The Distortive Impact of Article 57(4)(d) of Directive 2014/24/EU on Competition in EU Public Procurement

*Watan A. Abuqaoud**

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* Watan Abuqaoud is an LL.M. graduate from the University of Antwerp. She earned her Bachelor of Laws from Al-Azhar University in Palestine, where she focused on international law, human rights, and women's rights. During this period, she also served as an advisory member with UN Women Palestine, contributing to initiatives advancing gender equality and women's empowerment. During her master's studies, she broadened her academic focus by specializing in commercial law, with particular emphasis on EU competition law and EU public procurement. This specialization enabled her to explore the intersection between her background in rights-based legal frameworks and commercial law.

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I. Introduction

Public procurement is the purchase of goods or services by the public sector and it generally accounts for a large share of public expenditure in a domestic economy.[1] Existing statistics suggest that public procurement represents a significant part of the EU economy. Each year, more than 250,000 public bodies across the EU spend approximately EUR 2 trillion, equivalent to around 14% of the EU's GDP, on procurement of goods, services and works.[2] Public procurement plays multiple roles in the public sector: it is a catalyst for public-private collaborations, has value for businesses (for example, by sustaining small and medium-sized enterprises (SMEs) or stimulating innovation), and can bring new resources, services, solutions, and methods directly into government operations.[3] In addition, public procurement is the largest platform for government interaction with the private sector, as governments are the chief buyers of various categories of goods, services, and public works.[4]

Governments are under increasing pressure to improve the cost-effectiveness of public services while addressing complex challenges like climate change, public health crises, and digital transformation.[5] By strategically utilizing public procurement, governments can stimulate the development of new products, services, and technologies to address emerging societal needs, thus improving public services, and strengthening the business ecosystem, especially for SMEs.[6]

Public procurement is one of the market-based instruments to be used to deliver the Europe 2020 strategy for Smart, Sustainable and Inclusive Growth by aiming to improve the conditions for business to innovate, encourage the wider use of green procurement, ensure the most efficient use of public funds, and keep procurement markets open EU-wide.[7] These aims are reflected in the changes incorporated into the 2014 Directives, which focus on ensuring transparency, increasing flexibility and encouraging the involvement of SMEs in public procurement.[8]

The efficiency of the procurement process will, in turn, depend upon how the process is designed and carried out.[9] Procurement is often, but not always, carried out through

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[1] OECD, *Public Procurement – The Role of Competition Authorities in Promoting Competition*, Series Roundtables on Competition Policy No. 71, OECD Publishing, Paris, 2007, DAF/COMP(2007)34, p. 7, available at: https://www.oecd.org/en/publications/public-procurement-the-role-of-competition-authorities-in-promoting-competition_8ed0c7ba-en.html
[2] Ibid.
[3] OECD, *Public Procurement for Public Sector Innovation: Facilitating Innovators' Access to Innovation Procurement*, OECD Working Papers on Public Governance No. 80, OECD Publishing, Paris, 2024, p. 9, available at: The Role of Competition Authorities in Promoting Competition
[4] Ibid.
[5] Ibid. at p. 4.
[6] Ibid.
[7] SIGMA, *Selection of Economic Operators in Public Procurement Procedures*, SIGMA Paper No. 56, OECD Publishing, Paris, September 2018, p. 15.
[8] Ibid.
[9] OECD, *Competition Policy and Procurement Markets*, Series Roundtables on Competition Policy No. 20, OECD Publishing, Paris, 1999, DAFFE/CLP(99)3/FINAL, p. 17, available at:

competitive "bidding" or "tendering" processes. In particular, a bidding process may both identify the most efficient producer of a certain good or service and simultaneously determine the efficient price.[10] Open, competitive processes may ensure access to business opportunities for new suppliers and can be more easily defended against claims of discrimination or favoritism.[11]

In all markets, the efficiency of bidding processes depends upon the number of potential bidders.[12] When the number of potential bidders is very small a single bidder may have very significant market power. In this context a simple auction will not yield an efficient outcome.[13]

According to the OECD, reducing barriers to entry to procurement procedures is one way to enhance competition in procurement by increasing the number of competitors. Procurement policy therefore may be used to shape the longer-term effects on competition in an industry sector.[14] Thus, public procurement and competition are inherently linked. Public procurement regulations are strongly linked to free market economics and their final justification has always been primarily twofold: to guarantee the fundamental freedoms under the Treaty on the Functioning of the European Union ("TFEU") and to implement the economic policy of opening up public procurement to competition as a key tool for the development of the internal market in areas largely controlled by public demand.[15]

Competition in the public procurement market is essential for the efficiency of public expenditure. Competitive and transparent markets are necessary for public authorities to purchase goods and services at lower prices and of better quality, with a considerable simplification of the purchasing process and a reduction of administrative costs and other inefficiencies.[16] The European Court of Justice (ECJ) has repeatedly stressed that the purpose of the public procurement directives is to develop effective competition in the field of public contracts.[17]

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https://www.oecd.org/content/dam/oecd/en/publications/reports/1999/05/competition-policy-and- procurement-markets_7ef6a96e/071ae827-en.pdf

[10] Ibid.

[11] Ibid.

[12] Ibid. at p. 16.

[13] Ibid.

[14] Ibid. at p. 21.

[15] Albert Sánchez-Graells, Public Procurement and the EU Competition Rules, 2nd ed. (Oxford: Hart Publishing, 2015), p. 6.

[16] Isabelle Adam, Alfredo Hernández Sánchez, and Mihály Fazekas, *Global Public Procurement Open Competition Index*, GTI Working Paper Series GTI-WP/2021:02 (Budapest: Government Transparency Institute, April 7, 2021), p. 6, https://www.govtransparency.eu/wp-content/uploads/2021/09/Adam-et-al_Evidence- paper_procurement-competition_210902_formatted_2.pdf.

[17] SÁNCHEZ GRAELLS, A., "Truly Competitive Public Procurement as a Europe 2020 Lever: What Role for the Principle of Competition in Moderating Horizontal Policies?", *European Public Law*, vol. 22, no. 2, 2016, pp. 377– 394, at p. 3, available at: https://research-information.bris.ac.uk/ws/portalfiles/portal/47837419/Truly_competitive_public_procurement_as_a_Europe_2020_lever_EPLJ_revised_.pdf.

Despite the framework supporting competition, certain mechanisms are necessary to safeguard the integrity of the procurement procedures. In this context, exclusion grounds play an important role. Exclusion grounds refer to legal reasons based on which contracting authorities may or must disqualify economic operators from participating in public procurement procedures. Their purpose is to ensure that only trustworthy and reliable operators are awarded public contracts, thereby protecting the general interest and safeguarding public funds.

The adoption of exclusion measures is nothing new in EU public procurement law. Article 23 of Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts had already provided for the possibility of excluding tenderers who failed to provide sufficient guarantees of their ability to execute the contract or who breached applicable legislation.[18] However, the 2004 Directive marked the first occasion on which certain exclusion grounds were made mandatory by the EU legislator. The 2014 Directive logically builds on the 2004 reform.[19] Its Article 57 covers both mandatory exclusion grounds, where disqualification is automatic, and discretionary exclusion grounds, where contracting authorities have the choice to exclude an operator under certain circumstances.

Procurement plays a crucial role in a country's development. Therefore, it attracts strong interest from economic operators who may try to manipulate the process for profit (Azfar et al., 2001; Della Porta & Vanucci, 1999; Rose- Ackerman, 1999; Tanzi & Davoodi, 2002).[20] Therefore, among the discretionary exclusion grounds introduced in 2014, Article 57(4)(d) of Directive 2014/24/EU plays a pivotal role. It permits contracting authorities to exclude economic operators where there are "sufficiently plausible indications" that the operator has entered into agreements with other economic operators aimed at distorting competition. However, this provision is drafted in broad and ambiguous terms, granting significant discretion to contracting authorities and creating legal uncertainty for economic operators.

This thesis investigates the distortive and disproportionate impact of Article 57(4)(d) of Directive 2014/24/EU on competition in EU public procurement, especially its role as a discretionary exclusion ground targeting economic operators involved in anti-competitive practices. While the Article is framed as a tool to safeguard procurement integrity, this research reveals that its ambiguous, broad scope, inconsistent national transposition, and broad discretionary application have a counterproductive effect on competition in public procurement and ultimately the market.

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[18] ARNÁIZ, T., "Grounds for Exclusion in Public Procurement: Measures in the Fight Against Corruption in European Union", in *Proceedings of the 2nd International Public Procurement Conference*, 21–23 September 2006, p. 338.

[19] de Mars, S., "Exclusion and Self-Cleaning in Article 57: Discretion at the Expense of Clarity and Trade?", in Ølykke, G. and Sanchez-Graells, A. (eds), *Reformation or Deformation of the EU Public Procurement Rules*, Edward Elgar Publishing, 2016, (pp.253-273) p. 254. Available at: Exclusion and Self-Cleaning in Article 57: Discretion at the Expense of Clarity and Trade?.

[20] ARNÁIZ, T., *supra* n. [18]., p. 332-333.

The thesis research aims to answer the following question: "Does Article 57(4)(d) of Directive 2014/24/EU undermine the need for diverse and competitive public procurement procedures?".

Therefore, this research adopts a doctrinal legal methodology as its primary approach. It systematically examines the relevant provisions of EU public procurement law, particularly Directive 2014/24/EU and its Article 57(4)(d), alongside the broader legal framework established by the Treaty on the Functioning of the European Union (TFEU). The analysis relies on the interpretation of legal texts, case law of the Court of Justice of the European Union (CJEU), and general principles of EU law, including the principles of proportionality, competition, transparency, and equal treatment.

In addition to doctrinal research, the study applies a comparative legal analysis. This comparative dimension focuses on the transposition and application of Article 57(4)(d) in two selected Member States: Germany and Hungary. By contrasting their national implementations, procedural mechanisms, and approaches to self- cleaning, the research identifies divergences and evaluates the broader effects on legal certainty and competition within the EU internal market.

To complement the legal analysis, the research also incorporates secondary empirical data, particularly statistical findings from institutional reports, such as the European Court of Auditors' 2023 Special Report on Public Procurement. This data is used to contextualize and support the assessment of how exclusion grounds, especially under Article 57(4)(d), impact competition levels across the EU procurement market. No primary empirical research (such as surveys, interviews, or fieldwork) was conducted; instead, the study builds on established doctrinal sources, jurisprudence, and authoritative empirical evidence to provide a solid legal and practical evaluation

A. Exclusion of Economic Operator from Public Procurement under Article 57(4)(d)

Looking at the EU procurement directives of 2014 and the context in which they were adopted is an important step to understanding the basics of public procurement in the European Union (EU).[21] Therefore, before the assessment of the exclusion penalty under Article 57(4)(d) of Directive 2014/24 on the competitiveness of the process of public procurement, it is important to set the foundation for a more comprehensive analysis.[22] Therefore, This chapter aims to cover the legal framework of public procurement in the European Union, with particular focus on the exclusion of economic operators under Article 57(4)(d) of Directive 2014/24/EU. Also, the chapter examines the structure and purpose of EU competition law and its interplay with public procurement, showing how both aim to ensure market integrity and fair access to public contracts.

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[21] SØRENSEN, K.E., JESSEN, P.W., et al., "Chapter 12: Public Procurement", in *Regulating Competition in the EU*, 2nd ed., Kluwer Law International, 2024, p. 561.
[22] Ibid.

1. Rationale of Directive 2014/24/EU: brief overview

The development of European Union public procurement law progressed further with the Green Paper Modernisation of EU Public Procurement Policy, aiming for a more efficient European Procurement Market. The focus lay in refining the innovation framework, enhancing the business climate, promoting broader adoption of green procurement, and upgrading existing procurement rules. This initiative led to the adoption of three directives: the new Procurement Directive (Directive 2014/24/EU), the revised Utilities Directive (Directive 2014/25/EU), and, for the first time, the Concession Contracts Directive (Directive 2014/23/EU).[23] Among these three directives, Directive 2014/24 is the most comprehensive and broad one, including the entire public sector across all Member States.[24]

The scope of the directives in the field of public procurement does not seek to enforce or establish a uniform regulatory regime on EU Member states.[25] Rather, member states can continue to apply their national procedures as adapted to the Directive.[26] Therefore, member states are allowed to maintain or adopt substantive and procedural rules to the extent that these rules do not conflict with the Directive.[27] In essence, the common rules of the Directives in this field consist of applying the basic principles of proportionality, competition, non-discrimination, equal treatment and transparency.[28]

Directive 2014/24, which was to be transposed into national legal systems of the Member States on 18 April 2016, found its foundation in the general rules of the Treaty on the Functioning of the European Union ("*TFEU*"), especially the rules on freedom of movement.[29] These rules state clearly that its objective is to facilitate the exercise of freedom of movement and freedom of establishment of a self-employed person and goods through the adoption of the directive with regard to mutual recognition of diplomas and coordination of the relevant national legislation.[30] The CJEU established that it is not compatible with the rules on freedom of movement for discriminatory conditions to be applied to the granting of public contracts.[31] Thus, it is not permitted to require that the goods in question must be from some specific source or that the workers employed in the

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[23] Ibid.
[24] Ibid. at p. 563.
[25] SIGMA, *Public Procurement in the EU: Legislative Framework, Basic Principles and Institutions*, Brief 1, OECD Publishing, September 2016, p. 3, available at: https://www.sigmaweb.org/en/publications/public-procurement-in-the-eu_caee1fdb-en.html.
[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] SØRENSEN, K.E., JESSEN, P.W., et al., *supra* n. [21], at p. 559
[30] PAPADOPOULOS, T., "Article 53 TFEU [Mutual recognition of diplomas" in BLANKE, H.J. and MANGIAMELI, S. (eds), *Treaty on the Functioning of the European Union – A Commentary*, Springer, 2021, (1121) 1121 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3924132.
[31] SØRENSEN, K.E., JESSEN, P.W., et al., *supra* n. [21], at p. 559.

