including their suitability to pursue a professional activity, their economic and financial standing, their technical and/or professional ability, or their systems to ensure compliance with quality assurance
and environmental management standards). Under the rest of the rules of Directive 2004/18, clarifications are only allowed in competitive dialogues and always provided that 'this does not have the effect of modifying substantial aspects of the tender or of the call for tender and does not risk distorting competition or causing discrimination' [art 28(7) dr 2004/18].

On its part, Article 56(3) of the new Directive goes well beyond the current rules and empowers contracting authorities to adopt a more proactive role. Specifically, this provision foresees that 'Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous or where specific documents are missing, contracting authorities may, unless otherwise provided by the national law implementing this Directive, request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency'. This should be seen as a codification of the case law of the Court of Justice of the European Union (CJEU) concerned with the duty of good administration in the area of public procurement and need to be read in conjunction with its interpretation of the limits imposed by the principles of transparency and equal treatment. Despite being concerned with the tender phase rather than the selection of candidates itself, the closest 'precedent' to the rule in Article 56(3) of the new Directive should be found in the Slovensko Judgment, where the CJEU clearly indicated that EU procurement law 'does not preclude a provision of national law [...] according to which, in essence, the contracting authority may ask tenderers in writing to clarify their tenders without, however, requesting or accepting any amendment to the tenders. In the exercise of the discretion thus enjoyed by the contracting authority, that authority must treat

7. Interestingly, the Court of Justice of the European Union has strengthened this possibility in its recent Judgments Case C-599/10 Slovensko [2011] ECR I-10873, and C-336/12 Manova [2013] ECR nyr.


the various tenderers equally and fairly, in such a way that a request for clarification cannot appear unduly to have favoured or disadvantaged the tenderer or tenderers to which the request was addressed, once the procedure for selection of tenders has been completed and in the light of its outcome. After the proposal for the new Directive was already being discussed, the CJEU clarified that Slovensko provided “guidance in relation to tenders [that] can also be applied to applications filed at the screening stage for candidates in a restricted procedure”, hence suppressing any doubts as to the applicability of the rule throughout the tender procedure and not only in any specific phase. Even more specifically, it clarified that “a contracting authority may request the correction or amplification of details of such an application, on a limited and specific basis, so long as that request relates to particulars or information, such as a published balance sheet, which can be objectively shown to pre-date the deadline for applying to take part in the tendering procedure concerned”, but bearing in mind that “this would not be the case if the contract documents required provision of the missing particulars or information, on pain of exclusion”. Moreover, an interpretation of this clause in view of the CJEU case law may result in a positive obligation to contact tenderers and seek clarification or additional information (given that contracting authorities do not have an unfettered discretion not to exercise their power to seek clarification), at least under certain conditions, such as when “the circumstances of the case, of which [the contracting authority] is aware, suggest that the ambiguity probably has a simple explanation and is capable of being easily resolved”. Therefore, Article 56(3) of the new Directive should be welcome inasmuch as it can contribute (through the interpretation to be given to it by the CJEU) to the development of a common (minimum) standard of “good administration” in public procurement across all EU Member States—regardless of the requirements of their domestic codes of administrative procedure or similar provision.

3. Grounds for the exclusion of economic operators

3.1. Extension of the grounds for mandatory exclusion of economic operators: an emphasis on the fight against fraud and corruption

Article 57 of the new Directive alters and extends the grounds for mandatory exclusion currently foreseen in Article 45 of Directive 2004/18. According to Article 57(1) of the new Directive, the current four grounds for mandatory exclusion of economic operators convicted by final judgment are maintained, which include the following offences: i) participation in a criminal organisation, ii) corruption (see also below here and section 3.2), iii) fraud, and iv) money laundering. The references to the statutory instruments where these offences are regulated have been updated, but the regime remains substantially identical. However, Article 57(1) and 57(2) of the new Directive significantly extend the remit of the grounds for mandatory disqualification.

Firstly, in connection with corruption, the ground is extended beyond the ‘EU definition’ of this offence and will now cover ‘corruption as defined in the national law of the contracting authority or the economic operator’ [art 57(1)(b) new dir]. This will not be without difficulty, given the variety of criminal laws that might need checking, but it seems in line with the requirements of Article IV:4(c) of the revised version of the 2011 WTO Agreement on Government Procurement (GPA), which mandates that contracting authorities conduct ‘covered procurement in a transparent and impartial manner that: (c) prevents corrupt practices’ and which makes explicit reference to the

16. However, there is a very scant (if not non-existent) explanation for these relevant changes in the recitals of the new Directive, which number (100) simply states that ‘Public contracts should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union’s financial interests, terrorist offences, money laundering or terrorist financing. The non-payment of taxes or social security contributions should also lead to mandatory exclusion at the level of the Union. Member States should, however, be able to provide for a derogation from these mandatory exclusions in exceptional situations where overriding requirements in the general interest make a contract award indispensable. This might, for example, be the case where urgently needed vaccines or emergency equipment can only be purchased from an economic operator to whom one of the mandatory grounds for exclusion otherwise applies’.


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United Nations Convention against Corruption.\textsuperscript{19} Therefore, the scope of this
ground for mandatory exclusion seems to have been significantly broadened
(at least potentially, and depending on the actions of the Member States to
adopt aggressive anti-corruption legislation) (see also below section 3.2).
Such broadening can even result in a certain extraterritoriality in the application
of this ground for exclusion when national criminal laws concerned with
corruption cover instances of bribery of third country officials following the
OECD Convention on Combating Bribery.\textsuperscript{20}

Secondly, in relation to terrorism, two new mandatory grounds for exclu-
sion are created for terrorist financing [art 57(1)(e) new dir] and for terrorist
offences or offences linked to terrorist activities [art 57(1)(d) new dir].

Thirdly, a new ground for mandatory exclusion is created to tackle child
labour and other forms of trafficking in human beings, as defined in the cor-
responding EU instruments [art 57(1)(f) new dir].

