



# Exclusion Grounds

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# Exclusion and Competition

## **Exclusion of Economic Operators**

- Strong procedural tool for cleaning the business stage
- Intervention in competition field
- Competition is self-regulating activity
- Not in wide use
- Creates problems instead of problem-solving



02

## Exclusion and Legal Framework

# Exclusion and Legal Framework (I)

## Procurement Law

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Directive 2014/24/EU

Non-compulsory grounds for exclusion

Discretion of CA

Self-cleaning

Principle of proportionality

Integrity and reliability

## Contract Law

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Deficiencies in contract performance

Breach of contract

Contract disputes

Court decisions

# Exclusion and Legal Framework (II)

- Exclusion of EO from procurement procedure is a typical procurement legal problem
- It arises from the distinction and correlation of procurement and contract law
- Exclusion has its roots in breach of contract/deficiencies in contract performance

# Exclusion and Legal Framework (III)

- Breach of contract/deficiencies in contract performance are the basis of contract disputes and contract law cases
- **Here is PP law soft, light, and at the discretion of CA!**
- As PP law is often wrongly and dominantly perceived as an exclusive, compact legal field, apart from contract law, the existing problem is normal
- The result is a conflict of understanding of the exclusion as a tool and a consequence of the non-existing fulfilment of contract obligations



03

Optional or discretion  
right of CA



# Optional or discretion right of CA (I)

## **Optional application of the legal instrument**

- Applicant has a discretionary option to apply or not
- If applied, the reasons for application have to be given and secured
- Decisions made in an optional regime must have the possibility to be controlled

# Optional or discretion right of CA (II)

## **Exclusion of EO in public procurement procedures**

- Decision must necessarily be capable of being challenged by any person having or having had an interest
- There has to be the possibility of assessment as to whether the conditions required for the application of one of the non-compulsory grounds for exclusion were satisfied (C-927/19)
- Exclusion must not be applied arbitrarily
- Exclusion has to be measured and adjusted to the level of misconduct (principle of proportionality)



04

## Non-compulsory grounds for exclusion and EU law

# Non-compulsory grounds for exclusion and EU law (I)

## EU level

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Treaty on EU

Treaty on the Functioning of the EU

Common market

Directives

Obligation to implement

## MS level

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Public Procurement Act

Obligation to implement an idea from the Directive in accordance with MS law and local system

# Non-compulsory grounds for exclusion and EU law (II)

- If the wording of the Directive is "MS may..." then it is a recommendation for consideration, not an obligation of implementation - implementation is optional
- In that case, MS may ignore the proposal or regulate the proposed matter in accordance with EU law

# Non-compulsory grounds for exclusion and EU law (III)

## Directive 2014/24/EU, Article 57.(4)

- *Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator...*
  - Addressed (not primarily to MS but) to CA
  - Optionally addressed to MS
  - Action: Exclusion of EO in numbered cases
  - Action is optional, non-compulsory! Action is CA discretionary right.

# Non-compulsory grounds for exclusion and EU law (IV)

## Court of Justice EU - Meca, C-41/18

„Member States’ *discretion is not absolute* and that, once a Member State decides to incorporate one of the optional grounds for exclusion provided for in Directive 2014/24, it must respect the *essential characteristics* thereof, as expressed in that directive.

By stipulating that the Member States are to specify ‘the implementing conditions for this Article’ ‘having regard to Union law’, Article 57(7) of Directive 2014/24 prevents Member States from *distorting the grounds for exclusion laid down in that provision or ignoring the objectives or principles underlying each of those grounds.*”



05

Non-compulsory  
grounds for exclusion  
and Croatian PPA



# Non-compulsory grounds for exclusion and Croatian PPA (I)

## Croatian PPA- Article 254. and others

- Similar, almost equal wording as Directive
- Same grounds for exclusion
  - grave professional misconduct
  - significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract....
- Optional right of CA
  - CA has freedom to decide upon the application of a given ground within a given procedure in tender documents
  - CA may decide that within a given procedure it would resign from examining any non-compulsory grounds or that it would examine only selected grounds

# Non-compulsory grounds for exclusion and Croatian PPA (II)

- Croatia did not avail of the opportunity to make more precise the content of the provisions of Directive 2014/24/EU in the national legal regime in such manner that would make it possible to minimize the *interpretational doubts concerning*, e.g. the relationship between individual exclusion grounds, the moment from when the exclusion period should be calculated or the self-cleaning procedure
- These doubts will have to be resolved in the case law of the CJEU or of national remedy body/court



