



# Mandatory vs. optional exclusion grounds Comments in the context of the judgment in *Infraestruturas de Portugal* and *Futrifer Indústrias Ferroviárias*

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The opinions expressed here belong solely to the author

# Request for preliminary reference

- \* The dispute involved the following factual framework:
- \* On June 12, 2019, Futrifer had been sentenced by the Competition Authority to pay a fine for violating competition law in public tenders, organized in 2014 and 2015, relating to the provision of maintenance services for devices and roads that made part of the national railway network.
- \* Later, Infraestruturas de Portugal, by decision of July 25, 2019, awarded Futrifer a contract for the acquisition of creosoted pine wood dowels and sleepers for the railway infrastructure sector, for the price of 2,979,200 euros.
- \* Following a request for annulment of the decision, proposed by Toscca, and after two court decisions, the Portuguese Supreme Administrative Court (STA) raised a request for a preliminary ruling.

# Request for preliminary reference

- \* According to the Portuguese Court of Appeal, the exclusion of a tenderer on grounds of lack of reliability on account of a breach of competition rules unrelated to a public procurement procedure, may be accepted only pursuant to Article 55(1)(f) of the Portuguese Public Procurement Code (CCP), that is to say, by the effect of an express decision delivered by the Competition Authority, imposing on that tenderer the ancillary penalty of prohibition from participating in public procurement procedures for a certain period of time.
- \* To that court, that solution was, however, contrary to Directive 2014/24 and, in particular, point (d) of the first subparagraph of Article 57(4) thereof, in that it undermines the independence of the contracting authority in deciding on the reliability of any tenderer.

# Article 57 of Directive 2014/24/EU

- \* It provides for reasons for excluding an economic operator from participating in a contracting procedure which, until the Infrastructures ruling, were traditionally grouped into two categories:
  - \* (i) mandatory - a. The grounds for exclusion, to be provided for in national law, constituted those described in paragraphs 1 and 2 of article 57, which may be exempted in accordance with paragraph 3;
  - \* (ii) optional - b. Optional grounds for exclusion were those resulting from paragraph 4 of article 57;

# Article 57 of Directive 2014/24/EU

- \* It largely resumed solutions previously provided for in article 45 of Directive 2004/18/EC relating to reasons for excluding competitors.
  - \* Article 45, number 2, d) of the Directive 2004/18 provided for the possibility of excluding from the hiring procedure anyone who “has committed serious misconduct in professional matters, proven by any means that the contracting authorities can evoke”.
- \* The 2011 *Generali-Providencia Biztosító* judgment assessed the cause of exclusion of a competitor for infringement of competition rules in the context of the (now repealed) Directive 2004/18/EC.
- \* In that ruling, the CJEU concluded that “*an infringement of the competition rules constitutes a ground for exclusion resulting from Article 45(2)(d) of Directive 2004/18, in particular when that infringement was sanctioned by a fine* ” (qualified as serious professional misconduct);

# Infringement of competition rules as grounds for exclusion

- \* Following the approval of the Directive 2014/24/EU, the grounds for exclusion were expanded, with the infringement of competition rules now being associated with paragraph d) of article 57, paragraph 4 ...
  - \* ...in cases where “the contracting entity has sufficiently plausible evidence to conclude that the economic operator has entered into agreements with other economic operators with the aim of distorting competition.”
- \* Article 57, paragraph 4, subparagraph c) of Directive 2014/24/EU kept the reason for exclusion of the competitor who “has committed serious misconduct in professional matters”.

