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Chapter 9

Exclusion and Self-Cleaning in Article 57: Discretion at the Expense of Clarity and Trade?

Dr Sylvia de Mars

I. INTRODUCTION

Exclusion grounds, as a particular aspect of qualification criteria for economic operators bidding for public contracts, have existed in secondary EU law on public procurement since its inception in 1971. However, the 2004 Directive¹ marked the first occasion on which certain exclusion grounds were made *mandatory* by the EU legislator; the 1971, 1977 and 1993 Directives on public procurement left decisions on exclusion to individual contracting authorities, noting only that there were limited grounds on which economic operators *may* be excluded.²

The 2014 Directive carries on logically from the 2004 Directive. Its Article 57 covers both mandatory exclusion grounds, meaning grounds that automatically result in disqualification of a contractor, and discretionary exclusion grounds, meaning grounds on which contracting authorities *may* disqualify economic operators. However, the actual trigger conditions for exclusion have been changed on a number of fronts since 2004 and – as a countermeasure to exclusion – Article 57 introduces EU level rules on so-called ‘self-cleaning’ processes. Self-cleaning means that economic operators who trigger an exclusion ground (whether mandatory or discretionary), can prove that they have modified their behaviour and organisational structure and should consequently be permitted to participate in the procurement process before the exclusion period formally expires.³ While treading familiar ground, Article 57 thus introduces both changed and newly regulated aspects of qualification criteria.

What became Article 57 of the 2014 Directive was Article 55 of the Commission’s 2011 Proposal. The development of the provision is documented in section II, where it is revealed that the Commission set out a skeletal provision, largely unchanged from Article 45 of the 2004 Directive (with the exception of the introduction of ‘self-cleaning’), but that the Parliament and the Council required significant increases in the amount of flexibility and scope of discretion available to both Member States and domestic contracting authorities during the course of the trilogue. Section III discusses the probable interpretation by the CJEU of the amended provision

¹ Art. 45 of the 2004 Directive.

² See, inter alia, art. 23 of Directive 71/305/EEC of 26 July 1971 concerning the coordination of the procedures for the award of public works contracts, OJ [1971] L 185/5, Art. 20 of Directive 77/62/EEC of 21 December 1989 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] OJ L395/33 and Directive 93/36/EC of 14 June 1993 coordinating procedures for the award of public supply contracts, [1993] OJ L199/1

³ See, on self-cleaning generally, H Puender, HJ Priess and S Arrowsmith (eds), *Self-Cleaning in Public Procurement Law* (Carl Heymanns Verlag 2009); S Arrowsmith, HJ Priess and P Friton, ‘Self-cleaning as a defence to exclusions for misconduct: an emerging concept in EC public procurement law?’ (2009) 18(6) *Public Procurement Law Review* 257.

on exclusion which, unsurprisingly, ended up as a complex compromise provision suggesting discretion to a point that may be curbed significantly by the CJEU and its application of the general principles of EU law (in particular equal treatment and transparency). Section IV concludes.

II. EVOLUTION AND DEFORMATION OF ARTICLE 57 IN THE 2011-2014 LEGISLATIVE PROCESS

A. Historical Developments

As noted in the introduction, exclusion criteria are not new to EU public procurement regulation. In its proposal for what became the 2004 Directive, the Commission set out in Article 46 what it then termed qualification criteria based on the ‘personal situation of the candidate or tenderer’.⁴ Reflection on this draft Article 46 makes clear that the Commission was committed to enforcing mandatory exclusion of economic operators who had been convicted in the five years preceding tendering of a variety of criminal offenses⁵; and, furthermore, made it possible to discretionarily exclude economic operators who were, inter alia, bankrupt, guilty of grave professional misconduct or found to have not been paying taxes or social security contributions.⁶

Comparing this draft to the final Article 45 of the 2004 Directive, however, reveals that these Commission proposals were perceived as in part insufficient by the Council and the Parliament. For one, the ‘within the last five years’ condition placed on mandatory exclusions by the Commission was removed; mandatory exclusions for convictions of participation in a criminal organisation, corruption, fraud and money laundering in Article 45 were not time-limited vis-à-vis the date of the conviction. The negotiation process thus resulted in a stricter regime for mandatory exclusions, than what the Commission had proposed. Conversely, the regime set out by the Commission regarding discretionary exclusion and the documentation that could be provided to evidence inapplicability of any of the exclusion grounds, was left untouched by the negotiation process, barring some linguistic clarifications. It is not clear why such substantial changes were made to the mandatory exclusions when the discretionary exclusions were left untouched; however, it appears that already in 2004, the Commission had a different attitude towards excluding economic operators from procurement processes than the Council and the Parliament did.

B. Pre-legislative Stage and the 2011 Proposal

⁴ Commission, Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts, 10.05.2000, COM(2000) 275 final, art. 46.

⁵ COM(2000) 275 final, art. 46(1).

⁶ COM(2000) 275 final, art. 46(2).

