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## **Self-Cleaning as a Defence to Exclusions for Misconduct – An Emerging Concept in EC Public Procurement Law?\***

*Sue Arrowsmith, Hans-Joachim Prieß, and Pascal Friton*

### **I. Introduction**

The EC Procurement Directives<sup>1</sup> require Member States to exclude an economic operator from public contracts if the operator has been the subject of a conviction by final judgment for corruption or fraud, and also money laundering or participation in a criminal organisation (Article 45 para. 1 of Directive 2004/18/EC) (the “mandatory exclusion”).<sup>2</sup> Furthermore, any economic operator *may* be excluded if it has been

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\* A version of this paper will also be published in Pünder, Prieß and Arrowsmith (eds) “Self-Cleaning in Public Procurement Law” (Carl Heymans Verlag: Cologne 2009), forthcoming.

<sup>1</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ [2004] L134/114 hereinafter: “*Directive 2004/18/EC*”, and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ [2004] L134/1, (hereinafter: “*Directive 2004/17/EC*”). The Utilities Directive does not provide for own exclusion grounds but refers in its Article 54 para. 4 to Article 45 of the Public Sector Directive.

<sup>2</sup> See further Arrowsmith, “Implementation of the new EC procurement directives and the Alcatel ruling in England and Wales and Northern Ireland: a review of the new legislation and guidance” (2006) 15 P.P.L.R. 86 at 116 et seq.; Williams, “The mandatory exclusions for corruption in the new EC Procurement Directives”(2006) 31 EL.Rev. 711; Williams, “Coordinating public

convicted by a judgment which has the force of *res judicata* of any offence concerning its professional conduct or has been found guilty of grave professional misconduct (Article 45 para. 2 of Directive 2004/18/EC) (the “discretionary exclusions”).<sup>3</sup> Within these rules the concept of self-cleaning might be raised as an argument to avoid exclusion. The general idea would be that an economic operator can regain the possibility of participating in public contracts by demonstrating that it has taken effective measures to ensure that wrongful acts will not recur in the future. However, it is only in some Member States of the EC (e.g. Germany and Austria) that the principle of self-cleaning has become a well established legal concept, while in other Member States (e.g. Greece and France) contracting authorities in practice do not consider the measures taken by an affected company when assessing the suitability of the candidates or tenderers.

In the following, we will seek to show that the acknowledgment of self-cleaning measures is a necessity derived from fundamental principles of EC law. The existence of these measures, we will argue, *must* be taken into account in applying both the mandatory and the discretionary exclusions of the procurement directives, such that

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procurement to support EU objectives – a first step? The case of exclusions for serious criminal offences”, ch. 12 in S. Arrowsmith and P. Kunzlik (eds.), *Social and Environmental Policies in EC Procurement Law* (Cambridge: CUP 2009), 479 *et seq*; Ohrtmann, “Korruption im Vergaberecht - Konsequenzen und Prävention” (2007) NZBau 201 and 278.

<sup>3</sup> See Triantafyllou and Mardas, “Criteria for qualitative selection in public procurement: a legal and economic analysis” (1995) 4 P.P.L.R. 145; Piselli, “The scope for excluding providers who have committed criminal offences under the E.U. Procurement Directives” (2000) 9 P.P.L.R. 267; Arrowsmith, *The Law of Public and Utilities Procurement*, (2<sup>nd</sup> ed, London: Sweet & Maxwell 2005), at 12.31.

economic operators that have undergone adequate self-cleaning processes may not generally be excluded from EC public contracts.

The chapter will proceed as follows.

First, we provide an overview of what is understood by “*self-cleaning*”. Here we will also suggest a number of specific measures that might be included in developing such a concept in EC law, drawing on the experiences of, in particular, Germany and Austria where, as we mentioned, the concept is well established (section II) .

We will then examine the position of self-cleaning under Community law (section III). In this respect, we will first briefly introduce the mandatory and discretionary exclusion provisions that apply under the procurement directives. We will then examine certain fundamental principles of EC law that we consider are relevant to self-cleaning, namely free movement, proportionality and equal treatment. We will next consider the various possible purposes of the exclusion provisions in the procurement directives. It will then be argued that, in light of these purposes, self-cleaning measures must generally be accepted in applying the exclusion provisions: we suggest that both in applying the mandatory exclusions under the directive and in exercising their powers under the discretionary exclusions for criminal convictions and grave misconduct permitted by the directives Member States *must* generally admit economic operators that have undertaken adequate self-cleaning measures. In particular, we will argue that this is a result of the principle of proportionality, since the various purposes of exclusions that we have identified can be achieved as well – and in some cases, even more effectively – by precluding the application of

exclusions in cases where self-cleaning measures have been applied. We will also argue that such a conclusion might be justified on the basis of the principle of equal treatment.

It is suggested that the only possible exception to a general requirement to admit operators who have undergone a self-cleaning exercise applies to exclusions that are adopted for punitive purposes, when it is arguable that an economic operator undertaking self-cleaning measures is not automatically exempt from exclusion. However, we suggest that under the proportionality principle self-cleaning is still a factor that must be considered in determining whether exclusion should be imposed as a sanction in any case, since this principle requires that the sanction not be disproportionate to the conduct in question, and the existence of self-cleaning measures is relevant in considering the undertaking's conduct. This approach may be relevant for discretionary exclusions imposed by Member States that are punitive in nature. However, we contend that the mandatory exclusions introduced under the 2004 directives do *not* have a punitive purpose and that therefore a self-cleaning derogation must *always* be admitted when applying these mandatory exclusions.

We will finally suggest that many of our general arguments are endorsed in the corresponding provisions regulating procurement by EC institutions set out in the EC Financial Regulation and its Implementing Regulation, which explicitly require self-cleaning measures to be taken into account as an aspect of the Community law principle of proportionality.

## II. The Concept of Self-Cleaning

The concept of self-cleaning refers to the possibility that a firm that might otherwise be excluded from a public procurement because of some kind of wrong doing should be admitted to the process, on the basis that it has taken all necessary measures to ensure that the wrongdoing of the past will not occur again in the future.<sup>4</sup>

Obviously one cannot answer in general terms whether particular self-cleaning measures that have been taken are adequate to prevent a re-occurrence of the wrongful conduct in question. This remains a question to be answered with regard to the circumstances of the particular case, including the seriousness of the wrongdoing as demonstrated by its duration, recurrence and financial impact, and the adequacy of the measures employed by the affected company. The decisive aspect is, in all cases, that further occurrences of wrongdoing are rendered as difficult as possible. However, from the case law and literature of jurisdictions that recognise the concept of self-cleaning it is possible to deduct a canon of main elements which a successful self-cleaning will normally comprise. The measures to be taken will normally include:

- clarification of the relevant facts and circumstances;
- repair of the damage caused;
- personnel measures; and
- structural and organizational measures.

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<sup>4</sup> Prieß and Stein, "Nicht nur sauber, sondern rein: Die Wiederherstellung der Zuverlässigkeit durch Selbstreinigung" (2008) NZBau 230

Possible elements of a successful self-cleaning process will now be presented. The analysis of this issue that follows below is largely influenced by the German legislation, case law and literature in which, as we have mentioned, the concept of self-cleaning is well established. The courts of other Member States might take a different approach on some of the issues detailed below. However, the experiences discussed below do provide a useful illustration of the kind of issues that might be considered in developing a doctrine of self-cleaning in EC case law.

## **1. Clarification of facts**

First of all, the company has to actively assist with regard to the criminal offence or severe misconduct proceedings, in order to clarify the facts and the responsibility of all persons involved in a comprehensive manner and as quickly as possible. A complete clarification of the facts is necessary to ensure that the subsequent self-cleaning measures are appropriate and comprehensive. Without such clarification, the subsequent self-cleaning steps to be taken will lack a sufficient factual basis and therefore, in most cases, will not be regarded as a credible and promising effort to eliminate the reasons for the wrongdoing.

Among such clarification activities, legal precedent has shown particular preference for special audits by outside certified public accountants or other independent persons. In such a case, the company must collaborate both with the investigating authorities

and with the contract-awarding authorities concerned, in accordance with the relevant statutory provisions.<sup>5</sup>

## **2. Repairing the damage**

In cases in which the company has succeeded in clarifying the facts or where it has been able to make well-substantiated initial statements, it will be required to repair the financial damage caused, if any.<sup>6</sup> This may also be done by recognizing both the obligation to pay damages and the amount of such damages, in a binding manner.

## **3. Personnel measures**

Moreover, the company will have to take relevant personnel measures – a task as difficult to put into practice as it is fundamental to the self-cleaning process. The meaning behind this innocuous phrasing is that the company is obliged to dismiss the shareholders, executives and employees concerned, immediately and comprehensively.<sup>7</sup> In doing so, the company has to ensure that all persons who have been involved in the wrongdoing are given notice of dismissal in accordance with the relevant provisions of labor law (or are dismissed without notice, if applicable).

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<sup>5</sup> Court of Appeals of Düsseldorf, court decision of April 9, 2003 - Verg 66/02; Regional Court of Berlin, court decision of March 22, 2006 - 23 O 118/04, reported in (2006) NZBau 397 at 399.

<sup>6</sup> Regional Court of Berlin, court decision of March 22, 2006 - 23 O 118/04; reported in (2006) NZBau 397 at 399.

<sup>7</sup> Court of Appeals of Düsseldorf, court decision of 28 July, 2005 – Verg 42/05.