provisions of a service must be from specific nationality.[32] Also, Article 114 TFEU[33] confers a discretion on the EU legislature, in particular with regard to the possibility of proceeding towards harmonization in stages and requiring only the gradual abolition of unilateral measures adopted by the Member States.[34]
This is affirmed in Recital 1 of Directive 2014/24 which states that "*Member States' authorities has to comply with the principles of the TFEU, and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency.*"[35]

The main objectives of Directive 2014/24 are to i) improve the conditions for business to innovate; ii) encourage the wider use of green procurement; iii) ensure the most efficient use of public funds; and iv) keep procurement markets open EU-wide.[36] This is through establishing rules on the procedures for procurement undertaken by contracting authorities, specifically in relation to public contracts and design contests. These procedures come into effect when the estimated value of such contracts meets or exceeds the financial thresholds established under Article 4 of the Directive.[37] The rationale behind introducing such thresholds is that the European Union legislature intends to focus the scope of the Directive on those contracts that are most likely to have a negative effect on cross-border trade within the EU Internal Market.[38] Therefore, generally speaking, public procurement procedures in the EU are carried out on the basis of national rules, however, for higher value contracts that meet the threshold set by the Directive, these rules are based on general EU public procurement rules.[39]

(a) Public Procurement

Public procurement represents a significant part of the EU economy. Each year, more than 250,000 public bodies across the EU spend approximately EUR 2 trillion, equivalent to around 14% of the EU's GDP, on procurement of goods, services, and works.[40] Public

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[32] Ibid.
[33] EUROPEAN UNION, *Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC*, OJ L 94, 28 March 2014, at Preamble.
[34] ECJ, C-547/14, Philip Morris Brands SARL and Others v Secretary of State for Health, ECLI:EU:C:2016:325, 4 May 2016, para 10 Philip Morris Brands SARL and Others v Secretary of State for Health.
[35] DIRECTIVE 2014/24/EU, *Supra* n. [33], at Recital 1.
[36] OECD, *2014 EU Directives: Public Sector and Utilities Procurement*, SIGMA Public Procurement Brief No. 30, July 2014, available at: https://www.oecd.org/content/dam/oecd/en/publications/reports/2014/07/2014-eu-directives-public-sector-and-utilities-procurement_g17a25f8/5js4vmngsbvk-en.pdf (last accessed 22 December 2024), p. 2.
[37] ERA – Academy of European Law, *Summer Course on European Public Procurement Law*, completed December 2024, available at: https://www.era.int/cgi-bin/cms?_SID=10cb6cf3e4f56b26c12ceb539daf01a345b9546d01123582520465&_sprache=en&_bereich=artikel&_aktion=detail&idartikel=132613.
[38] SIGMA, *supra* n. [25], at p. 3.
[39] European Commission, *Public Tendering Rules in the EU*, available at: https://europa.eu/youreurope/business/selling-in-eu/public-contracts/public-tendering-rules/index_en.htm (last accessed 28 December 2024).
[40] GRANDIA, J. and VOLKER, L. (eds), *Public Procurement: Theory, Practices and Tools*, Springer, 2023, p. 14.

procurement regulations are closely tied to free market principles and are mainly justified by two core aims: ensuring the fundamental freedoms guaranteed by the *TFEU* and promoting economic policies that encourage competition in public sector purchasing, which is seen as essential for developing the internal market in areas heavily influenced by public spending. [41]

The broader legal foundation of EU public procurement law lies in the TFEU, specifically in the fundamental freedoms enshrined in Articles 34, 49, and 56, which prohibit restrictions on the free movement of goods, freedom of establishment, and the freedom to provide services.[42] However, the detailed set of public procurement rules is found in secondary law in the 2014 Public Procurement Directives on public procurement.[43]

The European Commission defines public procurement as "*the process by which public authorities, such as government departments or local authorities, purchase work, goods or services from companies*."[44] The foundation of the EU public procurement law finds its roots in the EU's ambition to establish an internal market.[45] As such, the legislation developed in this area has primarily aimed to eliminate protectionist practices by public authorities that may otherwise favor domestic, regional, or local suppliers over bidders from other Member States.[46] On the other hand, national public procurement laws in EU member states are more detailed and combat corruption through procurement procedures by making public spending transparent and a focus on achieving best value for taxpayer's money through competitive process.[47]

The type of procurement, as defined by the European Commission, can be divided into three main categories. First, works which include public works that are built and maintained for the internal functioning and operation of public organisation, such as offices of public organizations or public buildings like town halls and schools. Public organizations also procure the construction and maintenance of public roads and water works, such as tunnels, highways maintenance, coastal protection activities, bike paths, and sidewalks.[48] Second, supplies also referred to as goods include products or other commodities that are necessary for the internal operation and functioning of public organisation, such as office supplies, coffee machines, furniture, energy, transportation.[49] Third, services include services that are necessary for the internal functioning of the public organization, such as cleaning, security, or catering services, and unemployment training

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[41] SÁNCHEZ GRAELLS, A., *Public Procurement and the EU Competition Rules*, 2nd ed., Hart Publishing, Oxford, 2015, p. 6.
[42] GRANDIA, J. and VOLKER, L. (eds), supra n. [40], at p. 54.
[43] Ibid.
[44] EUROPEAN COMMISSION, *Public Procurement – Single Market*, available at: https://single-market-economy.ec.europa.eu/single-market/public-procurement_en (last accessed January 2025).
[45] GRANDIA, J. and VOLKER, L. (eds), supra n. [40], at p. 52.
[46] Ibid.
[47] Ibid. at p. 53.
[48] Ibid. at p. 16.
[49] Ibid.

programs.[50] If a public organization requires a work, supply, or service, they have the option of producing these works, supplies or services or to buy (procure) them from private or non-public parties. This decision is called the make-or-buy decision.[51] When public organizations decide to procure it rather than make it themselves, this is called public procurement.[52]

Although public procurement procedures have different forms, it generally follows a standard process.[53] It typically begins with the publication of a contract notice, intended to inform the market about the service or goods for which bids are being requested.[54] This notice must include enough detail to help potential bidders understand the nature of the contract.[55] To ensure consistency, standardized templates for contract notices have been developed as part of the procurement directives.[56] After the contract notice is published, interested economic operators must receive additional details regarding both the procurement procedure and the contract itself.[57] This information is usually provided through the tender documents, which can be shared directly with bidders or made accessible online.[58] The main stages of the tender process involve evaluating the reliability and suitability of the economic operator and the quality of the bids submitted. The process concludes with the contract being awarded to the bidder offering the most advantageous proposal.[59]

In every procurement procedure, two main evaluations are carried out.[60] First is the selection phase, where the qualifications of the bidders are assessed to determine whether they are eligible to participate. This step ensures that only competent candidates are considered.[61] Second is the award phase, where the submitted tenders are evaluated to identify the offer that best meets the needs of the contracting authority.[62] These stages are regulated under Articles 57 to 66 of Directive 2014/24,[63] which means that the reliability of an economic operator is assessed during these stages by examining whether any of the exclusion grounds, including that under Article 57(4)(d), apply to them.

EU public procurement law applies if the public organization awarding the contract is a "contracting authority", and if the contract qualifies as a "public contract", unless an exemption is applicable.[64] According to Article 2(1) Sub 1 of Directive 2014/24 The concept of "contracting authority" refers to *the state, a regional or local authority, a body governed*

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[50] Ibid.
[51] Ibid.
[52] Ibid.
[53] SØRENSEN, K.E., JESSEN, P.W., et al., *supra* n. [21], at p. 562.
[54] Ibid.
[55] Ibid.
[56]Ibid.
[57] Ibid.
[58] Ibid.
[59] Ibid.
[60] Ibid. at p. 578.
[61] Ibid.
[62] Ibid.
[63] Ibid. at p. 579.
[64] GRANDIA, J. and VOLKER, L. (eds), supra n. [40], at p. 58.

by public law, or an association formed by one or more such authorities or one or more such bodies governed by public law.[65] In the *Beentjes case* of 1988 (C-31/87), the CJEU decided that the State is a functional concept, meaning that the Court generally considers the composition of an entity, assigned tasks, and dependency on other authorities to decide if an entity is a contracting authority. [66] A *public contract,* as defined in the same Directive, is "*a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services*."[67] In the *Helmut Müller case* (C-451/08), the CJEU affirmed that a "contract for pecuniary interest" requires a reciprocal obligation, where the contracting authority receives a service in return for compensation.[68] Important to note that Directive 2014/24 applies only when the estimated value of the contract meets or exceeds the financial thresholds published by the European Commission every two years.[69]

In practice, public procurement law operates on a set of fundamental legal principles: proportionality, equal treatment, competition, transparency, and non-discrimination.[70] It appears from Article 18(1) of the procurement Directive 2014/24 that compliance with these principles is a legal requirement and must take place in procurement processes.[71] The principles of equality and transparency were originally developed through the case law of the Court of Justice of the European Union (CJEU) and were later formally integrated into the procurement directives. [72] While the principle of proportionality has always been an implicit requirement in tender procedures, it was not explicitly codified until the adoption of the 2014 directives.[73]

b) Exclusion Sanction: Article 57(4)(d)

In *Tobacco Advertising I,* the CJEU clarified that Article 114 TFEU does not only intend to address barriers to free movement in the internal market, but also to rectify the distortions of competition. [74] Therefore, the EU legislature provides grounds for excluding the economic operator from the public procurement process for a limited period of time under Article 57(4)(d) of Directive 2014/24 to deter economic operators from conducting anti-competitive behaviors that affect the effectiveness and integrity of public

[65] Ibid.
[66] Ibid.
[67] Ibid. at p. 58.
[68] Ibid. at p. 59.
[69] Ibid.
[70] Ibid. at p. 55.
[71] SØRENSEN, K.E., JESSEN, P.W., et al., *supra* n. [21], at p. 590.
[72] Ibid.
[73] Ibid.
[74] Court of Justice of the European Union, *Case C-376/98, Germany v European Parliament and Council*, Judgment of 5 October 2000.

procurement procedures. [75] Exclusion grounds could be mandatory or discretionary. [76] Mandatory grounds for exclusion means that member states' authorities are obliged to exclude an economic operator that has been the subject of a conviction of one or more of the grounds under Article 57(1) of the Directive by final judgment. [77] While in discretionary or optional exclusion, contracting authorities may exclude or may be required by member states to exclude from participating in a procurement procedure any economic operator in any of situations stated under Article 57(4) of the Directive. [78]

The Directive requires Member States to determine the conditions for applying exclusion grounds, in line with their national legal frameworks and consistent with EU law. [79] This obligation is meant to promote transparency in the system used to exclude economic operators from procurement procedures. [80] According to the Directive, the exclusion period for mandatory grounds must not exceed five years from the date of a final conviction, unless the judgment itself specifies a different duration. [81] For discretionary grounds, the exclusion period is limited to three years from the date of the relevant event. [82] The Directive also sets out, in general terms, the types of evidence that contracting authorities may request to verify that an economic operator does not fall under any of the exclusion grounds. [83] At any stage during the procurement process, contracting authorities may ask operators to provide all or part of the necessary supporting documents, if this is required to ensure the efficient implementation of the procedure. [84] Also, before awarding a contract, the authority must require the highest-ranked tenderer to submit up-to-date supporting documentation. [85] When putting these exclusion rules into effect, Member States must ensure that their national laws comply with the Directive, relevant provisions of the Treaties, general legal principles, and the fundamental principles of public procurement, including transparency, equal treatment, competition and proportionality. [86]

The practice of distorting competition is included under Article 57(4)(d) of the Directive as a discretionary ground for exclusion. It states that "*where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition, the contracting authority may exclude or may be required to exclude that economic operator(s).*" [87] The Directive, however, does not provide a detailed scope of the anti-competitive behaviours

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[75] Directive 2014/24/EU, *supra* n. [33], at Art. 57(4)(d).
[76] Ibid. at Art. 57.
[77] ERA, *Supra* n. [37].
[78] Ibid.
[79] SIGMA, *Use of Official Automatic Exclusion Lists in Public Procurement*, Public Procurement Brief No. 24, OECD Publishing, Paris, September 2016, at p. 5, available at: https://www.sigmaweb.org/en/publications/use- of-official-automatic-exclusion-lists-in-public-procurement_9018a003-en.html.
[80] Ibid.
[81] Ibid.
[82] Ibid.
[83] Ibid.
[84] Ibid.
[85] Ibid.
[86] Ibid.
[87] DIRECTIVE 2014/24/EU, *Supra* n. [33], at Art. 57(5).

covered by Article 57(4)(d), nor does it directly refer to the Article 101 *TFEU* for interpretation. Despite this, the case law of the Court of Justice of the European Union (CJEU) has clarified that provisions which do not make explicit reference to national law should be interpreted autonomously and uniformly, taking into account their legal context and purpose. [88] Therefore, given that a key objective of the Directive is to foster fair, transparent, and competitive public procurement procedures, it is reasonable to interpret Article 57(4)(d) in light of Article 101(1) TFEU, which also prevents anti-competitive practices. [89] However, it is important to note that the CJEU clarified that the scope of Article (57)(4)(d) of the directive is broader than Article 101 *TFEU*, and it applies to anti-competitive behaviors that do not even fall under the latter Article. [90]

Article 57(4)(d) of the Procurement Directive allows contracting authorities to exclude economic operators when there are "sufficiently plausible indications" that an anti-competitive agreement has been made. [91] This provision grants authorities a clear basis to act when there is a "substantiated suspicion" of collusion among bidders. [92] It refers to the notion that a contracting authority does not need to have evidence of the conclusion of an anti-competitive agreement to decide whether an economic operator is subject to exclusion. [93] Therefore, it lowers the evidentiary threshold compared to other exclusion grounds that require authorities to *demonstrate* specific misconduct. [94] Despite the significance of this provision, the European Court of Justice ("CJEU") has not provided a definitive interpretation of what constitutes "sufficiently plausible indications." [95] Through its case law, the Court has emphasized the need to assess "relevant circumstances" but has refrained from specifying what qualifies as such. [96] However, practical guidance has emerged from the Danish Complaints Board for Public Procurement, which has addressed this issue in several cases. [97] The Board's decisions indicate that indications can fall into three main categories: structural, behavioural, and enforcement-related. [98] Structural indicators might include links between companies, such as being part of the same corporate group. [99] Behavioural indicators refer to patterns in tender submissions, such as