Motivation for the Commission's revision of Article 45 of the 2004 Directive can be found in its 2011 Green Paper on the Modernisation of EU Public Procurement Policy.⁷ Here, the Commission makes it clear that the primary problems it has perceived to exist regarding the mandatory exclusions in Article 45 of the 2004 Directive, relate to 'scope, interpretation, transposition and practical application', rather than to substantive content.⁸ It highlights that the Member States have requested clarification of Article 45. As a secondary point, the Commission suggests that it is worth examining whether further grounds for exclusion are required, but it sets out its primary task as being one of clarifying existing provisions.⁹

The Green Paper also notes that there is uncertainty as to how much scope the EU regime should permit for 'national legislation on exclusion grounds', i.e., discretionary exclusion.¹⁰ It highlights here that providing Member States with discretion might enable them to 'tackle specific problems of unsound business behaviours linked to the national context', but that national variance on exclusion grounds could also 'jeopardise the principle of a European level playing field'.¹¹ The Green Paper does not arrive at any conclusions on how to resolve these tensions, but merely suggests that the Commission will consider them.

Finally, the Commission indicates interest in one novelty in the exclusion regime: that of self-cleaning. It suggests, however, that Article 45 already permits consideration of self-cleaning when it comes to certain discretionary exclusion grounds (such as professional honesty, solvency and reliability of the economic operator), but that there are 'no uniform rules' on self-cleaning practice. Key here is the emphasis it places on the fact that self-cleaning *is* standard practice in certain Member States, so it may be inferred that the Commission's priority in this context is the 'European level playing field' rather than increasing the flexibility for contracting authorities.¹²

The issues highlighted by the Commission in its Green Paper all resurface in its 2011 Proposal. Clarification is indeed the main focus of the changes proposed in the field of exclusion: the mandatory exclusion grounds found in Article 55(1) of the 2011 Proposal are substantively largely unchanged, but are more clearly linked to relevant EU legislation on, i.e., participation in a criminal organisation, fraud, and money laundering. It adds 'terrorist offences' to the list of mandatory exclusion grounds. A more substantial and potentially problematic change is its change to the definition of 'corruption', which now also includes *national* law definitions of corruption. More generally, Article 55(1) states that 'the obligation to exclude... shall also apply where the conviction ... has condemned company directors or any other person having powers of representation, decision or control in respect of the candidate or tenderer'. Such persons were mentioned as a source of information in the final version of Article 45; however, the 2004 Directive left it ambiguous whether a conviction of one of these persons

⁷ 2011 Green Paper.

⁸ Ibid, 51.

⁹ Ibid.

¹⁰ Ibid, 52.

¹¹ Ibid.

¹² Ibid.

should also result in exclusion. The proposal for Article 55(1) on mandatory exclusion, hence, is indeed clearer than its predecessor, but otherwise not changed in notable ways.

The Commission proposes a partial novelty in Article 55(2) of the 2011 Proposal. While there was discretion to exclude for the non-payment of taxes and social security in Article 45 of the 2004 Directive, the 2011 Proposal creates a new mandatory exclusion ground for non-payment of taxes and social security *where* the contracting authority is aware of ‘a decision having the force of *res judicata*’ relating to this non-payment. There is no clear reason as to why this mandatory exclusion ground is in a separate paragraph, though the Commission clarifies that it is included as a mandatory exclusion because of the ‘importance of such payments for European public finances and social systems, in particular in times of economic and fiscal crisis’.¹³

The draft proposal on discretionary exclusion grounds is found in Article 55(3) of the 2011 Proposal. Some proposed changes are mere simplifications: for one, the discretionary exclusion relating to a conviction for an offence pertaining to professional conduct has been deleted, as ‘it largely overlaps’ with the discretionary exclusion relating to grave professional misconduct.¹⁴ Other amendments reflect changing EU agendas: for instance, violations of obligations in the field of labour and environmental law are now a discretionary exclusion ground.¹⁵ A further change reflects responses that the Commission obtained to a consultation on a new procurement directive, indicating that contracting authorities wanted scope to consider deficient past performance of a public contract as a discretionary exclusion ground.¹⁶ This was included in Article 55(3) (d); however, it was included in a limited fashion, largely copied from provisions in the WTO’s Government Procurement Agreement.¹⁷ In ~~the~~ this regard, the proposal first suggests that there have to be ‘significant or persistent deficiencies’ before an economic operator can be excluded. Second, the proposal suggests that in order to assess such deficiencies, contracting authorities ‘shall provide a method for the assessment of contractual performance that is based on objective and measurable criteria and applied in a systematic, consistent and transparent way.’ Any assessment of past performance also has to be communicated to the economic operator, who would have a right to object to the contracting authority’s findings. What the proposal thus establishes is *some* discretion for contracting authorities, but in a significantly limited way: the

¹³ See DG Internal Market, Annex to Cluster 3: Reducing documentation requirements (ST-5736/2012), 5, <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%205736%202012%20INIT>> accessed February 2016.

¹⁴ *Ibid*, 6.

¹⁵ See DG Internal Market, Annex to Cluster 2: Strategic use of public procurement (ST-5369/2012), 31, <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%205369%202012%20INIT>> accessed February 2016. The wording of this provision is changed constantly over the course of the negotiating process, but is not discussed in the remainder of the paper, as its meaning does not alter.

¹⁶ Green Paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market Synthesis of replies, <http://ec.europa.eu/internal_market/consultations/docs/2011/public_procurement/synthesis_document_en.pdf> accessed February 2016, 11.

¹⁷ DG Internal Market, Annex to Cluster 3 (fn. 13), 7.