Furthermore, particularly in the case of shareholders, it must be ensured that such persons are prevented from exercising any kind of on-going influence on the management of the company. Such influence may arise where the shareholder removed has concluded trust agreements with his successors which grant him substantial continuing influence over the administration of the company, e.g. by reserving him the right to recall his share in the company at any time.<sup>8</sup> In cases in which the participation on the part of the person in question was relatively minor – such as, for instance, knowledge of the facts, subordinate ancillary services, etc. – less dramatic measures may also be considered, such as, for instance, dismissal with notice, a termination agreement or a reprimand.<sup>9</sup>

#### **4. Structural and organizational measures**

Once the past and the present have been dealt with, the company must take care of the future. Contract-awarding authorities will generally only consider self-cleaning measures to be sufficient if the company takes both structural and organizational measures to prevent serious misconduct in the future as far as possible. This will oblige the company to take a broad spectrum of preventative measures. These measures can comprise in-house training for staff members with comprehensive information concerning criminal, antitrust and procurement law as well as formulating binding company guidelines for the prevention of wrongdoing – which should also provide for sanctions in case of transgression. Such internal guidelines can, e.g., set standards for due conduct regarding corruption-related actions such as offering

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<sup>8</sup> *Ibid.*

<sup>9</sup> Cf. Court of Appeals of Düsseldorf, court decision of April 9, 2003 - Verg 66/02.



invitations or gifts to business partners.<sup>10</sup> Further organizational measures may consist in establishing a dual-control system and, even though it often causes a significant (and expensive) loss of expertise, the introduction of periodical staff rotation in those units that may be regarded as particularly prone to corrupt practices.<sup>11</sup> In addition, separating the administration and operational departments through distinct legal entities may be considered as an appropriate organizational step.<sup>12</sup> Other preventive measures with regard to compliance may include the appointment of an intra-company or external compliance officer and/or an ombudsman as a contact person for whistleblowers, the establishment of a clearing department to oversee the company's strategy of applying for contracts etc., the review of external commission and consultancy agreements by external lawyers in future and the introduction of a value management process within the group of enterprises.<sup>13</sup>

### **III. The Implications of EC Law**

We will now turn to consider the position of self-cleaning in the context of the exclusions found in the EC procurement directives.

Before considering the provisions of the directives themselves we should first note that under Article 249 of the EC Treaty, a directive 'shall be binding as to the result to

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<sup>10</sup> Ohrtmann, "Korruption im Vergaberecht - Konsequenzen und Prävention" (2007) NZBau 278 at 280

<sup>11</sup> *Ibid.* at 281.

<sup>12</sup> Court of Appeals of Brandenburg, court decision of December 14, 2007 - Verg W 21/07; reported in [2008] NZBau 277.

<sup>13</sup> *Ibid.*

be achieved, upon each Member States to which it is addressed, but shall leave to the national authorities the choice of form and methods'. Thus, Member States are obliged to take the necessary implementation measures, but in doing so may have certain discretionary options left open to them. However, even if the national measures of implementation may vary, Member States must take into account the aim and purpose of the directive in question, especially if the directive itself does not provide for full harmonisation. Moreover, the implementation measures must be in accordance with Community law, because when implementing a Community law scheme, Member States act as 'agents' on the Community's behalf,<sup>14</sup> and, therefore, are bound by the principles of Community law.<sup>15</sup>

## **1. The explicit provisions of the directives on mandatory and discretionary exclusions**

We will first introduce and examine the explicit provisions of the directives that deal with exclusions. As we will see the relevant provisions do not deal explicitly with the issue of self-cleaning. However, the provisions do reiterate and confirm the application in this area of the general principles of EC law, which form the basis of our arguments in favour of a self-cleaning concept in EC law.

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<sup>14</sup> See Temple Lang, "The Sphere in Which MS are Obligated to Comply with the General Principles of Law and Community Fundamental Rights Principles" (1991) 18 LIEI 23.

<sup>15</sup> See Case C-292/97 *Karlsson* [2000] ECR I-2737, para. 37.

We will consider first the mandatory grounds for exclusion under Article 45 para. 1 Directive 2004/18/EC and then the discretionary grounds for exclusion within the meaning of Article 45 para. 2 Directive 2004/18/EC.

**a) Mandatory exclusions**

So far as mandatory exclusion is concerned, we can start by noting that Article 45 para. 1 Directive 2004/18/EC foresees a strict and mandatory exclusion rule for candidates or tenderers convicted by final judgment of offences relating to participation in a criminal organization, corruption, fraud or money laundering. At a first glance, it does not appear to provide for a discretionary decision: where these offences have been committed exclusion is *required*.

During the legislative process for Directive 2004/18/EC the question was raised of including an explicit exception to the exclusion obligation where the cause of the conviction has been removed. The possible need to clarify what would happen in this situation was first raised in the report of the Committee of the Regions<sup>16</sup> and an

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<sup>16</sup> Opinion of the Committee of the Regions, 13 December 2000, on the Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts, and for a Directive of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy and transport sectors, OJ C-144, 16 May 2001, 23 at 2.5.2 “... the COR takes the view that the Commission must clarify which situations are covered by Article 46 (1) which states that an economic operator shall be excluded from a procurement contract if he has been convicted of corruption in the previous five years. In countries where a legal person cannot be convicted of corruption, would the provision apply to all the supplier's employees? *In the*

explicit provision on this issue was included in a number of drafting proposals.<sup>17</sup> Such an exception appeared in its last published form in a compromise text of the Presidency that was put to the Council Working Group prior to the first reading of the legislation by the European Parliament, which provides, similarly to the previous drafts on the point, that an exclusion is not to apply to an economic operator when that economic operator “has removed the cause of the conviction, for instance by penalising an employee having committed one of the [relevant acts] without that operator’s knowledge”.<sup>18</sup> However, the provision does not appear in any subsequent drafts and there appears to be no public record of the reasons for its removal – although, as we will see below, it may be linked to the addition of the more general derogation for reasons of overriding public interest.

Whilst the final version of the directive thus contains no explicit derogation for self-cleaning there are, however, certain exceptions to the general principle of exclusion, namely both an explicit derogation and an implicit derogation.

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*affirmative, are penalties to be imposed - and if so, which penalties - if the economic operator has, for example, introduced appropriate preventive measures in his enterprise or has dismissed without notice the manager who committed the criminal offences without the knowledge of the economic operator?” (emphasis added).*

<sup>17</sup> Such a provision first appears in Council Document 10269/01, 27 June 2001, concerning a Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts. For a full legislative history see Hebly, *European Public Procurement: History of the ‘Classic’ Directive 2004/18/EC* (Alphen aan de Rijn: Kluwer Law International 2007), 1105 *et seq.*

<sup>18</sup> Council document 15381/01, 8 January 2002, concerning a Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts, on Art. 46 para. 1 subpara. 3.

So far as the explicit derogation to Article 45 is concerned, para. 1 subpara. 3 Directive 2004/18/EC allows for an explicit derogation from the general exclusion rule due to “*overriding requirements in the general interest*”.<sup>19</sup> The Directive does not define “*overriding requirements in the general interest*”.

An argument might possibly be made that such interests are present where a convicted firm has addressed the problem fully by taking successful self-cleaning measures.<sup>20</sup> From an objective point of view it seems to be in the general interest that “convicted” companies should clean themselves in order to prevent the recurrence of corruption and other relevant offences in the future. Further, just recently, the ECJ Grand Chamber in Case C-213/07<sup>21</sup> expressly confirmed that it is a legitimate “public interest objective” to fight fraud and corruption. It can be argued (as we elaborate later in the article) that the self-cleaning concept supports this public interest objective of eradicating fraud and corruption by providing an incentive to firms to eliminate this kind of conduct through the prospect of being allowed to take part in public procurement procedures if they do so. It may also be significant that the proposed explicit exception for self-cleaning referred to above disappeared from the draft of the directive just before the above general exception was added, apparently to reflect Member States’ concerns that the explicit exceptions to the provision in previous

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<sup>19</sup> The wording seems to be taken from the “*Cassis de Dijon*” judgment of the ECJ (Case C-120/78 *Cassis de Dijon* [1979] ECR 649, para. 14), which however concerns a different situation, namely the justification of an infringement of the four freedoms.

<sup>20</sup> Cf. Arrowsmith, note 3 above, at 19.81.

<sup>21</sup> Case C-213/07 *Michaniki AE*, judgment of 16 December 2008 [not yet published], para. 59.

drafts were too narrow.<sup>22</sup> Thus it might be argued that the explicit derogation from Article 45 is intended to cover situations of self-cleaning by allowing Member States, *if they choose*, to admit firms that have undergone self-cleaning, as a matter of overriding requirements in the public interest. The fact that a narrow interpretation of this derogation would promote the directive's principle of competition by increasing participation, which is also an important general principle of the directive, might also be cited to support such an interpretation.

However, it is not entirely clear whether the courts will follow this line of argumentation. Commentators have suggested that overriding requirements in the general interest exist only in exceptional circumstances, such as cases of public health national security, state secrecy or military procurement.<sup>23</sup> The Commission seems to be of the same opinion.<sup>24</sup> Legislative history materials in Austria implementing

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<sup>22</sup> Subsequent to Council document 15381/01, 8 January 2002, the Position of the European Parliament adopted at first reading on 17 January 2002 (see document 5307/02 of the Council, 6 February 2002) did not make any specific reference to self-cleaning and this was not included in subsequent Council documents. However, Council document 7944/02, 17 April 2002, included for the first time a general exception for reasons of overriding general interest in the same position as the previous sub-para on self-cleaning, reflecting a concern that previous exceptions stated expressly in the directive were too narrow (as to which see Council document 6737/02, 1 March 2002: *"The Presidency assured its willingness to rephrase the sub-paragraph on the exceptions concerning obligatory exclusions, which were deemed to be too restrictive by the majority of delegations."*

<sup>23</sup> Cf. Williams, note 2 above, at 727 *et seq.*

<sup>24</sup> See Communication from the Commission to the European Parliament of 25 March 2003 concerning the common position of the Council, Doc. SEC (2003) 366 final.

Directive 2004/18/EC into Austrian law also support this approach.<sup>25</sup> In addition, the guidelines issued by the Office of Government Commerce (OGC), an UK authority that provides policy standards and guidance on best practice in procurement and on interpreting EC procurement law to contracting authorities in the UK, states that the derogation in Article 45 para. 1 subpara. 3 Directive 2004/18/EC should only be used in the most serious of circumstances, for instance in the case of a national emergency, and that the accounting office or minister of the contracting authority, as appropriate, must be satisfied that the use of the exception will be justified.<sup>26</sup> Thus it may be that Article 45 para. 1 subpara. 1 Directive 2004/18/EC cannot be relied on by Member States to admit candidates or tenderers that have implemented self-cleaning measures.

