

**Judicial interpretation of the notion of 'grave professional misconduct'
in public procurement: Lessons for contracting authorities and suppliers.**

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Abstract

Public Procurement Law is the acquisition of goods, works and services by a contracting authority through the use of a public contract. The general principles of Public Procurement Law dictate that suppliers are treated fairly and without discrimination whilst encouraging transparency, proportionality, competition and free trade within the member states. This area of law is mainly regulated by the EU through the use of Directives and their national equivalent, judge-made law from the Court of Justice of the European Union ('CJEU') and national courts.

Due to the substantial amount involved throughout the life cycle of the public contract (including the contract value), it is paramount that the contract is awarded to the right supplier in order to attain value for money. As such, unqualified suppliers should be eliminated from the procurement exercise. Art.57 (4) (c) of Directive 2014/24/EU and reg. 57 (8) (c) of the UK Public Contracts Regulation 2015 (PCR 2015) specifies that a contracting authority may exclude an economic operator who by conviction by a final judgement is guilty of "grave professional misconduct". With no definition of this phrase offered by Directive 2014/24/EU, PCR 2015 and their predecessors, this paper seeks to examine the judicial interpretation of the concept of "grave professional misconduct" through an analysis of key judgements from the Court of Justice of the European Union and national courts. The paper will conclude by identifying important lessons for contracting authorities and current or prospective suppliers when an issue of grave professional misconduct arises.

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1. Introduction

The definition of public procurement used to be complex and dependent on each country's definition of the relationship between government agencies and the private sector. However, with the internationalisation of public procurement through international agreements such as the WTO GPA², the UNCITRAL model law³ and the regulation of public procurement across the 28 EU member states, the concept of public procurement has become clear with its regulations modernised to accommodate technological advancements and other provisions that enhance the integration of member states both within the EU and the larger global market.⁴ While it is acknowledged that public procurement is a global tool that affects all 196 countries in our global village with regulations amongst the countries diverse, this paper is concerned with the regulation of public procurement in the EU, especially by the Court of Justice of the European Union ('CJEU') and in national courts of the EU member states.

In its simplest form, EU public procurement is defined as the acquisition by means of a public contract of works, goods or services by one or more contracting authority from suppliers chosen by the contracting authorities.⁵ Public procurement is a highly regulated area in the EU as it accounts for 14% of each member state's national GDP.⁶ According to the European Commission, over 250,000 contracting authorities (public authorities) procure goods, works and services annually.⁷ It is probably not an exaggeration to consider the consequences of not regulating public procurement both on national level and in a supranational institution like the EU as catastrophic. As a result, since 1971, the EU has regulated public procurement through the adoption of Directives which give member states a transposition period of usually 24 months.⁸ Interwoven with

² World Trade Organisation Government Procurement Agreement 2012

³ United Nations Commission on International Trade Law (UNCITRAL) Model Law on Public Procurement 2011. The Model Law is supplemented with a Guide to Enactment of UNCITRAL Model Law on Procurement of Goods, Construction and Services 2012.

⁴ The UK voted on the 23rd June to leave the European Union. While it is clear that Article 50 has been triggered by Prime Minister Theresa May, there is no immediate amendment of the Public Contracts Regulations and many academics do not foresee any changes to the Regulations in the near future. As such, the UK is still considered a member state until the two years in article 50 have lapsed.

⁵ Directive 2014/24/EU OJ L 94, art 1(2)

⁶ European Commission, 'Public Procurement' (Europa.EU) <https://ec.europa.eu/growth/single-market/public-procurement_en> accessed 20 June 2017

⁷ Ibid

⁸ The history of EU public procurement law has been relatively clear cut. The first EU Directive dealing with public procurement was Directive 71/305/EEC OJ L 185 which regulated the procurement of works and Directive 77/62/EEC for supplies. These directives were shortly amended following the enactment of Directive 89/440/EEC OJ L 210 for works and Directive 88/295/EEC OJ L 127 for supplies. With further amendments carried out in 1993 and 2004, the most recent legislative regulation of public procurement in the EU is in form of Directive 2014/24/EU for public works, services and goods; Directive 2014/23/EU OJ L 94 for Concessions and Directive 2014/25/EU OJ L 94 for the regulation of Utilities. To ensure compliance and effectiveness of the rules, Directive 92/13/EC OJ L

the legislative regulation of public procurement in the EU is the regulation of procurement through case law “oriented towards ensuring the effectiveness” of the rules.⁹ The CJEU has been instrumental in the modernisation of the legislative regulation of public procurement, especially with the notion of grave professional misconducts as will be shown later in this paper. The author will not set out the basic rules and principles governing public procurement in the EU.