Commission's proposal requires an almost mathematical proof of continued or severe underperformance, which suggests that it intended for this exclusion ground to be used rarely.¹⁸

A new provision describing a process of 'self-cleaning' is found in Article 55(4) of the 2011 Proposal. Of all the Commission's changes to Article 45, this is the most expansive one; however, the wording of Article 55(4) sets out rather general rules, despite claiming to be inspired by legislation and case law from 'various Member States, in particular Germany and Austria'.¹⁹ It makes clear that contracting authorities have full discretion to accept or reject evidence of self-cleaning, providing that they state reasons for rejection to the economic operator. Beyond that, it suggests to economic operators that they must prove that they have a) compensated for damage caused by their behaviour; b) actively collaborated with any investigation of their behaviour; and c) 'taken concrete technical, organisational and personal [sic] measures that are appropriate to prevent' further instances of the behaviour.²⁰ How economic operators must do this is left unclear in Article 55; the Commission commentary on it cross-references to the proposed recital 35, which suggests a few particular steps to be taken by economic operators, such as staff reorganisation and 'appropriate compliance measures to prevent future misconduct'. How contracting authorities are to assess self-cleaning efforts is similarly undiscussed, though [the](#) Commission comments that 'the proposed system ensures that the decision on acceptance of "self-cleaning" measures is taken by the contracting authority on the basis of harmonised criteria in a case-by-case approach.... [which] allows for a flexible and realistic practice'.²¹ This, in the view of the author, is a generous interpretation of the very sparse legislation actually proposed.

Finally, Article 55 of the 2011 Proposal sets out means of obtaining the information required to prove compliance with the exclusion grounds in the most general of terms, simply noting that cooperation between contracting authorities and Member State authorities is required in Article 55(5) and 55(6).

In sum, the Commission thus proposed three 'new' grounds for exclusion – the mandatory 'terrorist offences' and the discretionary 'violation of labour/environmental law' and 'deficiencies in past performance' – and made the previously discretionary exclusion for non-payment of taxes and social security mandatory. Beyond that, it clarified that mandatory exclusion applied not only where convictions concerned the economic operator but also natural persons closely involved in its functioning, and set out that economic operators could in theory self-clean, though contracting authorities are not obliged to accept evidence of self-cleaning. The changes to Article 45 of the 2004 Directive proposed by the Commission are thus relatively

¹⁸ It bases its requirements on allusions to the general principles of equal treatment and transparency, but as will be discussed in section III, there was no effort to do this with other aspects of candidate communication implied by Article 55 as proposed – suggesting that this was a deliberate effort to restrict this discretionary ground rather than simple evidence of awareness of the general principles.

¹⁹ DG Internal Market, Annex to Cluster 3 (fn. 13), 8.

²⁰ Ibid, 8-9.

²¹ Ibid, 9.

modest, with only one truly novel provision in place. However, as we will see, the Council and the Parliament demanded significant changes to what the Commission proposed.

C. Amendments in the Council Presidency's Compromise Texts

Chronologically, the first amendments to Article 55 of the 2011 Proposal were made by the Presidency of the Council, which published subsequent 'compromise texts' reflecting the negotiations between the Member States. The First Council Presidency Compromise Text, published on 24 July 2012, already makes some significant changes to the Commission's 2011 Proposal. Some of these are relatively minor or largely textual in nature; Article 55(1), for instance, is amended to state that the exclusion on mandatory grounds is to be done *by* contracting authorities 'where they are aware' of a conviction.²² This is perhaps a clarification of the original proposal, but does not substantially change it. Another example of a minor change is to Article 55(1) (e), which is amended to state that mandatory exclusion applies to convictions of both money laundering *and* terrorist financing. This is an adaptation only to reflect the corresponding EU legislation, which tackles money laundering and terrorist financing together.²³

Further changes, however, are more substantial. For example, an Article 55(2a) is introduced, stating:

Member States may provide for a derogation from the mandatory exclusions provided for in paragraphs 1 and 2 for overriding requirements in the general interest.

Member States may also provide for a derogation from the mandatory exclusion provided in paragraph 2, where only minor amounts of taxes or social security contributions are unpaid.²⁴

This amendment is a good example of the general tenor that most of the Council's substantive changes adopt: it offers contracting authorities significantly more flexibility to either *act* or *not act* on exclusion grounds, than the Commission's 2011 Proposal did. Similar types of amendments are made in Article 55(3), granting the Member States more policy choice than the Commission's 2011 Proposal did. For example, the first paragraph of Article 55(3) is rewritten to state that '[c]ontracting authorities may exclude or may be required by Member States to exclude' economic operators on the subsequent discretionary grounds. The Council thus prioritises the Member States having control over the use of discretionary grounds, where they

²² Similar linguistic amendments are proposed to art. 55(1), regarding the scope of mandatory exclusions as also applying to 'a person who is a member of the administrative, management or supervisory body of that economic operator' (as opposed to 'company directors'); art. 55(2) (which, *inter alia*, changes 'res judicata' to 'final and binding effect'); art. 55(3) (a) (changing 'legislation' to 'law'); and art. 55(4), where the Council makes explicit that where 'self-cleaning' is deemed sufficient it will not result in exclusion (which is implicit in the 2011 Proposal).

²³ Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, [2005] OJ L309/15.

²⁴ First Council Presidency Compromise Text; all underlining represents changes made by the Council (and is copied from the compromise texts).

wish it. It also adds a number of discretionary exclusion grounds to Article 55(3), again granting Member States and/or contracting authorities more flexible approaches to condemning certain types of behaviour: consequently, the Council suggests anti-competitive agreements (Article 55(3) (d)), serious misrepresentation during a procurement procedure (Article 55(3) (f)), and undue influence of the contracting authority (Article 55(3) (g)) as further discretionary exclusion grounds.