If the general derogation does indeed cover self-cleaning, then it would appear to give Member States a discretionary power to take account of self-cleaning measures. Our arguments below, however, concerning the principles of proportionality and equal treatment, will suggest that Member States will in fact enjoy only a limited discretion in exercising this power since they will generally be *required* to admit self-cleaning measures as a reason not to impose an exclusion.

Whatever the position of the explicit derogation as the basis of an exception for self-cleaning, we can note that Article 45 para. 1 subpara. 2 Directive 2004/18/EC

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<sup>25</sup> Hahnl, “Strafrechtliche Verurteilung und vergaberechtliche Zuverlässigkeit” (2006) *ecolex* 6 at 8 *et seq.*

<sup>26</sup> Para. 9 of the OGC guidance on the mandatory exclusion of economic operators in the new procurement legislation, OGC, January 2006, available at <http://www.ogc.gov.uk>

confirms also that there is also an implicit derogation, for reasons of conformity with Community law:

“Member States shall specify, in accordance with their national law and *having regard for Community law*, the implementing conditions for this paragraph”(emphasis added).

In this way, the European legislator explicitly reminds the Member States to respect the implications of Community law when transposing the mandatory exclusion rule of Article 45 para. 1 Directive 2004/18/EC into national law. Community law demands observance of the principles of proportionality and equal treatment. We will argue below that in this context the specific result of these principles is that Member States *must* allow economic operators that have undergone effective self-cleaning to be admitted to be admitted to their public contracts markets, by way of derogation from the general mandatory exclusion, whether or not self-cleaning is covered by the explicit derogation for reasons of overriding public interest.

#### **b) Discretionary grounds for exclusion**

Pursuant to Article 45 para. 2 Directive 2004/18/EC a contracting authority *may* exclude an economic operator:

- in cases of insolvency or winding up, or equivalent;
- when the economic operator has been convicted by a judgment which has the force of *res judicata* concerning his professional conduct;



- when it has been guilty of grave professional misconduct;
- when it has not fulfilled his obligations relating to the payment of social security contributions or of taxes; or
- when he is guilty of serious misrepresentation in supplying required information.

The provision grants a margin of discretion, which needs to be exercised in conformity with European as well as national law. As a consequence, the contracting authority must observe e.g. the general EC law principles of proportionality and non-discrimination. Furthermore, as with the provision for mandatory exclusions, Article 45 para. 2 sub-para. 2 Directive 2004/18/EC requires that the Member States specify the implementing conditions for this paragraph “having regard for Community law.”

Again, when transposing this rule, the Member States are obliged to ensure that the general principles of Community law, including proportionality and non-discrimination, will be respected by contracting authorities.

We will argue below that to apply these principles again means that self-cleaning measures generally need to be taken into account. In the context of the discretionary exclusions we suggest that this means that Member States are not generally permitted to exclude firms that have undergone adequate self-cleaning measures, even if the Member States provide for a discretionary exclusion of a punitive character. However, we should note here that, by their nature, not all of the grounds for discretionary exclusions are suitable for self-cleaning measures. Thus an economic operator either is or is not bankrupt or being wound up. Unlike most of the other

grounds for exclusion this ground refers to a present condition of unsuitability and not to behaviour in the past, and there is no room for self-cleaning to remedy this situation.

## **2. The relevant fundamental principles of Community law and their implications for self-cleaning under the procurement directives**

As we have mentioned above, our argument regarding the relevance of self-cleaning measures under the EC procurement directives is based on the application of fundamental Community law principles. These are, in particular the free movement of services and goods, the principle of equal treatment and the principle of proportionality. The ECJ (Grand Chamber) has recently stressed the importance of the principle of proportionality for Community procurement law generally in its landmark decision in case C-213/07,<sup>27</sup> *Michaniki*. As already stated above, Member States are obliged to respect all these principles when implementing Directive 2004/18/EC, including Article 45 paras. 1 and 2, and in general when tendering public contracts within the scope of the EC Treaty.<sup>28</sup>

In this section we will explore further the nature and content of these principles, and the way that they have been applied in cases that are relevant to our context of exclusions in public procurement. We will then argue that, in light of the purposes of

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<sup>27</sup> Case C-213/07 *Michaniki AE*, judgment of 16 December 2008 [not yet published], paras. 46, 48, and 61 *et seq.*

<sup>28</sup> The recitals provide that Directive 2004/18/EC is to be read and applied in light of these Treaty provisions and principles: Recital 2 of Directive 2004/18/EC.

the exclusion provisions under the directives, these principles require significant consideration to be self-cleaning measures when applying those exclusions.

**a) Freedoms of movement of services and goods**

Guaranteeing the four freedoms (whose effects in the field of public procurement are substantiated in the public procurement directives) ensures that every participant in the Single Market has, fundamentally, the opportunity to apply for public contracts. Article 28 EC prohibits “quantitative restrictions on imports and all measures having equivalent effect” between Member States. Quantitative restrictions, or quotas, are measures which amount to a total or partial restraint of import, exports, or transit of a given product by amount or by value.<sup>29</sup> This is the standard of comparison to any other measure interfering with the freedom of movements of goods. The first and current definition of those measures having equal effect to quantitative restrictions on imports is given in the *Dassonville* case:

“All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.”<sup>30</sup>

With regard to services, Article 49 EC provides that

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<sup>29</sup> Case C-2/73 *Geddo v Italy* [1973] ECR 865 at 879; cf. also Arnall et al, *Wyatt & Dashwood's European Union Law* (5<sup>th</sup> ed, London: Sweet & Maxwell 2006), 572 at 16-002.

<sup>30</sup> Case C-8/74 *Procureur du Roi v Dassonville* [1974] ECR 837, para. 5.

“within the framework of the provisions set below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended”.

In contrast with Article 29 EC,<sup>31</sup> the ECJ’s *Dassonville*-formula on imports does not require that the Member State treats imported goods and goods which are produced in the Member State itself differently for a restriction on trade to exist. Even without any discrimination, actions can have an effect equivalent to quantitative restrictions.

The exclusion from participation in a public tender may prevent the operator’s market access in general. Provided that the awarded contract involves an element of cross-border trade for the tenderer – which does not necessarily require the tenderer to participate in the public tender of a Member State different from his home state – an exclusion on the basis of Article 45 para. 1 or para. 2 Directive 2004/18/EC is, therefore, a restriction of the freedom of movement of goods and the freedom to

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<sup>31</sup> Concerning measures having equivalent effect to quantitative restrictions on exports the ECJ has not mirrored the jurisprudence on the imports. Accordant to the *Groenveld*-formula there is a discriminating effect required. Cf. Case C-15/79 *P.B. Groenveld BV v Produktschap voor Vee en Vlees* [1979] ECR 3409, para. 7.

provide services.<sup>32</sup> This restriction must be justified on grounds of public policy, public health, or one of the other limits which are recognized by the Treaty.

Moreover, it is settled case law of the ECJ that derogations from the fundamental principles must be the least restrictive possible in the circumstances,<sup>33</sup> because, without prejudice to other requirements, such restrictions must comply with the principle of proportionality.<sup>34</sup> It is therefore necessary to assess whether an exclusion of an economic operator on the basis of Article 45 para. 1 or para. 2 Directive 2004/18/EC is proportional where the economic operator has completed self-cleaning measures.

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<sup>32</sup> On this issue see Arrowsmith and Kunzlik, “EC regulation of public procurement”, ch. 2 in S. Arrowsmith and P. Kunzlik (eds.), *Social and Environmental Policies in EC Procurement Law* (Cambridge: CUP 2009) at 57 *et seq.* Arrowsmith argues in this piece that there is in fact a qualification to this principle in that certain procurement decisions – which can be called „*excluded buying decisions*“ – are not generally to be treated as restrictions on trade and also that non-discriminatory procurement decisions are not regulated unless they manifest government activity as a regulator through procurement rather than as a purchaser - although this distinction is not easy to apply in the context of exclusions for misconduct, where it will depend on the purpose of the exclusion.

<sup>33</sup> Case C-36/75 *Rutili v Ministre de l'Interieur* [1975] ECR 1219, para. 32; Case C-33/74 *Van Binsbergen* [1974] ECR 1299, para. 14/16; Case C-120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, para. 34.

<sup>34</sup> Cf. Kingreen, in Callies and Ruffert, *EUV/EGV Kommentar*, 3<sup>rd</sup> edition 2007 (available at <http://www.beck.de>), Article 28 at no. 88 *et seq.* and, criticising the phenomenon of a double review of proportionality : Koch, *Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften* (Berlin: Duncker & Humblot 2003), 255 *et seq.*

**b) The principle of proportionality**

Under the principle of proportionality laid down in Article 5 Section 3 EC Treaty, actions by the Community must not go beyond what is necessary to achieve the objectives of the Treaty. The ECJ has consistently ruled in its case law that the principle of proportionality is one of the general principles of Community law and held that

“the lawfulness of the prohibition of an economic activity is subject to the condition *that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question*; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.”<sup>35</sup> (emphasis added)

The principle of proportionality also applies to criminal and administrative sanctions imposed for breach of rules connected with the exercise of a Community right.<sup>36</sup> This was the case in *Messner*, where a criminal prosecution was brought in Italy against a German national who was accused of not having made, within three days of entering

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<sup>35</sup> Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, para. 13; Joined Cases C-279/84, C-280/84, C-285/84 and C-286/84 *Rau v Commission* [1987] ECR 1069, para. 34; Case C-180/00 *Netherlands v Commission* [2005] ECR I-6603, para. 103; Case T-170/06 *Alrosa v Commission* [2007] ECR II-2601, para. 58.

<sup>36</sup> On proportionality as a general principle of EC Law see Emiliou, *The Principle of Proportionality in European Law* (London: Kluwer Law International 1996), 115.