Fourthly, lack of payment of taxes or social security contributions be-
comes a ground for mandatory disqualification ‘where this has been estab-
lished by a judicial or administrative decision having final and binding effect
in accordance with the legal provisions of the country in which it is estab-
lished or with those of the Member State of the contracting authority’ [art
57(2) new dir]. This makes mandatory the grounds for discretionary exclu-
sion currently foreseen in Articles 45(2)(e) and 45(2)(f) of Directive 2004/18
where there is a final and binding jurisdictional or administrative decision—
and, otherwise, it will remain a discretionary ground for exclusion under Ar-
ticle 57(2) of the new Directive (below section 3.2).

Lastly, Article 57(1) in fine of the new Directive clarifies the provisions in
Article 45(1) in fine of Directive 2004/18 and extends the obligation to ex-
clude the economic operator on the basis of any of the prior grounds for ex-
clusion ‘where the person convicted by final judgment is a member of the
administrative, management or supervisory body of that economic operator
or has powers of representation, decision or control therein’. The only excep-
tion to this rule concerns the lack of payment of taxes and social security con-
tributions, but this seems open to contention. In my opinion, at least where
lack of payment is related to the activities of the economic operator, the rule
should apply despite the legal person not being the one directly convicted or

\textsuperscript{19} See undoc.org/undocs/treaties/CAC1.
\textsuperscript{20} oe.cd.org/corruption/ocedantlibriberyconvention.htm. See also the 2009 OECD Rec-
ommendation for Further Combating Bribery of Foreign Public Officials in Interna-
tional Business Transactions, oe.cd.org/daf/anti-bribery/ocedantlibriberyrecommen-
dation2009.htm.
the direct addressee of the jurisdictional or administrative decision confirming the breach of tax or social security rules.

It is also worth stressing that, similar to what is already provided for in Article 45(1)III of Directive 2004/18, Article 57(3) of the new Directive foresees that ‘Member States may provide for a derogation from the mandatory exclusion [...] on an exceptional basis, for overriding reasons relating to the public interest, such as public health or protection of the environment’. In this regard, I would submit that the interpretation of the concept of ‘general interest’ developed by the CJEU in the area of free movement (of goods, in relation to art 36 TFEU and the so called Cassis rule of reason) may be of relevance for the interpretation and construction of such potential derogations. Moreover, in the case of the lack of payment of taxes and social security contributions, Article 57(3) in line of the new Directive authorises Member States to create an (additional) derogation ‘where an exclusion would be clearly disproportionate, in particular where only minor amounts of taxes or social security contributions are unpaid or where the economic operator was informed of the exact amount due following its breach of its obligations relating to the payment of taxes or social security contributions at such time that it did not have the possibility of taking measures [addressed at sorting out the situation …] before expiration of the deadline for requesting participation or, in open procedures, the deadline for submitting its tender’. In order to ensure consistency of such de minimis exception to the mandatory rule established in Article 57(2) of the new Directive, a common definition of what constitutes ‘minor amounts’ seems necessary. Otherwise, this is an issue likely to end up being referred to the CJEU for a preliminary interpretation, which answer may be almost impossible for the Court to provide, unless it is clearly willing to create a judicial de minimis threshold for this ground of exclusion.

3.2. Extension of the discretionary grounds for exclusion of economic operators

Following the current distinction in Article 45(2) of Directive 2004/18, which establishes additional exclusion grounds that contracting authorities can decide to apply at their discretion, Articles 57(2)II and 57(4) of the new Directive extend the current list of discretionary grounds for the exclusion of economic operators.

economic operators that contracting authorities may decide to use (or may be required by their Member State to use) to exclude any economic operator from participation in a procurement procedure. With some drafting modifications, but with fundamentally the same content, the list provided in Articles 57(2)(ii) and 57(4) covers the current grounds of exclusion on the basis of: i) bankruptcy, judicial administration or assimilated situations, including being part of ongoing proceedings, ii) demonstrated grave professional misconduct, which renders its integrity questionable, iii) lack of payment of taxes or social security contributions not established by a jurisdictional or administrative decision having final and binding effect (otherwise, the exclusion ground becomes mandatory, above section 3.1), and iv) serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria, or withholding of such information. Furthermore, and similarly to what happened with mandatory exclusion grounds, Article 57(4) of the new Directive extends and broadens the list of situations in which an economic operator can (or must) be excluded.

Firstly, given the creation of new rules on the European Single Procurement Document (ie the submission of self-declarations) rather than the supply of full evidence supporting the inexistence of grounds for exclusion and compliance with qualitative selection criteria (art 59 new dir and below section 4.5), the ground concerned with misrepresentation and withholding of information is extended to cover situations where the economic operator is 'not able to submit the supporting documents required pursuant to Article 59' [art 57(4)(h) new dir]. This establishes a iuris et de iure presumption that the economic operator that cannot supply the required supporting documentation has gravely misrepresented its suitability and qualification to be awarded the contract and seems a natural extension of this grounds for exclusion—which,

22. Article 57(1)(c) of the new Directive refers to situations 'where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct', merging the current provisions of Directive 2004/18 in Articles 45(2)(c) 'has been convicted by a judgment which has the force of res judicata in accordance with the legal provisions of the country of any offence concerning his professional conduct' and 45(2)(d) 'has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate'. Actually, the list (partially) suppresses the content Article 45(2)(c). This seems to exclude the grounds for exclusion for non-grave professional misconduct sanctioned by a final judgment under Article 45(2)(c). However, given the absence of a common definition of 'grave professional misconduct' the practical effects of such a change remain doubtful.
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In my opinion, should however constitute a mandatory ground for exclusion (below section 4.5).

Secondly, as already mentioned (above section 2.3), contracting authorities can exclude economic operators where they can demonstrate by any appropriate means violations of applicable obligations established by Union law or national law compatible with it in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex X [arts 18(2) and 57(4)(a) new dir]. Other than the considerations related to the use of public procurement as a lever to reinforce compliance with such ‘secondary policies’, this new ground for exclusion raises the issue of the standard of diligence that the contracting authority must discharge in order not to be negligently unaware of the existence of such violations. Given that there are different standards for different exclusion grounds, these are issues that are prone to litigation and that will likely require interpretation by the CJEU. In my view, any means of proof should suffice to proceed to such exclusion, but the violation should be of a sufficient entity as to justify the exclusion under a proportionality test (similarly to what the new Directive proposes in terms of lack of payment of taxes or social security contributions, or ‘grave’ professional misconduct), since exclusion for any minor infringement of social, labour or environmental requirements may be disproportionate and, ultimately, not in the public interest if it affects the level and intensity of competition for the contracts.