There are different directives governing public procurement in the EU. As footnote 8 states, Directive 2014/24/EU oversees the procurement of goods, works and services; The regulation of utilities is governed by Directive 2014/25/EU, concessions being Directive 2014/23/EU¹⁰ and defence procurement being Directive 2009/81/EC. While it is acknowledged that the exclusion of suppliers is applicable to all the Directives, from the procurement of goods, works and services to the procurement of utilities and military weapons, this paper seeks to address the exclusion of suppliers from the provision of Directive 2014/24/EU, and its direct predecessor Directive 2004/18/EC and the Public Contracts Regulation 2015 (‘PCR’) which governs the procurement of goods, works and services in the United Kingdom (‘UK’). Due to the similarities in Directive 2014/24/EU and the PCR, the majority of this paper will address the concept of “grave professional misconduct” from judicial and statutory provisions in the EU and from the perspective of selected EU member states such as Poland, Netherlands and Italy. The UK’s position will not be addressed in this paper as there is currently no caselaw in the courts of England and Wales addressing this issue.

To provide clarity and ease for the reader, any reference to suppliers in this paper will have the same meaning as economic operators and tenderers although some academics may find these terms to be different. To begin, the author will analyse the general principles of public procurement, provide a basic overview of how this ground of exclusion fits into the procurement process and how relevant the procurement principles are in the exclusion of suppliers.

2. Principles of Procurement

The importance of public procurement and its role in maintaining integration across the member states in the EU cannot be overstated.¹¹ The economic regulation of public procurement in the EU is essential to the strengthening of the

76, Directive 89/665/EEC OJ L 395 and the modernised Directive 2007/66/EC OJ L 335 provide remedies for breaches of the procurement rules.

⁹ Dr Albert Sanchez-Graells, “If it ain't broke, don't fix it? EU requirements of administrative oversight and judicial protection for public contracts” To be published in S Torricelli & F Folliot Lalliot (eds), *Administrative oversight and judicial protection for public contracts* (Larcier, 2017).

¹⁰ The regulation of concessions used to be governed by the public-sector directives – being Directive 2004/18/EC OJ L 134 and its predecessors. However, the 2014 enactment changed this by creating a separate directive that regulates concessions.

¹¹ Albert Sanchez Graellz, *Public procurement and the EU competition rules* (Hart Publishing 2011), pg. 3

single market as public procurement has been identified as a “non-tariff barrier” which guarantees an open market economy with free competition according to article 119 of the Treaty on the Functioning of the European Union (TFEU).¹² Underpinning this regulation of procurement are the principles of non-discrimination, equal treatment of all suppliers, proportionality and transparency. While these principles appear in the textual provisions of the TFEU – article 18 for non-discrimination and the procurement directives, specifically article 18 of Directive 2014/24/EU, the understanding of these principles has been developed by the CJEU. Complying with these principles applies to all public procurement carried out by a contracting authority in the EU regardless of the contract value. As such, this is the minimal expectation that must be applied to all aspects of the procurement process from the drafting of the technical specification, choice of procedures, the qualification of tenderers including the exclusion of suppliers on the grounds of grave professional misconduct and the award of the contract to the successful supplier.

2.1 Non-discrimination

The key principle underlining the strengthening of competition in EU public procurement is the principle of non-discrimination on the grounds of nationality. As previously mentioned, this principle predates the regulation of EU public procurement as this was expressly prohibited under article 18 TFEU and by the CJEU through cases such as *Beentjes*¹³. Over the years, contracting authorities have developed innovative way of discriminating suppliers on the grounds of nationality. For example, requiring the supply of pipes to meet Irish standards as was done in *Commission v Ireland*¹⁴. In order to ensure the judicial creation of law is running concurrently with statutory provisions and modern developments, the CJEU also developed innovative ways of analysing the intentions of the authorities and thus have prohibited any discriminatory measures found in the procurement process.

2.2 Equal treatment

Prior to the 2004 directives, the language of the procurement legislation did not expressly include the principle of equal treatment as a legal obligation for the contracting authorities. As such, the CJEU in the case of *Commission v Denmark*¹⁵ emphasised that this principle “*lies at the very heart of the directive*”.¹⁶ The principle of equal treatment was defined in the case of *Fabricom SA*¹⁷ which explained that this principle requires that “comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified”.¹⁸ Moreover, the CJEU has

¹² François Lichère, Roberto Caranta and Steen Treumer (eds), *Modernising Public Procurement: The New Directive* (DJØF Publishing. 2014). See also Sanchez Graells (n 11) at pg.3