Italian territory, the declaration of residence as prescribed by Italian legislation. Non-compliance with the obligation was punishable by imprisonment of up to three months or a fine of up to 400,000 lire. In this case, the ECJ held that the time-limit of three days was unreasonable because it was excessively restrictive and the imposition of such a short time-limit does not appear to be ‘absolutely necessary’. For this reason, the majority of Member States imposing a similar obligation allowed appreciably longer periods.<sup>37</sup> The ECJ made it clear that Member States are not entitled to impose “a penalty so disproportionate to the gravity of the infringement that it becomes an obstacle to the free movement of workers”.<sup>38</sup>

For EC procurement law specifically the ECJ has held in relation to exclusionary measures that such measures must not go beyond what is necessary to achieve their objectives.<sup>39</sup>

**aa) Member States bound by the principle of proportionality**

Member States are bound by the principles of Community law in the same way as the EC itself when implementing directives.<sup>40</sup> Therefore, the principle of proportionality can be applied to challenge the legality of state action which falls within the sphere of

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<sup>37</sup> See Tridimas, *The General Principles of EC Law* (2<sup>nd</sup> ed, Oxford: OUP 2006), 235.

<sup>38</sup> Case C-265/88 *Messner* [1989] ECR I-4209, paras. 11, 14.

<sup>39</sup> Case C-213/07 *Michaniki AE*, judgment of 16 December 2008 [not yet published], paras. 47 and 48; Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] I-1559, para. 34.

<sup>40</sup> See Case C-292/97 *Karlsson* [2000] ECR I-2737, para. 37.

application of Community law.<sup>41</sup> The ECJ case law, coming from different Community policy fields, shows that where a national measure restricts the exercise of a fundamental Treaty freedom, or runs contrary to general principles of Community law, a test of proportionality will be applied in order to ensure that there is no unjustified infringement of the freedoms.

It follows that national provision implementing Community law must be in accordance with the principle of proportionality. This is also the case as regards provisions implementing the mandatory exclusions of Directive 2004/18/EC, which – at first glance – seem to fully harmonise the legal consequences of certain misconduct. For example, in *Baumbast* the ECJ ruled that the principle of proportionality has to be applied even to national measures which are consistent with secondary legislation enacted at Community level and which provide for limitations of the rights granted therein. Mr Baumbast was a German national, living in the UK, who was denied renewal of his residency permit on the grounds that he did not fulfil the conditions set out in Directive 90/364/EC (which make the right to reside in another Member State conditional upon having sufficient resources and comprehensive health insurance). Although Mr Baumbast had sufficient resources and health insurance in Germany, where he and his family would go to receive health treatment, he did not have health insurance for emergency treatment in the UK and thus was not insured for all health risks as required by Directive 90/364/EC. Even though the national rules were consistent with secondary legislation enacted at Community level and the right to move to and reside freely in the territory of the Member States is subject to the limitations contained in secondary legislation, i.e.

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<sup>41</sup> Craig and de Búrca, *EU Law* (3<sup>rd</sup> ed, Oxford: OUP 2002), 372.



sufficient resources and comprehensive health insurance so as not to become a burden on the host welfare system, the ECJ found that these limitations and conditions had to be applied consistently with the general principles of Community law and in particular the principle of proportionality. Not to allow Mr Baumbast to reside in the UK merely because he was not covered by emergency treatment insurance would be a disproportionate interference with the substance of the right of residence which he derived directly from the Treaty.<sup>42</sup> Thus, any limitations and conditions, even if set out in the directive itself and applied by the Member States, have to be applied consistently with the general principles of Community law, taking into account the aim of the directive.

The strictness with which the Court applies the principle of proportionality can be seen in the *Sknavi* judgment. In this case, the principle of proportionality was invoked to assess the compatibility of a national measure with a fundamental Treaty freedom.<sup>43</sup> Two Greek nationals took up residence in Germany in order to acquire a German company. When taking up residence in Germany, German law pursuant to Directive 80/1263/EC provided for an obligation to exchange driving licences within a year. The failure to exchange the driving licence would be treated as driving without a licence and thus rendered punishable by imprisonment or a fine. Since both of the Greek nationals failed to comply with this legal obligation they were fined by the German authorities.<sup>44</sup> The Court found that the issue of a driving licence by a Member

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<sup>42</sup> Case C-413/99 *Baumbast* [2002] ECR I-7091, paras. 91, 93; see also, to that effect, Joined Cases C-259/91, C-331/91 and C-332/91 *Alluè and Others* [1993] ECR I-4309, paras. 15.

<sup>43</sup> See *Tridimas*, note 37 above, 235.

<sup>44</sup> Directive 80/1263/EC on the introduction of a Community driving licence OJ [1980] L 375/1.

State in exchange for a licence issued by another Member State does not constitute the basis of the right to drive a motor vehicle in the territory of the host State, but evidence of the existence of such a right. Thus, the Court concluded that treating a person who has failed to have a licence exchanged as if he were a person driving without a licence, thereby causing criminal penalties, even if only of a financial nature, would be disproportionate to the gravity of that infringement in view of the ensuing consequences, since a criminal conviction may have consequences for the exercise of a trade or profession by an employed or self-employed person, particularly with regard to access to certain activities or certain offices.<sup>45</sup>

Regarding the ECJ case law, the principle of proportionality has been applied both as setting a limit on the scope of restrictions to the four freedoms and as an independent constitutional criterion to review onerous measures.<sup>46</sup>

#### **bb) Comparable case law of the ECJ**

By applying the principle of proportionality, the ECJ has solved conflicts comparable to the question of whether self-cleaning measures should be taken into account when deciding on excluding a candidate or tenderer, by stressing the necessity of restriction of national limitations to the four freedoms with regard to the aim pursued by the directive that is being implemented in the particular case.

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<sup>45</sup> Case C-193/94 *Skani and Chryssanthakopoulos* [1996] ECR I-929, paras. 36, 37.

<sup>46</sup> Scheuning, in Schulze and Zuleeg (eds), *Europarecht – Handbuch für die deutsche Rechtspraxis* (Berlin: Nomos 2006) § 6 at 240.

This becomes very clear when reviewing the ECJ's *Molenheide*<sup>47</sup> ruling. In *Molenheide* the Court examined the impact of the proportionality principle on the tax authorities' right to retain refundable VAT where there are serious grounds for presumption of tax evasion or a disputed VAT debt.<sup>48</sup> Provisions of Belgian law allowed the domestic authorities to refuse to refund a VAT credit for a specific period or to carry it forward to a later period, but rather to retain it for as long as it had a claim against the taxpayer for a previous tax period even though that demand was contested by the taxable person. The Court ruled that the Belgian withholding measure was not precluded by the Sixth VAT Directive. It concluded, however, that in accordance with the principle of proportionality,

“the Member States must employ means which, whilst enabling them effectively to attain the objective pursued by their domestic laws, are the least detrimental to the objectives and the principles laid down by the relevant Community legislation.”<sup>49</sup>

Therefore, even if it was legitimate for Belgium to adopt measures in order to preserve the rights of the Treasury as effectively as possible, the measures adopted must not go further than is necessary for their purpose, nor could they be used so as to undermine the right to deduct VAT, this being a fundamental principle established by

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<sup>47</sup> Joined Cases C-286/94, 340/95, 401/95 and 47/96 *Garage Molenheide BVBA v Belgische Staat* [1997] ECR I-7281.

<sup>48</sup> See Jacobs, “Recent Developments in the Principle of Proportionality in European Community Law” in Ellis, *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart 1999), 16.

<sup>49</sup> Joined Cases C-286/94, 340/95, 401/95 and 47/96 *Garage Molenheide BVBA v Belgische Staat* [1997] ECR I-7281, para. 46.

the Community legislation. The ECJ acknowledged that the specific application of proportionality would be left to the national courts to determine, but it gave guidelines as to the application in the instant case. First, it found that the retention system in Belgium was disproportionate because it was based on an irrebuttable presumption, in the sense that it was not open to the claimant to argue that the retention was unnecessary or put forward arguments concerning urgency. Second, the ECJ noted that rules that prevented the taxpayer from requesting a national court to adopt a different measure that would be equally effective in protecting the interests of the Treasury in place of the retention of the VAT credit were disproportionate.

The issue in *Molenheide* seems comparable to the issue of exclusion from public contracts deriving from Article 45 para. 1 Directive 2004/18/EC. Although this exclusion rule does not establish an explicit irrebuttable presumption, as was the case in *Molenheide*, its effect in regard to exclusion of a tenderer, at least, comes very close to it, because according to its wording “[a]ny candidate or tenderer who has been the subject of a conviction by final judgment ... shall be excluded”. Without qualification, it would not be open to a concerned tenderer to argue that its exclusion was unnecessary to achieve the objectives of the relevant exclusion provision.

Even more compelling is the recent ECJ decision in the procurement case Case C-213/07, *Michaniki AE*.<sup>50</sup> In this case the court struck down as incompatible with the proportionality principle a Greek provision that established an irrebuttable presumption that the status of owner etc. of an undertaking active in the media sector is incompatible with that of owner etc. of an undertaking which enters into a

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<sup>50</sup> Case C-213/07 *Michaniki AE*, judgment of 16 December 2008 [not yet published]

procurement contract with the public sector. The automatic exclusion of such undertakings was considered disproportionate to achieve the objective allegedly pursued, namely to ensure equal treatment of tenderers and transparency. The Greek government considered that such firms might use their influence with the media to influence award decisions or to criticise such decisions when not in their favour.

The above cases show the tendency of the ECJ to test actions of Member States against the proportionality principle in so far as their application undermines the basic principles and objectives of Community law. In *Molenheide*, what was particularly criticised about the Belgian rules on VAT was their inflexibility, resulting in the lack of any possibility of the judge to take a fair decision on the facts. Where a Member State interprets or implements a Community Directive too narrowly and contrary to the objectives of the Directive, the action is likely to fail the proportionality test as applied by the ECJ.<sup>51</sup> In *Michaniki AE* the irrebuttable presumption was considered excessive.<sup>52</sup> All of these cases demonstrate that the principle of proportionality must be taken into account when interpreting provisions of European legislation, irrespective of whether it is explicitly required by the directive itself.