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[88] Court of Justice of the European Union, *Saudaçor – Sociedade Gestora de Recursos e Equipamentos da Saúde dos Açores SA v Fazenda Pública*, Judgment of 29 October 2015, Case C-174/14, para. 52.
[89] HARTUNG, W. and KUŹMA, K., "EC Notice on How to Tackle Collusion in Public Procurement: A Step Forward or a Stall for Time?", *European Procurement and Public Private Partnership Law Review* (2021), p. 59.
[90] Court of Justice of the European Union, *Landkreis Aichach-Friedberg v J. Sch. Omnibusunternehmen and K. Reisen GmbH*, Judgment of 15 September 2022, Case C- 416/21, para. 48, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62021CJ0416.
[91] SØRENSEN, K.E., JESSEN, P.W., et al., *supra* n. [21], at p. 601 - 603.
[92] Ibid.
[93] JÄMSÉN-SMITH, I., *Interpreting Article 57(4)(d) of Directive 2014/24/EU on Public Procurement in Line with EU Competition Law and Its Application in the Context of Joint Bidding*, Master's thesis, University of Helsinki.
[94] Ibid.
[95] SØRENSEN, K.E., JESSEN, P.W., et al., *supra* n. [21], at p. 601 - 603.
[96] JÄMSÉN-SMITH, I., *supra* n. [93], at p. 28.
[97] SØRENSEN, K.E., JESSEN, P.W., et al., *supra* n. [21], at p. 601 - 603.
[98] Ibid.
[99] Ibid.

similarities between bids or a history of bid-sharing. Enforcement indicators involve signals from competition authorities, such as investigations or complaints. [100]

According to Article 101(1) TFEU, "*all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market are prohibited.*" [101] Therefore, such anti-competitive behavior may include, but is not limited to: fixing purchase or selling prices or establishing other trading terms and conditions either directly or indirectly; imposing restrictions on production levels, market access, technological innovation, or capital investment; engaging in market sharing or allocation of sources of supply; applying unequal or discriminatory conditions to similar transactions with different trading partners, thereby disadvantaging certain parties; or requiring the acceptance of supplementary obligations as a condition for contract conclusion, which, by their nature or by prevailing commercial standards. [102]

The Directive has also introduced the right of "self-cleaning measures" under Article 57(6) for the first time. These measures allow an economic operator that has been excluded, whether under mandatory or discretionary grounds, to demonstrate its reliability and potentially regain access to the procurement procedures if it implements specific remedial measures. [103] These measures aim at proving the "reliability" of the economic operator to allow it to access the public procurement procedures again. [104] They could involve technical, organizational and personnel aspects that are needed to ensure compliance in the future by the firm. [105] It is important to note that these measures do not automatically prevent the application of bidder exclusion, they allow economic operators to take corrective actions to avoid or shorten the exclusion period. [106] At the end, it is up to the contracting authority to determine if the corrective measures taken by the excluded economic operator are sufficient or not. [107]

2. Competition Law

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[100] Ibid.
[101] Treaty on the Functioning of the European Union, consolidated version, *Official Journal of the European Union*, C 326, 26 October 2012, Art. 101.
[102] Ibid.
[103] OECD. *Director Disqualification and Bidder Exclusion in Competition Enforcement*. OECD Competition Policy Roundtable Background Note, Paris: OECD Publishing, 2022, pp. 32–33. Available at: http://www.oecd.org/daf/competition/director-disqualification-and-bidder-exclusion-in-competition-enforcement-2022.pdf.
[104] Ibid.
[105] Ibid.
[106] Ibid.
[107] CHOENMAEKERS, S., "Self-Cleaning and Leniency: Comparable Objectives but Different Levels of Success?", *European Procurement & Public Private Partnership Law Review*, 2018, p. 3, available at: https://cris.maastrichtuniversity.nl/ws/portalfiles/portal/75666173/Schoenmaekers_2018_Self_Cleaning_and_Leniency_Comparable.pdf (last accessed March 2025).

Competition law has always played an important part in the EU Internal Market. [108] It mainly covers anti- competitive agreements between firms, abuse between firms, abuse of a dominant position and mergers. [109] The European Commission has noted that tackling hard-core cartels is now considered a key part of competition policy. [110] Competition policy set by the EU legislator targets different objectives. [111] The primary one is to enhance efficiency by maximizing consumer welfare and achieving the optimal allocation of resources. [112] This has been addressed by the Competition Commissioner, Margrethe Vestager, who stated that "breaking up cartels remains a top priority for the Commission, especially when they involve essential consumer goods." [113] The Commissioner explained the serious impact of the cartel on both consumers and the wider EU economy. [114] This objective is based on the traditional economic theory which indicates that goods and services will be produced most efficiently where there is workable competition. [115] Protecting consumers and smaller firms from large aggregations of economic power, whether in form of monopolies or agreements whereby rival firms coordinate to act as one unit, serves as another objective of competition policy. [116] A third and important objective is to facilitate the creation of a single European Market, and to prevent this from being frustrated by private undertakings. [117]

Article 101 TFEU serves as the principal weapon to control anti-competitive behavior held by cartelists. [118] The required existence of anti-competitive agreement, decision or practice under Article 101 does not have to be explicit and formal, otherwise, it would be impractical since undertakings would achieve their anti- competitive goals in less formal ways. [119] In the *Quinine Cartel* case, the ECJ confirmed that informal agreements can be caught under Article 101. [120] The CJEU ruled that the Gentlemen's agreements, which are informal agreements, can fall under Article 85(1) TFEU -Article 101 now- if they restrict competition in the common market and reflect the shared intention of the parties involved. [121] Also in the *Polypropylene Case,* the Commission held the existence of an agreement between firms in the petrochemical industry for many years, even though the agreement

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[108] EUROPEAN PARLIAMENT, *Competition Policy*, Fact Sheets on the European Union, available at: https://www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy (last accessed March 2025).
[109] CRAIG, P. and DE BÚRCA, G., *EU Law: Text, Cases, and Materials*, 7th ed., Oxford University Press, Oxford, 2020, p. 1034.
[110] BARR, F., "5. Cartels", in BAILEY, D. and JOHN, L.E. (eds), *Bellamy & Child European Union Law of Competition*, 8th ed., Oxford University Press, Oxford, 2018, p. 327.
[111] CRAIG, P. and DE BÚRCA, G., *supra* n. [109], at p. 1034.
[112] Ibid.
[113] BARR, F., *supra* n. [110], at p. 327.
[114] Ibid.
[115] CRAIG, P. and DE BÚRCA, G., *supra* n. [109], at p. 1034.
[116] Ibid. at p. 1035.
[117] Ibid.
[118] Ibid.
[119] Ibid. at p. 1037.
[120] Ibid. at p. 1038.
[121] Court of Justice of the European Union, *ACF Chemiefarma NV v Commission of the European Communities*, Judgment of 15 July 1970, Case 41/69, para. 9.

was oral, there were no sanctions for breach, and it was not legally binding. [122] Therefore, an agreement is considered to have existed if the parties reach a consensus on a plan that limited, or was likely to limit, their commercial freedom by determining the lines of their mutual action, or abstention from action, in the market.

According to the wording of Article 101 TFEU, the existence of an agreement requires the concurrence of will between at least two parties. Thus, unilateral measures are not sufficient to form an agreement under the meaning of Article 101 TFEU. For an agreement to be based on tacit acceptance, it is necessary that the expression of the wish of one contracting party to achieve an anti-competitive goal forms an invitation to the other party, whether expressed or implied, to fulfill that goal jointly. [123] In *Limburgse Vinyl,* The CFI stated that where there were complex infringements over many years, involving many parties, the Commission could not be expected to classify the infringement precisely for each undertaking at any given moment. [124] The dual classification designated a complex whole, where some factual elements were relevant to an agreement, and others to a concerted practice. The ECJ confirmed this approach in *ANIC* to prevent cartelists from escaping liability through the creation of impossible evidentiary barriers. [125]

3. The Interplay between Competition Law and Public Procurement

Public procurement rules are not directly connected to the competition rules, but they are rooted in the principle of freedom of movement. [126] Nonetheless, there is no doubt that these procurement rules have close resemblances to competition rules. [127] Therefore, procurement law and competition law are closely connected. They can be seen as two sides of the same coin because both aim to create fair and efficient markets. [128] The CJEU has repeatedly stressed that the purpose of the public procurement directives is to develop effective competition in the field of public contracts. [129] This link was clearly recognized in 1993 in the *Storebaelt* case. In that decision, the Court said that one of the main goals of EU public procurement law is to support effective competition. [130]

Competition law mainly aims to make markets more competitive. However, more competition is not the final goal. The bigger purpose of competition law is to improve consumer welfare. [131] On the other hand, the main goal of public procurement policy is to

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[122] Commission of the European Communities, *Polypropylene*, Commission Decision 86/398/EEC of 23 April 1986, [1986] OJ L 230/1; [1988] 4 CMLR 347.
[123] CRAIG, P. and DE BÚRCA, G., *Supra* n. [109], at p. 1039.
[124] Ibid.
[125] Ibid.
[126] SØRENSEN, K.E., JESSEN, P.W., et al., *supra* n. [21], at p. 600.
[127] Ibid.
[128] MUNRO, C., "Competition Law and Public Procurement: Two Sides of the Same Coin?", *Public Procurement Law Review* (2006) 352.
[129] SÁNCHEZ GRAELLS, A., *supra* n. [17], at p. 3.
[130] MOLDÉN, R., *Competition Law or the New Competition Principle of Public Procurement Law: Which is the More Suitable Legal Instrument for Making Public Procurement More Pro-Competitive?*, Doctoral Dissertation in Law, Stockholm School of Economics, 2021, p. 11.
[131] Ibid. at p. 43.

make sure that public money is spent wisely. [132] This usually means choosing suppliers who offer the lowest price or the best value for money. [133] In the end, this also leads to benefits for consumers, because public services become better and cheaper.

Public procurement can be harmed by anti-competitive actions like bid-rigging, price fixing, or collusion between bidders. [134] These unfair practices can increase costs, reduce quality, and waste public funds. This directly affects government budgets and taxpayers. [135] That is why competition authorities across Europe consider tackling bid-rigging in public procurement as a top priority. [136] Because of this, the connection between public procurement and competition law is very important. Many countries try to stop collusion in public procurement by enforcing competition laws strictly. [137]Competition authorities often work with procurement officials at all levels of government. [138] They help train them to design better procurement processes and to recognize signs of collusion which develop closer working relationships between the two authorities. [139] Also, in many countries, competition laws clearly forbid bid-rigging in public procurement procedures. [140]

Directive 2014/24 has further expanded the role of competition considerations in the assessment of the behaviour of the public bidders through the consolidation of a principle of competition amongst the general principles of EU public law. [141] This incorporation means that rules on public procurement must not distort competition between economic operators. This fundamental competition principle embedded in the public procurement directives could be defined or phrased in these terms: public procurement rules have to be interpreted and applied in a pro-competitive way so that they do not hinder, limit or distort competition. Contracting entities must refrain from implementing any procurement practices that prevent, restrict or distort competition. [142] However, there is some overlap between the goals of traditional competition law and the objectives of procurement rules. [143] For example, it has been argued that the use of an electronic auction under Article 35 of the Directive may, in some cases, make it easier for businesses to engage in concerted

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[132] OECD, *Competition and Procurement: Key Findings*, OECD Publishing, Paris, 2011, p. 40, available at: https://www.oecd.org/content/dam/oecd/en/publications/reports/2011/11/competition-and-procurement- key-findings_48813c6d/c6e6d5ae-en.pdf (last accessed January 2025).
[133] Ibid.
[134] Ibid.
[135] Ibid.
[136] SÁNCHEZ GRAELLS, A., "Survey: Competition and Public Procurement", in DE STEFANO, G. and IBÁÑEZ COLOMO, P. (eds), *Journal of European Competition Law & Practice*, vol. 9, no. 8 (2018), p. 551.
[137] OECD (2011), *supra* n. [132], at p. 44-45.
[138] Ibid.
[139] Ibid.
[140] Ibid.
[141] SÁNCHEZ-GRAELLS, A., "Competition Law and Public Procurement", forthcoming in MORENO MOLINA, J.A. and DÍAZ BRAVO, E. (eds), *Contratación Pública Global: visiones comparadas*, Tirant lo Blanch, Valencia, 2020, manuscript last revised 16 August 2019, p. 14, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2643763.
[142] Ibid. at p. 16.
[143] SØRENSEN, K.E., JESSEN, P.W., et al., *supra* n. [21], at p. 600.

practices. [144] This is because the latter require a high level of transparency regarding tenderers, which, while essential under procurement law, can facilitate coordination between competitors violating Article 101 TFEU. [145] Article 57(4)(d) which allows a contracting authority to exclude an economic operator is an important provision in this context. [146] As argued in Chapter 3 of this thesis, this measure can also restrict and hinder competition in public procurement procedures.