An exception to this general approach is in its amendment to Article 55(3) (d) of the 2011 Proposal, which concerns deficiencies in past contract performance; here, the Council amends what it has renumbered to Article 55(3) (e) to significantly restrict the availability of this exclusion ground, by suggesting that the deficiencies have to have been so serious that they have led to ‘early termination of that prior contract, damages or other comparable sanctions’. It is not clear from the Compromise Text why this particular exclusion ground is limited when, in different scenarios, the Council proposes *further* exclusion grounds.

A similar amendment is the one proposed as Article 55(4a), which sets out maximum exclusion periods to be determined by the Member States, but not exceeding five years in the case of mandatory exclusions and not exceeding three years in the case of discretionary exclusions. Much like the amendment to Article 55(3) (e), and in contrast to most other amendments, this appears to focus on legal certainty and non-exclusion of economic operators rather than on providing flexibility insofar as possible.

Perhaps surprisingly, the Council proposes very limited change to the new Article 55(4) on self-cleaning; its main amendment is to make clear that where an economic operator has been ‘excluded by final judgment from participating in procurement procedures’ it cannot self-clean during the ‘period of exclusion resulting from that judgment’. This is likely to have been added simply to acknowledge that as a matter of law, self-cleaning practices cannot overrule domestic court judgments that result in the exclusion from procurement of economic operators, as they can do in certain Member States.

The Second and Third Council Presidency Compromise Texts were published on 2 and 19 October 2012. Most of the changes in these compared to the First Council Presidency Compromise Text are linguistic in nature, clarifying changes already proposed or perhaps amending them slightly.²⁵ Some changes proposed in the Second Council Presidency Compromise Text were scrapped in the Third Council Presidency Compromise Text: Article 55(1) in the Second Council Presidency Compromise Text suggests that mandatory exclusions should only be triggered by convictions of administrative, managerial or supervisory members of the economic entity *where* the conviction pertained ‘an act or omission that was committed during the exercise of the function in the economic operator’, but the underlined is deleted in the Third Council Presidency Compromise Text. Regarding self-cleaning, the Second Council Presidency Compromise Text makes clear that self-cleaning does not require having *paid*

²⁵ I.e., a revised version of art. 55(3) (d) on anti-competitive agreements Third Council Presidency Compromise Text suggests that rather than outright evidence of such agreements, the exclusion ground can be applied when there is ‘the presence of plausible indicators’ of such an agreement.

compensation in relation to the misconduct, but rather can be evidenced by the economic operator having ‘undertaken to pay compensation’. Under this phrasing, self-cleaning can be *in progress* at the time that an economic operator applies to participate, whereas the Commission’s proposal effectively required it to be *finished*, suggesting that the Council’s priority is including as many economic operators as possible at the time of the procedure where the Commission’s was ‘demonstrably clean’ participation.

The Third Council Presidency Compromise Text proposes another substantial change to Article 55(4) on self-cleaning, by suggesting that it should not apply to the proposed Article 55(2), relating to non-payment of tax and social contributions. This amendment suggests that non-payment of taxes and social contributions are *unlike* other mandatory and discretionary exclusion grounds. Such separation was initiated in the First Council Presidency Compromise Text, where the inserted Article 55(2a) already stated that non-payment of these contributions is not an exclusion ground where the amount of non-payment was ‘minor’, but the special treatment is furthered by the deletion of any reference to Article 55(2) in Article 55(4).

The Fourth Council Presidency Compromise Text, of 14 November 2012, completes the distinct treatment of non-payment of taxes and social security. The Commission’s 2011 Proposal treats it as a mandatory exclusion ground only; but in its Fourth Council Presidency Compromise Text, the Council adds a second paragraph to Article 55(2) stating that in the absence of a final and binding judgment but with awareness of non-payment, ‘contracting authorities may exclude or may be required by Member States to exclude’ such economic operators. The Fourth Council Presidency Compromise Text further adds that the discretionary exclusion will not apply ‘when the economic operator has fulfilled its obligations by paying or entering into a binding arrangement [to pay] the due taxes or social security contributions, including [...] any interest accrued or fines’.²⁶ Non-payment of taxes and social security is thus, in the Council’s amendments, ultimately treated as fully separate from the regular regime of mandatory and discretionary exclusions, including the new provision on self-cleaning which does not apply to it. Why the Council has insisted on a separate regime for non-payment of taxes and social security contributions is, unfortunately, entirely unclear – this is more regrettable as it has been singled out as being one of the strangest aspects of the final Article 57 by commentators.²⁷

The Sixth Council Presidency Compromise Text, dated 30 November 2012, is again one that largely centres on linguistic clarifications and amendments to the provision on exclusions. To summarize the Council’s position prior to trilogue, it suffices to say that it²⁸s most substantial amendments concern the scope for domestic policy offered by the Commission’s 2011 Proposal. Most amendments proposed create more discretion, such as the increased number of discretionary exclusion grounds; the addition of non-payment of taxes and social security contributions as a discretionary exclusion ground; and, the general conditions clarifying in more detail that Member States can make discretionary exclusion grounds mandatory *or* leave

²⁶ Cf. *La Cascina*, C-226 and 228/04, EU:C:2006:94.