It follows that Member States who implement Community law or act within the sphere of its application must exercise their discretion in compliance with the principle of proportionality. Thus, a contracting authority is only able legitimately to

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<sup>51</sup> The Court tends to apply increasingly more rigorous scrutiny with the result that Member States' actions which were regarded as lawful in earlier cases have been held not to be so in later cases (see Craig and de Búrca, note 41 above, 378).

<sup>52</sup> Case C-213/07 *Michaniki AE*, judgment of 16 December 2008 [not yet published], para. 69.

exclude a company on the basis of Article 45 Directive 2004/18/EC – under either the mandatory or discretionary exclusions - despite effective self-cleaning measures already having been taken, if this measure is appropriate and necessary to achieve the objective of the exclusion rule and does not impose a burden on the company that is excessive in relation to the objective to be achieved.

**cc) The purposes of the exclusions in Directive 2004/18/EC**

Before we can consider the precise way in which the above principles of Community law affect the issue of self-cleaning it is now necessary to consider the objective(s) of the directive's exclusion provisions, both mandatory and discretionary. The purposes for which these exclusions are adopted are potentially relevant to the issue of self-cleaning, since the proportionality of a measure is to be considered in light of the objectives to be achieved. We will see that in many cases self-cleaning will in fact support the objective of the exclusion, rather than detract from it.

We can note that so far as the recent mandatory exclusions are concerned, little light is thrown on the question of the objective of the exclusions either by the recitals to Directive 2004/18/EC – which merely states in recital 43 that the award of contracts to those convicted of the relevant offences “should be avoided” – nor the Commission's original Explanatory Memorandum to the directive – which simply notes that the exclusion “strengthens the Community's arsenal of means” for combating the phenomena concerned. However, for both mandatory and discretionary exclusions it is possible from the context, in particular, to identify a number of purposes that might be served by the exclusions.

**(1) Protection of public budgets and other public interests in the performance of the contract**

We can start by observing that the exclusion rules provided in Article 45 para. 1 and para. 2 Directive 2004/18/EC are an integral part of Section 2 “*Criteria for qualitative selection*”, which lays down rules for the assessment of the personal, professional, economic, financial and technical suitability of a candidate or tenderer. The provisions of this section are mainly concerned with the possibility for contracting authorities to exclude firms that are not able reliably to perform the contract. In particular, this section allows entities to exclude for absence of financial and economic standing to perform the contract and absence of professional capability to perform,<sup>53</sup> as well as allowing exclusion of those not registered on professional and trade registers.<sup>54</sup>

As both the mandatory and discretionary exclusions are part of a section mainly concerned with reliability to perform, it could possibly be argued that an objective of these exclusion provisions is to prevent contracting authorities from entering into business with an unreliable undertaking (in the case of the mandatory exclusions) or to allow Member States and their contracting authorities to avoid unreliable undertakings, if they choose (in the case of discretionary exclusions). From this perspective, Article 45 para. 1 and 2 Directive 2004/18/EC could be seen as protecting public budgets, and the public services etc to which the contract relates,

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<sup>53</sup> See, in particular, Article 47 and 48 respectively.

<sup>54</sup> Article 46 of Directive 2004/18/EC.

from the economic and other consequences of concluding contracts with undertakings that have been involved with certain types of wrongdoing. The reason for excluding these undertakings that have been involved in past wrongdoing is the justified assumption that there is a higher risk that they might not meet their obligations when performing the contract in question.

It is submitted that ensuring reliability is clearly one of the functions of the discretionary exclusions, at least of those relating to criminal convictions and grave misconduct. It can be noted that the ECJ in *La Cascina* stated that one of the concerns of the seven general exclusions now found in Article 45(2) is the reliability of undertakings, along with their solvency and professional honesty,<sup>55</sup> and this certainly seems to be at least one function of excluding undertakings that have criminal convictions.

Ensuring reliability might also possibly be considered as one purpose of the mandatory exclusion provisions. However, the limited and specific type of offences covered by the mandatory exclusions might tend to suggest, on the other hand, that the mandatory exclusion provisions are more concerned to support the policies that are reflected in the criminalisation of the conduct concerned – for example, in the case of exclusion for convictions for corruption, to support anti-corruption policy. (See further the discussion in the text below). From this perspective, these provisions could well have been included in section 2 of the directive merely because that section

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<sup>55</sup> Joined Cases C-226/04 and C-228/04, *La Cascina* [2006] ECR I-1347, para. 21 with regard to the equivalent provision in Article 29 Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts.



contains *all* the provisions on exclusion, regardless of their objectives - that is, whether concerned with reliability or with other objectives.

## **(2) Preventing corruption and other unacceptable activity in economic life**

So far as concerns the mandatory exclusion in Article 45 para. 1 Directive 2004/18/EC, a strong argument can be made that this is intended as a tool to prevent corruption and certain other crime in economic life, both in the specific context of government contracting and more generally. This is because exclusions can deter firms from engaging in the relevant offences both in government contracting and more generally (since *any* conviction will result in exclusion from government contracts, whether it relates to conduct in government contracting or conduct in other economic activity) and because excluding convicted firms from government contracts makes it more difficult for these firms to thrive in the general marketplace. In these functions the mandatory exclusions could be seen to reflect the general policy against corruption and certain other crime etc at EC level.<sup>56</sup> As the procurement directives have always allowed for a discretionary exclusion in these cases, the introduction of an *obligation* to exclude tenderers shows that the legislator intended to send a very clear signal to economic operators not to engage in the listed activities, and to provide an incentive not to do so.

The fact that the mandatory exclusions are focused on a limited number of offences, and that these refer to specific areas of activity that are of concern to EC policy, offers

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<sup>56</sup> On the EC policy on the offences referred to in Article 45(1) see Williams in Arrowsmith and Kunzlik (eds), note 2 above, at 484 *et seq.*

strong support for this view of the preventative function of the mandatory exclusions. This view also appears to be supported by the European Commission's Communication on Disqualifications arising from criminal convictions in the European Union, which in fact regards prevention of the proscribed behaviour as the *primary* function of Community disqualifications.<sup>57</sup> In this Communication, disqualifications are defined as:

“a category of sanction whose objective is *primarily preventive*. When a person who has been convicted of an offence is deprived of the ability to exercise certain rights [...], it is *primarily to prevent him or her from re-offending*.” (emphasis added)

In the further text of the Communication, the exclusion rule of Article 45 para. 1 Directive 2004/18/EC is expressly mentioned as an example of an instrument that refers to disqualifications.<sup>58</sup>

So far as concerns the grounds for discretionary exclusion listed in Article 45 para. 2 Directive 2004/18/EC these, arguably, serve the purpose of allowing Member States to implement in their own national systems procurement exclusions that seek to

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<sup>57</sup> Communication from the Commission to the Council and the European Parliament - Disqualifications arising from criminal convictions in the European Union, COM(2006)0073 final\*.

<sup>58</sup> Communication from the Commission to the Council and the European Parliament - Disqualifications arising from criminal convictions in the European Union, COM(2006)0073 final\*, at 4.

support the policies embodied in regulatory provisions of applicable criminal law.<sup>59</sup> These discretionary exclusions again can have both a deterrent effect and the effect of reducing economic activity by criminal firms, again – like the mandatory exclusions – both in government contracts and more generally. The use of procurement to support in this way policies that are embodied in norms that are also enforced by other measures (such as criminal sanctions) can be seen as an appropriate and legitimate use of national procurement power; for example, such measures may sometimes be more effective as a method of enforcement than more traditional regulatory sanctions, since it can allow limited resources to focus on enforcement in the context of specific ongoing relationships. Of course, the possibility for Member States to use exclusions in this way is reinforced if it is indeed the case that the mandatory exclusions promote such a purpose at Community level.

The contention that the discretionary exclusions are not linked solely to reliability, at least, is also supported by the recent ECJ judgment in *La Cascina*. In this case the ECJ stated that Member States may decide not to apply the discretionary exclusions, or to apply them with varying degrees of rigour, ‘*according to the legal, economic or*

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<sup>59</sup> Argued by Arrowsmith, “Application of the EC Treaty and directives to horizontal policies: a critical review”, ch. 4 in S. Arrowsmith and P. Kunzlik (eds.), *Social and Environmental Policies in EC Procurement Law* (Cambridge: CUP 2009) at 230 *et seq.* This view is arguably supported by Case C-213/07 *Michaniki AE*, judgment of 16 December 2008 [not yet published], para. 59 of the judgment, stating that Member States may exercise certain discretionary exclusions with the aim of preventing fraud or corruption (although this finding is concerned with the discretion to exclude outside the context of the listed exclusions altogether, rather than specifically with exclusions relating to criminal convictions).

*social considerations prevailing at national level*<sup>60</sup> (emphasis added). This seems to imply that the provisions can support social and other purposes and need not be concerned just with the firm's reliability to perform a contract. Further, the ECJ in that case described these discretionary exclusion provisions as being concerned with 'professional honesty, solvency and reliability'. In doing so, the ECJ treated reliability as distinct from 'professional honesty', thus indicating that violating certain norms is unacceptable per se and exclusion from government contracts a legitimate response independently of the issue of reliability.<sup>61</sup>

### **(3) Publication and promotion of values**

In addition to preventing the relevant offences, both mandatory and discretionary grounds for exclusion might also serve as a way of publicising and promoting certain values held by the European legislator and national legislators and/or administrations. The use of such exclusions might also aim to bring about a cultural change towards the acceptance of these values in society as a whole. Such objectives can be better served if the government avoids associating itself directly through its procurement with firms that have not complied with the relevant values in the past, and by forbidding or deterring contracting authorities from entering into business with non-compliant companies the legislator or administrator can more clearly exhibit its disapproval of this kind of behaviour. It is notable that Directive 2006/32<sup>62</sup> on Energy

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<sup>60</sup> Joined Cases C-226/04 and C-228/04 *La Cascina* [2006] ECR I-1347, para. 23.

<sup>61</sup> Arrowsmith, ch. 4 in Arrowsmith and Kunzlik (eds.), note 59 above, at 230.