The core antitrust prohibitions are easily enforced in the public procurement setting. Therefore, tackling bid rigging in public procurement is one of the most important tasks for competition authorities. Moreover, public procurement rules have incorporated the possibility of excluding competition law infringers from tenders for public contracts, thus increasing the sanctions potentially derived from collusion in public procurement markets. [147]

The reason for placing strong emphasis on the principle of competition within the area of public procurement can be clearly understood when looking at the origins of EU Public Procurement rules. [148] These rules were introduced from the very beginning with the recognition that such a framework was required to build competition in a system where, at the time, competition was nearly absent. [149] The aim of fostering competition became a guiding principle behind the design of public procurement legislation. [150] As a result, contracting authorities are not only expected to avoid distorting competition but are also responsible for maintaining it as a foundational aspect of procurement. [151] This goal was eventually formalized into the principle of competition, which is now embedded in EU public procurement directives and is stated in Article 18(1) of Directive 2014/24. [152]

The principle of competition also reflects the broader purpose of EU procurement rules, which aim to eliminate protectionist procurement behaviours practiced by individual Member States. [153] These behaviours often led to the division of the internal market. By removing such barriers, the rules promote increased cross-border competition for public contracts. At the same time, they also encourage greater domestic competition for those same contracts within each Member State. [154]

All in all, competition in the public procurement market is essential for the efficiency of public expenditure, competitive and transparent markets are in fact necessary for public authorities to be able to purchase goods and services at lower prices and of better quality, with a considerable simplification of the purchasing process and this with a reduction of

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[144] Ibid. at p. 601-603.
[145] Ibid.
[146] Ibid.
[147] SÁNCHEZ-GRAELLS, A., *supra* n. [141], at p. 17
[148] Ibid. at p. 15.
[149] Ibid.
[150] Ibid.
[151] Ibid.
[152] Ibid.
[153] Ibid. at p. 16.
[154] Ibid.

the related administrative costs and to the sector's other inefficiencies. [155] Besides, the connection between public procurement and the principle of free competition is clearly shown in different parts of EU legislation. This connection appears not only in the legal articles but is also strongly emphasized in the recitals that come before them. These recitals regularly highlight the key role of competition in the goals set out by the EU Procurement Code.

II. Interpretation and Implementation of Article 57(4)(d)

Chapter 2 examines the European Court of Justice ("CJEU") interpretation of the discretionary exclusion ground under Article 57(4)(d) of Directive 2014/24/EU. These judgments highlight the necessity of proportionality and the significance of individual assessments by contracting authorities, explicitly clarifying that discretionary exclusions cannot be automatically applied and must reflect a balance between protecting the integrity of public procurement processes and preserving competition. Then, this chapter further enriches the analysis by conducting a comparative review of how Germany and Hungary have transposed Article 57(4)(d) within their national legal frameworks.

A. Judicial Interpretation of Article 57(4)(d): CJEU Case Law

The CJEU has a key role in ensuring that EU treaties and their implementing legislations are understood and applied lawfully and consistently. [156] It has the power and authority to check whether EU institutions and Member States follow and comply with EU law. One of its key functions is to provide authoritative legal interpretations that must be followed by national courts. [157] According to Article 234(c) of the EC the CJEU has jurisdiction to give a preliminary ruling concerning the interpretation of the statutes of bodies established by an act of the Council." [158] Also, under Article 19(1) TEU the CJEU "*shall ensure that in the interpretation and application of the Treaties the law is observed*". Therefore, The CJEU has the final word on the interpretation of EU law according to Article 267 of the TFEU. [159] The CJEU often relies on a functional interpretation of EU law, which means that it uses the objective of EU public procurement law to decide how a specific concept should be interpreted. [160]

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[155] FIORENTINO, L., "Public Procurement and Competition", *International Public Procurement Conference Proceedings*, 21–23 September 2006, pp. 848–868, at p. 851.
[156] SIGMA, Implementing the EU Directive on the *Selection of Economic Operators in Public Procurement Procedures*, OECD Publishing, October 2018, p. 174, available at: https://www.sigmaweb.org/en/publications/implementing-the-eu-directives-on-the-selection-of-economic-operators-in-public-procurement-procedures_f511e46f-en.html.
[157] Ibid.
[158] EUROPEAN COMMUNITY, *Treaty establishing the European Community (consolidated version)*, OJ C 325, 24 December 2002, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12002E%2FTXT (last accessed January 2025).
[159] GRANDIA, J. and VOLKER, L. (eds), *Supra* n. [40], at p. 55.
[160] Ibid.

1. Vossloh Laeis GmbH v Stadtwerke München GmbH (C-124/17)

In *Vossloh Laeis GmbH v Stadtwerke München GmbH,* the company Vossloh Laeis was excluded from the system set by the Stadtwerke München because it had been fined by the Federal Competition Authority for participating in a cartel. [161] München Stadtwerke was one of the parties affected by that cartel. [162] After discovering the cartel, Vossloh Laeis did not approach the contracting authority, Stadtwerke München, to clarify the facts of the cartel in full; it believed that its cooperation with the Competition Authority was sufficient. [163] Therefore, it refused to forward the decision of imposing a fine to the contracting authority to examine it and refused to cooperate with the contracting authority to clarify the offense committed. [164]

Despite the fact that legal action was still ongoing, Vossloh Laeis showed interest in participating in a new tendering procedure launched by Stadtwerke München. The company defended its position against allegations of distorting competition through self-cleaning measures it had implemented. However, the contracting authority decided to verify these claims and requested access to the leniency decision issued by the Federal Cartel Office that imposed fines on Vossloh Laeis for violating competition laws. [165] Nevertheless, Vossloh Laeis refused to provide this information. The company argued that it had already provided full cooperation to the relevant competition authority and claimed that, under Directive 2014/24, there was no legal obligation to disclose the leniency decision with the contracting authority. [166] Subsequently, Stadtwerke München made the decision to exclude Vossloh Laeis from the new public procurement procedure.

The Public Procurement Board of Southern Bavaria, which was classified as a court or tribunal under Article 267 TFEU, referred four questions to the CJEU regarding Article 57. [167] The First and Second question were whether collaboration required by Article 57(6)(2) of directive 2014/24 to be afforded only to the investigation authorities or also to contracting authority if required by the domestic legislation of a Member State. [168] The Third and Fourth questions focused on whether under Article 57(7) of Directive 2014/24, which sets a maximum exclusion period of three years from the "relevant event", should this event be interpreted, in the context of the optional grounds for exclusion in Article 57(4), as the actual occurrence of the exclusion grounds, such as an economic operator's participation in a cartel under Article 57(4)(d), or as the moment when the contracting entity gains certain and reliable knowledge of these grounds. [169]

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[161] Court of Justice of the European Union, *Vossloh Laeis GmbH v Stadtwerke München GmbH*, Judgment of 24 October 2018, Case C- 124/17, para. 11.
[162] Ibid. at para. 12.
[163] Ibid. at para. 14.
[164] Ibid.
[165] Ibid.
[166] Ibid., at para. 16.
[167] Ibid., at para. 17.
[168] Ibid. at para. 17(1), 17(2).
[169] Ibid. at para. 17(3), 17(4).

Regarding the first two questions, the Advocate General and CJEU explained that Directive 2014/24 gives some investigative functions to the contracting authority. However, these functions are not the same as those held by an investigating authority in the strict sense. [170] The contracting authority must assess whether an economic operator meets the exclusion grounds. [171] But the main aim of Article 57(6) is different from a criminal or competition investigation. The contracting authority does not carry out its own investigation into the facts that led to the exclusion. Instead, its task is to review the information provided by an economic operator that has been excluded but now claims to have reformed itself. Therefore, the contracting authority's task is passive, [172] to review and decide based on the information provided, while the economic operator's task is active, gathering and presenting evidence of its reform. [173]

Therefore, the economic operator seeking to join procurement must show the contracting authority that it has actively and thoroughly cooperated with the investigating authority. [174] It clarified that collaboration with both authorities must not lead to duplicating the same obligation on the economic operator. [175] The Advocate General concluded that equal collaboration with the investigating and collaborating authorities does not align with Article 57(6) for two reasons: First, duplication of obligation and Second risk of unfairness since the contracting authority might be biased if it has suffered damages from undertaking past conduct.

In conclusion, Article 57(6) of the Directive allows national laws to require companies with past misconduct or criminal offenses to fully explain the circumstances of their wrongdoing. [176] To prove they have regained reliability, economic operators must actively cooperate not only with investigative authorities but also with the contracting authority in the context of the latter's specific role. [177] Thus, cooperation must only go as far as needed for the contracting authority to assess whether the company can be considered reliable again.

In addressing the third and fourth questions about the "relevant event" to start the exclusion penalty, the Advocate General and the CJEU clarify that the starting point of the exclusion period should be based on the formal decision from a court or administrative authority that proves the conduct, rather than the conduct itself. [178] Therefore, once the competition authority issues a penalty, this decision provides the contracting authority with a clear legal notice of the conduct that justifies exclusion. Therefore, the exclusion

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[170] Opinion of Advocate General Campos Sánchez-Bordona, delivered on 16 May 2018, in *Vossloh Laeis GmbH v Stadtwerke München GmbH*, Case C- 124/17, para. 27.
[171] Ibid.
[172] Ibid. at para. 49.
[173] Ibid. at para. 48.
[174] Ibid. at para. 50.
[175] Ibid. at para. 55.
[176] Vossloh Laeis GmbH v Stadtwerke München GmbH, *Supra* n. [161], para. 33.
[177] Ibid.
[178] Ibid. at para. 38 - 39.

period should start from the date of the decision, not from the date of the end of the actual misconduct.

2. Landkreis Aichach Friedberg (C-416/21)

This case played a significant role in defining the scope of Article 57(4)(d). It concerned public procurement procedures for bus transport services, announced by the District of Aichach-Friedberg. In this procedure, J, a trader operating under his own business name, and K. Reisen, a bus transport company managed and solely owned by J, both submitted tenders. These tenders were prepared and submitted by the same person, namely J himself. [179]

The contracting authority decided to exclude both tenderers from the procurement procedure because both submissions were created by one individual in violation of competition regulations. [180] J. and K.Reisen challenged the decisions by bringing an action before the Public Procurement Board. They argued that they formed a single economic unit and that their situation should not be considered a violation under Article 101 TFEU. [181] They claimed that a tenderer can only be excluded on the basis of violating competition law if the situation falls directly under Article 101 TFEU. [182] The Public Procurement Board agreed with their argument, however, the District of Aichach-Friedberg filed an appeal against that decision. In its appeal, the district authority argued that allowing economically connected tenderers to participate in the same procurement process undermines both the principle of equal treatment and the rules of competition. [183] This is because such tenderers may coordinate their tenders in a way that gives them an unfair advantage over others.

Consequently, after classifying J and K. Reisen as an economic unit, the referring court asked the CJEU whether "the contracting authority must have sufficiently plausible indications of an infringement of Article 101" to apply Article 57(4)(d) of Directive 2014/24. [184] It also asks whether the principle of equal treatmentprecludes taking into account tenders that are "neither autonomous nor independent", and whether the CJEU's previous case-law applies when tenders are submitted by tenderers forming a single unit. [185]

The CJEU explained that Directive 2014/24 allows contracting authorities to exclude economic operators from procurement procedures. [186] This can be done when there are "sufficiently plausible indications that the operator has entered into agreements with other

[179] *Landkreis Aichach-Friedberg v J. Sch. Omnibusunternehmen and K. Reisen GmbH*, *Supra* n. [90], para. 15-17.
[180] Ibid. at para. 18.
[181] Ibid. at para. 21.
[182] Ibid.
[183] Ibid. at para. 20
[184] Ibid. at para. 22.
[185] Ibid. at para. 23 - 24.
[186] Ibid. at para. 37.

economic operators to distort competition," as clearly stated in Article 57(4)(d). [187] This condition is not the same as the one found in Article 101 TFEU. [188] The latter requires that agreements between undertakings must be capable of affecting trade between Member States. [189] In contrast, Article 57(4)(d) does not include that requirement. Therefore, as confirmed by the CJEU in the *TIM* case, the focus of Article 57(4)(d) is different. Its purpose is to assess the reliability and integrity of economic operators. [190] It is also intended to guarantee the contracting authority's confidence in the selected tenderers. Therefore, Article 57(4)(d) is not restricted to agreements that come under Article 101 *TFEU*.

The CJEU clarified that while Article 101 TFEU punishes anti-competitive behavior, [191] Article 57(4)(d) of the Directive focuses on protecting the public procurement procedures by ensuring the integrity and reliability of the economic operators involved in those procedures. Therefore, this Article allows the exclusion of tenderers who may be considered unreliable. It helps to maintain a relationship of confidence between the contracting authority and the economic operator. As a result, although an agreement falls within the scope of Article 101 TFEU can serve as a ground for exclusion under Article 57(4)(d). [192] It also includes anti- competitive agreements that do not fall under Article 101 TFEU. [193] Therefore, the fact that an agreement does not fall under Article 101 TFEU does not automatically mean that it cannot be addressed under the discretionary exclusion ground in Article 57(4)(d) of the Directive. Additionally, the European Commission pointed out that when two economic operators are both under the control of the same person, their actions cannot be automatically treated as agreements intended to distort competition. [194] Therefore, it is the responsibility of the referring court to decide whether the specific situation qualifies for exclusion under Article 57(4)(d). This assessment must be based on the principle of proportionality. [195] The Court clarifies that, to uphold the principle of proportionality, the contracting authority must investigate and evaluate the facts to determine whether the relationship between two entities has actually influenced the respective content of the tenders submitted in the same procurement procedure. If such an influence is found, in any form, it is sufficient ground for those undertakings to be excluded from the procedure. [196]

In conclusion, the judgment confirms that Article 57(4)(d) includes situations of discretionary exclusion where there are credible indications of collusion that negatively affect competition. This applies even if the conduct does not fall within the scope of Article 101 TFEU. The CJEU made it clear that although Article 57(4) provides an exhaustive list

[187] Ibid.
[188] Ibid. at para 38.
[189] Ibid.
[190] Ibid. at para. 41.
[191] Ibid. at para. 43.
[192] Ibid. at para 48.
[193] Ibid.
[194] Ibid. at para. 50.
[195] Ibid. at para. 58.
[196] Ibid. at para. 60.

of discretionary grounds, it does not prevent Member States from creating additional substantive rules. These rules must aim to protect the principles of equal treatment and transparency in the public procurement process. However, these rules must always comply with the principle of proportionality. The CJEU further explained that the principle of equal treatment is violated when two tenderers, who form a single economic unit, submit tenders that are coordinated or concerted. This refers to tenders that are not autonomous, nor independent, and that give those tenderers an unfair advantage over other participants. Therefore, if the tenders were not submitted autonomously and independently, the award of the contract to such tenderers is precluded. It is the responsibility of the referring court to make this determination. It also must apply the principle of proportionality when deciding whether the conduct justifies exclusion.