¹³ Case 31/87 *Gebroeders Beentjes v The Netherlands* (“Beentjes”) [1988] E.C.R. 4653

¹⁴ Case 45/87 *Commission v Ireland* [1988] ECR 4929

¹⁵ Case C-243/89 *Commission v Denmark* (“Storebaelt”) [1993] ECR I-3353

¹⁶ *Ibid*

¹⁷ Joined cases C-21/03 and C-34/03 *Fabricom SA v État Belge* [2005] ECR I-01559

¹⁸ *Ibid*, para.27

stressed that the principle of equal treatment does not only apply to those suppliers that have participated in the procurement process but also to those that hope to participate.¹⁹ As such, actions such as giving more information to domestic/national suppliers than foreign suppliers or excluding a supplier on the grounds of grave professional misconduct and not excluding another supplier of the same or similar circumstance would be a breach of equal treatment.

2.3 Transparency

A third principle is that of transparency which requires contracting authorities to conduct procurement in an open, clear and impartial manner. According to Arrowsmith, Linarelli and Wallace, this principle can be broken down into four different components, that is:

- (i) The publicity of contract opportunities;
- (ii) The publicity for the rules governing each procedure;
- (iii) The limits on discretion; and
- (iv) The provision for verification that the rules have been followed and for enforcement where they have not.²⁰

As regards judicial interpretation of the principle of transparency, the CJEU has been actively instrumental in the widening and modernisation of the principle to cover cases that would otherwise fall short through legislative enactments. Ironically, the CJEU has ruled against many EU institutions that fail to comply with procurement principles listed above or the procurement rules especially when the said institution drafted or implemented the law. For example, in the case of *Embassy Limousine v European Parliament*²¹, the EP sought to procure a chauffeur driven car services for the Members of Parliament (MEP). The relevant committee recommended that Embassy Limousine be awarded the contract and this was communicated to Embassy who relied on this and started preparing for the execution of the contract. A few months later, doubts were raised about the integrity of Embassy and this led to the award of the contract to another supplier. In issuing proceedings, Embassy argued that the EP breached the principle of transparency as it had failed to keep them informed about the subsequent doubt. The CJEU ruled in Embassy's favour. Transparency in procurement procedures both in the EU and outside is therefore important to ensure contracting authorities are in compliance with the prescribed rules.

2.4 Proportionality

Finally, the principle of proportionality requires that any measures chosen by the contracting authority be both necessary and proportionate in light of the objectives sought.²² As will be seen in the analysis of judicial interpretation of the notion of

¹⁹ Case C-16/98 *Commission v France* [2000] ECR I-8315

²⁰ Sue Arrowsmith, Paula Faustino, Baudouin Heunincks, Steen Treumer and Jens Fejø, *EU Public Procurement Law: An Introduction* (2010). Retrieved from <<https://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/eupublicprocurementlawintroduction.pdf>> accessed 15 June 2017

²¹ Case T-203/96 *Embassy Limousine and Services v European Parliament* [1998] ECR II-4239

²² Arrowsmith (n 20)

professional grave misconduct, the success of each case usually hinges on the issue of proportionality, that is, whether it was necessary to exclude a supplier on the grounds of grave professional misconduct.

In addition to the general principles of public procurement, the EU has a number of objectives. The most common objective is the promotion of competition across the member states which will generate better value for money and the reduction of corruption or poor procurement practices.²³ Competition in public procurement simply means that contracts are awarded as a result of opening the bid process to many suppliers before choosing the most economically advantageous tender.²⁴ While it is clear that the EU aims to foster competition through the use of public procurement, this objective can conflict with national procurement objectives. The UK announced in its consultation exercise for the 2014 directive that it aimed to adopt policies that will increase the participation of SMEs, encourage environmental and sustainable procurement, address human rights issues such as the prohibition of trafficking in supply chains in UK public procurement.²⁵ The UK's objectives and the EU objective may come into conflict when, for example, the UK tries to award its contracts to local SMEs in order to encourage more SMEs to compete for contracts. While this objective may be easily achieved for contracts under the EU threshold as these contracts are not subject to the Directives but only to the procurement principles, it will certainly breach the principle of non-discrimination.

3. The exclusion of suppliers

In EU public procurement exercises where two or more suppliers have responded to a call for competition by either submitting their tenders through the use of the open procedure or sent a request for participation, the contracting authority will need to eliminate some suppliers in order to award the contract to the successful supplier.²⁶ This process is known as the qualification of tenderers which can be done under two legal provisions, namely article 57 and article 58 of Directive 2014/24/EU. This paper is concerned with article 57, the exclusion of suppliers.