<sup>62</sup> Directive 2006/32/EC of the European Parliament and of the Council on energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC, OJ [2006] L 114/64.

End-use and Energy Services, in recital 7,<sup>63</sup> explicitly recognises this role of public procurement in “setting an example” in the context of the EC’s policy of promoting energy efficient products and services: this role is expressly mentioned in recital 7 as a justification for imposing obligations on Member States in their procurement under Article 5 of that Directive.

It can be argued that the mandatory exclusion at EC level serves also these purposes so far as the Community legislator is concerned. It can also be suggested that the discretionary exclusions for Member States allow the Member States to do this, or to allow their contracting authorities to do so, for selected values of the Member State or authorities concerned – a view that again is clearly reinforced by recognition of this role for procurement in the context of policies set at Community level.

#### **(4) Ensuring fair competition**

Exclusions can also aim to ensure a level playing field for all bidders. By neglecting their obligations, including through the commission of the offences listed in Article 45 para. 1 Directive 2004/18/EC, economic operators can gain an unfair advantage over their competitors. The objective of some of the exclusion rules in Directive 2004/18 to ensure fair competition has been acknowledged on several

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<sup>63</sup> “...the public sector in each Member State should...set a good example regarding investments, maintenance and other expenditure on energy-using equipment, energy services and other energy efficient improvement measures. Therefore, the public sector should be encouraged to integrate energy efficiency improvement considerations into its investments, depreciation allowances and operating budgets. *Furthermore, the public sector should endeavour to use energy efficiency criteria in tendering procedures for public procurement...*” (emphasis added).

occasions by Advocate General Poiares Maduro. Recently, in case C-213/07, *Michaniki*, he stated in his Opinion that Member States may exclude economic operators in order to ensure equal treatment and to further effective competition and the ECJ (Grand Chamber) upheld this conclusion.<sup>64</sup> In joined cases C-224 and 228/04, *La Cascina*, he argued specifically that the discretionary grounds for exclusions relating to the payment of taxes or of social security contributions serve to ensure that all tenderers are treated equally,<sup>65</sup> including by preventing some firms from gaining an unfair competitive advantage.<sup>66</sup>

#### **(5) A punitive approach?**

Exclusions for criminal offence could also potentially be used for punitive purposes, to provide a sanction for prohibited behaviour that is in addition to that provided by the criminal law or other kinds of penal provisions.

Whether this is a purpose of the exclusion provisions of the EC directives is an important question, since if this is the case it can provide an argument for rejecting any obligation under EC law to accept an automatic doctrine of self-cleaning in applying the exclusion provisions. Generally in criminal law the fact that a criminal is no longer a danger or has become a reformed character does not mean that no

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<sup>64</sup> Advocate General Poiares Maduro, Case C-213/07 *Michaniki AE*, opinion of 8 October 2008, para. 34; confirmed by ECJ in Case C-213/07 *Michaniki AE*, judgment of 16 December 2008 [not yet published], para. 60.

<sup>65</sup> Advocate General Poiares Maduro, C-226 and C-228/04 *La Cascina* [2006] ECR I-1347, para. 27.

<sup>66</sup> *Ibid*, para. 24 of the Opinion.

sentence is imposed, because the punishment is meant to off-set the guilt of the criminal. Thus, if the exclusions in the directive have a punitive purpose, or can be used by Member States for such a purpose, rejection of self-cleaning might be considered appropriate, at least in certain circumstances.

However, in the case of the mandatory exclusion of Article 45 para 1 of Directive 2004/18, we would argue that the exclusion clearly does *not* serve a punitive objective. It is arguable – although perhaps not entirely clear – that the Community has the *competence* to adopt measures of a punitive character, at least in relation to some types of conduct covered by the mandatory exclusion provisions. Whilst neither criminal law nor the rules of criminal procedure fall generally within the Community’s competence,<sup>67</sup> Article 61 of the EC Treaty allows the Council to adopt certain measures to prevent and combat crime under Article 31(e) of the Treaty on European Union, which in turn relates to “*measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking*” (emphasis added). This might possibly provide a legal basis for mandatory exclusions from public procurement by way of a punitive sanction for persons committing these crimes.<sup>68</sup> However, if the provisions were actually intended to have a punitive character, relying on the competence conferred by Article 61, it would be expected that Directive 2004/18

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<sup>67</sup> Case C-203/80 *Casati* [1981] ECR 2595, para. 27; Case C-226/97 *Lemmens* [1998] ECR I-3711, para. 19; Case C-176/03 *Commission v Council* [2005] ECR I-7879, para. 47.

<sup>68</sup> Although one of the present authors, Arrowsmith, has doubted whether this is in fact the case: see Arrowsmith and Kunzlik, “Public procurement and horizontal policies in EC law: general principles”, ch. 1 in Arrowsmith and Kunzlik (eds.), *Social and Environmental Policies in EC Procurement Law* (Cambridge: CUP 2009) at 37 *et seq.*

would refer to Article 61 as one of the legal bases for adopting the directive. Whilst this is not strictly necessary if the “punitive” measures in the directives can be considered merely as incidental to the single-market objectives, it has been the practice to refer to Article 61 as the legal basis in directives that include punitive provisions, no doubt because of the exceptional nature of provisions of a punitive nature. This is the case, for example, with Directive 2002/90/EC, which deals with the facilitation of unauthorized entry, transit and residence and is clearly aimed at “strengthening [...] the penal framework.”<sup>69</sup> However, Directive 2004/18 does *not* refer to Article 61: it is adopted solely on the basis of the single market provisions of Articles 47(2), 55 and 95 EC. This view that the mandatory exclusions are not intended to have a punitive character, as indicated by the legal basis of the directive, is consistent with the European Commission’s Communication on Disqualifications. This, as we have seen, suggests that the primary role of the mandatory exclusion rule in Article 45 para. 1 Directive 2004/18/EC is preventative, which might imply that it does not pursue an additional “punitive” purpose, which the Communication does not mention.

What of the position with discretionary exclusions? These we consider to be slightly different. There is no specific indication in the directive of any intention to limit Member States’ pre-existing powers to use exclusion from public procurement as a punitive measure. Indeed, as a general principle the Community would appear to have no competence in principle to limit Member States’ power to adopt such punitive measures, except to the limited extent that this is given by specific Treaty powers allowing Community action relating to the criminal law, which, as we have seen, exist

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<sup>69</sup> Cf. Recital 3 of Directive 2002/90/EC.



only in specific areas of activity. Some Member States have provided for rules that allow the punishment of economic operators by debarring them for a certain period of time from public procurement procedures which are independent of Member State obligations under the procurement directives – for example, in the case of France such provisions are included in the country’s penal Code.<sup>70</sup> This indicates that some Member States do consider that they do retain such powers to use access to public procurement for punitive purposes.

Nevertheless, it is submitted that the *manner* in which public procurement measures are used by Member States for punitive purposes is still curtailed by the principle of proportionality, given the impact of such a power on the exercise of the economic freedoms under the Treaty: there can be no question that any Member State measure affecting the fundamental freedoms – including punitive exclusions under Member State criminal law - must be in compliance with general principles of Community law, including proportionality. We will suggest below that this means that self-cleaning measures are important in practice even in the context of discretionary exclusions adopted for punitive purposes.

Further, it might even be argued that the proportionality principle itself totally or significantly curtails the possibility for Member States to use exclusion from public procurement as a means to punish economic operators. In this respect it might be argued that - in contrast with the other objectives referred to above – the punitive objective of exclusion can equally well be achieved by using other kinds of sanctions,

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<sup>70</sup> Article 131-19 Code Pénal allows to apply the sanction of exclusion from tender procedures in case that the Code Pénal provides for a conviction of legal persons.

such as fines or imprisonment, that do not involve direct restrictions on participating in economic activity.

**dd) Exclusion as an appropriate means to achieve the objectives of the exclusion provisions**

It would appear that the exclusion of candidates or tenderers judged to have committed criminal offences falling within Article 45 Directive 2004/18/EC or other grave professional misconduct is in general an appropriate means to achieve the objectives of the exclusions referred to above.

This is certainly the case, first, as regards any objective of protecting public funds and other public interests in reliable contract performance. The conviction of a company (or of an employee whose acts can be imputed to the company) for one of the criminal offences listed in Article 45 para. 1 Directive 2004/18/EC, or for another offence relating to its professional conduct or grave professional misconduct within Article 45 para. 2 Directive 2004/18/EC, generally casts doubt on the reliability of the candidate. By excluding such companies, the contracting authority can ensure it does not contract with unreliable companies.

Furthermore, the exclusion of such companies is generally appropriate to achieve the preventative and value-promoting effects contemplated by Article 45 Directive 2004/18/EC. The exclusion is individually preventative (*“spezialpräventiv”*), inasmuch as it removes or reduces the possibility that the affected company can continue its wrongdoing in relation to further public contracts. The threat of exclusion

from the public contracts market also has a general preventative (“*generalpräventiv*”) effect. For companies mainly or exclusively active in sectors in which the principal demand comes from public contracting authorities (such as road construction), the threat of exclusion from procurement procedures presents a significant economic risk which it is vital to avoid. Exclusion as a fundamental legal consequence can therefore act as a deterrent for other companies who have not yet been found to have committed wrongdoing within Article 45 Directive 2004/18/EC, and can therefore cause these companies to refrain from making use of illegal or dishonest methods when competing for, or carrying out, contracts.<sup>71</sup> Moreover, any exclusion made provides a clear statement that there will be no tolerance for companies that have been involved in the particular conduct that is the subject of the exclusion. It is perfectly plausible that this helps to bring about a cultural change, namely acceptance of the values underlying the relevant exclusion.

Finally, it is generally appropriate to exclude companies in order to ensure fair competition. Companies that have committed one of the criminal offences listed in Article 45 para. 1 Directive 2004/18/EC or another offence relating to their professional conduct might have an unfair advantage over their competitors resulting from the offence that needs to be remedied by an exclusion.