Thirdly, the new Directive creates a new (limited) ground for the exclusion of infringers of competition law. Indeed, contracting authorities can now exclude economic operators where they have ‘sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition’ [art 57(4)(d)]. This should be read in connection with the OECD’s July 2012 Recommendation on Fighting Bid Rigging in Public Procurement23 and with the many actions undertaken by national competition authorities of some of the Member States to better liaise with contracting authorities and entities, and to advocate for competition law compliance in the public procurement setting. In my opinion, this new ground for exclusion is excessively limited and, given the gravity of bid rigging, it should be a ground for the mandatory exclusion of the offenders.24 As a matter of diligence (and subject to applicable domestic rules), in

23. oecd.org/competition/cartels/fightingbidrigginginpublicprocurement.htm.
24. For further discussion, see A Sanchez Gacell, ‘Prevention and Deterrence of Bid Rigging: A Look from the New EU Directive on Public Procurement’, in G M Racea
these cases, the contracting authority seems likely to be under a duty to report this behaviour to the national competition authority and to cooperate as much as necessary with the ensuing competition law investigation.

Fourthly, the new Directive creates yet another ground for exclusion based on poor past performance by the economic operator. Under this new ground, contracting authorities can exclude economic operators that have ‘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’ [art 57(4)(g)]. The introduction of past performance as an exclusion ground responds to the requests made for a long time by practitioners and brings the EU system closer to that of the US. Remarkably, this provision may overturn the practice and case law that prevented contracting authorities to take past performance into consideration. In my opinion, even if good past performance should not be taken into consideration either for selection or award purposes (because of the effect it has in entrenching the incumbents), it seems sensible to introduce its use for ‘negative’ purposes in order to allow contracting authorities to (self)protect their interests by not engaging contractors prone not to deliver as expected. This seems particularly proportionate in view of the rules on ‘self-cleaning’ that allow contractors to compensate such poor past performance by showing that they have implemented changes to avoid them recurring (below section 3.3).

Interestingly, a (soft) corruption-related new ground for exclusion is also created. Further to the ground for mandatory exclusion of economic opera-

25. Indeed, ‘the past acquisition of significant experience in the field of [providing services to public authorities] and, more specifically, to the [contracting authority], cannot under any circumstances be taken into account by the contracting authority when selecting tenders if the principles of equal treatment and non-discrimination are to be respected’; Case T-59/05 Evropalıki Diamantí (DG AGRI) [2008] ECR II-157 para 104. Similarly, although in less explicit terms, see Case T-183/00 Strabag Benelux [2003] ECR II-135 para 79; and Case T-493/04 Belfast [2008] ECR II-781 para 76.
26. This would have been strengthened if the intermediate drafts of the Compromise Text published in July 2012 had changed Article 15 on the principles of procurement to read ‘Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner that avoids or remedies conflicts of interest and prevents corrupt practices’ (emphasis added). See register.consilium.europa.eu/pdf/en/12/st12/st12878.en12.pdf. However, this is not the drafting retained in the latest version of the Directive.
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ters engaged in (hard) corruption (above section 3.1), contracting authorities can exclude economic operators where they have ‘undertaken to unduly influence the decision-making process of the contracting authority, to obtain confidential information that may confer upon it undue advantages in the procurement procedure or to negligently provide misleading information that may have a material influence on decisions concerning exclusion, selection or award’ [art 57(4)(i) new dir]. To be sure, some or all of these activities may be caught by the definition of corruption under domestic laws and, consequently, could substantively overlap with the mandatory ground for exclusion in Article 57(1)(b) of the new Directive (above section 3.1). However, the mandatory ground for exclusion is only triggered if the economic operator has already been convicted by final judgment. Consequently, the virtuality of Article 57(4)(i) of the new Directive resides in allowing the contracting authority to immediately exclude any economic operator engaged in (quasi)corruption or that has otherwise tried to tamper with the integrity of the tender procedure. As a matter of diligence (and subject to applicable domestic rules), in these cases, the contracting authority seems likely to be under a duty to report this behaviour to the competent authorities or courts and to push for criminal prosecution.

Finally, and strengthening the general remarks contained in the recitals of previous generations of procurement directives,27 the new Directive has also created two complementary grounds for the exclusion of tenderers in cases of conflict of interest, either generally [arts 24 and 57(4)(c)], or as a result of the prior involvement of candidates or tenderers in the preparation of the procedure [arts 41 and 57(4)(f)]. Indeed, the contracting authority can exclude economic operators ‘where a conflict of interest within the meaning of Article 24 cannot be effectively remedied by other less intrusive measures’,28 or ‘where


28. It is worth noting that, according to Article 24.11 of the new Directive, ‘The concept of conflicts of interest shall at least cover any situation where staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a finan-
a distortion of competition from the prior involvement of the economic operators in the preparation of the procurement procedure, as referred to in Article 41, cannot be remedied by other, less intrusive measures’. These provisions should allow contracting authorities to ensure the integrity of the procurement process, despite the fact that the conflict of interest will also affect themselves (or members of their staff) and, consequently, these may end up being provisions which disappointed tenderers use in order to challenge their lack of application, rather than provisions directly and positively applied by the contracting authorities themselves—depending, of course, on the institutional robustness of the specific contracting authority concerned (and the litigation environment in any given Member State).

3.3. Self-cleaning and corporate compliance programs
As a novelty, and in order to allow ‘for the possibility that economic operators can adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour’ [rec (102) new dir], Article 57(6) of the new Directive establishes rules on self-cleaning, and promotes the adoption of corporate compliance programs. Under the rules of Article 57(6), any economic operator that should be excluded under any of the grounds in 57(1) or 57(4) can provide evidence to the effect that measures it has taken are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion and, if such evidence is considered as sufficient by the contracting authority, the economic operator concerned shall not be excluded.