# Directive 2014/24/EU

- \* The grounds of exclusion are based on an essential ingredient of the relationship between the person awarded the contract and the contracting entity, namely, “integrity”; “reliability” or “suitability”, which expresses the trust that the contracting entity places in the economic operator.
- \* Although Directive 2004/18/EC did not expressly refer to this element – “integrity”; “reliability” or “suitability” – the case law of the Court of Justice was responsible for consolidating it.
- \* The emphasis on *optional* grounds for exclusion was also changed, now being placed on the contracting authority, requiring this to analyze and assess the facts that may motivate the application of optional grounds for exclusion

# Article 57 (4) ( c ) and (d)

- \* The *ratio* of these two causes of exclusion: ensuring the “integrity”; “reliability” or “suitability” of the economic operator before the contracting entity.
- \* The European legislator thus unfolded the previous Article 45(2)(d) of Directive 2004/18 into Article 57(4)(c) and d) of Directive 2014/24 keeping the ratio of these two grounds of exclusion.
- \* In the specific case of article 57, paragraph 4, subparagraph d), the aim is to ensure a requirement of honesty or moral fitness, namely regarding compliance with competition rules, placed on anyone who intends to be contractually associated with the contracting entity;



# Optional grounds of exclusion

- \* In the *Infraestructuras* judgment, in contrast to previous jurisprudence, the CJEU expressly recognized the need to review previous jurisprudence. It stated that the **Member States have an obligation to transpose into national law the grounds on which economic operators may be excluded from public procurement procedures, as set out in Article 57(4) of the Public Procurement Directive.**
- \* However, while Member States are free to decide whether, **for contracting authorities, the exclusion should be optional or an obligation**, they cannot restrict the scope of those grounds.
- \* National legislation that restricts the possibility of excluding economic operators based on the existence of “significant evidence” of distortion of competition infringed the Public Procurement Directive.
- \* The CJEU further stressed that the EU legislature intended to confer discretion on the contracting authorities as regards the applicability of exclusion grounds. **The option or the obligation to exclude an economic operator from a public procurement process is intended to enable the contracting authority to assess the integrity and reliability of each of the economic operators participating in a public procurement procedure.**

# Optional grounds of exclusion

- \* For the CJEU, the EU legislator decided to assign to the contracting authority, and only to the contracting authority, at the stage of selecting tenderers, the task of assessing whether a candidate or a tenderer should be excluded from a public procurement procedure.
- \* In the past, the CJEU had already recognized that it was “undeniable that Directive 2014/24 restricts the Member States’ margin of appreciation”.
- \* The doctrine also highlighted that, in article 57, 4, (c ) and (d), structuring principles of European Union Law were at stake - such as the principle of competition and the principle of effectiveness of EU Law -, which is why the transposition of these two paragraphs could not be, for the Member States, optional.

# Necessary probatory evidence

- \* The ECJ held that a decision by a competition authority finding that an economic operator had been involved in a bid-rigging cartel is of particular significance – and that **the contracting authorities must, in principle, rely on the outcome of the antitrust investigation when assessing whether or not to exclude that economic operator from a public procurement.**
- \* The contracting authorities' assessment **must comply with the principle of proportionality** and take into account all the relevant factors.
- \* However, the ECJ further stated that, given the discretion conferred by the Public Procurement Directive, **the assessment cannot be based solely on a competition authority's decision.** Therefore, a national rule that ties the assessment of the integrity and reliability of economic operators involved in a tender solely to the findings of a competition authority undermines the discretion conferred on contracting authorities under the Public Procurement Directive.

# Ancillary penalty

- \* In Portugal, the legislator allows the Competition Authority, within the scope of its powers, to set an additional sanction of deprivation of the right to participate in public contract formation procedures “provided that the practice that constitutes an administrative offense punishable by a fine occurred during or because of the relevant procedure, starting the term of the additional sanction to count after the final judgment of the sentencing decision.”
- \* The Portuguese legislator established the possibility of setting additional sanctions, by the Competition Authority, **in the administrative context pursued by it, and not in light of the nature of the grounds of exclusion provided for in article 57 of the Directive 2014/24/EU.**

# Ancillary penalty

- \* One cannot confuse the actions of the Competition Authority, in the field of monitoring compliance with the rules of Competition Law, with the actions of contracting authorities, in the field of application of Public Procurement Law.
- \* in the event that the NCA imposes a fine on an economic operator for violating the Competition Law, but does not concomitantly determine the additional sanction of deprivation of the right to participate in public contract formation procedures, this does not constitute a legal obstacle to the contracting entity being able to exclude from a public procurement procedure a competitor previously sanctioned by the said Authority.
- \* It will be up to the contracting authority, assessing the seriousness of the infractions previously committed by the competitor, to decide whether (or not) they call into question the integrity, reliability or suitability of the competitor.

