

The mandatory exclusions for corruption in the new EC procurement directives

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The EC's new public procurement directives include new provisions requiring contracting authorities to exclude from contracts, firms convicted of corruption, in support of the EU's anti-corruption policy. This article provides a critical assessment of these provisions. It is suggested that there are a number of problems with the provisions. First, it is not clear how effective they are likely to be in addressing corruption. Secondly, their application can lead to significant costs and delays in procurement – for example, because of difficulties in establishing whether persons associated with the firm (such as subsidiaries or directors) have any relevant criminal convictions. These concerns have led to the final version of the provisions being considerably watered down from that originally proposed by the Commission. Thirdly, it is questionable whether it is appropriate to use procurement to impose such sanctions and whether sufficient procedural safeguards are provided for affected firms. In view of the practical difficulties of operating such provisions, Member States implementing them may have to choose between making the provisions effective, with attendant procedural and financial burdens, or leaving the measures as largely symbolic.

Introduction

The European Union (EU) has become increasingly concerned with measures designed to combat corruption and recent years have seen a plethora of anti-corruption initiatives and instruments.¹ One method the EU has chosen to address corruption is by a provision in its new procurement directives requiring Member States to exclude persons convicted of corruption and other offences from gaining access to public contracts.

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¹ Communication from the Commission to the Council and European Parliament on a Union Policy Against Corruption COM (97) 0192; Communication from the Commission to the Council and European Parliament on a Comprehensive EU Policy Against Corruption COM (2003) 0317; Convention on the Protection of the European Communities Financial Interests [1995] O.J. C 316/48 and its Protocols [1996] O.J. C313/2 and [1997] O.J. C151/1; Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the EU [1997] O.J. C195/1; Action Plan to Combat Organised crime [1997] O.J. C251/1.

This is the first time that *mandatory* obligations in relation to specified offences have been imposed by Community procurement legislation. Member States have traditionally had the freedom within the framework of Community procurement law to pursue various policies² including the possibility of targeting criminal and corrupt behaviour by excluding contractors guilty of such behaviour from obtaining government contracts.³ In contrast to previous permissive regimes for exclusions, the requirement for mandatory exclusions introduced by the new directives is intended to support anti-corruption policy at EU level by requiring all Member States to exclude contractors guilty of listed offences from public contracts.

This article offers a critical assessment of the new exclusion provisions. The article will first introduce the new procurement directives and then briefly examine EU corruption policy to explain the relationship between procurement regulation and anti-corruption policy. The next part will explain the rationale for the use of exclusions in public procurement. The remaining sections will provide a detailed examination of the new exclusion requirements, concluding with an assessment of the practical and conceptual difficulties that may be faced by Member States seeking to implement the mandatory exclusions.

² Kunzlik, “Environmental Issues in International Procurement” in Arrowsmith and Davies (eds.), *Public Procurement: Global Revolution* (1998) p.199; McCrudden, “Social Policy Issues in Public procurement: a legal overview”, *ibid.* p.219; Arrowsmith, *The Law of Public and Utilities Procurement* (2005) p.1256.

³ Art.20, Council Directive 93/36/EEC coordinating procedures for the award of public supply contracts [1993] O.J. L199/1; Art.24, Council Directive 93/37/EEC concerning the coordination of procedures for the award of public works contracts [1993] O.J. L199/54; Art.29, Council Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts [1992] O.J. L209/1. (Hereafter, outgoing directives).

Background to the Consolidated Procurement Directives

The main aim of Community procurement regulation is to create an internal market by prohibiting discrimination between Member States in awarding government contracts, removing restrictions on access to those markets, and providing for transparency in contract award procedures to ensure that discriminatory practices cannot be concealed⁴. The EC recently adopted two new procurement directives, namely Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts⁵ (hereinafter public sector directive) and Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors⁶ (hereinafter utilities directive).

The main purposes of the new directives were to modernise the legislation in response to recent procurement developments⁷ and to simplify the regime by consolidating the rules on the public sector, previously contained in three separate directives,⁸ into a single instrument, which must be implemented by Member States by 31st January 2006.⁹ The major changes introduced by the directives include a general exemption from the rules applicable to utilities for entities which operate in

⁴ See generally, Arrowsmith, *The Law of Public and Utilities Procurement* (2005).

⁵ [2004] O.J. L134/114

⁶ [2004] O.J. L 134/1. See Arrowsmith, above n.4, Chs.15 and 16.

⁷ Arrowsmith, "An assessment of the new legislative package on public procurement", (2004) 41 C.M.L.R. 1277, 1278.

⁸ Council Directive 93/36/EEC coordinating procedures for the award of public supply contracts [1993] O.J. L199/1; Council Directive 93/37/EEC concerning the coordination of procedures for the award of public works contracts [1993] O.J. L199/54; Council Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts [1992] O.J. L209/1.

⁹ Art.80 (public sectors), Art.71 (utilities).

competitive markets, reflecting the liberalisation of that sector;¹⁰ and introducing new award procedures,¹¹ which provide greater flexibility in relation to complex contracts and electronic procurement.

In terms of corruption control, the directives contain an important innovation: they include mandatory provisions requiring contracting authorities to exclude corrupt suppliers from public contracts in support of EU anti-corruption policy. Although, as explained further below, Community procurement directives have always permitted Member States to decide to exclude firms convicted of corruption, this is the first time Community procurement legislation has made it *obligatory* for Member States to do this.

EU Policy on Corruption.

The EU's anti-corruption programme gained momentum in recent years, in parallel with increasingly firm international action against corruption.¹² EU policy on corruption can be said to have three interrelated but distinct objectives. Initially, the policy was directed at protecting Community finances,¹³ in partial response to the

¹⁰ Art.30(1) (utilities)

¹¹ Competitive dialogue in Art.29 (public sector); framework contracts in Art.32 (public sector), Art.14 (utilities); electronic auctions in Art.54 (public sector), Art.56 (utilities), dynamic purchasing systems in Art.33 (public sector), Art.15 (utilities).

¹² OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 37 I.L.M. 1; United Nations Convention Against Corruption 43 I.L.M 37; African Convention on Preventing and Combating Corruption 43 I.L.M 5; Inter- American Convention Against Corruption, 35 I.L.M 724.

¹³ Art.280 EC Treaty; Convention drawn up on the basis of Art.K.3 of the Treaty of the European Union on the Protection of the European Communities' Financial Interests [1995] O.J. C316/49 and Protocols; Council Regulation (EC, Euratom) 2988/95 of December 18, 1995 on the Protection of the Communities Financial Interests [1995] O.J. L312/1.

widespread corruption that appeared to characterise EU institutions.¹⁴ Since then, corruption control has expanded in scope and is now an integral part of EU internal and external trade policies, to the extent that countries which obtain aid or trade concessions from the EU must undertake domestic anti-corruption reform.¹⁵

The second objective of EU corruption control is to provide Member States citizens with a high level of safety in an area of freedom, security and justice, devoid of criminal activity, corruption, fraud, terrorism etc. The power to act against corruption is derived from the Third Pillar¹⁶ of the EU by virtue of which the Union may pursue closer cooperation in judicial and criminal matters and the limited approximation of criminal laws.¹⁷

The third rationale for EU anti-corruption measures, relates to the liberalisation of the internal market,¹⁸ although there is no explicit Treaty provision linking the elimination of corruption to market integration. Corruption is however at variance with the principles of non-discrimination and free competition advocated by the single market.¹⁹ The elimination of corruption facilitates competition by ensuring that

¹⁴ Committee of Independent Experts, First Report regarding allegations of fraud, mismanagement and nepotism in the European Commission, (March 15, 1999). See <http://www.europarl.eu.int/experts>.

¹⁵ See Cotonou Partnership Agreement 2000/483/EC [2000] O.J. L317/3; Opinion of the Economic and Social committee on “Development aid, good governance and the role of socio-economic interest groups” [1997] O.J. C287/44.

¹⁶ Art.29 TEU

¹⁷ Art.31(e) TEU

¹⁸ Resolution on the Communication from the Commission to the Council and the European Parliament on a Union policy against Corruption. [1998] O.J. C328/46.