²⁷ See HJ Priess, ‘The rules on exclusion and self-cleaning under the 2014 Public Procurement Directive’ (2014) 23(3) *Public Procurement Law Review* 112, 117.

contracting authorities discretion as to whether to apply them. The push for discretion is perhaps unsurprising: the Council's primary goal in the negotiations is undoubtedly to achieve the best possible outcome *for* the Member States. As previous procurement directives have been criticized as lacking in flexibility by the Member States, a push for more discretion is logical. Some of the Council's proposed amendments, however, restrict actions set out by the Commission to a significant extent, such as the limitation on exclusion on the grounds of deficient past performance, whereas others reorder or reword the Commission's 2011 Proposal for reasons that appear purely linguistic. The Council's changes, in short, are substantial; and as revealed in the next section, they do not always correspond to what the Parliament desired in a new procurement framework.

D. Amendments Proposed by the Parliament

The Committee on the Internal Market and Consumer Protection (IMCO) of the Parliament had been considering the 2011 Proposal independently from the Council's negotiations and published its report on 11 January 2013.²⁸ In comparison to the Council, the Parliament proposed relatively few amendments in the present context. Regarding mandatory exclusions, the only real change it proposed was the inclusion of convictions relating to human trafficking and child labour as a ground for exclusion. It suggested a further amendment to the obligation to exclude economic operators where their company directors (etc.) were convicted of one of the mandatory exclusion grounds, but only to stress that where such a conviction arises *during* the procurement procedure, it must also lead to exclusion. One can argue that this was implicit in the Commission's 2011 Proposal, and therefore should not be seen as a major amendment.

Regarding discretionary exclusions, the Parliament proposes a number of changes to the text of the Commission's 2011 Proposal. For instance, first, regarding the exclusion ground relating to bankruptcy and winding-up proceedings in Article 55(3) (b), the Parliament states that 'the common situation where an economic operator has entered into an arrangement with creditors must not be considered as a ground for exclusion by itself'. Instead, it proposes that where an economic operator can prove that it can fulfil the contract despite this arrangement, it should not be excluded. Second, where a conflict of interest of the economic operator *cannot* be remedied by means other than exclusion, the Parliament suggests such a conflict should be a discretionary exclusion ground (Art. 55(3) (da)). The most substantial change to Article 55(3) proposed by the Parliament, however, is the deletion of grave professional misconduct as an exclusion ground. The Parliament here states that 'the wording is too vague' given the seriousness of exclusion. Finally, the Parliament amends the wording of Article 55(3) (d) relating to past performance deficiency, to stress that it is irrelevant whether the past deficiencies arose due to negligence or intention. It further deletes the explicit instructions on evaluating deficits in past performance that the Commission had proposed in Article 55(3), suggesting that the Parliament took a more generous view of applying this discretionary ground than the Commission wished for.

²⁸ The Parliament's Report on the 2011 Proposal.

Beyond this, there are no changes made to the Commission's 2011 Proposal. However, the the Parliament's report does not consider the substantial changes proposed by the Council. While the Parliament might have been broadly satisfied with the Commission's 2011 Proposal, it needed to substantially negotiate with the Council to arrive at an agreed version of Article 55.

E. Trilogue

Despite the transparency in both the Council's compromise texts and the Parliament's report, the actual negotiations in the subsequent legislative trilogue are somewhat of a mystery. The Council's database reveals certain aspects of discussion, but not all – particularly not where there were was substantial disagreement and compromise solutions had to be tabled.²⁹

A 27 March 2013 'Debriefing following technical meetings and an informal trilogue' provides five stages of negotiation progress regarding the provision on exclusion.³⁰ First, there are those aspects of Article 55 that are 'agreed in principle' following the trilogue. These include, for instance, the actual grounds for mandatory exclusion in Article 55(1); the Parliament agreed to include terrorist financing as a ground, and the Council agreed to add human trafficking and child labour as a ground.

The second category is 'compromise proposal tabled' or 'compromise proposal to be confirmed', which suggests that a solution has been put forward but has not yet been agreed. An example of this is found in the first paragraph of Article 55(1), where in the trilogue, the Parliament objected to the trigger of mandatory exclusions proposed by the Council's amendments, i.e., that contracting authorities 'are aware' of a conviction. The compromise proposal reads that contracting authorities 'have established' a conviction. Regarding Article 55(3) (b) on bankruptcy, the compromise proposal in part incorporates the Parliament's suggestion to permit participation by economic operators in arrangements with creditors, but makes this *optional* rather than *required*. Regarding Article 55(3) (c) on grave professional misconduct, again a compromise was proposed – where the Parliament wanted this provision to be removed, the Council appears to have countered with an amendment suggesting that it can be an exclusion ground only where there is 'conclusive evidence' of grave professional misconduct.

The third category is 'awaiting the confirmation by the [Parliament]'. In most instances, this wording simply results in the Council's proposed amendments being repeated; but, as stated, they are repeated without the agreement of the Parliament and, hence, remain under negotiation. Fourth, there is 'discussed at trilogue', which appears to reflect a state of negotiations where no wording at all has been put forward by the Council; for instance, regarding the Council's proposed Article 55(2a), it is noted that '[the Parliament] is agreeable to such a provision' but with no amendments to the wording set out in the Council's compromise texts.