# The *Infraestructuras* case

- \* Any decision taken by a competition authority that determines the presence of competition violation by an economic operator, may take on particular significance, and all the more so if that penalty is accompanied by debarment. Such a decision may logically lead the contracting authority to exclude the economic operator from the public procurement procedure.
- \* However, the same is not true in reverse: the absence of such a decision by the competition authority must neither prevent nor exempt the contracting authority from carrying out an assessment by itself and possibly concluding that an exclusion is in order.

# Preliminary conclusion

- \* An infringement decision of a competition authority does not remove the contracting authority's obligation to carry out its own assessment on whether to exclude an economic operator from a given tender procedure.
- \* That assessment is based on the principle of proportionality and is subject to the obligation to state reasons.

# Which procedures?

- \* Article 57(4)(d) of Directive 2014/24/EU **does not establish** that acts, agreements, practices or information capable of distorting the rules competition law **must be limited to the procedure in question.**
- \* This understanding was comforted, from the outset, by the European legislator in paragraph 5 of article 57 (“the exclusion of an economic operator occurs when it is found that the economic operator in question, “(… ) taking into account acts committed or omitted before or during the procedure (… )”);
- \* The CJEU also had the opportunity to clarify, in the *Vossloh Laeis* ruling (C-124/17), that, for the purposes of the ground for exclusion provided for in article 57, paragraph 4, subparagraph d) of Directive 2014/24/EU, **the violation of Competition Law may have occurred outside or in the context of the procedure in question.**



# Which procedure?

- \* The *Infraestructuras* ruling recognized that the wording of Article 57 (4) (d) **does not limit the application of this reason for exclusion to the public procurement procedure within the scope of which this type of behavior occurred.**
- \* Directive 2014/24/EU is therefore now clear: the indications provided for in Article 57(4)(d) may have been committed or omitted before or during the procedure and must relate to the reliability or suitability of the competitor.
- \* If found, they will result in the mandatory exclusion of the proposal.

# Agreements aimed at distorting competition

- \* The 2022 *Landkreis Aichach-Friedberg* judgment (C-416/21);
- \* Article 57(4)(d) must be interpreted as meaning that the optional ground for exclusion covers cases where there are sufficiently plausible indications to conclude that economic operators have entered into an agreement prohibited by Article 101 TFEU, **but is not limited solely to the agreements provided for in that article.**
- \* Article 57(4) does not prevent the principle of equal treatment, provided for in Article 36(1) of Directive 2014/25 from precluding the award of the contract in question to economic operators which constitute an economic unit and whose tenders, although submitted separately, are neither autonomous nor independent.
- \* See 2018 *Lloyds of London* case (C-144/17);

# The 2022 Landkreis Aichach-Friedberg judgment (C-416/21);

- \* Different interpretations of ‘anticompetitive agreements’
  - \* The purpose of a contracting authority assessing reliability of tenderers as potential contract partners, differs from the aim of a competition authority assessing the behaviour of economic operators as subjects of the EU competition law (similar to the *Infraestuturas* case);
  - \* While the objective of the former is to assess an undertaking’s reliability, the objective of the latter is to punish anticompetitive behaviour on the part of undertakings and to deter them from engaging in such conduct.
  - \* CJEU’s judgement establishes that in the light of its procurement-law objective, Art 57(4)(d) of Directive 2014/24 leads to a broad interpretation.
  - \* While anticompetitive agreements within the meaning of Article 101 TFEU are included within the scope of Art 57(4)(d) **the latter has a broader scope and can also allow exclusion of economic operators based on anticompetitive agreements that do not fall within Article 101 TFEU.**

Thank you!

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