The new Directive includes a list of compensatory measures that, as a minimum, shall include proof that the economic operator ‘has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, 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 ap-


30. Exclusion on the grounds of lack of payment of taxes or social security contributions is not included due to the fact that the only ‘compensatory’ measures accepted in the new Directive are payment of the arrears or entering into a binding agreement to do so (below section 3.4).
propriate to prevent further criminal offences or misconduct'. Furthermore, the discretion retained by the contracting authority to assess the sufficiency of the self-cleaning measures adopted by the economic operator is modulated by the requirement that they 'shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct'. As a specific requirement of the duty of good administration and the obligation to provide reasons for any decision adopted in a procurement procedure, "[w]here the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision"—which, in my opinion, shall be amenable to judicial review under the applicable rules of each Member State.

Oddly, the new Directive restricts the possibility of implementing self-cleaning measures for economic operators that have 'been excluded by final judgment from participating in procurement procedures [which] shall not be entitled to make use of [this] possibility [...] during the period of exclusion resulting from that judgment in the Member States where the judgment is effective'. This shows a lack of trust in self-cleaning measures and imposes exclusion as an irreversible sanction in the Member State adopting that decision (but, oddly, not in other Member States), which can sometimes disproportionately reduce competition (as well as creating a dual standard applicable to 'domestic' and 'cross-border' participation in procurement by that operator). Therefore, in my opinion, self-cleaning should also be available in these cases, which may justify a particularly tough approach to the evaluation of the sufficiency of the measures implemented by the economic operator. At least, an escape clause should exist in these cases to waive, substitute or defer the exclusion on grounds of public interest if having the economic operator excluded actually harms the interests of the contracting authority (which may be the case in highly concentrated or specialised markets).

3.4. Harmonisation of minimum rules on maximum exclusion periods

Following the current position in Articles 45(1) and 45(2) of Directive 2004/18, Article 57(7) of the new Directive requires that Member States specify the implementing conditions for the exclusion of economic operators by law, regulation or administrative provision and always having regard for EU law. However, it establishes new minimum rules concerning maximum exclusion periods. Indeed, Member States shall 'determine the maximum period of exclusion if no [self-cleaning] measures [...] are taken by the economic operator to demonstrate its reliability. Where the period of exclusion has not been set by final judgment, that period shall not exceed five years from the date of the conviction by final judgment in the cases referred to in para-
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graph 1 and three years from the date of the relevant event in the cases referred to in paragraph 4’ of that same article 57 of the new Directive.

In the specific case of (mandatory or discretionary) exclusion due to lack of payment of taxes or social security contributions, the exclusion seems to be subject to an indefinite period that will only finish once the economic operator settles the outstanding debt or enters into arrangements to do so. This derives from Article 57(2) in fine which determines that these grounds for exclusion ‘shall no longer apply when the economic operator has fulfilled its obligations by paying or entering into a binding arrangement with a view to paying the taxes or social security contributions due, including, where applicable, any interest accrued or fines’.

In my opinion, such different treatment for these specific exclusion grounds seems unwarranted and other exclusion grounds that indicate the existence of similarly ongoing infringements (such as those concerned with infringements of social, labour and environmental law, or those concerning bankruptcy and administration) should also be subjected to indefinite exclusion until the economic operator complies with the relevant legislation. This result may be achieved anyway depending on the domestic rules applicable to continued infringements, but some further clarification and harmonisation could be desirable in order to keep the level playing field. Moreover, rules on the recognition of domestic exclusion decisions in the rest of the Member States could also be necessary, although this can be indirectly achieved by the European Single Procurement Document (below section 4.5).

4. Qualitative selection criteria

4.1. Numerus clausus of selection criteria and minimum ability levels

Article 58(1) of the new Directive consolidates and somehow clarifies the requirements in Articles 41(1) and 41(2) of Directive 2004/18 as regards the fact that selection criteria can exclusively relate to: i) the suitability to pursue the professional activity concerned, ii) the economic and financial standing, and iii) the technical and professional ability of the economic operator; and that, in any case, the requirements shall be limited to ‘those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded. All requirements shall be related and proportionate to the subject-matter of the contract’.

However, Article 58(1) of the new Directive is not free from interpretive difficulties, since it seems to aim to establish a numerus clausus or exhaustive
list of selection criteria when it indicates that 'Contracting authorities may only impose criteria referred to in paragraphs 2, 3 and 4 of this Article on economic operators as requirements for participation' (emphasis added). However, this is not consistent with the open-ended wording of such paragraphs (see below sections 4.2 to 4.4) and would contradict the existing case law of the CJEU, which establishes that contracting authorities have wide discretion to set the specific requirements that they consider adequate for the evaluation of the suitability of candidates to perform the contract. Therefore, regardless of the specific drafting, it seems clear that there is actually no numeros clausus of selection criteria, as long as they 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 (are related and proportionate to the subject-matter of the contract, and are kept to a minimum in order to take into account the need to ensure genuine competition).


32. Cf Arrowsmith, The Law of Public and Utilities Procurement, above n 32, 732-3, and P Trepte, Public Procurement in the EU. A Practitioner’s Guide, 2nd edn (Oxford, Oxford University Press, 2007) 341-2, who considered that the equivalent lists under Articles 45(2) and 46 of Directive 2004/18 imposed a numeros clausus “The reasons for the exclusion of tenderers on grounds of their general unsuitability are exhaustive, as demonstrated in the early case of Transporoute” [with reference to Case 76/81 Transporoute [1982] ECR 417. However, the discussion between acceptable criteria and admissible means of proof or documentary requirements is bound to create confusion in any case.

33. This last caveat has been suppressed in the new Directive, but was included in the original 2011 proposal by the European Commission and, in my view, gave all rules on selection criteria a much more pro-competitive spin and imposed stricter proportionality requirements. A Sanchez Garella, ‘Are the Procurement Rules a Barrier for Cross-Border Trade within the European Market? A View on Proposals to Lower that Barrier and Spur Growth’ in Tvarno, Olykkø & Risvig Hansen (eds), EU Public Procurement: Modernisation, Growth and Innovation, (Copenhagen, DIJOF, 2012) p. 107-133. In any case, this procompetitive requirement should be seen as an (implicit) extension of Article 18(1) of the new Directive, which expressly consolidates the principle of competition by mandating that: ‘The design of the procurement shall not be made with the intention of […] artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators'.