¹⁹ Ferola, “Anti-Bribery Measures in the European Union: A Comparison with the Italian Legal Order” (2000) 28 International Journal of Legal Information 512; Joint Action 98/742/JHA of December 22, 1998 adopted by the Council on the basis of Article K.3 TEU on Corruption in the Private Sector [1998] O.J. L358/2; Council Framework Decision 2003/568/JHA of July 22, 2003 on Combating Corruption in the private sector [2003] O.J. L192/54.

corrupt practices do not hinder trade by interfering with the transparent and open conduct of international trade.²⁰ In a free market, corruption might have cross-border implications possibly leading to the ‘contagion’ of corruption²¹ where Member States which would not normally condone corruption, do so, in order to compete for international business with countries that ignore such practices. Corruption also increases the costs of economic activity thereby reducing the optimal use of resources.²²

A sub-rationale for corruption control in the EU, which is tied to the completion of the internal market, is the desire to effectively regulate public procurement. Community interest in reducing corruption in procurement arises because corruption can impede the goals of Community procurement regulation by reducing competition in public procurement by turning competitive bidding to ‘competitive corruption.’²³ It has to be stated that since the opening up of the public procurement market is integral to the Community’s desire to complete the internal market, anti-corruption measures in public procurement must be designed so as to promote the functioning of the internal market.

The linkage between procurement regulation and EU anti-corruption goals takes the following form. First, the EU finances several large projects within and outside

²⁰ Ferola, n.19 above, at p.515

²¹ Caiden and Dwivedi, “Official Ethics and Corruption” in Caiden (eds.) *Where Corruption Lives* (2001), p.245

²² Ades and di Tella, “Rents, Competition and Corruption” (1999) 89 (4) *American Economic Review* 982; ‘Report on Combating Corruption in Europe’ The European Parliament, Committee on Civil Liberties and Internal Affairs, Economic and Political Corruption in Europe, Doc A4-0314/95, which estimates that 10-15% of consumer prices goes into corruption.

²³ Moran et al, “Debarment as an Anti-Corruption Means”, p.5. See <http://www.u4.no>

Europe and must protect its investments by ensuring the absence of corruption therein. Secondly, corruption is a large facet of activities such as money laundering and organised crime; eliminating these activities necessitates a comprehensive policy targeting them in the sphere of public finance, including public procurement.²⁴ Thirdly, the adoption of measures to address corruption may possibly be justified by the adverse impact that corruption may have on the internal market, as described above. In addition, because open public procurement is an area with increased opportunities for corruption, the EU has an interest in ensuring that Community procurement regulation is designed in a manner that reduces the scope for corruption that may arise from opening up markets across borders.

The Commission itself has reiterated that apart from eliminating competition-distorting irregularities in the procurement process, the introduction of corruption-focused measures into procurement regulation is designed to affect organised crime,²⁵ and take action where Community finances might be at risk.²⁶ These are areas where corruption is endemic,²⁷ and cannot be addressed without Community legislation, if EU anti-corruption policy is to be effective.²⁸

²⁴ To prevent organised crime from penetrating public administration, and succeeding in state capture-Action Plan against Organised Crime cited above n.1, Part II.

²⁵ See Green Paper- Public procurement in the EU: Exploring the way forward COM 96 (583) which referred to the possibility of using the directives to criminalise anti-social behaviour on the part of suppliers, Ch.5.

²⁶ Commission Communication on a Union Policy against Corruption COM (97) 0192

²⁷ Committee of Independent Experts, First Report regarding allegations of fraud, mismanagement and nepotism in the European Commission, (March 15,1999); Committee of Independent Experts, Second Report on Reform of the Commission: Analysis of current practice and proposals for tackling mismanagement, irregularities and fraud. Vol. 1 & 2 (September 10, 1999). See <http://www.europarl.eu.int/experts>

²⁸ Committee of Independent Experts, Second Report on Reform of the Commission, above n.27 Vol.2, para.5.8

Exclusion in public procurement: Meaning and Rationale

Exclusion is an administrative remedy utilised by governments to disqualify contractors from obtaining public contracts, or acquiring extensions to existing contracts for alleged breaches of law or ethics.²⁹ Exclusion includes disqualification for three kinds of behaviour. First, exclusion could be directed at past violations of law, ethics or anti-corruption norms that may be unrelated to public procurement.³⁰ Secondly, exclusion could disqualify a supplier from a particular procurement for a breach of the rules of that process. Third, a supplier could be excluded from future contracts for past procurement violations.

The rationale behind exclusions is two-fold. First, exclusions targeting general (or non-procurement related) violations could support the anti-corruption policies of government and be viewed as a statement indicating a government's lack of tolerance for corruption,³¹ while acting as a deterrent against breaches of anti-corruption legislation by increasing the economic costs of corruption. Exclusions could incidentally be punitive, because in addition to the immediate detrimental financial effect on the excluded supplier, the exclusion can damage the reputation of the firm, affecting its ability to obtain business from other sectors. This is the attraction of exclusion as an anti-corruption tool- the attendant infamy entails a more severe and lasting impact, more so where the exclusion is published.

²⁹ Schooner, "The Paper Tiger Stirs: Rethinking Exclusion and Debarment", (2004) 5 P.P.L.R. 211, pp.212-213.

³⁰ Yukins, "Suspension and Debarment: Re-thinking the Process" (2004) 5 P.P.L.R. 255, p.256.

³¹ Schooner, cited above, n.29 p.216.

Secondly, exclusions which are directed towards maintaining the integrity of the procurement process protect the government by ensuring it only transacts with responsible contractors thereby safeguarding public funds as contracting authorities are prevented from entering into business with an unreliable contractor, evidenced by that contractor's lack of business integrity.

The use of procurement legislation to combat corruption.

Public procurement is often used to pursue secondary objectives. The relatively high value of public contracts³² presents an opportunity for a government to achieve certain objectives,³³ and support initiatives like the anti-corruption project.³⁴ Corruption control is a salient feature of procurement regulation as government contracts are susceptible to corrupt activities,³⁵ due partly to the large sums involved, the non-commercial nature of contracting entities, the nature of the relationship between the decision-maker and the public body- where deviating from the public interest may not affect the decision maker's personal finances,³⁶ the measures of unsupervised discretion, bureaucratic rules, budgets that may not be tied to specified goals, as well as non-performance related pay and low pay. The incidence of

³² Public procurement accounts for about 15% of GDP in most EU countries.

³³ See n.2 above.

³⁴ This refers to the totality of anti-corruption measures. See Anechiarico and Jacobs, *The Pursuit of Absolute Integrity: How Corruption Control makes Government Ineffective* (1996), p.xi.

³⁵ Soreide "Corruption in Public procurement: Causes, Consequences, Cures" (2002); Anechiarico and Jacobs, cited above n.34, Ch.8.

³⁶ European Parliament Directorate General for Research Working Paper, Measures to prevent corruption in EU Member states, Legal Affairs Series JURI 101 EN 03-1998, (Annex: Combating Corruption in public procurement contracts).

corruption within government procurement is well documented in Europe, and in countries where there is little regulation and non-transparency.³⁷

Community procurement directives have historically³⁸ contained provisions allowing Member States to exclude suppliers from public contracts for reasons ranging from legal violations to professional infringements. The outgoing directives similarly contain provisions,³⁹ giving Member States a measure of discretion in deciding whether or not to utilize exclusions in public procurement in support of their own policies.⁴⁰ In particular, the outgoing directives permit Member States to exclude from public contracts, a supplier, who has been convicted of an offence regarding his professional conduct.⁴¹ This provision provides the possibility of a supplier being excluded for a corruption conviction related to his profession.⁴² In addition, the outgoing directives permit Member States to exclude a supplier who is guilty of grave professional misconduct,⁴³ possibly permitting exclusion for corruption in the

³⁷ Pontarollo, "Regulatory Aspects and the problem of Corruption in public procurement in Italy" (1995) 5 P.P.L.R. 201; Hors, "Shedding Light on Corrupt Practices in Public Procurement" (2003) 5 P.P.L.R. NA101; Nichols et al, "Corruption as a Pan-Cultural Phenomenon: An Empirical Study in Countries at opposite ends of the former Soviet Empire" (2004) 39 Texas Int'l L. J 215.

³⁸ Art.20, Council Directive 77/62/EC of 21 December 1976 Coordinating Procedures for the Award of Public Supply Contracts [1977] O.J. L013/15.