3. Infraestruturas de Portugal and Futrifer Indústrias Ferroviárias (C-66/22)

The case contained a request for a preliminary ruling by the Portuguese Supreme Administrative Court concerning the interpretation of point (d) of Article 57(4) of Directive 2014/24 and Article 80(1) of Directive 2014/25. The main question in this case was whether it was lawful to award a public contract to a tenderer who had already been ordered by the national competition authority to pay a fine for violating competition rules during earlier public procurement procedures. [197] According to Portuguese law, which transposes Directive 2014/24 into national legislation, the contracting authority is bound to follow the assessment made by the competition authority regarding the tenderer's reliability. [198] This obligation applies even when that assessment has not resulted in an additional penalty, such as a temporary ban from taking part in future procurement procedures.

The CJEU considered whether Member States are allowed to limit the exclusion of cartelists only to those cases where the competition authority has already imposed such exclusion as an additional ancillary sanction. In doing so, the Court provided important explanations on how discretionary grounds for exclusion should be applied. It also clarified the extent of the discretion that Directive 2014/24 gives to contracting authorities when deciding whether to exclude a tenderer based on past anti-competitive conduct.

The CJEU started by explaining that, unlike what might be understood from earlier judgments, such as *Meca* (C-41/18), *Tim* (C-395/18), and *Rad Service* (C-210/20), which confirms that Member States are allowed not to include the discretionary exclusion grounds in their national legislation, [199] there is a specific obligation when it comes to another provision. The Court made it clear that Member States must transpose into national law the first subparagraph of Article 57(4) of Directive 2014/24. [200] This provision states that contracting authorities may exclude, or may be required by the Member States

[197] Court of Justice of the European Union, *Infraestruturas de Portugal SA and Futrifer Indústrias Ferroviárias SA v Toscca – Equipamentos em Madeira Lda*, Judgment of 7 September 2023, Case C- 66/22, para. 23, available at: Case C- 66/22.
[198] Ibid. at para. 24.
[199] Ibid. at para. 49.
[200] Ibid. at para. 54.

to exclude, an economic operator from a public procurement procedure under certain defined situations.

Therefore, the key findings of the judgment are that the EU legislature intended to give the responsibility of deciding on exclusion to the contracting authority alone. This responsibility must be carried out during the stage where tenderers are selected. [201] The EU legislature's aim was to make sure that contracting authorities in all Member States have the ability to exclude economic operators they consider unreliable. [202] As a result, the CJEU stated that for Member States to correctly transpose the relevant rule, they must choose one of two options. First, they may require contracting authorities to apply the discretionary grounds as an obligation. Alternatively, they may allow contracting authorities to decide for themselves whether or not to apply these exclusion grounds. [203]

The referring court also asked the CJEU whether, under point (d) of Article 57(4) of Directive 2014/24, Portuguese law could provide that the existence of significant evidence of anti-competitive behavior likely to lead to the exclusion of the competitor must necessarily occur in the context of the ongoing tender procedure. [204] The CJEU clarifies that the text of Article 57(4) does not limit the use of this exclusion ground only to anti-competitive behavior that happens in the specific procedure at hand. [205] On the contrary, the reliability and integrity of each economic operator participating in a procurement process must be evaluated more broadly. That evaluation must include not just their behavior in the ongoing procedure, but also their conduct in previous public procurement procedures. Past participation in unlawful or anti-competitive practices can be relevant and sufficient for applying exclusion under Article 57(4)(d). [206]

Finally, the CJEU confirmed that it is solely the responsibility of the contracting authority to decide whether an economic operator should be excluded from a public procurement procedure. This decision must be based on an assessment of the integrity and reliability of each operator taking part in the procedure. [207] However, the contracting authority is also required to respect the principle of proportionality. This means that it must carry out a specific and individual assessment of the conduct of the economic operator concerned before making a decision. [208] The Court also discussed the obligation to provide reasons for decisions made by contracting authorities concerning the reliability of economic operators. It concluded that this obligation comes from the general principle of sound administration in EU law, which includes a duty to give reasons for decisions. [209] The duty to state reasons applies not only when a tenderer is excluded but also when the contracting authority

[201] Ibid. at para. 55.
[202] Ibid. at para. 57.
[203] Ibid. at para. 58.
[204] Ibid. at para. 65.
[205] Ibid. at para. 67.
[206] Ibid. at para. 69.
[207] Ibid. at para. 75.
[208] Ibid. at para. 77.
[209] Ibid. at para. 87 - 88.

decides not to exclude a tenderer. For example, if the authority finds that applying a discretionary ground for exclusion would be disproportionate, and therefore decides not to exclude, it must still explain this decision. [210]

In conclusion, the judgment provides important clarification on the interpretation and application of Article 57(4)(d) of Directive 2014/24. The CJEU confirmed that Member States cannot restrict the use of this discretionary exclusion ground only to cases where a national competition authority has imposed a formal ban. Also, it confirmed the right of contracting authorities across all the EU to exclude economic operators even if the concerned member state does not transpose the discretionary grounds into its national law. The Court held that contracting authorities alone are responsible for assessing the reliability and integrity of economic operators, including decisions on exclusion, provided that they act in line with the principle of proportionality. The Court further established that exclusion under Article 57(4)(d) is not limited to anti- competitive conduct that occurs during the current procurement procedure. Past behavior in earlier procedures can also justify exclusion, so long as it raises serious concerns about the operator's reliability. Finally, the judgment emphasized the importance of transparency and proper justification. Contracting authorities must provide reasons for their decisions, including when they decide not to exclude a tenderer.

4. Meca v. Comune di Napoli (Case C-41/18)

In this case, the CJEU clarifies that Member States do not have full discretion when applying the optional exclusion grounds listed in Article 57(4) of Directive 2014/24. Once a Member State chooses to adopt any of these optional grounds into its national legislation, it must apply them in line with the essential features set out in the Directive. [211] The CJEU emphasized that the basic conditions of these provisions must be respected. The Court also stated that, based on the wording of Article 57(4), it is the contracting authority, not the national judge, that has the task of deciding whether an economic operator should be excluded from a procurement procedure. [212]

Additionally, the CJEU noted that the possibility for a contracting authority to exclude a tenderer is intended to support its ability to assess the integrity and reliability of each participant. [213] This principle is also reflected in Article 57(4)(c), Article 57(4)(g), and recital 101 of the Directive. [214] The Court further highlighted that, under Article 57(4), the contracting authority must be allowed to exclude a tenderer "at any time in the procedure." [215] This power is not dependent on a final judgment by a court. According to the CJEU, this clearly shows the EU legislature's intention to allow contracting authorities to carry out their own evaluation of the actions or omissions of an economic operator. These

[210] Ibid. at para. 90.
[211] Court of Justice of the European Union, *Meca Srl v Comune di Napoli*, Judgment of 3 October 2019, Case C- 41/18, para. 33.
[212] Ibid. at para. 28.
[213] Ibid. at para. 29.
[214] Ibid.
[215] Ibid. at para. 31.

evaluations can concern conduct that occurred before or during the procurement process, as long as it fits one of the cases outlined in Article 57(4). [216]

Finally, the Court stated that if a contracting authority were automatically bound to follow an assessment made by a third body or institution, it would likely find it difficult to properly apply the principle of proportionality. [217] This could limit the authority's ability to make a fair and balanced decision when using optional exclusion grounds.

In conclusion, the case clarified important principles concerning the application of discretionary exclusion grounds under Article 57(4) of Directive 2014/24. The CJEU made it clear that Member States, once they choose to include an optional ground in their national law, must apply it in full alignment with the Directive's purpose and framework. The judgment emphasized that it is the responsibility of the contracting authority, not the national courts, to decide whether an economic operator should be excluded from a procurement procedure. The authority must be free to assess the reliability and integrity of the operator at any stage of the procedure. This includes reviewing conduct that took place either before or during the process. The CJEU also highlighted that the power to exclude is tied to the principle of proportionality, which requires careful, case-specific assessment. Importantly, the Court warned that automatic reliance on assessments by third parties could prevent the contracting authority from fairly applying the proportionality principle. The authority must retain the independence to decide whether exclusion is justified under the optional grounds, based on its own analysis of the facts.

B. Concluding Remarks

Despite repeated intervention by the CJEU, the interpretation of Article 57(4)(d) of Directive 2014/24 continues to leave significant room for uncertainty and vagueness. The judgments in *Vossloh Laeis*, *Landkreis Aichach-Friedberg*, *Infraestruturas de Portugal*, and *Meca* have clarified certain procedural aspects and reinforced the authority of contracting authorities, yet the scope and practical application of the exclusion grounds remain broad and open to divergent national implementation.

The most consistent finding across all the above-mentioned cases is that the contracting authority is solely responsible for assessing the reliability and integrity of economic operators. This evaluation must be independent and grounded in the principle of proportionality. Furthermore, a duty to give reasons applies in all cases, including decisions not to exclude when discretionary grounds are met.

In *Vossloh Laeis*, the Court clarified that cooperation under Article 57(6) may extend to contracting authorities but must not duplicate obligations. It also ruled that the three-year exclusion period under Article 57(7) begins at the moment of a formal decision

[216] Ibid.
[217] Ibid. at para 32.

confirming misconduct not the end of the misconduct itself. *Landkreis Aichach-Friedberg* further illustrated the flexible, and arguably vague, nature of Article 57(4)(d), broadening its scope beyond Article 101 TFEU. The Court allowed exclusion even where no formal infringement under EU competition law was found, provided there were "sufficiently plausible indications" of collusion.

In *Infraestruturas de Portugal*, the Court rejected the idea that exclusion should only occur when a competition authority imposes a formal ban. Past misconduct, even outside the present procedure, can justify exclusion. Yet, this raises concerns about retrospective punishment and the limits of administrative discretion. The ruling reaffirmed the principle of proportionality and required contracting authorities to justify all decisions. Still, no clear guidance was offered on how to balance the severity of the misconduct against proportionality in practice. *Meca* clarified that once Member States choose to transpose optional exclusion grounds into national law, they must respect the Directive's characteristics and objectives. It also reinforced the contracting authority's independence in deciding on exclusion without being tied to judicial rulings.

All in all, the Court has granted contracting authorities wide discretion to decide whether to exclude an economic operator, and whether any self-cleaning measures taken by an excluded operator are sufficient for them to be readmitted into procurement procedures. Importantly, exclusion is not limited to misconduct within the procurement procedure itself; it can also extend to past instances of anti- competitive behavior. Although the Advocate General clarified that the role of contracting authorities is not equivalent to that of investigative bodies in the strict sense, I believe that some overlap between their functions do exist. This can impose a significant administrative burden on economic operators and may lead to duplication of obligations. This concern is heightened by the fact that contracting authorities are allowed to exclude operators based on "plausible sufficient indications" of anti-competitive conduct, which is a term that remains poorly defined, leaving contracting authorities broad discretion. While the Court emphasized the need to respect the principle of proportionality and the objectives of the Directive, there is still no clear and uniform set of criteria that contracting authorities must follow. As a result, there is significant divergence in how exclusion penalties are applied, both between Member States and among different contracting authorities within the same Member State. The lack of precise criteria for exclusion, the unclear evidentiary thresholds, and the wide discretion granted to Member States continue to create uncertainty for both authorities and economic operators.

C. Comparative Analysis of National Transposition of Article 57(4)(d): Germany and Hungary

Directive 2014/24/EU grants Member States discretion in applying exclusion grounds in public procurement, particularly the optional grounds under Article 57(4), including

paragraph (d), which targets tenderers involved in the distortion of competition. [218] It also allows for the inclusion of any discretionary grounds as part of the mandatory ones. [219] However, this discretion is limited by the need for proportionality and alignment with the Directive's broader objectives. [220] As a result, national legal frameworks vary in terms of transposition, enforcement, and the institutional mechanisms supporting these exclusion provisions. This section offers a detailed comparison of how Germany and Hungary have transposed and operationalized the discretionary exclusion grounds under Article 57(4)(d), focusing on key aspects such as legal basis, exclusion procedures, self-cleaning mechanisms, and institutional structure.

1. Legal Framework and Transposition

(a) Germany

Germany has developed a structured legal framework for transposing the exclusion penalty under Article 57(4)(d), integrating provisions from both competition law and public procurement law. [221] The transposition is mainly embedded in Section 124(1) of the Act Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen - GWB), which allows contracting authorities to exclude bidders who have entered into agreements or engaged in concerted practices with the aim or effect of restricting competition. [222] These agreements include typical cartel behaviors such as bid rigging, market sharing, and price fixing. Under this provision, exclusion may be applied even in the absence of a final criminal conviction, as long as there are "sufficient indications" that a competition law infringement has occurred. [223]

The scope of exclusion under Section 124 GWB is broad and includes all concerted practices and collusion, regardless of whether written or unwritten agreements. [224] Similar to Article 101 TFEU, Section 1 GWB prohibits any concerted practices or arrangements that restrain competition, including informal "gentlemen's agreements". [225] Furthermore, Section 21 GWB prohibits coercion among undertakings aimed at inducing unlawful collusion. [226]

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[218] Court of Justice of the European Union, *Tim SpA – Direzione e coordinamento Vivendi SA v Consip SpA and Ministero dell'Economia e delle Finanze*, Judgment of 30 January 2020, Case C- 395/18.
[219] SIGMA, *Selecting Economic Operators*, Public Procurement Policy Brief No. 7 (Paris: OECD Publishing, 2016), p. 4, https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-7-200117.pdf.
[220] Ibid. at para. 45.
[221] GERMANY, *Director Disqualification and Bidder Exclusion – Note by Germany*, OECD Competition Committee, DAF/COMP/WD(2022)70, November 2022, p. 29, available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/OECD_2022_Competition_Committee_Disqualification.pdf?__blob=publicationFile&v=2 (last accessed February 2025).
[222] Ibid. at p. 58.
[223] Ibid.
[224] BRÄUER, S., *Competition Compliance – Germany*, Debevoise & Plimpton LLP, 2023, p. 11, available at: https://www.debevoise.com/-/media/files/pdf/2023_competition-_compliance--germany.pdf (last accessed February 2025).
[225] Ibid.
[226] Ibid. at p. 7.