The exclusion grounds aim to exclude suppliers from participating in the procurement process when the contracting authority can establish from a final court ruling that the supplier(s) has been convicted of crimes and conduct listed

²³ Sanchez-Graells (n 11)

²⁴ Sue Arrowsmith and Arwel Davies, *Public Procurement: Global Revolution* (Kluwer Law International Ltd 1998) pg.15

²⁵ Crown Commercial Service, *A Brief Guide to the 2014 EU Public Procurement Directives* (CCS, October 2010)

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/560261/Brief_Guide_to_the_2014_Directives_Oct_16.pdf> accessed 29/06/2017

²⁶ Article 26 of Directive 2014/24/EU deals with the choice of procedures. There are currently six procedures available to member states. As a minimum requirement, member states must provide either the open or restricted procedure and may use any of the negotiated procedures (competitive procedure with negotiation, competitive dialogue, innovation partnership and negotiated procedure without prior publication) if the conditions in art 26(4) have been established.

in article 57. From the language of the provision, there are mandatory and discretionary grounds for exclusion.

Just like the name suggests, under the mandatory exclusion, the contracting authority 'shall' exclude suppliers who are guilty of the crimes listed. This means that if it is established that the tenderer has committed offences such as fraud, corruption, trafficking of human beings, terrorist offences etc they must be excluded without any discretion from the contracting authority.²⁷ In addition to the mandatory exclusion, contracting authority 'may' exclude a tenderer from the procurement process when their misconduct falls under art 57 (4) which includes bankruptcy, conflict of interests, distortion of competition and where the tenderer is guilty of grave professional misconduct.²⁸

As has been mentioned in passing, member states have a transposition period to implement an EU Directive. Due to the nature of directives, member states are permitted to alter the provisions in the directive when implementing the national equivalent if the spirit of the directive and the minimum requirements are complied with. The EU public procurement directives are not an exception to this rule. Regarding the discretionary grounds of exclusion, the contracting authority has a discretion on whether to exclude or not and if it decides to exclude, it must do so regardless of the stage of the procurement procedure and, in compliance with the procurement principles mentioned above. In addition, member states also have the discretion to upgrade an EU discretionary ground to the member state's mandatory ground for exclusion. This right has been exercised by member states such as Poland and Italy.

There are derogations provided in the Directive for the exclusion of suppliers. Article 57 (3) provides for derogations when it is in the public interest, public health or protection of the environment. In addition to this derogation, the procurement directive also provides for self-cleaning. The self-cleaning measure is a tool used by suppliers excluded under article 57 to redeem their misconduct and be eligible to participate in a future call for competition. This measure was introduced under article 45(2) of Directive 2004/18/EU and is arguably in compliance with the EU principle of proportionality as it allows a supplier to regain and redeem its status either by 'paying compensations' or by 'actively collaborating with the investigations' after a limited time. Therefore, the exclusion grounds as briefly examined are not permanent exclusions from a procurement process but rather temporary in nature. This measure, should therefore be appreciated as a step towards harmonisation and rehabilitation in public procurement.

4. What is grave professional misconduct?

As previously mentioned, the exclusion of suppliers on the ground of grave professional misconduct was introduced under art.45 (2) (d) of Directive 2004/18/EC which states that a supplier may be excluded if the supplier "*has been guilty of grave professional misconduct proven by any means which the*

²⁷ Directive (n 8)

²⁸ Directive 2014/24/EU

contracting authorities can demonstrate". Like many important concepts included in the procurement directives, no definition was offered and as such concepts like this are left to the court to adjudicate through the interpretation of the relevant EU law. Eight years after the adoption of the directive, the CJEU offered a definition in the case of *Forposta SA*²⁹.

In this case, the contracting authority and defendant (Poczta Polska) conducted an open procedure for the award of a public contract for the delivery of postal services. The value of the contract was above the relevant EU threshold under the 2004 directive and so, the directive and its provisions, specifically art 45 (2) (d) was applied. As a result of the value of the contract and the need for the contract to be performed effectively, the contract was divided into lots and was awarded to Forposata SA and ABC Direct Contract. On the day the contract was meant to be awarded, the defendant cancelled the procedure on the grounds that the winning suppliers were subject to a mandatory exclusion under art.24(1)(1a) of the Polish public procurement law 2004. This Article states that any

economic operators with which the contracting authority concerned annulled, terminated, or renounced a public contract owing to circumstances for which the economic operator is responsible, where the annulment, termination or renouncement occurred in the three-year period before the procedure was initiated and the value of the non-performed part of the contract amounted to at least 5% of the contract's value... must be excluded from the contract award procedure.