³⁹ Art.20(1) Directive 93/36/EEC (Public Supply) [1993] O.J L 199/1. The relevant provisions in the three outgoing public sector procurement directives are identical. See also Art.31 Council Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1993] O.J. L199/84

⁴⁰ Piselli, "The Scope for Excluding Providers who have committed criminal offences under the EU procurement directives" (2000) 6 P.P.L.R. 267

⁴¹ Art.20(1)(c) Directive 93/36/EEC (Public Supply)

⁴² Piselli, cited above n.40 at p.272.

⁴³ Art.20(1)(d) Directive 93/36/EEC (Public Supply)

absence of a conviction.⁴⁴ Note that these options for Member States to exclude suppliers at their discretion remain under the new directives.⁴⁵

The new exclusion provisions

Introduction

The new exclusion provision is contained in Article 45 of the public sector directive. Whilst the new utilities directive does not expressly contain a similar provision, it incorporates the requirement by reference to the public sector directive where the procuring entity is a ‘contracting authority.’

The new provisions are less extensive than the original Commission proposals on the subject. The provisions were attenuated as a result of resistance to the reforms elaborated in the proposals.⁴⁶ This has increased the scope of Member States discretion, which ought to “facilitate the practical implementation of the provisions and introduce options for Member States”.⁴⁷

The original proposals⁴⁸ stated as follows:

⁴⁴ Case C-71/92 *Commission v Spain* [1993] E.C.R. I-5923; Priess and Pitschas, “Secondary Policy Criteria and their compatibility with EC and WTO Procurement Law: The case of the German Scientology declaration,” (2000) 4 P.P.L.R. 171 p.175.

⁴⁵ Art.45(2) (public sector) and Art.54(4) (utilities)

⁴⁶ Progress Report on the Proposals DGC II 9032/01 para.4, May 24, 2001

⁴⁷ Common position adopted by the Council on March 20, 2003 with a view to the adoption of a directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contract, public service contracts and public works contracts: Statement of the Councils Reasons 11029/3/02 REV 3 ADD 1, p.2

⁴⁸ Proposal for a Directive of the European Parliament and of the Council on the Co-ordination of procedures for the award of public supply contracts, public service contracts and public works contracts [2001] O.J. C029E.

“Any economic operator shall be excluded from participation in the contract who, at any time during a five-year period preceding the start of the contract award procedure, has been convicted by a definitive judgement:

b) of corruption, that is to say, of having promised, offered or given, whether directly or via third parties, a benefit of whatever kind to a civil servant or public agent of a Member state, a third country or an international organisation or to any person for the benefit of that person or a third party, with the intention that such person will carry out or refrain from carrying out any act in breach of his professional obligations.”

(Article 46 of the proposals)

So far as the grounds of exclusion are concerned, apart from the exclusions on the grounds of corruption, the proposals also required exclusions for participation in a criminal organisation and fraud. In addition, Member States were *allowed*, although not required, to exclude suppliers for *inter alia*, bankruptcy; offences regarding professional conduct; grave professional misconduct; breach of social security or taxation law; misrepresentation in contract tender, and fraud or other illegal activity as defined by Article 280 of the Treaty.

At the first reading of the proposals,⁴⁹ the European Parliament greatly enlarged the scope of the mandatory exclusions to cover money laundering, anti-competitive behaviour, breaches of employment legislation, bankruptcy and drugs related offences. Except for that relating to money-laundering, these amendments were not accepted by the Council⁵⁰ for various reasons, including the difficulty of integrating the exclusions (for drug related offences) into the overall scheme of public

⁴⁹ Position of the European parliament adopted at first reading on January 17, 2002 with a view to the adoption of the European and Council Directive .../.../EC on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts. [2002] O.J. C271E/176.

⁵⁰ Common position adopted by the Council on March 20, 2003 with a view to the adoption of a directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contract, public service contracts and public works contracts: Statement of the Councils Reasons 11029/3/02 REV 3 ADD 1

procurement legislation.⁵¹ The Council also opined that requiring exclusions for bankruptcy would lead to the “systematic exclusion” of suppliers with arrangements with their creditors and “condemn them to bankruptcy”.⁵² The adopted version of the directives requires exclusions for participation in a criminal organisation, corruption, fraud and money laundering. However, only the exclusion for corruption will be analysed in this article.

Whilst it may be easier to implement the mandatory exclusions in their current limited form, some of the reasons advanced by the Council for rejecting the European Parliament’s insertions cannot be justified, especially as it is difficult to see how anti-corruption and anti-money laundering measures can be properly integrated into the scheme of public procurement policy, whilst exclusions for drug-related offences cannot. A better view is that the Council was wary of over-burdening the legislation with a plethora of exclusions, which would hamper the efficiency of national procurement systems.

The adopted version of the provision as set out in Article 45 of the consolidated public sector directive states as follows:

“Any candidate or tenderer who has been the subject of a conviction by final judgement of which the contracting authority is aware for one or more of the reasons listed below shall be excluded from participation in a public contract:

(b) corruption, as defined in Article 3 of the Council Act of 26 May 1997 (21) and Article 3 of Council Joint Action 98/742/JHA (22) respectively...

Member states shall specify, in accordance with their national laws and having regard for Community law, the implementing conditions for this paragraph. They may provide for a

⁵¹ *ibid.*

⁵² *ibid.*

derogation from the requirement referred to in the first subparagraph for overriding requirements in the general interest.”

Definition of corruption for the purpose of the mandatory exclusions

(a) Original proposals

The definition of corruption adopted by the new directives differed from that contained in the Commission’s original proposals. The proposals defined corruption as:

“...having promised, offered or given, whether directly or via third parties, a benefit of whatever kind to a civil servant or public agent of a Member state, a third country or an international organisation or to any person for the benefit of that person or a third party, with the intention that such person will carry out or refrain from carrying out any act in breach of his professional obligations.”

This definition encompassed bribery to public officials of Member States, a third country, and corrupt practices executed through entities set up for the avoidance of discovery. The proposals also prohibited the bribery of a civil servant or agent of an international organisation, covering situations where the corruption occurred in a contract financed by a multilateral development bank.

(b) The consolidated directives.

The definitions of corruption adopted by Article 45 of the consolidated directives are much narrower than the original proposals. The relevant definitions as incorporated into the consolidated directives are:

- Article 3 (1) of Council Joint Action adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on corruption in the private sector provides “the deliberate action of whosoever promises, offers or gives, directly or through an intermediary, an undue advantage of any kind whatsoever to a person, for himself or for a third party, in the course of the business activities of that person in order that the person

should perform or refrain from performing an act, in breach of his duties, shall constitute active corruption in the private sector”.

- Article 3 of Council Act of 26 May 1997 -Convention on the fight against corruption involving officials of the European Communities or officials of Member states of the EU defines active corruption as “...the deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties...”

(i) Scope of definition

As stated above, the definition of corruption within the original proposals included overseas bribery and corruption involving international organisations. The adopted directives omitted these as part of the prohibited actions. This omission raises two main points. First, including corruption within international organisations as part of the definition of corruption in the proposals might have meant that firms convicted of corruption in the conduct of a contract with, for instance, a multilateral development bank would have been subject to a mandatory exclusion. However, as the definitions as adopted specifically exclude the mention of international organisations and are taken from European instruments, it is arguable that they relate solely to corruption within Community institutions and Member States. If this is the case, then suppliers convicted of corruption in contracts with international organisations⁵³ will still have access to public contracts in Member States. However, the advantages of the adopted definition are that because it is fairly narrow, there is greater clarity in terms of what offences can lead to exclusion, and the definition is consistent with the overall framework of Community law.

⁵³ Some multinational companies engaged in the Lesotho highlands water project were convicted of corruption by the High Court of Lesotho, and subsequently debarred by the World Bank. See “A Blind Eye” *The Guardian*, (June 10, 2003).