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In any case, where contracting authorities want to establish minimum capacity levels, they have to comply with Article 58(5) of the new Directive which carries forward the requirements of art 44(2) dir 2004/18 and ‘indicate the required conditions of participation which may be expressed as minimum levels of ability, together with the appropriate means of proof, in the contract notice or in the invitation to confirm interest’.

4.2. Suitability to pursue the professional activity concerned
This is now regulated in Article 58(2) of the new Directive, which recasts and keeps the rules of Article 46 of Directive 2004/18 substantially unchanged. In this regard, it may simply be worth noting that, in relation to service contracts, contracting authorities may face difficulties in cases of breach of the Services Directive by Member States that impose excessive professional requirements.

4.3. Economic and Financial Standing and its Capping
Article 58(3) of the new Directive provides substantive guidance on the requirements concerned with the economic and financial standing of the economic operator and goes beyond Article 47 of Directive 2004/18, which was limited to regulating the means of proof that could be furnished and had to be accepted by the contracting authority [something now regulated in art 60(3) new dir]. Interestingly, Article 58(3) of the new Directive focuses on requirements of minimum yearly turnover, which is one of the criteria more widely used in practice.

According to this provision, ‘contracting authorities may impose requirements ensuring that economic operators possess the necessary economic and financial capacity to perform the contract’ and, in particular, ‘may require [...] that economic operators have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract. In addition, contracting authorities may require that economic operators provide information on their annual accounts showing the ratios, for instance, between assets and liabilities. They may also require an appropriate level of professional risk indemnity insurance’.

More importantly, the new Directive introduces a cap on economic and financial standing requirements that is particularly addressed to foster SME participation. Indeed, ‘The minimum yearly turnover that economic operators...”

are required to have shall not exceed two times the estimated contract value, except in duly justified cases such as relating to the special risks attached to the nature of the works, services or supplies. The contracting authority shall indicate the main reasons for such requirement in the procurement documents’ (emphasis added). However, in order to avoid this becoming the de facto standard requirement, it is still important to stress that contracting entities and authorities still have to comply with the requirement of article 58(1) of the new Directive, so that ‘within that limit, the specific requirements set still are ‘strictly proportionate to the subject-matter of the contract’, taking into account the need to ensure genuine competition.

This rule must be adjusted where the contract is tendered in lots and, in that case, the cap to double the value ‘shall apply in relation to each individual lot. However, the contracting authority may set the minimum yearly turnover that economic operators are required to have by reference to groups of lots in the event that the successful tenderer is awarded several lots to be executed at the same time’. In cases of framework agreements and dynamic purchasing systems, this cap should be calculated on the basis of expected maximum size of specific contracts.

4.4. Technical and professional ability and a hidden rule on conflicts of interest

Similarly to the changes introduced in relation to the economic and financial standing (section 4.3), Article 58(4) of the new Directive goes beyond the documentary requirements in Article 48 of Directive 2004/18 [now in art 60(4) new dir] and lays down some substantive requirements concerned with the technical and professional ability of economic operators. Generally, this provision indicates that ‘contracting authorities may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard’ and, in particular, may require ‘economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past’. Even more specifically, and consolidating the current rule in Article 48(5) of Directive 2004/18, Article 56(4) in fine stresses that ‘[i]n procurement procedures for supplies requiring siting or installation work, services or works, the professional ability of economic operators to provide the service or to execute the installation or the work may be evaluated with regard to their skills, efficiency, experience and reliability’.
Interestingly enough, Article 58(4) includes a rule against conflicts of interest disguised as a requirement of professional ability (which seems to stretch the concept, at least if taken on its ordinary meaning).\textsuperscript{35} Indeed, it establishes that "A contracting authority may assume that an economic operator does not possess the required professional abilities where the contracting authority has established that the economic operator has conflicting interests which may negatively affect the performance of the contract" (emphasis added). This development should be welcome, as it aims to cover a significant gap in the regime of Directive 2004/18, which has no rules concerned with the existence of conflicts of interest (despite mentioning them in the recitals),\textsuperscript{36} but more clarification should have been provided as to the type of conflicts of interest that justify the exclusion of the economic operator on the basis of its lack of professional ability. In that regard, it is important to stress that Article 24 of the new Directive defines ‘conflicts of interest’ for other purposes,\textsuperscript{37} indicating that it ‘shall at least cover any situation where staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure’. However, the conflicts of interest that can affect economic operators are not necessarily identical, nor their mirror image and, consequently, some further clarification will be necessary.

4.5. Means of proof and a revolution on paper: the European Single Procurement Document, self-declarations and other facilitating measures

Article 60 of the new Directive regulates in minute detail the certificates, statements and other means of proof that contracting authorities can require in order to check for the absence of grounds of exclusion (above sections 3.1 and 3.2) and compliance with qualitative selection criteria (above sections 4.2 to 4.4) and makes it clear that, together with Article 62 on quality assurance

\textsuperscript{35} This would have been easier to achieve and strengthened if an alternative drafting of Article 18(1) on the principles of procurement had been retained. See above n 27.

\textsuperscript{36} See footnote 28 above and accompanying text.

\textsuperscript{37} Member States shall ensure that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interests arising in the conduct of procurement procedures so as to avoid any distortion of competition and ensure equal treatment of all economic operators.
standards and environmental management standards,\textsuperscript{38} it sets a
cumbersome of documentation that can be required from economic operators. Such
documents are fundamentally the same foreseen in Articles 45(3), 47 and 48
of Directive 2004/18, which are moved to several annexes in the new Di-
rective. Therefore, there are limited changes in that respect.