06

Non-compulsory  
grounds for exclusion  
in practice

# Non-compulsory grounds for exclusion in practice (I)

## *Modus aplicandi (modus of application)*

- Article 57(4)(c)
  - CA can demonstrate **(prove)** by appropriate means **(relevant proofs)** that the economic operator is guilty **(culpa)** of grave professional misconduct **(legal standard)**, which renders its integrity questionable
- Predictions for exclusion application
  - Procedure of fact findings, assessment-prove
  - Existence of proofs for facts
  - EO responsible- guilty (culpa)- wrongful intent or negligence of a certain gravity on its part (C-425/18)
  - Proved activity shall be grave professional misconduct (legal standard)
  - Questionable integrity is result of professional misconduct

# Non-compulsory grounds for exclusion in practice (II)

## Problems

- Definition of grave professional misconduct (legal standard- regulated by the law, rarely by CA)
- Assessment of questionable integrity
- Level of responsibility required (wrongful intent or negligence of a certain gravity)
- Demanding procedure- difficult assessment and **extremely hard sanction** (exclusion from procurement procedure)
- Questionable quality of procedure performance, risk of subjectivity and arbitrary performance (civil court case- level of complexity)
- Application of proportionality principle

# Non-compulsory grounds for exclusion in practice (III)

## Solutions often in use

- CA assessment is arbitrary, not objective (both parties were not confronted with proofs)
- Different/same CA make different decisions
- Exclusion is rarely applied even when there is a real reason
- When there is no commercial or civil court decision

# Croatian Case Law (I)

**CA defines in the tender documentation that violation of GDPR is grave professional misconduct**

- **Facts:** Security services - During the review of the video surveillance video, one of the bidders' employees recorded a certain person with a mobile device and shared the video with a third person, after which the video was spread on social networks, the person was subjected to abuse.
- **Proofs:** News in the media, Decision of the Agency for Personal Data Protection which determined that the bidder violated the rules of personal data processing.
- **CA decision:** The contracting authority considers that in this case the exclusion of the bidder from the public procurement procedure would not be proportional to the severity of the specific violation, given that it is an isolated case, and not a serious violation of personal data at the company level, which would jeopardize its integrity until exclusion from the public procurement procedure

- **Issues**

- Decision of the CA different from the decision of the Agency for Personal Data Protection?
- Application of the principle of proportionality
- Grave professional misconduct or minor irregularities?
- Freedom of CA to make decision about reliability of the economic operator

- **PRB decision:** Confirms the decision of the CA



# Croatian Case Law (II)

## Breach of contract, deficiencies in the performance of requirement under a prior public contract, 5 different cases

- **Facts:** Termination of the previous contract due to non-performance of contractual obligations within the deadline
- **Proofs:** Contrary statements of the parties, civil proceedings pending
- **CA decision:** Different decisions of different CA, 5 different cases
- **PRB decision:** Confirms decisions of all CA (???)
- **Issues:**
  - Same facts- different ground for exclusion (Article 57.(4)(c) or (g))
  - CA decision before civil court decision
  - Freedom of CA to make decision about reliability of the economic operator
  - Different decisions of different CA

# Croatian Case Law (III)

## Grave professional misconduct, ESPD form, giving information to CA

- **Facts:** Distortion of competition
- **Proofs:** No decision of the Cartel Court was made at the time of the submission of the bid
- **Issues:**
  - Not giving information in ESPD
  - Classification of the grave professional misconduct is a matter for the discretion of the contracting authority, that classification may prove unforeseeable for the tenderer
  - Self-accusation by providing a list of failures that could possibly be classified by the contracting authority as 'grave misconduct'

- **PRB decision:** State Commission considers that responsibility and guilt do not arise during the conduct of proceedings, or investigative actions, but by the final decision of the competent body or a court.
- According to the assessment of the State Commission, in the specific case EO was not obliged to provide information on its actions for which no decision of the Cartel Court had been made at that time.



KEEP  
CALM  
AND

CUM GRANO  
SALIS

07

Recommendation

# Recommendation

- Apply exclusions *cum grano salis*- carefully taking in consideration all abovementioned limitations, scrutinise, drills and fears
- Make more precise the content of the provisions of Directive 2014/24/EU in the national legal regime in such manner that would make it possible to minimalizeze the interpretational doubts

# Thanks!

Do you have any questions?

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