The second point relates to overseas bribery. This was included in the proposals as part of the offences requiring exclusion, possibly meaning that third country convictions (for overseas bribery) would have sufficed to exclude a supplier from a contract with a Member State. Although the new directives omit overseas bribery as an element of the definition of corruption, this omission might not be of great significance, as overseas bribery increasingly becomes a domestic offence.⁵⁴ As exclusions are based on convictions for domestic offences, suppliers may be excluded for overseas bribery, where it has been criminalised domestically and a conviction results. However, if as discussed above, it is the case that the adopted definitions relate only to the corruption of public agents within Member States; this will remove convictions for the bribery of third country public servants from the scope of the mandatory exclusions.⁵⁵

(ii) Cross referencing

The proposals expressly stated the definition of corruption. However, the definition as adopted is incorporated by reference to the definitions of corruption in two Community instruments. Such cross-referencing is not ideal in a specialist and technical legislative instrument as it imposes an additional burden on procurement officials to obtain and understand the definitions incorporated by reference, regardless of accessibility.

⁵⁴ Most Member States have criminalised overseas bribery in response to obligations imposed by the OECD convention. e.g. Anti-Terrorism, Crime and Security Act 2001 (UK).

⁵⁵ Member States cannot discriminate against each other's judgements (Art.2, public sector). Contracting authorities must also comply with the treaty in relation to non-discrimination: C-324/98 *Telaustria v Telekom Austria AG* [2000] E.C.R. I-10745 para.60.

The general range of persons subject to exclusion

An important issue with implications for the effectiveness of the exclusion policy and the efficiency of the procurement process is the range of persons subject to the mandatory exclusion. The new directives provide for the exclusion of ‘any candidate or tenderer’, but the directives offer no guidance as to the meaning of candidate or tenderer in this context. The issues for determination can be listed as follows:

- (a) Will a main contractor be excluded if it intends to use a convicted subcontractor?
- (b) Will a convicted company that intends to act as a subcontractor on a contract be excluded?
- (c) Will exclusion affect a main contractor where it is a related company- such as a parent company, a subsidiary or a sister company (not involved in the contract) that is convicted?
- (d) Will a company be excluded where a conviction exists against a company director personally, whether or not his employment is later terminated? Similarly, is a firm’s ability to secure government contracts adversely affected where the convicted person is not the directing mind and will of the company, but his actions could not have been committed without the privity of the company?

In practice, firms do not necessarily cease to seek government contracts because they have been excluded as they may continue to bid ‘under different corporate identities and through different officers...or as subcontractors.’⁵⁶ To counter this problem, it may be necessary to extend exclusion to related persons. For instance, in the United States, a suspension or debarment will affect the subsidiaries and holding company of an affected supplier,⁵⁷ and can extend to the affiliates of an affected company as defined.⁵⁸ Similarly, the World Bank in recognising that companies reinvent themselves to avoid penalties and detection, excludes the firm engaged in corrupt

⁵⁶ Anechiarico and Jacobs, “Purging Corruption from Public Contracting: The Solutions are now part of the problem” (1995) 40 N.Y.L.Sch.L.Rev, 143 at p.172; Report Concerning the Debarment Processes of the World Bank, p.75, <http://www.worldbank.org>

⁵⁷ United States Federal Acquisition Regulations (FAR) 9.406-1 (b).

⁵⁸ Namely a firm that controls another or a third party who controls both- FAR 9.403.

practices, as well as any natural or legal person holding the majority of the excluded firm's capital, or any firm controlled by the excluded firm, as long as the subsidiary is formed or exists whilst the exclusion is in place.⁵⁹ This seeks to prevent a firm circumventing the effect of exclusion by acting through entities with which it has common ownership who remain eligible for Bank contracts.

As the new directives are silent on the matter, to answer the above questions, it is useful to consider the treatment of sub-contractors and subsidiaries in Community jurisprudence.

(a) Will a main contractor be excluded if it intends to use a convicted subcontractor?

So far as this question is concerned, although the directives generally permit contractors to insist on the use of sub-contractors,⁶⁰ the fact of subcontracting will not limit the main contractor's liability under the contract and restrictions on subcontracting may be justified where the contracting authority cannot verify the ability of the sub-contractor to perform.⁶¹ Thus, if a contracting authority can attest to the sub-contractor's turpitude, the sub-contractor should be excluded although it did not bid directly for the contract. This interpretation is consistent with the text, which excludes the convicted supplier from *participation* in a public contract. In cases where the proposed main contractor declares that it cannot perform without the convicted sub-contractor, this should be regarded as indicating the incapability of the

⁵⁹ Section 13(d) World Bank Sanctions Committee procedures (2001)

⁶⁰ Art.25 (public sector).

⁶¹ Case C-176/98, *Holst Italia SpA v Comune di Cagliari* [1999] E.C.R. I-8607 para.28-29; Case C-314/01, *Siemens AG Österreich, ARGE Telekom & Partner v Hauptverband der Österreichischen Sozialversicherungsträger Bietergemeinschaft EDS/ORG* [2004] E.C.R. I-2549.

main contractor to perform on the contract,⁶² prejudicing its ability to participate in the contract.

It is submitted that a proposed sub-contractor's conviction will affect a main contractor where the contractor insists on performing with the convicted firm, in which case, the main contractor will not be excluded, but denied the contract on the grounds that it does not qualify for the contract because of the presence of a disqualified sub-contractor.⁶³

(b) Will a convicted company that intends to act as a subcontractor on a contract be excluded?

In this case, a convicted sub-contractor will be excluded as such a contractor clearly comes within the provisions excluding any convicted candidate from participating in the contract.

(c) Will exclusion affect a main contractor where it is a related company such as a parent company, a subsidiary or a sister company (not involved in the contract) that is excluded?

(i) Conviction of subsidiary affecting main contractor who is the parent

First, it must be noted that the directives permit the use of subsidiary companies under provisions allowing an economic operator to rely on the capacities of other

⁶² Art.48 (public sector)

⁶³ Case C-5/97, *Ballast Nedam Groep NV v Belgian State* [1997] E.C.R. I-7549, para.13; Shannon, "Debarment and Suspension Revisited: Fewer Eggs in the basket" (1995) 44 *Catholic University Law Review* 363, p.382.

entities, regardless of the nature of the legal links it has with them.⁶⁴ These provisions require a contracting authority to look beyond the corporate shell where a parent company relies on the assets of a subsidiary to qualify for a contract. In *Ballast Nedam Groep I*⁶⁵ the Court of Justice held that account must be taken of the companies belonging to a holding company where it applies for a public contract, provided that it actually has the resources of the subsidiaries available to it.

Community law is also well acquainted with going behind the corporate veil to hold a parent company liable for the actions of its subsidiary.⁶⁶ For instance, in *Tokai Carbon*,⁶⁷ the Court of Justice held a parent company and its subsidiary jointly liable for alleged anti-competitive acts, imputing the acts of one company to the other.⁶⁸ Furthermore, in the context of the procurement directives, in considering whether an acquisition arrangement should be regarded as a contract with an external provider, which is covered by the directives, rather than an in-house arrangement which is not covered, the Court of Justice ruled that two entities will be regarded as one (thus regarding the arrangement as in-house) where the control exercised over a subsidiary is similar to the control exercised by the controlling entity over its own departments and the subsidiary carries out the essential parts of its activities with that entity.⁶⁹

⁶⁴ Art.48(3) (public sector)

⁶⁵ Case C-389/92, *Ballast Nedam Groep NV v Belgian State* [1994] E.C.R. I-1289, para.17.

⁶⁶ Joined Cases T-71/03, T74/03, T-87/03 and T-91/03, *Tokai Carbon v Commission* [2005] 5 C.M.L.R. 13 para.62, 295, 384

⁶⁷ *ibid.* para.62

⁶⁸ Case T-9/99, *HFB v Commission* [2002] E.C.R. II-1487 para.54, 524-525.

⁶⁹ Case C-107/98, *Teckal Srl v Comune di Viano* [1999] E.C.R. I-8121 para.50.