In addition to the GWB, Germany's framework is complemented by the Competition Register Act (Wettbewerbsregistergesetz – WRegG), which mandates the creation and maintenance of a central register of economic operators that have committed serious economic offenses, including those falling under Article 57(4)(d). [227] The register serves as a central repository of information about undertakings that have committed serious economic offenses, including violations of competition law. [228] According to Section 6 of the Competition Register Act, public contracting authorities must consult this register prior to awarding any contract with an estimated value of €30,000 or more to determine whether the winning bidder is listed. [229]

If a company is entered into the register for bid rigging or other anti-competitive practices, it becomes eligible for exclusion from procurement procedures for up to three years. [230] However, the entry in the register does not trigger automatic exclusion. [231] The contracting authority retains discretion to evaluate the gravity and context of the misconduct and determine whether exclusion is proportionate under procurement law. [232] The primary authority responsible for maintaining the register and enforcing competition law at the national level is the Federal Cartel Office (FCO). In addition to this central body, each federal state (Länder) has its own competition authorities that oversee regionally limited cases. [233] These bodies are empowered under Section 48 ARC to undertake investigations, demand information and documents, and conduct unannounced inspections. [234]

The register allows economic operators to apply for early deletion of their entry based on the implementation of effective self-cleaning measures, a process described under Section 8 WRegG. [235] If the Federal Cartel Office determines that the undertaking has fully met the conditions for self-cleaning, the entry is deleted, and the undertaking is no longer subject to exclusion based on the original misconduct. [236] This decision is binding on all contracting authorities, ensuring legal certainty and consistency across jurisdictions. [237]

Competition infringements are not only recorded in the register but are also prosecutable under criminal law in specific cases. [238] For example, collusive tendering is a criminal offense under Section 298 of the German Criminal Code, punishable by fines or imprisonment of up to five years. [239]

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[227] GERMANY, *Supra* n. [221], at p. 5.
[228] Ibid.
[229] Ibid.
[230] Ibid. at p. 3.
[231] Ibid. at p. 6.
[232] Ibid.
[233] Ibid. at p. 4.
[234] Ibid p.4
[235] Ibid. at p. 6.
[236] Ibid.
[237] Ibid.
[238] BRÄUER, S., *Supra* n. [224], at p. 7.
[239] Ibid.

In 2024, enforcement efforts in Germany significantly increased, with the FCO imposing €19.4 million in fines on three companies and one individual. This is a sharp rise from the €2.8 million imposed in 2023.[240] The FCO conducted 11 dawn raids, and 17 undertakings applied for leniency.[241] To detect infringements more efficiently, the FCO has also adopted software-based market screening tools and is planning to incorporate artificial intelligence into its operations in the future.[242]

(b) Hungary

In Hungary, the legal framework governing public procurement is primarily set out in Act CXLIII of 2015 on Public Procurement (PPL), along with several accompanying Government Decrees (PPRs), such as Government Decree No. 321/2015 (dated 30 October 2015) concerning the methods for verifying suitability and the absence of exclusion grounds. These regulations collectively implement the provisions of Directive 2014/24/EU. The PPRs are applicable to all contracting authorities and utility entities when the value of the procurement exceeds the financial thresholds established either at the EU level or under national law. Meanwhile, the PPL itself governs all public procurement procedures and contracts that fall within the scope of contracting authorities in Hungary.[243]

Article 62 of the PPL sets out the list of mandatory exclusion grounds, mirroring those outlined in Article 57(1) of the Directive. However, what stands out in Hungary's implementation is the inclusion of Article 57(4)(d) of the Directive, which refers to economic operators involved in anti-competitive agreements, as a mandatory exclusion ground, whereas the Directive treats it as discretionary. This adaptation appears under Article 62(1)(n) and (o) of the PPL. Despite this stricter approach, Hungary follows the Directive's maximum duration for exclusions based on this ground, which is three years.[244]

In line with Article 57(5) of the Directive, Article 63(3) of the PPL requires that contracting authorities exclude an economic operator if, at any point during the procedure, it becomes evident that any mandatory or discretionary exclusion ground applies. This applies regardless of whether the relevant act or omission by the economic operator occurred before or during the procurement process.[245]

Further procedural details are provided under Article 69 of the PPL and multiple sections of the PPRs, particularly in relation to the types of evidence required to prove exclusion

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[240] HEINZ, S., "Main Developments in Competition Law and Policy 2024 – Germany", *Kluwer Competition Law Blog*, 13 February 2025, available at: https://competitionlawblog.kluwercompetitionlaw.com/2025/02/13/main-developments-in-competition-law- and-policy-2024-germany/ (last accessed February 2025).
[241] Ibid.
[242] Ibid.
[243] SIGMA, *Supra* n. [156], p. 117-126.
[244] Ibid.
[245] Ibid.

grounds or to confirm that selection criteria have been met. The PPRs also distinguish between bidders or candidates based in Hungary and those based abroad. This distinction often imposes a heavier burden of proof on foreign tenderers. Specifically, while Hungarian-based bidders can submit a self-declaration as sufficient evidence, foreign bidders are required to provide additional documentation to prove compliance with eligibility requirements. [246]

Hungarian public procurement law also contains provisions for publishing official blacklists of economic operators. These blacklists include companies that have been excluded from participation in procurement procedures due to either a binding decision issued by the procurement appeal body or a final court ruling that confirms a contractual breach or in cases where the economic operator itself has acknowledged such a breach. [247]

Under Article 187(2) of the PPL, the Public Procurement Authority (PPA) is tasked with maintaining, updating, and publishing these lists on its official website. The information displayed includes the length of the exclusion, the key details of the contractual breach, any compensation or pending claims, other imposed sanctions, and a reference to the relevant decision by the contracting authority or the court ruling. [248]

The authority responsible for making the formal decision to blacklist an economic operator is the Public Procurement Arbitration Board. Any such decision made by the Board may be contested through a legal challenge in court. When an operator is blacklisted as a result of the Board's decision, the exact nature and length of the exclusion are determined by the Board, or if the matter is appealed, by the final ruling of the court. The exclusion period decided in this way can vary in length but must fall within the range of six months to three years. [249]

2. Self-Cleaning Measures

(a) Germany

Section 125 of the German Competition Act (GWB) provides that contracting authorities are not allowed to exclude a company from a procurement process, even if there are legal grounds to do so, as long as the company meets all three of the following conditions. First, the company must have paid, or agreed to pay, compensation for the harm caused by its criminal actions or misconduct. Second, the company must have fully explained the circumstances and events connected to the misconduct or criminal behavior, including the damage it caused, by actively cooperating with both the investigative authorities and the contracting authority. Third, the company must have implemented specific technical,

[246] Ibid.
[247] Ibid.
[248] Ibid.
[249] Ibid.

organizational, and personnel- related measures that are suitable for preventing future cases of misconduct or crime. [250]

When deciding whether the economic operator has taken the necessary personnel measures, it is important to consider the need for clarifying the facts of the misconduct. These measures may include removing or replacing individuals in management positions. If the economic operator decides not to take any personnel measures because it wants to uncover the full facts of the wrongdoing, it must explain why that decision is appropriate and provide detailed information about each person involved. The contracting authorities must carefully assess all the self-cleaning efforts taken by the economic operator, while also taking into account the seriousness and unique details of the offense or misconduct. If the authority finds that the economic operator's self-cleaning steps are not sufficient, it must give a clear explanation to the company stating the reasons behind its decision. [251]

Additionally, the recently created Competition Register at the Bundeskartellamt gives economic operators the option to have their self-cleaning efforts reviewed by a central authority. Economic operators listed in the Competition Register can submit a request to have their entry removed early based on the self-cleaning measures they have taken. If the Bundeskartellamt determines that the company has fulfilled all the necessary requirements for self-cleaning, the economic operator's entry will be removed from the register ahead of time. This decision is binding for all contracting authorities in Germany, meaning the economic operator can no longer be excluded from procurement procedures due to the prior misconduct that led to its entry in the register. [252]

However, if the Bundeskartellamt refuses an economic operator's application for early removal, that decision does not have a binding effect on contracting authorities. This means that the economic operator can still present its self-cleaning efforts to contracting authorities in future procurement procedures, and each authority is allowed to make its own decision on whether those efforts are enough. Nonetheless, public contracting authorities will be made aware that the economic operator's application was rejected, as this information will be recorded in the Competition Register. These authorities may also ask the Bundeskartellamt to send the rejection decision and any related documents to help with their evaluation. [253]

The Public Procurement Chamber of Thuringia, in a decision dated July 12, 2017, emphasized that a bidder must provide proof and proper documentation of the self-cleaning measures taken. Furthermore, according to a ruling by the Public Procurement Tribunal in Lüneburg on February 14, 2012, if the damage caused has not yet been compensated, the affected company must at least provide a concrete plan showing how it intends to compensate for the damages. Lastly, regarding technical, organizational, and personnel-

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[250] GERMANY, *Supra* n. [221], at p. 3.
[251] Ibid.
[252] Ibid. at p. 7.
[253] Ibid.

related actions, the Higher Regional Court of Düsseldorf ruled on April 18, 2018, that if a company's management personnel is involved in criminal behavior relevant to exclusion, removing that individual from their management role is a necessary part of proper self-cleaning. [254]

(b) Hungary

Similar to Germany's public procurement regulations, Hungarian law under the Public Procurement Law (PPL) also allows excluded economic operators to attempt to restore their eligibility through the process of self-cleaning. In Hungary, this process is handled centrally by the Public Procurement Authority (PPA), meaning that contracting authorities do not have the discretion to independently evaluate or approve self- cleaning efforts. If a company has been excluded from procurement procedures, it must formally submit a request for self-cleaning to the PPA in order to be considered for reinstatement. [255]

To be exempted from the exclusion, the company must prove that it is trustworthy again by meeting three cumulative conditions: i) It must have paid or committed to paying compensation for any damage resulting from the misconduct; ii) It must have thoroughly explained the facts and context of the infringement and shown active cooperation with the relevant authorities and iii) It must have introduced technical, organizational, and staffing measures that are suitable to prevent similar violations in the future. [256]

The PPA begins its evaluation by determining whether the misconduct actually caused any damage. If damage occurred, the PPA will assess whether the victims or affected parties can be identified. If the victims cannot be identified, the excluded company must show what actions it has taken to be prepared for potential future claims. If the victims are identifiable, the company must prove that they have been compensated, for instance, by submitting written waivers from those parties. All proof supporting the above must be submitted to the PPA alongside the self-cleaning request. If the PPA accepts the request and issues a positive decision, that decision applies to all future public procurement processes. This means that a successful self-cleaning procedure does not only apply to one specific tender, but has general effect.

However, the PPA retains wide discretion when evaluating such requests, and there is no certainty that any specific application for exemption will be approved. [257]

In its decision dated July 13, 2016, the PPA emphasized that, in assessing self-cleaning efforts, it also considers whether the company had already taken corrective steps before the PPA made its final ruling. The company's willingness to cooperate is demonstrated by

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[254] BRAUN, P., "Self-Cleaning Procedure in Germany", in *Guide to Self-Cleaning in European Public Procurement Procedures*, Dentons, 2021, p. 24-25.
[255] Ibid. at p. 27-31.
[256] Ibid.
[257] Ibid.

voluntarily sharing certain data with the Authority, even in cases where it was not legally obligated to do so. Also, In an order by the Budapest- Capital Regional Court (No. 9.Kpk.720.052/2018/4), the court clarified that self-cleaning is an exceptional opportunity offered after an infringement, allowing the company to prove its reliability despite the existence of legal grounds for exclusion. The main purpose of the self-cleaning process is to demonstrate that the corrective measures taken by the company are sufficient to re-establish its trustworthiness. [258]

In essence, the company must convince the PPA that, despite its previously established wrongdoing, it can still be considered a reliable and responsible partner in public procurement. This involves showing that its continued participation would not undermine public procurement principles or the protection of public interests and values. [259]

The goal of self-cleaning is to determine whether the excluded company's right to take part in procurement procedures can be restored. Under this concept, even a company that was previously involved in corrupt or unlawful behavior can re-enter the procurement process, but only if it can convincingly demonstrate, through a range of significant internal changes and preventative measures, that it will not engage in similar behavior again. It must be assessed whether the company has taken all necessary and credible steps to prevent future misconduct. Self-cleaning is not just about legal compliance; it requires the company to take both practical and ethical steps to change its behavior and mindset. [260]

In Hungary, public contracts may only be awarded to companies that are considered responsible. The Hungarian interpretation of "credibility" in this context means that the company must not only seek to minimize or repair financial damages, but also actively work toward future lawful conduct. This includes cooperating with the authorities in detecting any potential breaches of the law. The PPA is responsible for handling self-cleaning matters in Hungary, primarily in the interest of legal certainty. This central authority approach ensures consistency in decisions and removes discretion from individual contracting bodies, even though the EU directive allows for that possibility. Only the PPA, or a court, if judicial review is sought, has the authority to determine whether a company's self-cleaning efforts meet the legal requirements and sufficiently prove its reliability. [261]

One of the key benefits of this centralized model is that companies can receive a clear, official confirmation of their eligibility before they participate in a procurement process. In addition, previous PPA decisions can guide other companies in structuring their own self-cleaning measures. Hungarian law, following the Public Procurement Directive, outlines in Section 188 the types of actions required to qualify for exemption from exclusion. Still,

[258] Ibid.
[259] Ibid.
[260] Ibid.
[261] Ibid.

it ultimately leaves it to the PPA to decide whether the measures taken are adequate within the self-cleaning framework. [262]

D. Concluding Remarks

Germany and Hungary have both established legal frameworks to implement the exclusion mechanism under Article 57(4)(d) of Directive 2014/24/EU. While their approaches reflect the core requirements of the Directive, each country has developed distinct institutional and procedural models shaped by their national legal systems and enforcement structures.