It is true that the possibility for ensuring the effectiveness of exclusions for some of these purposes is subject to the general difficulty of making such exclusions effective in practice in certain cases. In particular, some companies may evade exclusions by

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<sup>71</sup> See also Killmann, “Bemerkungen zum verpflichtenden Ausschluss aufgrund strafrechtlicher Verurteilung – die europarechtliche Vorgabe” (2006) ZVB 134 at 135.

setting up new entities and it is challenging to prevent this whilst at the same time avoiding undue bureaucracy or interference with the procurement process<sup>72</sup>. There are also question marks over whether the EC's policy in relation to the mandatory exclusions has been drafted in an effective manner – for example, in relation to the obligation to obtain information on convictions or to exclude related companies.<sup>73</sup> However, this does not affect the fact that exclusions may still be valuable both in principle and in specific cases in which they are applied under EC law.

**ee) Self-cleaning measures as a limit on the mandatory exclusions: a requirement of the principle of proportionality**

Although exclusions are a suitable means for achieving the objectives of the mandatory exclusions in the procurement directives it is submitted, however, that exclusion is not *always necessary* to achieve these objectives. A less severe method, short of an absolute exclusion, is to take into account, in certain individual cases, self-cleaning measures which the affected company has taken. Further, as we will explain below, the accomplishment of a complete self-cleaning can often, in fact, *positively support* the objectives of the mandatory exclusions provisions. It is submitted that these considerations lead to the conclusion that contracting authorities are *required to* accept the existence of self-cleaning measures as a limitation on the mandatory exclusion rules, and hence to admit contractors that have undertaken effective self-cleaning measures. As is elaborated below, this is the case for all the possible

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<sup>72</sup> Anechiarico and Jacobs, “Purging Corruption from Public Contracting: The Solutions are now part of the problem” (1995) 40 New York Law School Law Review 143.

<sup>73</sup> See, for example, Arrowsmith, n. 3 above.

objectives of the mandatory exclusion rules that we have accepted in our analysis above.

This is the case, first, as regards any objective of protecting public funds and other interests in proper contract performance, and the related principle that contracting authorities should only grant public contracts to reliable candidates or tenderers. If the respective company has already taken effective self-cleaning measures a mandatory exclusion cannot be considered necessary for achieving the objective of only contracting with reliable economic operators. Where effective self-cleaning measures have been taken, the persons involved in the wrongdoing will have been removed from their positions in the company and the necessary structural and/or organizational measures will have been taken to ensure that such offences will not recur. Thus, the reliability of the respective candidate or tenderer has been restored. Any objective of contracting only with reliable companies in order to protect public funds can therefore be achieved with less onerous means than a complete exclusion.

The same holds true with regard to the purpose of mandatory exclusions in preventing corruption and other undesirable behaviour. If the persons involved in the criminal activity are removed from their positions and the necessary structural and/or organizational measures have been taken to ensure that the offences will not recur, the objective of prevention of corruption must also be deemed to be achieved. Indeed, a company that has successfully implemented compliance measures such as giving its staff members comprehensive information concerning criminal, antitrust and procurement law, formulating binding company guidelines for the prevention of corruption-related transactions and/or installing a compliance officer, might be

regarded as even less at risk of such criminal activities than a company that has not been found guilty of any offence but does not have such measures in place. For the very same reason a minimum period of mandatory exclusion would be contrary to the objective of securing the reliability of contractors since in this case the undertaking in question has no incentive to undergo the self-cleaning process and to bring about the necessary change in its values and structures. A long discretionary exclusion period that can be reduced to zero in the case of effective self-cleaning sets a much stronger incentive for the undertaking to take these measures and ensure that criminal activities do not recur.

The consideration of self-cleaning measures is also consistent with any general deterrent objective of the mandatory exclusion provisions, since consideration of successful self-cleaning in individual cases does not affect the status of exclusion as a general legal possibility or consequence. The fundamental deterrent effect seems unlikely to be reduced by the admission of exceptions in reasoned individual cases. It is important to note, in this regard, that the completion of effective self-cleaning measures generally requires a substantial investment of time and money, without any guarantee of recognition. Further, not only is the deterrent effect not undermined, but the possibility of taking self-cleaning measures can positively support this effect since companies that have committed an offence without the procurement office's knowledge are given an additional incentive for unilateral action on self-cleaning should the procurement office become aware of the wrongdoing.

The same holds true with regard to any objective of the mandatory exclusions of publicising and promoting important values. In this context, the consideration of

effective self-cleaning measures in individual cases reinforces these values as remedial steps and preventive measures combine to ensure compliance with the values which the mandatory exclusions promote.

To admit a firm that has completed effective self-cleaning measures is not only consistent with any possible objectives of the mandatory exclusion provisions, but also required by the objective to ensure that competition is on a level playing field. Where an economic operator has taken effective self-cleaning measures, it has no advantage over its competitors that needs to be remedied by an exclusion. As set out above, successful self-cleaning implies repairing all the damage caused, and self-cleaning measures are time-consuming and cost-intensive. These costs rebalance the past (illegal) advantages gained by the illegal conduct and the costs borne by compliant bidders in implementing strict compliance systems. When there remains no advantage it would also actually be incompatible with the objective of fair competition to exclude this tenderer.

Providing for self-cleaning measures to set a limit to the mandatory obligation to exclude is also consistent with the general objectives of Directive 2004/18/EC. The main objective of the directive, like that of the fundamental Treaty freedoms, is to develop an effective internal market, especially to ensure effective competition,<sup>74</sup> free from distortions and discrimination and to support the obligations on non-

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<sup>74</sup> Recital 36, 46, Article 29 para. 6 and 7, Article 33 para. 7, Article 35 para. 4 subpara. 5 of Directive 2004/18/EC.

discrimination.<sup>75</sup> The more tenderers take part in a procurement procedure, the better and more efficient the competition becomes. As Advocate General Poiares Maduro discussed in the *Michaniki* case, if more tenderers than necessary in order to ensure equal treatment fall within the scope of application of a ground for exclusion, this goes against the purpose of the directive to develop effective competition.<sup>76</sup> The criminal activities listed in Article 45 Directive 2004/18/EC and, in particular, corruption, may arguably be regarded as being at variance with the principles of non-discrimination and free competition, since corruption generally distorts competition between bidders and thereby increases public procurement costs. However, if a company has implemented the personnel, structural and/or organizational measures required by the concept of self-cleaning, those criminal activities which conflict with the above-mentioned objectives should not recur.

In light of these considerations, we consider that the mandatory exclusion provisions do not require Member States to provide for the exclusion of candidates or tenderers that have successfully implemented self-cleaning measures. Moreover, we would go further than this and contend that the arguments set out above lead to the conclusion that Member States are not in fact *allowed* to exclude candidates that have undergone self-cleaning. This would violate the principle of proportionality: as we have explained, this is not necessary to achieve any of the legitimate purposes of the

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<sup>75</sup> Case C-44/96 *Mannesmann Anlagenbau Austria AG and Others v Strohal Rotationsdruck GesmbH* [1998] ECR I-73, para. 33.

<sup>76</sup> Advocate General Poiares Maduro, Case C-213/07 *Michaniki AE*, opinion of 8 October 2008, para. 34; cf. also Case C-213/07 *Michaniki AE*, judgment of 16 December 2008 [not yet published], para. 63.



mandatory exclusion provisions, which can be achieved – and, indeed, can be *better* achieved - by an approach that allows self-cleaning as a limitation on the exclusions.

The only possible purpose of a mandatory exclusion provision that would not be so adequately served by allowing self-cleaning is a punitive purpose. However, we have argued earlier that this is not an objective of the mandatory exclusion provisions in Article 45.

**ff) Self-cleaning measures as a limit on the possibility for applying discretionary exclusions under the directives**

Having considered the position of the mandatory exclusions, we need also to consider the impact of the proportionality principle on the application of the *discretionary* exclusions by Member States.

For the most part, the arguments set out above are relevant in exactly the same way for the discretionary exclusions which, as we have seen, may fulfil parallel purposes to the mandatory exclusion provisions. Thus, the arguments above concerning the impact of the proportionality principle are generally equally relevant for Member States applying the discretionary exclusions, and lead to a parallel conclusion: in applying these discretionary exclusions Member States must not generally exclude firms that have completed adequate programmes of self-cleaning.

However, we saw above that purpose that the discretionary self-cleaning provisions may probably be exercised by Member States also for an additional purpose that does not constitute one of the purposes of the Community's mandatory exclusions, namely

the punishment of economic operators for past conduct. To the extent that Member States institute the discretionary exclusions for this purpose, it is not clear that self-cleaning should be an automatic defence to an exclusion in every case.

Nevertheless, we consider that self-cleaning will still be very important in this context. This is because, as we have explained above, the general principle of proportionality still needs to be applied by Member States in considering the manner in which they will exercise any punitive power of exclusion. In this context, it is important to note that the principle of proportionality requires that the sanction should not be excessive in light of the gravity of the conduct in question. The ECJ has confirmed this in the case of *Hansen* where it required explicitly “that the [criminal] penalty [...] is proportionate to the seriousness of the infringement committed.”<sup>77</sup> For this reason the fact that self-cleaning measures have been taken is a factor that must still be taken into account in assessing the economic operator’s overall conduct, and thus in deciding the nature or length of any exclusion.