Another example of piercing the corporate veil is found in the Seventh Company Law Directive⁷⁰ which provides for consolidated accounts for groups of companies where an EU firm exercises control over another. The stillborn Ninth Company Law Directive would have gone further by making a parent company liable for the debts of a subsidiary under its control.⁷¹

Some of the factors which the Court of Justice has taken into account in determining that a parent and subsidiary consist of a single economic entity so as to hold the parent responsible for the actions of the subsidiary include the fact that the companies in question form part of a 'unitary organisation of personal, tangible and intangible elements' pursuing specific economic aims that are determined in the same way.⁷² The Court will also find a parent responsible for the actions of a wholly owned subsidiary, as a presumption exists that the subsidiary follows instructions given by the parent, without actually confirming whether the parent exercised this power.⁷³ However, the court will consider whether the parent has itself committed an infringement of the rules either in its own right or through the subsidiary, before holding it liable for the actions of its subsidiary.⁷⁴ In *Tokai Carbon*, the Commission argued that a parent's responsibility for the acts of the subsidiary is based on the

⁷⁰ O.J. L193/1

⁷¹ European Communities Draft Ninth Company law directive on the conduct of groups containing a public limited company as a subsidiary. See Communication from the Commission to the Council and European parliament: Modernising Company law and Enhancing Corporate Governance in the European Union- A plan to move forward COM (2003) 284 p.18

⁷² *HFB v Commission*, above, n.68, para.53-54.

⁷³ *Tokai Carbon*, cited above n.66 para.60. See Opinion of Advocate General Mischo in Case C-294/98P *Metsa-Serla Oyj & Ors v Commission* [2000] E.C.R. I-10065 para.60.

⁷⁴ Case T-65/89 *BPB Industries & Anor v Commission* [1993] E.C.R. II-389, para.149, 153.

theory of economic unity and not on any separate legal concept of ‘attribution.’⁷⁵ In other words, a parent company is not liable because it is a parent, but where specified criteria are satisfied in relation to its interaction with the subsidiary.

From the above, one can arguably extrapolate the following principles in order to interpret the mandatory exclusions in the procurement directives. First, if the subsidiary is merely an agent of the parent, then its actions will be imputed to the parent in so far as the subsidiary was acting within the scope of its authority.⁷⁶ However, this may be very difficult for a government body applying the mandatory exclusions to establish in any particular case, illustrating the problems of applying these exclusions in practice. Secondly, if the subsidiary is not an agent, but is so controlled by the parent to the extent that the two units consist of a single business enterprise, then its conviction may be imputed to the parent. Thirdly, if the subsidiary operates independently of the parent company then there is no basis for imputing the conviction to the parent, unless one accepts the argument that a parent corporation should know and be liable for whatever is being done in its name.⁷⁷

(ii) Conviction of parent affecting main contractor who is a subsidiary

In deciding whether a main contractor will be affected by the conviction of a parent, the above considerations will similarly apply. Where it is decided that the two units consist of a single business unit, then the conviction of the parent should lead to the

⁷⁵ *Tokai Carbon*, cited above n.66, para.384.

⁷⁶ Joined Cases T-339/94 - T342/94, *Metsa-Serla & Ors v Commission* [1998] E.C.R. II-1727 para.58-59 and C-294/98P, *Metsa-Serla Oyj & Ors v Commission* [2000] E.C.R. I-10065 para.27

⁷⁷ Caiden, “A cautionary tale: Ten Major flaws in Combating Corruption” (2004) 10 South Western Journal of Law and Trade in the Americas 269 at p.276

exclusion of the subsidiary because of the level of control which the parent is deemed to exercise over the subsidiary. Support for this view can be obtained from the United States where the debarment extends to the affiliates of the debarred firm, which includes any firm that controls or has the power to control the debarred firm, as long as the affiliate is specifically named and is given notice of the suspension or debarment as well as an opportunity to respond.⁷⁸

(iii) Conviction of a sister or related company affecting the main contractor

Current European jurisprudence is not wholly in favour of imputing the actions of sister companies to each other, unless strong grounds for doing so exist. In *HFB v Commission*, the Court of Justice held that where there was no holding company coordinating the activities of a group of companies, the component companies could be held jointly and severally liable for a legal infringement.⁷⁹ However, the Court specified that this will only occur where there was either no person at the head of the group to which the violations of the group might be imputed or it was ‘impossible or excessively difficult to identify the person at the head of the group.’⁸⁰ Thus, in interpreting the mandatory exclusions, it is arguable that the conviction of a sister or related company will not affect the main contractor as long as the convicted company is not participating in the contract; unless it is determined that the companies constitute a single business enterprise. Whether the companies do indeed constitute a single business enterprise may again be difficult for a government body applying the

⁷⁸ FAR 9.407 (1)(c).

⁷⁹ *HFB v Commission* cited above n.68, para.66, 526

⁸⁰ *ibid*, para.526.

exclusion rule to establish, further demonstrating the practical difficulties of putting the exclusion rule into effect.

(d) Will a company be excluded where a conviction exists against a company director personally, whether or not his employment is later terminated? Also, is a firm's ability to secure government contracts adversely affected where the convicted person is not the directing mind of the company, but his actions could not have been committed without the privity of the company?

The new directives offer little clarity in response to these questions and give no indication whether a conviction against a natural person will affect a company. One study has revealed that several Member States believe exclusion should require criminal convictions secured by a firm and do not allow convictions to affect a company where secured by an employee, manager or director.⁸¹ However, one can argue that a firm should always be held responsible for the corrupt activities of its employees (to provide an incentive for internal monitoring within the firm), or that the conviction of an employee will affect the firm where it is determined that the corrupt activities benefited the firm as opposed to the employee as an individual. Alternatively, a firm could be affected by a conviction against an ex-decision maker or ex-employee⁸² where the conviction revealed an active and unchanged culture of corruption in the firm. Where the convict remains the key decision-maker then the

⁸¹ T.M.C. Asser Institute, "Prevention of and Administrative action against organised crime: A comparative study of the registration of legal persons and criminal audits in eight EU Member States" (1997) p.87.

⁸² World Bank debarments extend to decision makers of the debarred firm. See Section 13(d) World Bank Sanctions Committee Procedures (2001), available at <http://www.worldbank.org>

exclusion should affect the firm, as this is simply a case of piercing the corporate veil to hold the firm liable for the actions of its decision makers.⁸³ Again, the difficulty for a government agency to establish the precise status of the individuals involved and the impact of their behaviour for the purpose of applying the rules, illustrates the practical problems of giving effect to the mandatory exclusion provisions.

It can be seen from the above that the subject of related persons presents considerable problems. Both the Court of Justice, in deciding how the directives apply to related persons, and Member States in deciding how to implement the provisions, face the difficulty of maintaining a balance between ensuring the effectiveness of the provisions, and avoiding undue disruption and cost to the procurement process. Interestingly, empirical evidence from the US has shown that even when firms have been excluded from government contracts they are still often able to secure contracts through a complex network of subsidiaries, affiliates and related companies owned by the same principals that own the excluded firm. This is possible partly because of the prohibitive costs of investigating the networks of company ownership: it is estimated to cost between \$2000- \$10 000 to investigate an applicant for a public contract, and also because such firms are not averse to making misrepresentations about past convictions.⁸⁴

⁸³ US regulations impute to a corporation, the conduct of any officer, director, shareholder, partner, employee or other individual. The fraudulent, criminal or 'seriously improper' conduct of an employee may be imputed to the firm where the firm knew, approved or acquiesced in the conduct- FAR 9.406-5. See also Caiden, cited above, n.77.

⁸⁴ Anechiarico and Jacobs, "Purging Corruption from public Contracting: The Solutions are now part of the problem" [1995] *New York Law School Law Review* 143 at pp.162-172

To which procuring entities do the mandatory exclusions apply?

Under the public sectors directive, all bodies that are defined as contracting authorities must implement the exclusion provisions. These include State, regional or local authorities, bodies governed by public law and associations formed by such authorities.⁸⁵

The proposals for the new utilities directive provided that all contracting entities covered by that directive may apply the exclusion provisions.⁸⁶ However, the utilities directive as adopted departed from the proposals in that it specifies the contracting entities regulated by the directive who must apply the exclusion provisions. The utilities directive distinguishes between three types of entities regulated by the directive: contracting authorities, which are entities that are also subject to the public sectors directive; public undertakings, which are entities over which contracting authorities have a dominant influence; and entities carrying on the regulated activities under special or exclusive rights, which are regulated by the directives even if they are private entities.⁸⁷ Under the utilities directives, the exclusions are mandatory only for entities in the first category, namely entities that are contracting authorities under the public sector rules.⁸⁸ The mandatory exclusion does *not* apply to entities *solely* because they are public undertakings or because they operate on the basis of special or exclusive rights.