Germany's transposition of the exclusion ground is based on provisions that link competition and procurement law. Section 124(1) GWB allows contracting authorities to exclude companies involved in anti- competitive behavior, such as cartels, even in the absence of a final conviction. The scope includes both formal and informal agreements. The Competition Register and the role of the Federal Cartel Office (FCO) are part of the mechanism used to record relevant offenses. Contracting authorities have discretion when deciding on exclusions and evaluating self-cleaning measures, with the Bundeskartellamt responsible for assessing whether early removal from the register is justified. Companies may regain eligibility only if they meet specific conditions related to compensation, cooperation, and preventive actions.

Hungary's framework differs in several respects. Article 57(4)(d) is treated as a mandatory exclusion ground under Hungarian law. The evaluation of self-cleaning is handled exclusively by the Public Procurement Authority (PPA), and individual contracting authorities do not have the power to independently assess or accept self-cleaning measures. The process requires companies to fulfill three cumulative conditions: compensation for the harm caused, clarification of the facts, and the implementation of preventive measures. The PPA assesses these elements and, if satisfied, allows the company to participate in future procurement procedures. The centralized model is intended to ensure consistency in decisions but limits flexibility in individual cases and limits the discretion of contracting authorities.

Both systems include legal pathways for companies to re-enter public procurement after anti-competitive conduct, based on meeting certain conditions. While the core requirements are similar in both countries, the models differ in how they apply discretion and who is responsible for the evaluation. Germany's approach allows contracting authorities besides the central register to participate in the evaluation, whereas Hungary relies entirely on a centralized process led by the PPA. The application and outcomes of these mechanisms depend on how consistently legal standards are applied and how authorities and economic operators engage with the process.

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[262] Ibid.

III. Assessment of Article 57(4)(d) on Competition in EU Public Procurement

This chapter forms the analytical core of this thesis, focusing on a critical evaluation of Article 57(4)(d) of Directive 2014/24/EU and its impact on competition within EU public procurement processes. Article 57(4)(d) serves as a discretionary ground for exclusive economic operators suspected or proven of engaging in agreements that distort competition, concerns arise regarding its practical application and consequent effects on market dynamics.

This chapter systematically examines the theoretical foundations and practical applications of the discretionary exclusion ground, integrating doctrinal analysis, key EU jurisprudence, and empirical data. The principle of proportionality will serve as a guiding analytical lens, providing the basis for evaluating the practical effects of the discretionary exclusion regime on competition. In doing so, this assessment specifically draws upon key cases discussed in Chapter 2, analyzing how the CJEU employed and emphasized the principle of proportionality in its interpretations. It will explore whether the discretionary exclusion under Article 57(4)(d), while aiming at safeguarding the integrity of public procurement procedures, inadvertently restricts market participation and ultimately competition. Furthermore, the examination incorporates comparative insights from the German and Hungarian systems discussed in Chapter 2 to illustrate varied national implementations of exclusion measures and the operationalization of self-cleaning mechanisms.

Ultimately, through statistical analyses drawn from EU-wide procurement data, the chapter will assess whether the application of discretionary exclusion penalties under Article 57(4)(d) effectively achieves its regulatory objectives or instead contributes to a broader trend of declining competition within the EU public procurement market.

A. The Principle of Proportionality

1. Definition and Application to Discretionary Exclusion Grounds

As the application of the discretionary exclusion grounds is not uniform across the EU, the contracting authorities have broad discretion in deciding the implementing conditions of these grounds of exclusion. [263] However, this discretion is not unlimited as measures cannot be more extensive than necessary to meet objectives stated in the Directive 2014/24. [264] Here, the principle of proportionality must be considered when setting these conditions. Article 18(1) of Directive 2014/24 obliges contracting authorities to treat economic operators equally and without discrimination, and to act in a transparent and

[263] *Tim SpA*, *Supra* n. [218], para. 34.
[264] Ibid. at para. 45.

proportionate manner. [265] This provision clearly states that the design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of narrowing competition. [266] Therefore, the application of the specific rules on public procurement, including those related to the exclusion grounds, especially Article 57(4)(d), can be derived from these principles. [267]

According to Article 5 of the TFEU, the proportionality principle as a general principle of law means that among other things the action of the EU shall not go beyond what is necessary to achieve the objectives of the treaties. [268] In the context of public procurement, the principle of proportionality requires that whenever a contracting authority makes a decision related to a procurement, it must select the option that best supports the intended objective, while avoiding unnecessary restrictions on competition and ensuring that suppliers are not hindered from participating in the contract award process. [269] In other words, the principle of proportionality requires in the public procurement context that all conditions and criteria must be proportionate and reasonable. [270] Therefore, the principle of proportionality is highly relevant and must be taken into account when applying the exclusion grounds. [271]

In the context of the discretionary exclusion penalty, more precisely, and especially under Article 57(4)(d), the principle of proportionality means that any restriction on an economic operator's access to the market must be reasonable in relation to the goal it aims to achieve. [272] This principle, for instance, sets boundaries on how long an operator can be excluded. [273] It also prevents exclusions for minor issues, particularly when there was no intentional wrongdoing or negligence involved. [274] Moreover, it obliges contracting authorities to consider any corrective action, of "self-cleaning" steps, taken by the operator to prove their reliability. [275]

2. CJEU Jurisprudence and the Principle of Proportionality

The CJEU played a pivotal role in interpreting and stressing the importance of the principle of proportionality in the context of applying exclusion grounds. Although most of these judgments are based on 2004 Directive or earlier directives, they are still relevant to the current 2014/24 Directive since some of these judgments were codified on the reform of the 2014 Directive. [276] For instance, in the C-213/07 Michaniki, the CJEU stressed that the discretion to exclude on the additional grounds must be exercised in accordance with

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[265] GRANDIA, J. and VOLKER, L. (eds), supra n. [40], at p. 56.
[266] Ibid.
[267] Ibid.
[268] Ibid.
[269] SØRENSEN, K.E., JESSEN, P.W., et al., *supra* n. [21], at p. 600.
[270] GRANDIA, J. and VOLKER, L. (eds), supra n. [40], at p. 57.
[271] Ibid.
[272] SIGMA, *supra* n. [156], at p. 175.
[273] Ibid.
[274] Ibid.
[275] Ibid.
[276] Ibid.

the general principles of the Directives and of EU law in general, including the principle of proportionality. [277] Also in C-21/03 Fabricom, the CJEU rules that a Belgian law that prohibited from tender in all persons who had themselves been involved in the preparatory work, even if they could demonstrate that competition was not at risk, was contrary to the directives because it was not proportionate to the aimed objective, the law went beyond what was necessary to achieve the objective of the national rule. [278] In Connexxion (C-171/07) the EU stated that when applying optional exclusion grounds, contracting authorities should pay particular attention to the principle of proportionality. [279]

Moreover, in recent cases based on the 2014 Directive, the CJEU applied and stressed on the principle of proportionality even if it is not explicitly mentioned in the judgment. In C-416/21, the principle of proportionality plays a pivotal role in balancing the exclusion of economic operators from public procurement procedures. The CJEU emphasized that while Article 57(4)(d) of Directive 2014/24 allows for discretionary exclusion based on plausible indication of anti-competitive behaviour, any decision to exclude must still comply with the principle of proportionality. This means that the exclusion must be proportionate to achieve the aim of preserving the integrity and reliability of the procurement process, while also taking into account its impact on competition.

Also, in Vossloh Laeis GmbH v Stadtwerke München GmbH, while the principle of proportionality in not explicitly invoked, it is clearly embedded in the Advocate General's reasoning concerning the duplication of cooperation obligation for economic operator under Article 57(6)(2) of Directive 2014/24. The judgment implicitly reflects proportionality by emphasizing that the economic operator's obligation to cooperate must not be duplicated across both the investigating authority and the contracting authority. Therefore, requiring an economic operator to present the same evidence or explanation to both authorities would impose an unnecessary and excessive burden, which the Advocate General argues would be unfair and disproportionate, especially considering the potential bias of a contracting authority that may have been harmed by the operator's prior misconduct.

In the C-66/22 In Infraestruturas de Portugal and Futrifer Indústrias Ferroviárias (C-66/22), the principle of proportionality is explicitly acknowledged as a binding requirement for contracting authorities in the context of assessing whether to exclude a tenderer under Article 57(4) of Directive 2014/24. While the case primarily concerns the autonomy of contracting authorities in assessing reliability, it also firmly embeds proportionality as a necessary constraint on that discretion. Finally in the C-41/18 Meca v. Comune di Napoli, the CJEU explicitly highlights if a contracting authority were automatically bound by external assessments, it would likely be unable to properly apply the principle of proportionality, as required by the Directive. Therefore, we can say that the principle of proportionality is highlighted in all the CJEU judgments and practices, which demonstrate the importance of always basing exclusion decisions on the proportionality test.

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[277] Ibid.
[278] Ibid.
[279] GRANDIA, J. and VOLKER, L. (eds), supra n. [40], at p. 63.

3. Automatic Exclusion and Blacklist Mechanisms

Based on what is mentioned above, we can argue that automatic exclusion from public procurement procedures does not align with the principle of proportionality and competition. Automatic sanctions means that the sanction is automatically applied by the responsible authority regardless of the specifics of the case or the market. [280] This is also highlighted in the CJEU judgments. The Court ruled that the automatic and absolute nature of the prohibition is disproportionate and is not permitted under EU law (C-213/07 Michaniki). [281] Also, the Court held that a national law cannot force authorities to automatically exclude operators guilty of misconduct without considering the specific circumstances. [282] In Assitur (C-538/07), and Serrantoni (C-376/08), the Court rejected national rules that automatically excluded companies based on their affiliations, ownership ties, or membership in consortia. [283] Moreover, in C-395/18 Tim the CJEU rules that automatic exclusions from public procurement procedures are not permitted.

Any process that may lead to the exclusion of an economic operator from public procurement must follow core safeguards that ensure fairness, equality, and integrity. [284] The process must be proportionate, meaning the severity of exclusion should match the seriousness of the misconduct. [285] It must also be non- discriminatory, treating economic operators from all Member States equally, without preference or bias. Transparency is essential, requiring that rules and procedures be clearly defined, publicly available, and understandable to all participants. [286] In addition, the process must be fair and equitable, applied consistently across all cases without favoring any operator. [287] Decisions should reflect equal treatment and be made in a reliable, unbiased manner. [288] Finally, due process must be respected, ensuring that operators are given enough time to respond, understand the process clearly, and have access to an effective right of appeal or review. [289] These safeguards together protect against disproportionate exclusions and maintain integrity and competition in the procurement system. [290] This means that a case-by-case assessment is required by the contracting authority in all cases (C-41/18 Meca v. Comune di Napoli), except one case mentioned under Article 57(6) in the directive, where the economic operator is excluded from public procurement procedures by a final court judgment for a clear time period. [291] Consequently, These automatic bans were seen as going too far and violating the principle of proportionality because they failed to assess individual

[280] OECD (2022), *supra* n. [103], at p. 29.
[281] SIGMA, *supra* n. [156], at p. 179.
[282] Ibid.
[283] Ibid.
[284] Ibid., at p. 102.
[285] Ibid.
[286] Ibid.
[287] Ibid.
[288] Ibid.
[289] Ibid.
[290] Ibid.
[291] Ibid. at p. 109.

situations. [292] And the nature, seriousness and impact of the potential grounds of exclusion, irrespective of the nature of evidence required, should always be assessed on a case-by-case basis, with particular attention being paid to the proportionality principle. [293] This view is consistent with the CJEU rules in a number of cases concluding that laws requiring automatic exclusion are disproportionate and unlawful. [294]

Despite the existence of these safeguards and the requirement for case-by-case assessments, some scholars argue that, in practice, contracting authorities may feel compelled to exclude an economic operator once there is sufficiently plausible evidence or indications of involvement in anti-competitive behavior. Although the authority formally retains discretion in such decisions, the principle of equal treatment would likely demand exclusion to avoid any perception of unfairness or preferential treatment among bidders. As a result, the discretion granted to contracting authorities in theory may, in practice, become a de facto obligation to exclude. [295]

The OECD defines an "official automatic exclusion list or Blacklist" as a "centrally administered and published list of economic operators that are excluded from tendering for public procurement contracts." [296] Based on the above, and even though the permissibility of central automatic exclusion lists or blacklist is uncertain under the directive as the latter does not specifically address whether blacklist or debarment lists are allowed, we can conclude that member states must avoid making these lists for all excluded economic operators. [297] The legality and practical use of blacklists must be assessed based on the broader rules in the Directive, especially those concerning grounds for exclusion and the possibility of self-cleaning and as well as the overall legal principles of the Directive and the case law from the CJEU. [298] Especially that the Directive gives economic operators the new self-cleaning right under Article 57(6) which allows them to show evidence as a corrective step to become reliable gain even if they fall under the exclusion criteria. This means that even if Blacklists are permitted under national law, they must still allow for individual assessment and not automatically exclude operators unless a final court decision says so. [299] However, I believe that the safest approach is to avoid using such blacklists except the cases of blacklist of economic operators for which a final judgment has specified both the sanction of exclusion from public procurement procedures and the period during which that sanction will apply.

Applying the previous argument to Germany's Competition Register (Wettbewerbsregister) which provides a centralized mechanism for recording economic operators involved in serious economic offences, including anti-competitive practices.