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<sup>77</sup> Case C-326/88 *Hansen* [1990] ECR I-2911, para. 20; cf. also Case C-176/03 *Commission v Council* ECR [2005] I-7879, paras. 48 and 49; Case C-440/05 *Commission v Council* [2007] ECR I- 9097, para. 66; cf. also Article 2 para. 1 sentence 2 Regulation No. 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, according to which administrative checks, measures and penalties must be proportionate. The expert group on the European Legal Area Project found that “widely enshrined [...] in the legal tradition of European States, the principle of proportionality of penalties is in any case a general principle of Community law, being stated many times by the ECJ”, cf. Delmas-Marty (ed), *Corpus juris introduction penal provisions for the purpose of the financial interests of the European Union* (Paris: Economica, 1997) 72; cf. also Delmas-Marty and Vervaele (eds), *The Implementation of the Corpus juris in the Member States*, Vol. I (Antwerp: Intersentia 2000), 274 *et seq.*

The argument that the use of exclusions for punitive purposes is significantly limited by the principle of proportionality could perhaps be supported by reference to the Opinion of Advocate General Poiares Maduro in *La Cascina*, who considered that once a tenderer has fulfilled its obligations in relation to tax and social security payments, it *cannot* any longer be excluded.<sup>78</sup> This indicates that he rejected the possibility of a punitive objective for Member States in operating the discretionary exclusions for non-payment of tax and social security contributions and might possibly be applied by analogy to the case of exclusion for criminal convictions and gross misconduct.<sup>79</sup>

We also suggested earlier that it might even be argued that the proportionality principle even totally or significantly curtails the possibility for Member States to use exclusion from public procurement as a punitive sanction, on the basis that punitive objectives can equally well be achieved by using other kinds of sanctions, that do not involve direct restrictions on participating in economic activity, at least for some cases. If and to the extent that this is the case, the issue of self-cleaning would not need to be considered at all from the perspective of its application to procurement measures of a punitive nature, since these would be ruled out *a priori*.

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<sup>78</sup> Advocate General Poiares Maduro, Joined Cases C-226 and C-228/04 *La Cascina* [2006] ECR I-1347, para. 29.

<sup>79</sup> However, it can be pointed out that this view also precludes the possibility of many other functions for these provisions, such as deterrent functions. For this reason Arrowsmith considers that they probably cannot in fact be considered as analogous to the other discretionary exclusions so far as their objectives are concerned, but are generally more limited in their objectives, being concerned merely to bring firms into compliance with current obligations and to ensure a level playing field.

**c) Principle of equal treatment and non-discrimination**

An argument can also be made that a requirement to acknowledge self-cleaning measures can also be derived from the principles of equal treatment and non-discrimination. As set out above, the principles of equal treatment and non-discrimination are binding on the Community and on the Member States when acting within the scope of application of EC law. The ECJ in the *Storebaelt* case has emphasised the importance of the principle of equal treatment for interpreting the rules of the procurement directives stating that “the duty to observe that principle lies at the very heart of the directive.”<sup>80</sup> In another case, *Commission v France*,<sup>81</sup> the Court held that the principle applies “at all stages of the tendering procedure” and not just when a provider submits a tender.

According to the case law of the ECJ, the principle of equality of treatment requires that comparable situations are not treated differently and that different situations are not treated similarly, unless such a difference or similarity in treatment can be justified objectively.<sup>82</sup> In relation to exclusions taken other than for punitive purposes, it can be argued that failing to take self-cleaning measures into account breaches the principle of equal treatment, as it means that candidates who have taken comprehensive and effective self-cleaning measures are treated no differently from

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<sup>80</sup> Case C-243/89 *Storebaelt* [1993] ECR I-3353, para. 33.

<sup>81</sup> Case C-16/98 *Commission v France* [2000] ECR I-8315, para. 107.

<sup>82</sup> Case C-13/63 *Italy v Commission* [1963] ECR 165, III, 4(a); Case C-106/83 *Sermide v Cassa Conguaglio Zucchero and Others* [1984] ECR 4209, para. 28; Case C-203/86 *Spain v Council* [1988] ECR 4563, para. 25; Case C-306/93 *SMW Winzersekt v Land Rheinland-Pfalz* [1994] ECR I-5555, para. 30.

candidates who have made no effort to eliminate the causes of the convictions and wrongful conduct listed in Article 45 paras. 1 and 2 Directive 2004/18/EC. Although both groups share one characteristic, a conviction or misconduct within Article 45 para. 1 or para. 2 Directive 2004/18/EC, there is no objective justification for treating both groups equally.

This position is confirmed by the *Fabricom* judgment of the ECJ, in which the ECJ was required to decide on a situation comparable to the exclusion of bidders due to grave misconduct, namely due to the bidder's prior participation in the project at hand. The ECJ case concerned a piece of Belgian legislation that provided that undertakings were automatically to be excluded from certain contracts if they had been instructed to carry out research or other development works in connection with the work to be done under the contract. The ECJ decided that such a rule did not comply with EC public procurement law as it did not give the bidder the opportunity to prove that, in the circumstances of the case, the experience which it had acquired was not capable of distorting competition.<sup>83</sup> Consequently, the ECJ held that such a blanket exclusion is unlawful, as all the circumstances of the case must be taken into account before excluding a bidder. The irrebuttable presumption that a bidder may be privileged due to his prior cooperation with the contracting authority would deprive the bidder in question of the possibility to prove that it has not gained any advantages from the cooperation in the procurement procedure. The Grand Chamber decision in *Michaniki AE*<sup>84</sup> similarly struck down as disproportionate an irrebuttable presumption that led to the exclusion of an entire group of undertakings without allowing such

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<sup>83</sup> Joined Cases C-21/03 and C-34/03 *Fabricom* [2005] I-1559, para. 36.

<sup>84</sup> Case C-213/07 *Michaniki AE*, judgment of 16 December 2008 [not yet published].

undertakings to demonstrate that the values and objectives of the Community procurement law are not threatened by their participation in a tender procedure.

It follows that the principles of equal treatment and non-discrimination require that self-cleaning measures be taken into account when deciding whether to exclude a candidate or tenderer on the basis of Article 45 paras. 1 and/or 2.

### **3. Recognition of self-cleaning in the European institutions' procurement rules**

A strong indication that self-cleaning measures generally need to be taken into account is present in another piece of EC legislation in the field of public procurement. The European institutions' procurement rules that are laid down in Council Regulation 1605/2002/EC ("*Financial Regulation*")<sup>85</sup> explicitly mention self-cleaning measures in the context of an exclusion decision.

Article 93 para. 1 of the Financial Regulation on the European institutions' procurement rules provides mandatory exclusion grounds for procurement procedures conducted by European institutions that are by and large identical to those set out in Article 45 Directive 2004/18/EC for public procurement contracts awarded by Member States' authorities. The application of these exclusion criteria, including, for

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<sup>85</sup> Council Regulation (EC, Euratom) 1605/2002/EC of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ [2002] L 248/1, as amended by Council Regulation (EC, Euratom) 1995/2006/EC of 13 December 2006 and Council Regulation 1525/2007/EC of 17 December 2007.

example, the determination of the exclusion period, is further specified by Commission Regulation (EC, Euratom) 2342/2002/EC (*Implementing Regulation*),<sup>86</sup> which lays down more detailed rules for the implementation of the Financial Regulation. Article 133a para. 1 of the Implementing Regulation states that the institution responsible must take into consideration, inter alia, “the measures taken by the entity concerned to remedy the situation” when determining the duration of the exclusion. According to Article 133a para. 1 of the Implementing Regulation, this is necessary “to ensure compliance with the principle of proportionality”. By setting out these requirements for the application of the exclusion rules in compliance with the principle of proportionality, the European legislator has explicitly recognized that it is appropriate to take self-cleaning measures into account when deciding on the exclusion of a candidate or tenderer.<sup>87</sup>

#### **IV. Conclusions**

As we have seen, Directive 2004/18/EC does not specify the extent to which a successful implementation of a self-cleaning programme can affect exclusion from participation in public contracts.

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<sup>86</sup> Commission Regulation (EC, Euratom) 2342/2002/EC of 23 December 2002 (*Implementing Regulation*), as amended by Regulation 478/2007/EC of 23 April 2007.

<sup>87</sup> It can be noted that measures taken in accordance with the budgetary law of the Community similar to the procurement directives do not appear to have a punitive character, however, and are not relevant to this perspective.

We have argued, however, that Member States are generally *required* to take account of self-cleaning measures when applying the exclusion provisions.

First, in relation to the mandatory exclusion provisions of the directive, we have suggested that undertakings that have undergone adequate self-cleaning measures may not be excluded from EC public procurement. This result is required, in particular, by the principle of proportionality, since all the various possible objectives of the exclusion provisions can be equally well be achieved – and indeed better achieved – by this more limited approach to exclusions, and may also be required by the principle of equal treatment.

We have also suggested that the same result applies as a general rule in relation to the exercise of discretionary powers of exclusion by Member States. There may, however, be one possible difference between the mandatory and the discretionary exclusion provisions, which will apply if the discretionary exclusions can be invoked by Member States for punitive purposes, as has been done, for example, in the provisions of French criminal law. In this case an argument can be made that self-cleaning is not an automatic limit on exclusion in every case. However, even in this case Member States must comply with the proportionality principle and therefore exclusion cannot be automatically decreed against a self-cleaned undertaking – the whole conduct of the undertaking, including self-cleaning, must be taken into account in considering the punishment to be imposed.

With this in mind, public contracting authorities that become aware of (potential) grounds for exclusion under Article 45 para. 1 or para. 2 Directive 2004/18/EC are



obliged carefully to investigate whether the relevant conditions are in fact fulfilled. In particular, such an investigation should provide the affected candidate or tenderer with the opportunity to present completed or ongoing self-cleaning measures, notwithstanding the past wrongdoing. If the authority comes to the conclusion, after making its assessment, that due to the measures taken there are sufficient grounds to find that the purposes of the exclusion provisions are not jeopardised, it cannot generally exclude the relevant candidate or tenderer.

Since they do not specifically mention the concept of self-cleaning, the directives do not define the precise implementing conditions for the concept of self-cleaning, either in relation to the mandatory exclusions or in relation to the discretionary exclusions. This might be seen to imply a broad discretion on Member States concerning the manner in which the concept of self-cleaning is applied. However, as the concept of self-cleaning emerges as an established concept of EC law, it may be that any apparent discretion will be increasingly circumscribed as – drawing on the national experiences, such as those described earlier in this article - the ECJ develops the more precise conditions under which authorities must admit economic operators who have undergone a self-cleaning process. In this way, as in other areas of EC procurement law<sup>88</sup>, the Court may reduce both the legal uncertainty and the potential for variation in national approaches that exists under the current state of the law.

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<sup>88</sup> Arrowsmith, “The Past and Future Evolution of EC Procurement Law: from Framework to Common Code?” (2006) 35 *Public Contracts Law Journal* 337.