⁸⁵ Art.1 (9) (public sector)

⁸⁶ Art.53, Proposal for a directive coordinating the procurement procedures of entities operating in the water, energy and transport sectors [2001] O.J. C029E

⁸⁷ Art.2 (utilities)

⁸⁸ Art.54 (4) (utilities)

Time span for the relevance of the convictions

The original public sector proposals provided that exclusions would operate against convictions secured in the five years prior to contract award procedures. Under the new directives, the explicit reference to the time within which a conviction may have been secured has disappeared. Member States thus have the discretion to decide how far back a conviction must go for the exclusion rule to apply. However, the same conviction might be treated differently in Member States, where differences exist in national rules on the non-disclosure of convictions. For instance, UK corruption convictions become 'spent' and need not be admitted after the 'rehabilitation period'.⁸⁹ Thus, while a firm will not have to disclose a conviction secured before this period if tendering in the UK, disclosure may be required in another Member State, leading to its exclusion from the contract in that Member State.⁹⁰

The procuring entity's knowledge of the conviction

The Commission's original proposals did not refer to the state of knowledge required by a contracting authority necessary to trigger a mandatory exclusion. The adopted directives provide that a procuring entity has to be aware of the conviction before an obligation to exclude arises. Presumably if the contract is inadvertently awarded to a convicted supplier, the contracting authority will not have breached the directives. Furthermore, there is no express duty to ensure that at least a standard of best efforts is utilised in carrying out checks on potential suppliers. Although a procuring entity

⁸⁹ Rehabilitation of Offenders Act 1974.

⁹⁰ In the UK Draft Public Contracts Regulations intended to transpose the EC Directives into UK law there is also no time period within which the convictions should have been secured. See <http://www.ogc.gov.uk>

may request relevant information from suppliers or other competent authorities,⁹¹ the directives are silent as to whether this includes the possibility of investigations. Investigations might be necessary where the procuring entity suspects or is aware that a firm closely related to the bidding firm or owned by the same principals as the bidding firm has been convicted of corruption.

It has already been explained above in the context of dealing with related persons that the resource implications of conducting meaningful investigations may be significant for procuring entities, and possibly outweigh any benefits to be derived therefrom.⁹² On the other hand, a propensity not to investigate will weaken the effectiveness of the provisions, if a firm that does not declare a conviction or operates under a different identity to avoid detection, succeeds in obtaining a public contract. A partial solution to this problem is the creation of a central register of convicted firms. Member States could ensure that national corruption convictions are replicated on a website devoted to listing convicted firms. This will eliminate the need to routinely investigate firms where there is suspicion, but will not solve the problem of firms hiding behind different corporate identities. Unfortunately, disparities in data protection law⁹³ may mean that some Member States are unwilling to share conviction information.

⁹¹ Art.45 (1) (public sector)

⁹² Anechiarico and Jacobs, cited above, n.84.

⁹³ Art.3.2, Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] O.J. L281/31, excludes criminal law activities from its ambit. Thus Member States will apply domestic law in determining whether to make such information publicly available.

Derogations

Member States may derogate from the mandatory requirement to exclude for ‘overriding requirements in the general interest.’ This derogation must be interpreted in line with Community jurisprudence, such that any derogation granted would need to be appropriate, necessary and proportionate to the objective sought, and must not be used to discriminate against contractors of other Member States.⁹⁴ Where the relevant public interests are already the subject of specific derogations in the Treaty or procurement directives, the derogations from the exclusion requirement may be interpreted in the same manner as these derogations.

One reason that might be relied on for derogating from the mandatory exclusions is public health. The preparatory documents to the directives indicated that derogations from the mandatory exclusions may apply in cases of public health problems, where the only available medicines are provided by an economic operator who is to be excluded.⁹⁵ Although there is no explicit derogation from the procurement directives for public health, the recitals to the directives indicate that the directives do not affect the application of measures necessary to protect public health in so far as those measures are in conformity with the Treaty,⁹⁶ which permits derogation from the free movement provisions for public health reasons.⁹⁷

⁹⁴ Case C-318/86, *Commission v French Republic* [1988] E.C.R. 3559

⁹⁵ European Parliament’s Legislative resolution on the Council common position with a view to adopting a European parliament and Council directive coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors. (12634/3/2002-C5-0142/2003-2000/0117(COD)). Similar, waivers in the US can be made in situations where only one contractor exists- Dept of Health and Human Services Acquisition Regulations 309.405 (a) (1) (i).

⁹⁶ Recital 6

⁹⁷ Arts.30, 46 and 45 EC.

In applying the health derogations under the Treaty, the Court of Justice has considered whether such measures are the least trade restrictive means of achieving the stated objective⁹⁸ and whether the public health claim is sustainable in light of available scientific evidence.⁹⁹ Similar principles seem likely to be applied to reviewing the application of the mandatory exclusion derogation when invoked on health grounds.

The derogation from the mandatory exclusion could also no doubt be invoked on security grounds. In relation to national security, two other kinds of exemptions apply to public contracts,¹⁰⁰ namely general exemptions from the Treaty, including derogations from the free movement provisions on public security grounds¹⁰¹ and specific exemptions from the procurement directives, precluding the application of the procurement directives to public contracts declared secret, contracts which must be accompanied by special security measures and other contracts when the essential interests of the Member State so require.¹⁰² The security exemption in the procurement directives was considered in *Commission v Belgium*¹⁰³ where the exemption was invoked to justify limiting contracts for aerial photography to firms

⁹⁸ Case 40/82, *Commission v United Kingdom*, [1982] E.C.R. 2793, para.41; Hervey and Hale, *Health Law in the EU* (2005).

⁹⁹ Case 174/82 *Officier van Justitie v Sandoz BV* [1983] E.C.R. 2445

¹⁰⁰ Note that the procurement directives exclude hard defence material from their ambit. These exceptions will not be considered here. See Trybus, *European Defence Procurement Law* (1999).

¹⁰¹ Art.30 EC. On the standard of scrutiny applied see Case 72/83 *Campus Oil Ltd v Minister for Industry and Energy*, [1984] E.C.R. 2727 para.36.; Case C-398/98, *Commission v Greece*, [2001] E.C.R. I-7915; Akande & Williams, "International Adjudication on National Security Issues: What Role for the WTO?" (2003) 43 *Va. J. Int'l L.*365; Trybus, "On the application of the EC Treaty to Armaments" (2000) 25 *Eur. L. Rev.* 663. Also relevant are derogations for military hardware under Article 296 EC and the derogation in Article 297 EC. On their application to procurement see Arrowsmith, *The Law of Public and Utilities Procurement* (2005), Ch.4; Trybus *European Union Law and Defence Integration* (2005), Ch.5 and Georgopoulos, "Defence Procurement and EU Law" (2005) 30 *Eur.L.Rev.* 559.

¹⁰² Art.14 (public sector). See Trybus, *European Union Law and Defence Integration* (2005), Ch.7

¹⁰³ Case C-252/01 *Commission v Belgium*, [2003] E.C.R. I-11859

with a special security clearance, in order to protect military secrets. Here, the Court of Justice held the exemption to apply without examining whether measures less restrictive of the procurement directives were available to achieve the stated objective. Thus, at least where military contracts are concerned under the procurement directives, it seems that, whilst the Court of Justice may still examine whether the contract is one which falls within the derogations¹⁰⁴ by determining whether it relates to the security interests of a Member State, it will apply a low level of scrutiny to the application of the provision and in particular, may not consider at all the availability of alternative measures.

The Court of Justice can probably be expected to apply the same approach when dealing with matters of military security under the Treaty derogations to the free movement provisions, and also to any derogation from the mandatory exclusion that is based on military security – for example, when a procuring entity claims that it is necessary to give military work to a convicted contractor on the basis that only that contractor can maintain confidentiality, or do the work to the desired standard. On the other hand, following the approach of previous jurisprudence dealing with the Treaty derogations to the free movement provisions, a stricter approach might still be expected to scrutinising matters of security that are *not* of a military nature.

It can be noted that the derogation from the mandatory exclusions does not permit a contracting authority to derogate from the other requirements of the directives, nor,

¹⁰⁴ Case C-414/97 *Commission v Spain* [1999] E.C.R. I-5585; Case C-318/94 *Commission v Germany* [1996] E.C.R. I-1949, para.13

of course, from the Treaty principles of transparency and non-discrimination.¹⁰⁵ However, the facts giving rise to the derogation from the mandatory exclusion provision – such as a need to give the work to one contractor in particular – may sometimes also justify excluding the procurement from the directives as a whole and from the Treaty.