This was therefore a compulsory mandatory exclusion under domestic Polish procurement law. Forposta and ABC appealed against the decision of the contracting authority (Poczta Polska) to cancel the tendering procedure to the Krajowa Izba Odwoławcza (the Polish Public Procurement Office), claiming that the national provision was "much broader than the condition laid down in " art.45(2)(d) of Directive 2004/18/EU.³⁰ In considering the case, the Polish Procurement Office analysed the legal concept of grave professional misconduct which in their opinion relates to "ethics, dignity and professional conscientiousness" which would give rise to a professional liability if breached.³¹ The Polish Procurement Office further noted that the contracting authority was not equipped to decide or define what constitutes grave professional misconduct as this was a concept only the relevant professional body can ascertain.

In dealing with the argument raised by Forposta that the polish law was broad in comparison to the provision in the directive, the Polish Procurement Office considered the language of article 45 which looked at the conduct which was "committed by the operator" that is, actions which are directly linked to the supplier and not actions which "that operator is responsible for" as stated in the

²⁹ C-465/11 *Forposta SA and ABC Direct Contact sp. z o.o. v Poczta Polska SA* ECLI:EU:C:2012:801

³⁰ *Ibid*, para.9. The issue of whether the Polish Public Procurement Office was a court or tribunal as defined in Article 267 TFEU was raised by the defendant on the grounds that the office had both judicial and advisory roles. The CJEU ruled that the office had the jurisdiction to make a preliminary reference and the fact it had both roles did not diminish its status as a court or tribunal. See para 17 and 18 of the case.

³¹ *Forposta*, (n 29) para.11

Polish Law.³² Due to the lack of definition and guidance in the directive, the Polish Procurement Office sent a preliminary reference consisting of two questions to the CJEU. The first question asked if grave professional misconduct includes the annulment or termination of a contract in the past three years by a contracting authority owing to circumstances for which that supplier is responsible.³³ This question was essentially asking the court to define what grave professional misconduct is. If the first question was negative, the Polish Procurement Office asked if the principles and rules of the procurement directives allowed a contracting authority to automatically exclude "on the grounds of protection of public interest, the legitimate interests of the contracting authorities or the maintenance of fair competition".³⁴

This preliminary reference was inadmissible on the grounds that the Polish Public Procurement Office did not seek an interpretation of EU law but rather it sought to determine whether the national law was compatible or incompatible with art 45 of Directive 2004/18/EU. This issue was highlighted as the role of the CJEU is not to determine the compatibility or legitimacy of national law but rather to interpret EU law. Despite this issue of inadmissibility, the CJEU was able to issue some guidance or direction on the concept of grave professional misconduct.³⁵ In order to understand what is meant by 'grave professional misconduct', the concept was split into two, professional misconduct and grave misconduct. For a supplier to be excluded under the grounds of grave professional misconduct, there must be a professional misconduct which is applied to the subject matter of the contract in order to determine whether the misconduct is grave to give rise to the exclusion. This therefore means that there is a two part test to be applied in order to determine the definition of grave professional misconduct.

The first part looks at the definition of professional misconduct. It was pointed out that the concept of 'professional misconduct' covered "all wrongful conduct which has an impact on the professional credibility of the operator at issue and not only the violations of ethical standards...of the profession to which the operator belongs".³⁶ Professional misconduct may also include a situation where a supplier has failed to comply with any contractual obligations.³⁷ In theory, it means for example, if a UK law firm was competing for a service contract to provide legal services to a contracting authority and that firm has breached and been found guilty of any of the professional conduct issues set out in the SRA Code of Conduct, that firm has committed a professional misconduct.³⁸ Please note that the SRA example does not amount to a grave professional misconduct but seeks to provide an example of a professional misconduct.

³² Ibid, para 12

³³ Ibid, para 15

³⁴ Ibid, para 15: *Susie Smith, 'EU: Forposta SA, ABC Direct Contact sp. z o.o. v Poczta Polska SA (C-465/11) - exclusion on the grounds of grave professional misconduct' [2013] PPLR 3, NA57-NA60*

³⁵ *Forposta* (n 29), para.19

³⁶ Ibid, para.27

³⁷ *Smith* (n 34), pg.4

³⁸ Solicitors Regulations Authority Code of Conduct 2011

The second part of the test looked at the definition of 'grave misconduct'. This concept refers to the conduct of the supplier "which denotes a wrongful intent or negligence of a certain gravity on its part".³⁹ The CJEU stressed that a mere breach of professional conduct does not necessarily amount to a grave misconduct. This concept of 'grave misconduct' will have to be determined by the contracting authority in line with the subject matter of the contract. In the example given above relating to the SRA code of conduct, if the firm has consistently breached the principle of confidentiality as outlined in Outcome (4.1) of the SRA Code of Conduct, this can arguably be a grave professional misconduct as the subject matter of the contract would obviously require the successful supplier (firm) to keep the matters of the contracting authority confidential – maintaining the integrity of the firm. It must of course be stressed that what is determined as 'grave' should be assessed on a case by case basis. The issue of proportionality, transparency and equal treatment in the assessment of this ground of exclusion will be examined below.