²⁹ See, for instance, the 11 April 2013 'Examination of compromise proposals – 1' [8536/13] <<http://data.consilium.europa.eu/doc/document/ST-8365-2013-INIT/en/pdf>> accessed February 2016, where all 'compromise proposals' are not visible to the public.

³⁰ Debriefing following technical meetings and an informal trilogue covering clusters 5 and 2 [8024/13] <<http://data.consilium.europa.eu/doc/document/ST-8024-2013-INIT/en/pdf>> accessed February 2016.

Finally, there is the seemingly evenly more inconclusive status of ‘to be discussed further’, largely applicable to the final provisions of Article 55, relating to whether or not convictions prevent self-cleaning and the maximum exclusion periods proposed by the Council.

Unfortunately, the next piece of evidence of the negotiation that is publicly available is the ‘Approval of the Final Compromise Text (First Reading)’ of 12 July 2013.³¹ Thus, three months of negotiations and compromise between the Council and the Parliament are a complete mystery; we can see their final agreed positions, but not how they overcame drafts of proposed text that clearly differed. We can therefore assess who ‘won’ on various tabled amendments, but not *why* or *how* they were victorious.

The Parliament, on its first reading (from 13-16 January 2014)³², made a few textual changes but no substantial amendments to the Council’s Final Compromise Text.³³ Its primary contribution in this reading was the renumbering of the various provisions as a consequence of the negotiation process, which is how what was Article 55 of the Commission’s proposal became Article 57 of the 2014 Directive. The resulting text in the 2014 Directive largely reflects the Council’s amendments as set out in section B above. There are points where the wording of the Council’s amended text is again altered slightly, but the entirety of Article 57(1) on mandatory exclusion grounds in principle reflects the Council’s suggestions. The one amendment put forth here by the Parliament – on the inclusion of child labour and human trafficking – has also been adopted, albeit with minor linguistic changes.

The 2014 Directive’s version of Article 57(2) is again primarily a success for the Council: the text incorporates its rewording of Article 57(2) in its entirety. The 2014 Directive also adopts the exemption to the mandatory exclusion grounds in Article 57(3), though it was reworded as a consequence of the trilogue. First, the text adopts the Parliament’s suggestion that derogation from mandatory exclusions should only be available ‘on an exceptional basis’. Second, the new Article 57(3) also rejects discretionary exclusion for non-payment of contributions where the economic operator was not informed in time of how much money owed, and consequently not in a position to repay the contributions before participating in the procurement. It is not clear who proposed this addition to the provision, as it existed in neither the Parliament’s Report on the 2011 Proposal nor in the Council’s compromise texts.

Article 57(4) on discretionary exclusions contains successes for both the Council and Parliament. The Council’s proposed introductory paragraph, enabling Member States to make discretionary exclusions mandatory, is adopted, as are its grounds of anti-competitive agreements, serious misrepresentation, and undue influence. However, the Parliament obtained

³¹ Approval of the Final Compromise Text (First Reading) [11745/13]

<<http://data.consilium.europa.eu/doc/document/ST-11745-2013-INIT/en/pdf>> accessed February 2016.

³² Outcome of the European Parliament’s first reading (Strasbourg, 13 to 16 January 2014) [5218/14]

<<http://data.consilium.europa.eu/doc/document/ST-5218-2014-INIT/en/pdf>> accessed February 2016.

³³ An example of this is its reworking of art. 55(3) (b) on bankruptcy; the Council had agreed to the Parliament’s requirement that arrangements with creditors did not need to lead to exclusion before, but Parliament’s first reading text widens this general principle to saying that where an economic operator in *any* of the bankruptcy-related situations does not need to be excluded if they can perform the contract and national law does not preclude this.

inclusion of its proposal to exclude irremediable conflicts of interest, and also clearly influenced the wording of the final grave professional misconduct exclusion ground, which now states that the contracting authority must be able to ‘demonstrate by appropriate means’ that it is guilty of such misconduct that ‘renders its integrity questionable’. This provides *some* clarity to the original 2011 Proposal supported by the Commission and Council. Finally, Article 57(4) also contains an exclusion possibility for those economic operators who had prior involvement in the contract, if their advantage cannot be neutralized in another way, which surfaced during trilogue and cannot be clearly attributed to either legislative body.

A further negotiated addition, albeit one heavily inspired by a proposed Parliament amendment to Article 57(3), is the new agreed Article 57(5), which makes clear that exclusion can take place at any part of the procurement procedure where excludable behaviour is uncovered or takes place.

Article 57(6) follows the Council’s amended wording to the letter, with the exception of the final paragraph, where the compromise text now reads that exclusion by final judgment cannot be remedied by self-cleaning, but only in those Member States in which the final judgment is effective. Finally, the Council’s proposal on maximum exclusion periods was also adopted in Article 57(7), without any changes, the Council’s proposals to scrap Articles 55(5) and (6) of the Commission’s 2011 Proposal was also adopted.