Finally, derogations may be necessary where either the cost of switching suppliers or the consequences of the resulting reduction in competition would be unduly prohibitive. However, in view of the jurisprudence prohibiting Treaty derogations for purely economic reasons,¹⁰⁶ the Court of Justice might consider that higher procedural costs in the procurement context do not merit derogation from the mandatory requirement to exclude, unless such costs may ‘seriously undermine the financial balance’¹⁰⁷ of the procurement system.

Remedies for affected suppliers

The mandatory exclusion provision does not indicate what rights of review are available where a supplier claims to have been wrongly excluded, or alleges that a person who ought to have been excluded was not excluded. However, all contracts covered by the procurement directives are subject to the Public Sector Remedies

¹⁰⁵ Trybus, cited above, n.102, p.221.

¹⁰⁶ Case 104/75, *Officier van Justitie v de Peijper* [1976] E.C.R. 613; Case C-120/95, *Decker v Caisse de Maladie des Employés Privés* [1998] E.C.R. I-1831 para.39; Case C-398/98, *Commission v Greece* [2001] 3 C.M.L.R. 62.

¹⁰⁷ *Decker*, n.106 above para.39.

Directive¹⁰⁸ or the Utilities Remedies Directive¹⁰⁹ which specifies the redress that should be available in domestic courts to affected persons where the procurement directives are infringed. National courts provide these remedies in accordance with Treaty principles requiring that remedies available to persons affected by violations of Community law should be effective and comparable to those available for similar violations of domestic law.¹¹⁰ However, because of the importance of national remedies in ensuring the effective enforcement of Community procurement rules, these Treaty principles are supplemented by the Remedies Directives.¹¹¹ The public sector remedies directive specifies the types of redress that should be available in national courts for a breach of Community law in award procedures covered by the public sector directive, as well as the independent nature of the forum that will review challenged procurement decisions. This directive provides for three types of remedies: interim relief,¹¹² the setting aside of unlawful decisions- a remedy which must be effectively available against any reviewable decision in the award

¹⁰⁸ Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] O.J. L395/33.

¹⁰⁹ Council Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1992] O.J. L76/14

¹¹⁰ Craig and de Burca, *EU Law: Text, Cases and Materials* (2002), Ch.6

¹¹¹ See Pachnou, "Enforcement of the EC procurement rules: The standards required of national review systems under EC law in the context of the principle of effectiveness" (2000) 2 P.P.L.R. 55. On the Remedies Directive generally, see Arrowsmith, cited above, n.4 at Ch.21; Tyrell and Bedford, *Public Procurement in Europe: Enforcement and Remedies* (1997); Brown, "Effectiveness of Remedies at National Level in the Field of Public Procurement" (1998) 8 P.P.L.R. 9; Arrowsmith, "Public Procurement: Example of a Developed Field of National Remedies Established by Community Law", in Micklitz and Reich (eds.) *Public Interest Litigation before European Courts* pp.125-156 (1996).

¹¹² Art.2(1)(b)

procedure¹¹³ and damages.¹¹⁴ The Utilities Remedies Directive is similar, although with some additional and alternative provisions.

The public sector remedies directive gives standing to persons who have or have had an interest in obtaining a public contract and run the risk of being harmed by a legal infringement.¹¹⁵ Therefore, in challenging a wrongful exclusion decision, the persons eligible to request for a review of the decision will include a supplier alleging he was wrongfully excluded and a supplier who claims that one who ought to have been excluded was allowed to participate in the contract. Where a successful challenge is brought for a wrongful exclusion, the remedies will comprise of those specified in the remedies directive. An effective remedy (from the supplier's point of view) will be to suspend or set aside the decision taken,¹¹⁶ which clearly may cause disruption to the procurement process. Where a supplier claims that a supplier who ought to have been excluded from the procurement process was not excluded, the complainant may, if successful, be entitled to interim relief or a set-aside of the decision to include that supplier in the process, which again may cause disruption. In both cases, the directives allow the review body to refuse interim measures when warranted by their adverse effects. Damages are also available in principle, although this may be difficult to claim in practice because of the problems of proving loss.¹¹⁷

¹¹³ Case C-81/98 *Alcatel Austria v Bundesministerium für Wissenschaft und Verkehr* [1999] E.C.R. I-7671, para.43

¹¹⁴ Proof of fault may not be required: Case C-275/03 *Commission v Portugal* Judgment of 14/10/04 (unpublished). See Leffler, "Damages Liability for breach of EC procurement law: governing principles and practical solutions" (2003) 4 P.P.L.R. 151

¹¹⁵ Art.1(3)

¹¹⁶ *Alcatel* n.113 above.

¹¹⁷ See Leffler, n.114 above.

The problem of providing effective protection for participants and an effective system for enforcing EC rules, whilst at the same time avoiding undue disruption to the procurement process is a difficult one, that has been discussed elsewhere¹¹⁸: suffice it to say that Member States will no doubt apply in this context, the same system of remedies they have implemented under the Remedies Directives for other procurement violations. The mandatory exclusion rule from this perspective simply adds another possible violation that may form the basis of legal proceedings.

In addition to the rights of tender participants to challenge a procurement procedure, the Commission may initiate proceedings under Article 226 EC for non-compliance with EC law.¹¹⁹

Assessment

The mandatory exclusions seek to support EU anti-corruption policy by preventing corrupt suppliers from obtaining government contracts. Although it is not clear how the exclusions will work in practice, it is apparent that the exclusion mechanism raises several conceptual and practical challenges.

The first issue relates to the effectiveness of these provisions. Exclusion is only one limited tool in the range of measures available in the fight against corruption, and

¹¹⁸ See the literature cited in n.111.

¹¹⁹ On this power, and supplementary provisions in the Remedies Directive, see Fernández Martín, “The European Commission’s Centralised Enforcement of Public Procurement Rules: A Critical View” (1993) 2 P.P.L.R. 40; Fernández Martín, *The EC Public Procurement Rules: a Critical Analysis* (1996); Delsaux, “The Role of the Commission in Enforcing EC Public Procurement Rules” (2004) 13 P.P.L.R. 130. On complaints to the Commission see Pachnou, “Bidders Use of remedies to enforce European Community procurement law” (2005) 2 P.P.L.R. 256.

corruption in public life is by no means limited to procurement. In addition, corruption is such a complex issue that even within government contracts it requires clearly thought out and aggressive measures in order to tackle it. If it is considered that mandatory exclusions in procurement are an appropriate tool for corruption control, then the next issue becomes how to make the tool effective. The issue here is not whether these provisions can eliminate corruption, but whether they can make a significant contribution towards meeting EU anti-corruption goals, by protecting EU finances, reducing corruption in government contracts and increasing competition in public procurement.

First, in relation to EU finances, the measures are relevant as EU institutions must comply with the directives in their own procurements and the directives also apply to projects financed by the EU where the procurement process is conducted by a Member State. Secondly, whilst the provisions might reduce corruption in government contracts, either because they act as a sanction against corrupt suppliers, preventing them from accessing the procurement process or because they are able to deter other suppliers from engaging in corrupt practices, the tool is limited as it relies on the conviction of a corrupt supplier. Corruption notably thrives in secret, resulting in a dearth of convictions and since the provisions are conviction based, corrupt suppliers without convictions remain unaffected. Furthermore, even where a firm has secured a conviction, because excluded firms frequently take on different corporate identities, they are in practice able to participate in government contracts, as it is

‘extremely difficult to prove that a new firm is the alter ego of one previously excluded’ without lengthy and expensive investigations.¹²⁰

The effectiveness of the provisions will also be hampered without clear rules relating to the use of derogations from the exclusion requirement. Derogations may provide an avenue for the abuse of discretion by contracting authorities, where they are not keen to exclude a favoured supplier who has been convicted of corruption.

As to whether exclusion will lead to increased competition, there is little empirical evidence available from jurisdictions where exclusion is regularly utilised.¹²¹ However, if one agrees that corruption in procurement increases the scope of non-competitive awards, any reduction in the number of corrupt firms bidding for a contract should theoretically increase competition by granting non-corrupt firms access to the contract.