Lesson one – what is the national definition of "grave professional misconduct"?

This brings us to the first observation of the paper. The carrying out of due diligence by the contracting authority prior to the exclusion of suppliers is key in neutralising challenges to the procurement process. The wording of article 57(4) (c) requires the contracting authority to 'demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct'. The simplest way of doing this is to reach out to the relevant professional body which the supplier in question is or should be associated with. In the example given above, a simple email to the Solicitors Regulatory Authority will provide the contracting authority with the information it needs to determine whether there has been an issue of professional misconduct and most importantly if this professional misconduct is a grievous misconduct from the perspective of the professional body. It is important to stress that the opinion of the relevant professional body should not be the only justification for excluding the supplier but rather, the contracting authority should apply the professional misconduct to the subject matter of the procurement. Communication with the relevant professional body acts as a starting point to the investigation of misconduct and will provide the contracting authorities with evidence in support of the exclusion when the supplier commences litigation against the contracting authority.

From a supplier's perspective, the author advocates that they should consult their professional body's Code of Conduct regularly in order to be aware of what constitutes professional misconducts. Doing so does not eliminate the possibility of a supplier being guilty of professional misconduct but it does provide a conscious awareness of what constitutes professional misconduct.

Lesson two - No additional grounds for exclusion relating to professional qualities.

As mentioned in passing, the case of Forposta was crucial to the understanding of grave professional misconduct as a result of the two questions sent to the CJEU for a preliminary ruling. Whilst the first question has been addressed above, the second question asked if the member states can automatically exclude a supplier on the grounds of protecting the "public interest, the legitimate interests of the

³⁹ *Forposta* (n 29)

contracting authorities or the maintenance of fair competition between economic operators".⁴⁰ The CJEU held that while the contracting authorities have the power to add additional grounds of exclusion – mandatory or discretionary grounds, the contracting authorities are precluded from adding to the list of criteria relating to professional qualities. This ruling followed previous rulings such as *La Cascina*⁴¹, *Michaniki*⁴² and others.

For contracting authorities, this means that they are prohibited from using any other grounds of exclusions relating to the professional qualities of the supplier other than those listed in article 57 (4). This is arguably somewhat of a good news for suppliers as they can rely on the fact that exclusions relating to professional qualities are limited to those listed in article 57 (4) for which grave professional misconduct is among the grounds.⁴³

Lesson three – Contracting authorities must consider the procurement principles when excluding suppliers on the grounds of grave professional misconduct.

The procurement principles are pervasive in all aspects of the procurement process from the pre-tender phase to the award of the contract to the successful supplier. This means that the same principles as mentioned above in section 2 of this paper are important when excluding suppliers on the grounds of grave professional misconduct. This issue was recently addressed in the case of *Connexion Taxi Services*⁴⁴ and re-emphasised in *Casertana Costruzioni Srl*⁴⁵.

In *Connexion Taxi Services*, the Dutch Ministry of Health ('herein after referred to as the contracting authority') launched a call for competition for the award of transport services for persons with reduced mobility.⁴⁶ The contract was valued at EUR 60,000,000 which meant that Directive 2004/18/EC and the national equivalent Besluit aanbestedingsregels voor overheidsopdrachten (the 'BAO') was applicable to this procurement.⁴⁷ The law of public procurement reproduced article 45 of Directive 2004/18/EC in its entirety which includes the exclusion of a supplier on the grounds of grave professional misconduct.⁴⁸ The decision on whether to use any of the discretionary grounds as a mandatory ground was left to the discretion of the contracting authorities. As such, in the descriptive document published in relation to this contract, the contracting authority under para.3.1

⁴⁰ Ibid, para.37

⁴¹ Joined Cases C-226/04 and C-228/04 *La Cascina and Others* [2006] ECR I-1347, [22]. Case can be viewed by clicking on <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62004CJ0226>> accessed 18 June 2017

⁴² Case C-213/07 *Michaniki AE v Ethniko Symvoulío Radiotileorasis and Ypourgos Epikrateias* [2008] ECR I-9999, para. 43