F. Initial comments

Summarizing the legislative process, we can see that Article 55 of the 2011 Proposal is a very skinny version of what ultimately became Article 57 of the 2014 Directive. Contracting authorities received substantial discretion at the hands of the Council and the Parliament: largely at the insistence of the Council, additional grounds for exclusion were introduced; existing grounds were made more flexible, leaving greater ‘choice’ of exercising exclusion to the contracting authorities; and, Member States were given the option of making discretionary exclusion more policy-driven and centralised than under the 2011 Proposal. At the same time, some efforts were made to introduce greater clarity to the 2011 Proposal, both textually and legally. As such, derogations from the exclusion grounds were made more conditional; exclusion on the basis of past contract performance was made more exceptional; and maximum exclusion periods were set out for the first time. Surprisingly, the great novelty of the 2011 Proposal – the introduction of self-cleaning – was left relatively untouched by all the negotiations: what was done instead, was that non-payment of taxes and social contributions, as an exclusion ground, was subjected to a separate regime, and it was made clear that where convictions by final judgment precluded participation in public procurement, self-cleaning could not overcome this. Consequently, the result is a provision that tries for some legal certainty, but ends up offering flexibility in situations the Commission did not envisage, and that may be relatively difficult for contracting authorities to handle on the ground – that is, if the CJEU will interpret Article 57 in the way that the Council clearly wants it to.

III. CJEU INTERPRETATIONS OF THE NEW ARTICLE 57: DISCRETION OR TRADE?

The least contentious aspects of the new Article 57, and thus those where the Commission's drive to 'clarify' was most successful, are those relating to the mandatory exclusions in Article 57(1). One can imagine the occurrence of some national disputes about whether or not a person exercises 'control' over an economic operator in the future, but beyond that, there is very little left to debate in the final version of the article. One key exception is, potentially, that the concept of a 'conviction by final judgment' will be understandable in all Member States, but Article 57(1) leaves ambiguous *where* this conviction needs to have taken place. As briefly mentioned in section II, Article 57(1) (b) on corruption also refers to non-EU based definitions of the concept, but the remainder of the Directive is silent.³⁴ A CJEU-level case on whether or not a non-EU based conviction should trigger mandatory exclusions is imaginable; generally, however, the vast majority of Article 57(1) is unlikely to result in legal disputes, hence the Commission appears to have achieved its primary goal here.

The same can unfortunately not be said for those parts of Article 57 that permit significant discretion. Discretion is in direct opposition to the fundamental general principles underpinning all EU law, such as equal treatment, transparency and proportionality. A transparent procedure, as the CJEU has forcefully established in the field of public procurement, is one that is advertised and operated under clear and accessible procedural rules.³⁵ To demonstrate the clash between the Council's negotiation position and the CJEU's operation of the transparency principle, it is worth highlighting that in *Costa and Cifone* the CJEU stressed that any rules a contracting authority decides to apply 'must be drawn up in a clear, precise and unequivocal manner, to make it possible for all reasonably informed tenders exercising ordinary care to understand their exact significance and interpret them in the same way, and to circumscribe the contracting authority's discretion'³⁶ This is the case regardless of whether the procurement directives apply to a given award procedure, although contracts awarded under the directives are subject to stricter rules than contracts that fall below the directive's thresholds or are otherwise excluded from them.³⁷ Of course, where contracting authorities are considering exclusion grounds, they are dealing with contracts that are subject to the rules in the directives, and consequently the more strict transparency requirements therein.³⁸

³⁴ See Priess (fn. 27), 114.

³⁵ See S Arrowsmith, *The Law of Public and Utilities Procurement* (3rd edn, Vol I, Sweet & Maxwell 2014) sections 4-33 – 4-46 and the literature and case law cited there; in particular, *Telaustria*, C-324/98, EU:C:2000:669 and *Coname*, C-231/03, EU:C:2005:487.

³⁶ *Costa and Cifone*, C-72/10 and C-77/10, EU:C:2012:80, para 73. See similarly *Commission v Netherlands*, C-368/10, EU:C:2012:284, para 109.

³⁷ Arrowsmith (fn. 35), 272-273.

³⁸ See, generally, Arrowsmith (fn. 35), sections 7-20 – 7-23.

Article 57 is silent on transparency in its entirety, with the exception of Article 55(4) on self-cleaning, which suggests that reasons for a rejection of a self-cleaning application must be set out to the economic operator. This leaves various aspects of exclusion of economic operators untouched, yet likely the subject of a CJEU judgment sooner rather than later.

The first of these is exercise of discretion on the part of economic operators. Where a Member State decides to require discretionary exclusion, it effectively becomes mandatory exclusion, and this will be as transparent as the application of Article 57(1). However, where Member States leave the exercise of discretion in Article 57 to contracting authorities, contracting authorities are left with the responsibility to take at least three significant decisions in an EU-compliant manner:

- a) Which discretionary exclusion grounds, if any, they are applying;
- b) What evaluation criteria they are operating (which may be clear – i.e., regarding bankruptcy – but might also be very flexible – i.e., regarding ‘grave professional misconduct’) when applying those discretionary exclusion grounds;
- c) What particular evaluation criteria they are operating when considering if self-cleaning, relating to those exclusion grounds, has been successful.

The CJEU’s case law on the disclosure of methodology used for selection and award criteria, and particularly, the disclosure of award subcriteria (where they exist) and weightings of both criteria and subcriteria (where they exist) makes clear that discretion, even if seemingly limitless, is rarely actually that.³⁹ Where contracting authorities thus develop a system for operating discretionary exclusion grounds – involving both the exclusion criteria and any criteria they will take into account particularly when considering self-cleaning – they are required to set out to participants in a procedure what that system looks like. One possible solution is to simply *not* set out exact rules – at which point, much like with subcriteria, there cannot be a requirement to publicize them. However, while this would result in fewer grounds for appeal relating to the general principle of transparency, it is very possible that the CJEU would conclude that the application of discretionary exclusion grounds by such a contracting authority is then *itself* in violation of the general principle of equal treatment. After all, it will be very difficult for a contracting authority to prove that it was treating similar economic operators who triggered similar exclusion grounds in an ‘equal fashion’ if they are not using transparent, clear and fixed procedural rules to testify to such treatment.