Nonetheless, Article 59 of the new Directive introduces a significant at-
temp to flexibilise documentary requirements and to reduce red tape in pub-
lic procurement by means of the European Single Procurement Document
(ESPD) (ie a collection of self-declarations) and other facilitating measures.\textsuperscript{39}
Under this new system, economic operators will be able to submit an ESPD
"consisting of an updated self-declaration as preliminary evidence in re-
placement of certificates issued by public authorities or third parties confirm-
ing" that they are not affected by exclusion grounds, that they meet selection
and short-listing criteria (as applicable) and that they will be able to produce
hard documentary evidence of such circumstances without delay, upon re-
quest of the contracting authority [art 59(1)]. Indeed, the ESPD "shall consist
of a formal statement by the economic operator that the relevant ground for
exclusion does not apply and/or that the relevant selection criterion is fulfilled
and shall provide the relevant information as required by the contracting au-
thority. The ESPD shall further identify the public authority or third party re-
sponsible for establishing the supporting documents and contain a formal
statement to the effect that the economic operator will be able, upon request

\textsuperscript{38} Article 62 of the new Directive fundamentally consolidates the rules in Articles 49
and 50 of Directive 2004/18, with some updates to the standards referred to and with
some changes in drafting, the only of which seems relevant is that contracting au-
thorities must now only accept other evidence of equivalent quality assurance stand-
ards and environmental management standards where the economic operator con-
cerned has no access to such certificates, or no possibility of obtaining them within
the relevant time limits for reasons that are not attributable to that economic operator.
This seems to reduce the scope for the submission of equivalent certificates in some
instances and could be unduly restrictive of competition. However, this effect will
largely depend on the interpretation given to this 'waiver clause'. In view of the lim-
ited changes in Article 62 of the Compromise Text, it will not be discussed further.
The same applies to Article 64, which deals with official lists of economic operators
and is substantially identical to the current rules under Article 52 of Directive
2004/18—although, admittedly, the new Directive has aimed to simplify the drafting.

\textsuperscript{39} For further discussion, including the now abandoned proposal for the creation of a
European Procurement Passport, see Sanchez Graells, 'Are the Procurement Rules a
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and without delay, to provide those supporting documents’. In order to try to increase the advantages of the ESPD, it is conceived as a ‘reusable’ instrument, so that ‘economic operators may reuse an ESPD which has already been used in a previous procurement procedure, provided that they confirm that the information contained therein continues to be correct’.

The contracting authority will then be free to request submission of such documents at any point of the process where this appears necessary to ensure the proper conduct of the procedure and, in any case, shall require them from the chosen contractor prior to awarding the contract, unless it already possesses these documents or can obtain these documents or the relevant information by accessing a national database (art 59(4)). In that regard, it is worth stressing that, as a complementary facilitating measure, Article 59(5) of the new Directive foresees that: ‘economic operators shall not be required to submit supporting documents or other documentary evidence where and in so far as the contracting authority has the possibility of obtaining the certificates or the relevant information directly by accessing a national database in any Member State that is available free of charge, such as a national procurement register, a virtual company dossier, an electronic document storage system or a prequalification system. […] For [that] purpose […] Member States shall ensure that databases which contain relevant information on economic operators and which may be consulted by their contracting authorities may also be consulted, under the same conditions, by contracting authorities of other Member States’.

It should be recalled that failure to provide the required documentation in support of the self-declarations submitted by the economic operator will constitute a discretionary ground for exclusion (art 57(4)(b), above section 3.2),

40. Moreover, where the contracting authority can obtain the supporting documents directly by accessing a database pursuant to Article 59(5), the self-declaration shall also contain the information required for this purpose, such as the internet address of the database, any identification data and, where applicable, the necessary declaration of consent.

41. As a complement, and according to Article 59(6) of the new Directive, ‘Member States shall make available and up-to-date in e-Certis a complete list of databases containing relevant information on economic operators which can be consulted by contracting authorities from other Member States. Upon request, Member States shall communicate to other Member States any information related to the databases referred to in this Article’. Moreover, according to Article 61(1), ‘With a view to facilitating cross-border tendering, Member States shall ensure that the information concerning certificates and other forms of documentary evidence introduced in e-Certis established by the Commission is constantly kept up-to-date’.

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which the contracting authority can apply any time [art 57(5), above section 2.2]. In that regard, the system seems too lenient towards the failure to support any of the prior declarations. Under the initial 2011 proposal, it would generate an impediment to award under Article 68, now suppressed. Indeed, it is hard to understand why contracting authorities would be free to award the contract to an economic operator that cannot support its own self-declarations and how that would not infringe the principles of transparency, equal treatment and non-distortion of competition. In my view, this should constitute a case of mandatory exclusion of the economic operator concerned, unless there were good reasons beyond its control that prevented it from submitting the required documentation.

More generally, in my view, this rather revolutionary proposal (revolutionary at least for countries with ‘traditional’ administrative procedure regulations) for the acceptance of the ESPD (rectius, ‘mere’ self-declarations) clearly has the potential to reduce the costs of participating in the tender for unsuccessful bidders (increasing the incentive to participate), but generates a relatively small advantage for successful bidders (only a time gain, and of an uncertain length at that), increases the length of the procedure (there is no regulation concerning the time that the authority must give the successful tenderer to produce the requested documents prior to award) and generates a risk of potential award to non-compliant bidders that would require second or ulterior awards (with the corresponding difficulties regarding the need to ensure that other bidders keep their offers open, new award notices, etc.).