⁴³ Directive 2014/24/EU

⁴⁴ C-171/15 *Connexion Taxi Services BV v Staat der Nederlanden* EU:C:2016:948

⁴⁵ C-223/16 *Casertana Costruzioni Srl v Ministero delle Infrastrutture e dei Trasporti – Provveditorato Interregionale per le opere pubbliche della Campania e del Molise* ECLI:EU:C:2017:365

⁴⁶ *Connexion* (n 44)

⁴⁷ The BAO translates to the Law of public procurement 2012

⁴⁸ Article 45 of Directive 2004/18/EC was applicable not article 57 of Directive 2014/24/EU as the law governing the procurement at the time the process commenced was the 2004 directive.

clearly stated that “a tender to which a ground for exclusion applies shall be set aside and shall not be eligible for further (substantive) assessment” (the “automatic exclusion” of the supplier).⁴⁹

Connexxion and the ‘Tender group’ which comprised three companies (Transvision, RMC and ZCN) both took part in the call for tenders and were asked to complete a self-declaration form which declared that neither of the suppliers “nor any manager” were guilty of any grounds of exclusion found in article 45 of the law of public procurement, which includes the ground of grave professional misconduct. By a letter dated 8 October 2012, the Ministry informed Connexxion that its tender had been placed second, with the contract awarded to the Tender group. Before the contract was awarded, on 20 November 2012, the Dutch Competition Authority imposed a number of sanctions on RMC ZNC for breach of competition rules which took place in 2009 and 2011 relating to taxi services in the Rotterdam region. On 18 February 2013, the Ministry wrote to Connexxion, informing them that it stood by its decision to award the contract to the Tender group despite the Group being guilty of grave professional misconduct. As a result of the award, Connexxion brought legal proceedings, seeking an order to prohibit the Ministry from awarding the contract.

The court hearing the application for interim measures (the ‘Voorzieningenrechter te Den Haag’) held in favour of Connexxion. It was of the opinion that once it was established that the Tender group was guilty of grave professional misconduct, it should have been excluded from the tender process as the inclusion of para 3.1 in the descriptive document was a mandatory automatic exclusion. This decision was appealed to the Court of Appeal (the Gerechtshof Den Haag) which set aside the decision of the court of first instance in this case, thereby granting the Ministry the authority to award the contract to the Tender group on the grounds that it would have been disproportionate to exclude the Tender group from the procurement process. The case was further appealed to the Supreme Court. The Supreme Court had doubts as to whether the principle of the proportionality, equal treatment and transparency test were incorporated into the descriptive document and thus a legitimate tool to be used by the contracting authority in not excluding the Tender group. The Supreme Court subsequently referred the following questions to the CJEU:

- 1) Is it consistent with Directive 2004/18 (article 45 (2)) for a Member State to require contracting authorities to make the possible exclusion of tenderers who have been guilty of grave professional misconduct subject to an assessment of proportionality?
- 2) Is it significant in this regard that a contracting authority has stated in the tender conditions that a tender to which a ground for exclusion applies must be set aside and is not to be eligible for further substantive assessment?

First question

⁴⁹ Susie Smith, ‘Optional ground for exclusion for grave professional misconduct and the requirements for proportionality, equal treatment and transparency: C-171/15 Connexxion Taxi Services’ [2017] PPLR 3, NA86-NA90, pg. 3

In regard to the first question, the CJEU re-emphasised the application of the procurement principles throughout the procurement process. This means that the principles of proportionality, equal treatment, transparency and non-discrimination must be considered when a ground of exclusion arises. In this particular case, the CJEU noted that there is no uniformed application to the discretionary grounds of exclusions as found in art.45 (2) of Directive 2004/18/EC across the 28 member states. As mentioned previously in the context of *La Cascina*⁵⁰, each member state has the authority to include or not include any of the discretionary grounds into the national law. As long as a member state does not deviate from the spirit of the directive, then it may “incorporate discretionary grounds with varying degree of rigour according to legal, economic or social considerations prevailing at national level”.⁵¹ Under the BAO explanatory notes, the contracting authorities are required to assess proportionality on a case by case basis when a discretionary ground for exclusion arises. For that reason, generally, a contracting authority may invoke the principle of proportionality when excluding suppliers guilty of grave professional misconduct.

Second question

The CJEU faced slight difficulty in assessing the second question. As suggested by Smith, the court was “concerned” with the balancing of the principle of equal treatment and transparency, that is, the direct exclusion of the Tender group due to the inclusion of para.3.1 into the descriptive document.⁵² The court took the approach that some suppliers who may have been interested in the contract did not submit a tender due to the clear, precise and unconditional inclusion of para 3.1 which automatically excludes a supplier guilty of grave professional misconduct. In other words, if it was clear in the descriptive documents that the contracting authority would use their discretionary power to assess the grave professional misconduct, other suppliers would have taken part in the tender process. The CJEU was of the opinion that this would have applied to suppliers from other member states as they would not be familiar with the BAO and its explanatory notes. As was rightly suggested by Smith, the ruling from the CJEU was a balance between the principle of equal treatment, transparency and proportionality with the principle of equal treatment and transparency prevailing.