In short, it is in a contracting authority’s best interest to apply exclusion grounds in similar ways to similar procurement procedures; otherwise, they risk treating similar situations differently. Such ‘similarity in treatment’ is in practice likely to result in an actual set of criteria for weighing both exclusion grounds and self-cleaning evidence, implying that these criteria should be communicated to bidders. Where EU-compliant operation of Article 57(4) (on discretionary exclusion) and 57(6) (on self-cleaning measures) depends on there being an

³⁹ See *Universale-Bau*, C-470-99, EU:C:2002:746; *Lianakis*, C-532/06, EU:C:2008:40.

‘organised’ system of the exercise of discretion, it is possible that, despite the Council’s victory in text regarding flexibility, the CJEU’s case law on disclosure of methodology relating to award and selection criteria will make experienced contracting authorities wary of exercising such flexibility. Meanwhile, it is those contracting authorities who take the flexibility offered by Article 57 at face value, who are likely to produce further case law on just how the principle of transparency restricts discretion in the context of exclusion.

In terms of ‘clarifying’ the procurement directives, legal disputes are also likely on the Council’s proposed derogation to the exclusion on the basis of non-payment of taxes and social security, largely because the notion of a ‘minor amount’ of non-payment will be contentious.⁴⁰ One can expect significant domestic case law about the definition of ‘minor’ in this context – and where there is substantial national differentiation, these national definitions may ultimately reach the CJEU.⁴¹ The CJEU has offered some clarification in the *Libor* case, where it found that a national law that required exclusion of an economic operator with social security back payments that ‘[exceed] EUR 100 and [are] greater than 5% of the sums owed’ was compatible with the 2004 Directive⁴²; but a single example of a ‘non-minor’ amount under the 2004 Directive does not preclude case law on a ‘minor amount’ under the 2014 Directive.

IV. CONCLUSIONS

The Commission, as discussed, aimed to clarify the existing Article 45 of the 2004 Directive and to introduce an option for self-cleaning to the EU procurement directives. Surprisingly, the introduction of self-cleaning was in many ways the least contentious aspect of the negotiations that took place between the Council and Parliament. There was some debate about whether or not self-cleaning could also apply to those economic operators who were excluded from procurement by a conviction, but this one issue aside, the proposed Article 55(4) survived largely untouched.

The same cannot be said for the Commission’s efforts to clarify the contentious parts of Article 45 of the 2004 Directive. Some of the problematic issues in Article 45 were remedied by Article 55 of the 2011 Proposal, but the Commission’s proposal was retouched to such an extent that primarily the Council, but in part also the Parliament, have introduced entirely *new* problems to the EU directives’ exclusion grounds. In particular, the Council’s insistence on greater discretion in Article 57 results in a situation where almost too much responsibility for compliance with very general, flexible norms falls to contracting authorities. Legal certainty is

⁴⁰ A Sanchez-Graells, ‘Exclusion, Qualitative Selection and Short-listing in the New Public Sector Procurement Directive 2014/24’ in F Lichere, R Caranta and S Treumer (eds) *Novelties in the 2014 Directive on Public Procurement* (Djøf 2014), 107.

⁴¹ As Arrowsmith (fn. 35), 229, notes, even where such a case would appear before the CJEU, it is unlikely to offer a precise, numerical definition of the term.

⁴² *Consorzio Stabile Libor Lavori Pubblici*, C-358/12, EU:C:2014:2063, paras 32-40.

not the primary result of the Article 57 negotiation process, given the amount of scope for discretion it leaves with individual contracting authorities.

However, that is not to say that the Council will have succeeded in its goals, either. Clearly, it wanted to introduce an amount of discretion to Article 57 that resulted in contracting authorities being able to exclude economic operators on *more grounds*, corresponding to either domestic or EU-level priorities, but it simultaneously aimed to restrict the effects of these exclusion grounds in certain cases, so as to ensure greater *participation* in procurement. The ultimate outcome of the Council's amendment package is a degree of optionality that is likely to trigger violations of EU law's general principles, if liberally exercised by contracting authorities. Conversely, however, contracting authorities may have learned from the CJEU's revolutionary *Telaustria* case law – and may at this point be very wary of any EU provisions that appear generous and flexible, as the CJEU is likely to interpret such provisions in a limiting way so as to promote clarity and predictability and not discourage cross-border procurement. Hence, contracting authorities familiar with the CJEU's case law may consequently hesitate to actually utilize the degree of discretion mandated by the Parliament and the Council, in which case the practical effects of the provision may be more similar to what the Commission envisioned after all.

Time will tell how the Article 57 will be interpreted by the CJEU; what we can conclude for now is that a relatively clear Article 45 has become a significantly more debatable and only marginally clearer Article 57, albeit with an explicit option for self-cleaning. It is in introducing what is the most novel aspect of Article 57 that all three of the EU's legislative bodies appear to have been on the same page – but in revising their earlier work, they appear to have created more uncertainty than they have resolved; hence, the provision on exclusion is arguably deformed.