42 These risks are identified in the Commission, Impact Assessment of the Proposal for a Directive of the European Parliament and of the Council on Public Procurement 70 (SEC(2011) 1585 final) ec.europa.eu/internal_market/publicprocurement/modernising_rules/reform_proposals_en.htm, but simply dismissed on the hope that self-declarations would bring a significant reduction of time and costs and a potential automation of selection and award procedures. In my view, the analysis conducted in the impact assessment is overly optimistic, eg: “If measures reducing the information obligations placed on firms were to be implemented (e.g. through generalising the “winning bidder provides” provisions), this could theoretically reduce the efficiency of the evaluation process for contracting authorities and entities if, in some cases, a firm identified as a winner fails the evidentiary tests (and the contracting authority or entity would have to go to their second choice or repeat the process). From the information available, such instances are not that common, and in most cases contracting authorities and entities should save time by accepting self-certification of compliance from bidders who ultimately do not win the contract. Also, if more firms feel able to bid, competition could increase, which could lead to greater price savings or improvements in quality for the contracting authority or entity.” The premise that instances where the winner fails to meet the evidentiary tests are rare simply cannot
In order to complete this proposal, I think that it would be necessary to set speedy but reasonable time limits to produce the requested documents and to strengthen the consequences of failing to produce supporting evidence for the self-declarations, which should not only be an impediment to award, but also be clearly identified as a ground for mandatory exclusion—and maybe expressly set it as a head of damage that allows contracting authorities to recover any additional expenses derived from the need to proceed to a second-best, delayed award of the contract (without excluding the eventual enforcement of criminal law provisions regarding deceit or other types of fraud under applicable national laws). Also, rules on annulment of the awarded contract and other sanctions are needed for those instances where the discovery of the falsity of the documents occurs after contract award—since this case is not fully covered by the provision of Article 73(b) of the new Directive, which only requires that contracting authorities have the possibility to terminate a public contract during its term, where it turns out that 'the contractor has, at the time of contract award, been in one of the situations referred to in Article 57(1) and should therefore have been excluded from the procurement procedure'. Hence, if the self-declaration that the economic contractor has been unable to support is not concerned with Article 57(1), there is not even an indirect way to challenge (at least clearly) the award of the contract despite the infringement of Article 59(d) of the new Directive. In my opinion, challenges under domestic contract rules governing misrepresentations or falsity in private documents should be available in this case, but it would have been desirable that the new rules included a specific termination clause in this case in Article 73.

4.6. More precise rules governing reliance on the capacities of other entities

Article 63 of the new Directive maintains the functional approach in Directive 2004/18 and consolidates the rules on reliance on the capacities of other entities that are now scattered in Articles 47(2), 47(3), 48(3) and 48(4) of the Directive. It continues to make it clear that, as long as it is appropriate for a particular contract, any economic operator can 'rely on the capacities of be imported from an ex ante full control scenario to an ex post verification paradigm. In my view, the increase in risks based on strategic behaviour by bidders and the potential difficulties in meeting short submission deadlines prior to award of the contract are just not comparable with the current situation—at least, unless stronger consequences are attached to failing to provide the requested documentation and, more clearly, in cases of falsity of declarations.
other entities, regardless of the legal nature of the links which it has with them' to which add it 'it shall prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing a commitment by those entities to that effect'. Equally and under the same conditions, 'a group of economic operators [...] may rely on the capacities of participants in the group or of other entities'. However, the new Directive goes beyond these general rules and imposes more specific (and restrictive) criteria concerning reliance on other operators for certain requirements.

Firstly, with regard to criteria relating to the educational and professional qualifications or to the relevant professional experience, economic operators may only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required.

Secondly, the contracting authority shall verify whether the other entities on whose capacity the economic operator intends to rely fulfil the relevant selection criteria or whether there are grounds for their exclusion. Consequently, an entity which does not meet a relevant selection criterion, or in respect of which there are grounds for exclusion, may be excluded (ie may not be relied upon). In the precise terms of Article 63(1) '[t]he contracting authority shall require that the economic operator replaces an entity which does not meet a relevant selection criterion, or in respect of which there are compulsory grounds for exclusion. The contracting authority may require or may be required by the Member State to require that the economic operator substitutes an entity in respect of which there are non-compulsory grounds for exclusion.'

Thirdly, Member States may provide that in the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, contracting authorities may require that certain critical tasks be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators, by a participant in that group.

Finally, where an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial standing, the contracting authority may require that the economic operator and those entities be jointly liable for the execution of the contract.

In my view, the first two additions are sensible and aim to prevent instances where reliance on third party capabilities is merely formal. However, the same cannot be said from the other two requirements. On the one hand, there

43. Interestingly, Article 19 of the new Directive provides specific rules for groups of operators.
is no good reason to require that the conduct of critical tasks be carried out by
the main contractor, given that it is already assuming full liability for such
tasks. Imposing a requirement that the task is actually carried out by the main
contractor can have the effect of excluding other tenderers that could actually
fulfil the contract relying on the capabilities of third parties and, consequent-
ly, runs contrary to the functional approach in the current Directive, goes be-
yond the terms of Article 19 of the new Directive⁴⁴ and, ultimately, of the
case law of the CJEU on teaming and joint bidding.⁴⁵ On the other hand, and
on a related note, the last requirement of joint liability for the execution of the
contract can make it very difficult to reach subcontracting agreements or sim-
ilar arrangements for the reliance on third parties for the partial execution of a
minor part of the contract. Moreover, it can result in complicated structures of
side letters of indemnity that raise the legal costs linked to participation. In
my opinion, in relation with both requirements, the contracting entity should
be satisfied with the liability of the main contractor and, if need be, ‘self-
protect’ through requirements for adequate professional risk indemnity insur-
ance under Article 58(3) of the new Directive.

5. Short-listing or reduction of numbers of candidates, tenders
   and solutions

The content of Article 44(3) Directive 2004/18 has been moved to Article 65
of the new Directive and the content of Article 44(4) Directive 2004/18 has
been moved to Article 66. There are no changes in these rules, other than
some minor drafting changes and an update of the cross-references to other
Articles in the Directive.