Perhaps a different decision would have been reached if the CJEU was of the opinion that the procurement principles are implied into the descriptive documents or the national law irrespective of the lack of expressed inclusion. It is an important principle of law that any contractual terms and conditions or obligations are subject to the law governing the contract. For example, the sale of goods in the United Kingdom is governed by the Sale of Goods Act 1979 (‘SGA’). In every contract where goods are being sold, it is an implied term under the SGA that the goods are sold according to the description provided by the seller. Therefore, even if the contract is silent on this matter, the implied term will prevail.

⁵⁰ *La Cascina* (n 41)

⁵¹ *Connexion* (n 44)

⁵² Smith (n 49)

It should be no different in the realm of public procurement. As mentioned earlier, this procurement was governed by Directive 2004/18/EC due to the value of the contract exceeding the EU threshold. This meant that any obligations created by the contracting authority are subject to the provisions in the directive, the relevant provision here being the art 2 – principles of awarding contracts. Therefore, despite the descriptive document not explicitly stating the assessment of the procurement principles, the assessment of the principle of proportionality is implied and this is in compliance with the EU and the Dutch procurement rules as set out in the Directive and in the BAO's explanatory note.

The case of *Casertana Costruzioni Srl and Assitur v Camera di Commercio*⁵³ also addressed the principle of proportionality in relation to the selection criteria which determine the economic and financial standing of the supplier and the technical and/or professional ability to perform the contract. Despite the subject matter of this case being different to that of *Connexion*, the same rule applies and that is the assessment of the procurement principles in all stages of the tender process.

There are many valuable lessons to be learnt from these cases. From a contracting authority's point of view, whilst the above cases predominantly dealt with the principle of proportionality, it is envisaged that the principles of equal treatment, transparency and non-discrimination apply in the same manner. Therefore, it is important for contracting authorities to consider these principles before excluding suppliers on the grounds of grave professional misconduct. Whilst assessing one principle i.e. the principle of proportionality, contracting authorities should ensure that the other principles are not neglected as was stated in *Connexion*⁵⁴. Failure to do so may result in a challenge to the procurement rules which will create an automatic suspension of the award of the contract. Failure to address this issue at this stage may lead to the issuing of proceedings.

In like manner, the above cases give hope to suppliers who have been found guilty of grave professional misconduct. It essentially creates another lifeline which allows suppliers to be considered for the contract without the use of the self-cleaning mechanism.

Conclusion

Due to the importance of public procurement to the member states, the regulation of public procurement is crucial in ensuring public funds are spent in a way that shows accountability and transparency in government. In the EU, public procurement is subject to the Directive 2014/24/EU. As part of the process of eliminating suppliers, contracting authorities may exclude suppliers on the grounds of grave professional misconduct. Even though this ground is incorporated into the directives, the EU legislature failed to define this concept. As a result, the court has been instrumental in the interpretation and development of this concept.

⁵³ Case C-538/07, *Assitur v Camera di Commercio, Industria, Artigianato e Agricoltura di Milano* ("Assitur") [2009] ECR I-4219

⁵⁴ *Connexion* (n 44)

The paper has attempted to establish how the role of the court is important in the creation of law both in the EU and in domestic courts. Through the analysis of case law, the author has been able to identify lessons for contracting authorities and suppliers as a result of the preliminary references sent by national courts. The first lesson instructs contracting authorities to carry out satisfactory due diligence before excluding a supplier on the grounds of grave professional misconduct. The second informs the contracting authority that they cannot use additional grounds other than those listed in the directive to exclude suppliers. Finally, the third lesson reminds contracting authorities of their obligation to comply with the procurement principles when excluding suppliers on the grounds of grave professional misconduct. While it is acknowledged that following these simple steps will not avoid litigation or challenges to the procurement process, it will limit the probability of a supplier being awarded a remedy as a result of an exclusion on the grounds of grave professional misconduct.

Learning from past mistakes is key to success. This well-known proverb is applicable to procurement as the author has sought to identify in this paper. These lessons are vital in ensuring that contracting authorities do not fall into bad practice, challenges and proceedings brought against them. Although this issue was not emphasised in this paper, the consequences to the contracting authority as a result of a challenge leads to the automatic suspension of the contract, the setting aside of the contract or other remedies imposed by the courts.