A major problem with the provisions is the burden imposed on the procurement process and officials. At the barest minimum, procurement regulation seeks to ensure that a government obtains value for money and is designed to make the procurement process transparent and efficient.¹²² A strict interpretation and implementation of the mandatory exclusions will lead to costs and delays in the procurement process.

¹²⁰ 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 at p.172.

¹²¹ However, the US Air force granted waivers to Boeing on the grounds that the reduction in competition caused by Boeing’s exit from the market would increase prices. See “Air Force May Reinstate Boeing: Rocket-Launch Sanctions to be Lifted Soon” *Seattle Times*, (April 6, 2004) p.E1.

¹²² Anechiarico and Jacobs, n.120 above argue that anti-corruption mechanisms transform the procurement process into a ‘labyrinth that jeopardises governmental efficiency and flexibility’.

The first procedural burden is determining the relevance of a conviction from jurisdictions where corruption offences are not separately documented,¹²³ or definitions are dissimilar to those used domestically.¹²⁴ The issue of asymmetrical definitions requires serious consideration as convictions might have been secured elsewhere for offences which in substance amount to corruption, but differ from EU/domestic definitions. This problem can be overcome if all Member States provide a list of offences falling within the directives definitions, which is accessible to the contracting authorities of other Member States. Alternatively, the Commission could publish and maintain this list. In doing so, procurement officials are relieved of the burden of knowing whether the offence is one that requires exclusion, as consulting the list will confirm the conviction is for a prohibited offence.

A second problem is the difficulty of establishing whether particular firms have actually received a relevant conviction. A study into criminal audits for the purposes *inter alia* of public procurement revealed that in existing practice, investigations into convictions were only carried out where the procurement was sensitive (defence) or the contracting authority suspected criminal activity.¹²⁵ These investigations were not systematic and were often limited to selected sectors and projects. Investigations were conducted through questionnaires requiring the relevant information, or the

¹²³ Corruption appellations in the UK, include 'obtaining an advantage'- *R v Sec. of State ex.p. Elliot*, [2001] EWHC (Admin) 559 'attempted deception'- *R v Robert Harrington* (unreported) WL753424. Judgement of Forbes J and Steel J, July 18, 2001.

¹²⁴ Ferola, "The action of the EU against Corruption" (1999) 26½ Legal Issues in European Integration 123 at p.124

¹²⁵ T.M.C. Asser Institute, "Prevention of and Administrative action against organised crime: A comparative study of the registration of legal persons and criminal audits in eight EU Member States" (1997) pp. 39-80.

production by the tenderer of official evidence of the absence of criminal convictions.¹²⁶ Some of the obstacles faced by contracting entities trying to uncover convictions include the fact that criminal registers are not available to contracting authorities; investigations might offend constitutional rights; and the difficulties of investigating foreign firms.¹²⁷ The lack of information within national boundaries will significantly limit the impact the mandatory exclusions will have on corruption, more so in a Union wide context.¹²⁸ Apart from the practical difficulties of discovering these convictions, the additional administrative burden can discourage contracting authorities from being diligent and may discourage small firms from bidding for government contracts.¹²⁹

A third problem so far as costs and delays are concerned, is the difficulty of applying exclusion provisions effectively to persons related to a convicted contractor. As already explained above, it is difficult to prevent contractors avoiding the exclusion provisions through a network of related persons, unless governments are willing to incur significant investigative costs.

A final issue raised by the mandatory exclusion provisions is determining the procedure to be followed. The directives do not specify the procedural requirements necessary for exclusion. Member States must specify a transparent procedure in their

¹²⁶ *ibid.* p.90.

¹²⁷ *ibid.* p.92.

¹²⁸ White (ed.) *Procurement and Organised Crime: An EU wide study*, (2000), p.29.

¹²⁹ Anecharico and Jacobs, cited above, n.120 at p.151; Council of Europe, Preventive Measures against organised Crime, Best practice survey No. 9 (PC-S-CO (2003) 3E) Provisional, p.22

implementing legislation,¹³⁰ as they are obliged to ‘act in a transparent way’.¹³¹ This has been interpreted as requiring publicised contracts; rule-based decision making and opportunities for verification and enforcement.¹³² The introduction of non-commercial secondary criteria increases the discretion of procurement entities and the scope for unlawful decisions although, not necessarily in the case of mandatory requirements.¹³³ Transparency will be secured through formal procedures for excluding suppliers and safeguards against improper decision-making,¹³⁴ which could include giving suppliers opportunities of defence, especially where the conviction lies against a related company or an employee of the firm which has been excluded.¹³⁵

An important aspect in securing transparency and providing adequate protections for suppliers is in the provision of effective remedies where an improper exclusion is made. As discussed above, it seems clear that the remedies directives will apply to procedural violations of the mandatory requirement to exclude. Whilst effective remedies are welcome to counter or prevent the adverse and stigmatising effects of an unlawful exclusion on a supplier, one is wary that in light of the decision in

¹³⁰ Arrowsmith, Linarelli & Wallace, *Regulating Public Procurement: National and International Perspectives* (2000), p.298.

¹³¹ Art.2, (public sector), Art.10 (utilities); Case C-324/98, *Telaustria Verlags GmbH and Telafondress GmbH v Telekom Austria* [2000] E.C.R. I-10745, para.60-61.

¹³² Arrowsmith, *The Law of Public and Utilities Procurement* (2005), Ch.7.12

¹³³ Arrowsmith, Linarelli and Wallace, n.130 above, p.299.

¹³⁴ *ibid.*

¹³⁵ Bednar, “Emerging Issues in Suspension and Debarment: Some Observations from an Experienced Head” (2004) 5 P.P.L.R. 223 p.229.

Alcatel,¹³⁶ the application of remedies under the procurement directives may further slow down the procurement process.

Apart from the problems detailed above, there are two major objections to integrating corruption control into procurement regulation. The first is the suitability of utilizing procurement rules for criminal sanctions.¹³⁷ It is arguable in view of the doctrine of separation of powers that the punishment for legal violations should be left to the criminal justice system. The alternative to the current regime would be to assimilate exclusion into the penalties imposed during conviction, thereby applying the mechanism alongside fines and custodial sentences. Secondly, in tying procurement decisions to non-procurement criteria, it is difficult to see where the line will be drawn. The issue of including secondary criteria into procurement regulation has long been debated both at domestic and Community level.¹³⁸ While using procurement to achieve non-procurement objectives may not be economically efficient in terms of the additional procedures required and the increased costs,¹³⁹ governments view it as an attractive tool because the costs of the action are hidden within the procurement process, and the decision to include secondary criteria may be made without domestic legislative approval.¹⁴⁰ The inclusion of the mandatory exclusion for corruption in the new directives may set a precedent for the further use of secondary

¹³⁶ *Alcatel* suggests that a set-aside should be available even where a contract has been concluded and may be applied by the introduction of a compulsory period of delay between the notification of contract award and conclusion of the contract. See Case C-212/02 *Commission v Austria*, Judgment of 24/6/04 (unpublished).

¹³⁷ Kramer, "Awarding Contracts to Suspended and Debarred Firms: Are stricter rules necessary?" (2005) 34 (3) *Public Contract Law Journal* 539, p.543; Arrowsmith, "Public procurement as an instrument of policy and the impact of market liberalisation" (1995) 111 L.Q.R. pp.244-247.

¹³⁸ Arrowsmith, *The Law of Public and Utilities Procurement* (2005), Ch.19

¹³⁹ *ibid.* Ch.19.7

¹⁴⁰ *ibid.* Ch.19.3

criteria in later directives in a way that might not be justified on a proper balance of costs and benefits.

In conclusion, it seems necessary to make a choice between making the mandatory exclusion measure effective with the attendant increased procedural and financial burdens or leaving the measures as symbolic,¹⁴¹ with minimal disruptions to the procurement process. However, while the exclusions exist in their current form, Member States ought to take the above-mentioned issues into account in adopting their implementing legislation, to ensure, at least, that there is the maximum transparency and clarity in the way that the provisions are implemented.

¹⁴¹ Arrowsmith, et al, “Non-Commercial Factors in Public procurement” (2000), Ch.1.7