Grosso modo, the rules continue to allow for contracting authorities to
limit the number of candidates that they will invite to tender or to negotiate in
procedures other than open (and negotiated without prior publication). In that
case, they have to establish the minimum (and maximum) number of candi-
dates they intend to invite (at least five in the restricted procedure and three in
the competitive procedure with negotiation, in the competitive dialogue pro-

⁴⁴ Indeed, it only requires that ‘in the case of public service and public works contracts
   as well as public supply contracts covering in addition services or siting and installa-
tion operations, legal persons may be required to indicate, in the tender or the request
to participate, the names and relevant professional qualifications of the staff to be re-
   sponsible for the performance of the contract in question’.

procedure and in the innovation partnership). Contracting entities must 'indicate, in the contract notice or in the invitation to confirm interest, the objective and non-discriminatory criteria or rules they intend to apply' to short-list candidates [art 65(2) new dir]. Once the short-listing is completed, they must invite a number of candidates at least equal to the minimum number and where the number of candidates meeting the selection criteria and the minimum levels of ability is below that minimum, they may continue the procedure by inviting the candidates with the required capabilities but 'the contracting authority shall not include economic operators that did not request to participate, or candidates that do not have the required capabilities' [art 65(2) in fine new dir]. Similar rules apply to the reduction of the tenders to be negotiated or the solutions to discussed but, at any rate, in the final stage, the number arrived at shall make for genuine competition insofar as there are enough solutions, qualified candidates or tenderers [art 66 new dir]. By sticking to the same rules, the new Directive does not resolve the problems that, in my opinion, a strict interpretation of these rules may generate (such as short-listing that only leaves one tenderer out).46

6. Technical dialogue as a particular way of short-listing

Articles 30 and 31 of the new Directive regulate in rather obscure terms the 'technical dialogue' in which contracting authorities can engage with candidates invited to participate in a competitive dialogue or a tender for an innovation partnership. The procedures are basically subjected to very minimum requirements whereby contracting authorities need to establish their needs and (if known) minimum technical requirements in the tender documents [arts 30(2) and 31(1)] and, subsequently, can engage in the (technical) dialogue with the candidates that have been invited after checking that they meet the necessary selection/shortlisting criteria [arts 30(3) and 31(3)] and run rounds/stages of technical discussions and negotiations in order to reduce the number of solutions/proposals they are willing to continue analysing and negotiating, until a single set of technical specifications (or innovation plans, so to call them) is selected [arts 30(4) and 31(4)]. In case they want to avail themselves of this 'staged' (technical) dialogue, they must proceed to a reduction of the solutions to be further pursued in each round 'by applying the

46. For discussion, Sanchez Graells, Public Procurement and the EU Competition Rules (n 37) 262-265.
award criteria defined in the contract notice or in the descriptive document\textsuperscript{47} and 'the contract notice or the descriptive document [...] shall indicate [that the contracting authority] will use this option' [arts 30(4) and 31(5)]. In any case, regardless of conducting it in a staged or in a single-stage manner, the contracting authority shall continue the dialogue until it can identify the solution or solutions which are capable of meeting its needs [arts 30(5) and, implicitly, 31(5)]. Needless to say, discarding solutions (at the single stage or in any of the intermediate) generates effects that are not dissimilar from an exclusion of the candidate and, consequently, that decision should be subjected to the same procedural guarantees.\textsuperscript{48}

Particularly, in order to ensure the integrity of the technical dialogue process, contracting authorities shall ensure equality of treatment among all participants and, in particular, they shall not provide information in a discriminatory manner which may give some participants an advantage over others. They must also comply with the requirements of Article 21 regarding protection of confidential information\textsuperscript{49} and shall not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the dialogue without its agreement (which shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information) [arts 30(4) and 31(6)].

\textsuperscript{47} And, in the case of the innovation partnership, 'contracting authorities shall in particular apply criteria concerning the candidates’ capacity in the field of research and development and of developing and implementing innovative solutions', as per Article 31(6) of the new Directive.

\textsuperscript{48} For discussion on the theoretical possibility of an obligation to admit participants to compete based on a solution different from the one they suggested, see S Arrowsmith and S Troumou, "Competitive dialogue in EU law: a critical review", in ibid (eds.), Competitive Dialogue in EU Procurement, 2nd edn (Cambridge, Cambridge University Press, 2012) 3 and ff.

\textsuperscript{49} 'Unless otherwise provided in this Directive or in the national law to which the contracting authority is subject, in particular legislation concerning access to information, and without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers [...] the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders'. On the issue of protection of confidential information, see the recent Judgments in Case C-629/11 P Evropaki Dynamiki v Commission (ESP-ISEP) [2012] ECR nyr, and Joined Cases T-339/10 and T-532/10 Co-separi Soc. Coop. pA v European Food Safety Authority (EFSA) [2013] ECR nyr.
7. Conclusions

As this brief overview of the novelties and changes brought about by the new Directive on the rules concerning exclusion, qualitative selection and short-listing has shown, the new texts aim to generate some simplification and flexibility of the current rules. The new Directive has also tried to clarify and improve the drafting of the current Directives and to consolidate requirements and avoid duplication where possible.

The search for flexibility and simplification is particularly clear concerning the rules that aim to make exclusion of economic operators a dynamic activity (section 2.2), that increase the scope and power for contracting authorities to seek clarifications and source additional information from tenderers (section 2.4), that allow for an evaluation of the effectiveness of self-cleaning measures adopted by economic operators that should otherwise be excluded (section 3.3), or that allow for a ‘certificate-less’ qualitative selection of candidates, subject to an ex post verification of the self-declarations submitted by means of the newly created European Single Procurement Document (ESPD) (section 4.5). However, such flexibility does not come without risks and contracting authorities must tread lightly if they want to avoid challenges based on potential abuses of their (increased) administrative discretion. Moreover, the extent and weight of the obligations derived from the principle of good administration are expanding and this needs being duly taken into consideration.

There are also several indications of a clearer integration of public procurement and competition rules (such as the possibility to exclude bid riggers, section 3.2) which should be seen as a natural result of the consolidation of the principle of competition in Article 18(1) of the new Directive; as well as clear evidence of the increasing will to use of public procurement as a lever to ensure compliance with social, labour and environmental rules, in a classic example of pursuit of secondary (or horizontal) considerations in procurement (section 2.3). This shows that, despite the search for simplification, the (asymmetrical) integration of public procurement and other economic and non-economic policies by necessity depicts a more complicated scenario that requires further professionalism and capacity building in the Member States, as well as more cooperation between contracting authorities and other competent authorities, such as national competition or environmental agencies.

All in all, in my view, EU public procurement regulation continues becoming more and more sophisticated (and complicated), the new Directive does not solve all problems and creates some new ones and, consequently,
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public procurement litigation will continue playing a key role in the clarification of the applicable rules.

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