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[292] Ibid.
[293] SIGMA 2016, *Supra* n. [79], p. 9.
[294] Ibid. p. 9.
[295] SØRENSEN, K.E., JESSEN, P.W., et al., *supra* n. [21], at p. 580.
[296] SIGMA 2016, *Supra* n. [79], p. 2.
[297] SIGMA, *supra* n. [156], at p. 103.
[298] Ibid. at p. 100.
[299] Ibid. at p. 101.

While the Central Register System does not form an automatic exclusion list in the strict sense used by the OECD, it could have the effects of automatic exclusion. Although inclusion in the Register does not automatically mean an economic operator will be excluded, I believe, in practice it may strongly influence contracting authorities to exclude companies without fully considering whether that decision is proportionate or taking competition implications into account. Since contracting authorities are obliged to check the Central Register before awarding contracts exceeding EUR30,000, they might rely too heavily on the register to save time or reduce risk, they may overlook their legal obligation to assess each case individually based on the specific facts and context. This raises concerns about whether such a system is fully compatible with EU public procurement law. According to the CJEU judgment in Meca and Infraestruturas de Portugal, contracting authorities must always respect principles like proportionality, fairness, and the right of economic operators to demonstrate reform through self-cleaning. Therefore, if contracting authorities treat the register as a more than just a source of information by making it a deciding factor, they risk turning what should be a flexible and fair assessment into a rigid and unjust process. Consequently, to stay in line with EU rules, I believe the best approach for Germany is to use the Central Register only for economic operators excluded from public procurement procedures by a court final judgment.

B. Sufficiently Plausible Indications for Excluding Competition Law Infringers

Unlike other discretionary exclusion grounds under Article 57(4) of the Directive, which require contracting authorities to "*demonstrate"* specific misconduct, Article 57(4)(d) adopts a more flexible standard. [300] It allows for the exclusion of bidders based on "sufficiently plausible indications" of competition law infringements. This lowers the evidentiary threshold and enables authorities to act even in the absence of definitive proof, relying instead on a well-founded suspicion of anticompetitive behavior. [301] The aim is to protect the integrity of the procurement process without demanding conclusive legal findings in every case.

However, neither the Directive nor the Court of Justice of the European Union (CJEU) has provided a precise definition of what constitutes a "sufficiently plausible indication."[302] This lack of guidance leaves considerable discretion to national authorities and contracting authorities, [303] resulting in varied interpretations and practices across member states without considering the serious implications on competition in the public procurement landscape. From my point of view, like other exclusion grounds under Article 57(4), excluding economic operators from public procurement must be based on clear-cut evidence of its involvement in anti-competitive behaviors.

Some might argue that the reason legislators require only "sufficiently plausible indications" to exclude companies that breach competition law is because proving anti-

[300] Jämsén-Smith, *Supra* n. [93], p. 27.
[301] SØRENSEN, K.E., JESSEN, P.W., et al., *supra* n. [21], at p. 601 - 603.
[302] SØRENSEN, K.E., JESSEN, P.W., et al., *supra* n. [21], at p. 601 - 603.
[303] Jämsén-Smith, *Supra* n. [93], p. 27.

competitive behavior is often difficult. Without this lower threshold, it might be practically impossible for contracting authorities to take action against suspected infringers.

While this is a fair argument, I argue that a higher standard of proof is necessary when considering the broader goals of the directive, namely, increasing participation of small and medium-sized enterprises (SMEs), promoting cross-border procurement, and encouraging fair competition.

A vague and broadly worded exclusion ground, such as Article 57(4)(d), risks undermining these objectives. It creates legal uncertainty for economic operators, especially as its interpretation and application vary across member states. This inconsistency increases administrative burdens and may discourage companies from participating in procurement procedures.

Moreover, the current low evidentiary threshold appears to contradict both the directive and the case law of the CJEU. The Court requires that exclusions be based on individual, proportionate, and evidence-based assessments. The directive also emphasizes the importance of respecting all core principles of public procurement. Therefore, excluding companies based merely on suspicion comes close to an automatic exclusion, which the CJEU has clearly prohibited.

It is also unrealistic to expect all contracting authorities across the EU to conduct such nuanced assessments effectively, particularly when the evidentiary standard is vague and there are no clear or harmonized criteria. From a balanced and proportional perspective, this low threshold may actually do more harm than good by discouraging participation and weakening competition, rather than protecting the integrity of public procurement.

C. Self-Cleaning Measures and their Validation

The development of Article 57 of Directive 2014/24 is largely unchanged from Article 45 of the 2004 Directive, except for the introduction of the "self-cleaning", [304] that was introduced for the first time at the EU level. [305] Self-cleaning measures were adopted by the EU to mitigate the significant consequences that the exclusion penalty might have on the bidding landscape, as it could come with counter consequences on the competitiveness of public procurement procedures. [306] Therefore, self-cleaning measures offer a way for economic operators to correct their behavior and remain in the bidding landscape without severely distorting the market or reducing competitors. [307] These measures do not automatically prevent the application of bidder exclusion, they allow economic operators to take corrective actions such as compensation damage, cooperating with investigations

[304] DE MARS, S., Supra n. [19], at p. 2.
[305] MITAK, P., *Contemporary Issues in the EU Public Procurement Rules on "Self-Cleaning" Measures: The Cases of Austria and Croatia*, Master's thesis, University of Graz, November 2023, p. 7.
[306] OECD (2022), *supra* n. [103], at p. 32.
[307] Ibid.

and improving internal practices to avoid or shorten the exclusion. [308] For instance, in Germany, economic operators include director disqualification as part of the self-cleaning measures submitted as evidence to the contracting authority. [309]

According to Auriol and Soreide, governments may not afford to exclude needed suppliers for the sake of promoting integrity in markets. [310] They need more flexible rules. [311] Therefore, instead of excluding these suppliers, they can reach an administrative settlement agreement, where contracting authorities are given the discretion to list far-reaching demands. So in exchange for a shorter debarment period or even complete leniency, an economic operator might agree to dismiss managers, accept external monitoring, or make some form or restitution payment. [312] The 2014/24 Directive adopts these like-measures by providing economic operators with the right of "self-cleaning". As a countermeasure to exclusion, Article 57 introduces EU level rules on self-cleaning processes, [313] where economic operators subject to one of the exclusion grounds under Article 57(4) have the opportunity to "correct their mistakes" by providing evidence that they continue to be credible in spite of the presence of the grounds of exclusion so that the contracting authority may repair faith in them. [314]

From my point of view, a centralized approach, like the one implemented in Hungary, is the most effective way to manage the self-cleaning process. Under this model, contracting authorities do not have the power to assess or approve self-cleaning efforts themselves. This structure helps eliminate potential bias, especially in cases where a contracting authority may have been previously harmed by the anti-competitive conduct of the operator now seeking self-cleaning. Furthermore, excluded economic operators would benefit from greater clarity and certainty regarding the specific measures required for self-cleaning, rather than being subject to the discretion and evaluation of individual contracting authorities. It is also important to note that contracting authorities may lack the necessary resources, expertise, and knowledge to properly assess whether an operator has genuinely reformed.

While Germany has introduced a central authority that economic operators may approach for the purpose of self-cleaning, it is important to note that this process remains optional. Operators are not obliged to pursue self-cleaning through this authority, and contracting authorities are only bound by its decisions if the economic operator's measures are formally approved. As a result, this framework introduces a level of legal uncertainty and risks inconsistent outcomes in the evaluation of self-cleaning efforts.

D. Empirical Assessment: Impact of Article 57(4)(d) on Competition

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[308] Ibid.
[309] Ibid.
[310] Ibid. at p. 33-34.
[311] Ibid.
[312] Ibid.
[313] DE MARS, S., *supra* n. [19], at p. 2.
[314] Ibid.

1. Statistical Overview: European Court of Auditors' Report (2023)

In 2023, the European Court of Auditors published the Special Report on Public Procurement in the EU. The audit assessed the level of competition for public procurements in the EU's single market over the period of 10 years and the actions taken by the Commission and the member states to identify and address obstacles to competitive tendering, in the interest of obtaining the best value for money. In order to assess whether the 2014 reform has had an impact on competition levels and whether other objectives of the reform have been met, the audit used open data available on public procurement in the EU in the 10 years up to 2021. The audit concluded that the level of competition for public contracts to deliver works, goods, and services decreased over the past 10 years in the EU single market. [315] Also, the Audit notes that some of the objectives of the 2014 reforms may, at times, go against the overarching objective of ensuring competition in public procurement. [316] This Audit covered the period from 2011 to 2021.

The audit analysis of the data available indicates a significant increase in single bidding, a high level of direct contract awards in most member states and a limited level of direct cross-border procurement between member states. As several objectives of the 2014 reform remain unattained, they concluded that the entry into force of the 2014 directives has had no demonstrable effect. On the contrary, bidders and contracting authorities are of the view that public procurement procedures still give rise to a significant administrative burden, the share of SME participating in public procurement has not significantly increased and strategic aspects are rarely considered in public tenders. Also, as publication rates remain low, transparency, a key safeguard against the risk of fraud and corruption, is negatively affected.

Within the European Commission, two Directorates-General share responsibility for public procurement policies and the member states' implementation of the directives: 1. the Commission's Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW) and the Tenders Electronic Daily (TED). All calls for tenders and contract award notices for procurements valued above the applicable EU threshold must be published on TED. The audit focused in line with the concept of competition on the three triple-weighted indicators in the Single Market Scoreboard, which are the "no call for bids" rate, the "single bidding" rate; and the "publication" rate based on all data provided in TED, as they identify the level of limited, or even non-existent, competition and are therefore widely accepted as significant inefficient market behavior that poses a risk to "best value for money" procurement, and thus efficient use of public money. The audit also looked at regional and sectoral differences. [317] They examined how direct cross- border procurement has evolved over time, as this is another relevant indicator. Lastly, they checked how prices for works, goods and services procured by public authorities have

[315] EUROPEAN COURT OF AUDITORS, *Special Report 28/2023: Public Procurement in the EU*, Luxembourg, 2023, p. 5(VI), available at: https://www.eca.europa.eu/en/publications/SR-2023-28 (last accessed April 2025).
[316] Ibid.
[317] Ibid. at p. 11-12, 15.

evolved, since price increases above the consumer price inflation rate could also indicate weak competition. [318]

(a) Decline in Competitive Bidding

Jumping to the audit observations. A direct award or no calls for bids means that a public authority does not publish a call for tender but approaches one or more companies directly, asking them to submit an offer. [319] In 2021, the direct awards accounted for around 15.8% of all procurement procedures in the EU's single market reported by member states on TED. In the Scoreboard, a "no call for bids" rate above 10% is considered a red flag, and in 2021, 23 out of 27 Member States, which is the majority, fall under this situation as shown in Figure 3. [320] Moreover, it was noted that contracting authorities' approach to award contracts directly, in the absence of any competition, varies significantly across economic sectors like shown in Figure 4. [321] For example, over the 11-year period covered, there were increasingly fewer direct awards for financial services, while in 2021 the energy sector showed the highest number. [322]

On the other hand, single bidding means that only one company shows interest and submit a bid for a given public procurement. In such situations, as there is no competition, the contracting authority either accepts the only bid received or discontinues the procedure. The audit noted a significant increase in the single bidding rate across the EU Single Market from 23.5% to 41.8% over the period 2011-2021. [323] At the same time, the number of bidders per procedure almost halved, decreasing from an average of 5.7 bidders to 3.2 bidders per procedure. [324]

(b) Procedural Length and Administrative Burden Post-2014 Directive

The audit showed that the 2014 reforms have made the length of administrative procedures increasing by half since 2011. The data shows that current contract award procedures take significantly longer than they did 10 years ago. In particular, the overall decision-making period up to the time of contract award not including appeal procedures against award decisions has increased from 62.5 days in 2011 to 96.4 days in 2021. Therefore the entry into force of the 2014 directives did not shorten this duration. [325]

2. The Role of Discretionary Exclusion in Undermining Competition in Public Procurement: Article 57(4)(d)

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[318] Ibid. at p. 15.
[319] Ibid.
[320] Ibid. at p. 15-17.
[321] Ibid. at p. 18.
[322] Ibid.
[323] Ibid.
[324] Ibid.
[325] Ibid.

(a) Awareness Deficits and the Competitive Costs of EU Procurement Policy

Even though the European Court of Auditors' report does not explicitly identify all the root causes behind the statistical evidence pointing to a decline in competition after the adoption of the 2014 Public Procurement Directives, it is reasonable to argue that the application of the exclusion ground under Article 57(4)(d) has played a role in contributing to this trend. In my view, keeping this penalty in place, especially in its current form, may further exacerbate the problem by reducing competition even more. While the exclusion penalty aims to promote the integrity of public procurement procedures by preventing anti- competitive behaviors, its enforcement and practical effects might discourage economic operators from participating, especially when applied in rigid ways without adequate awareness about its impact on competition. This concern is supported by the audit's results that indicate that member states' awareness of competition issues is limited. [326] Few activities used by member states to address obstacles to competition in public procurement at national level. [327]

More concerning is the finding that approximately half of the survey respondents, along with a number of interviewees, did not perceive the design of procurement procedures and its impact on competition as a concern, as long as the procedures were formally compliant with the Directive. [328] From my point of view, this lack of awareness stems from the European Commission's initial monitoring activities, which were primarily focused on the transposition of the 2014 Public Procurement Directives into national law and subsequent enforcement actions, rather than on actual impact of those reforms on competition. [329] It has been noted that during the transposition period, the Commission did not devote sufficient attention to initiatives aimed at raising awareness of competition principles, ensuring value for money, or improving procurement efficiency. In particular, the Commission failed to make targeted use of available procurement data to identify the root cause of limiting competition in public procurement across the EU and the member states, and it did not implement systematic mitigation strategies to address these shortcomings. [330] This lack of awareness raises high risks concerning the proper application of the principles of proportionality and competition as emphasized in the Directive and the case law of the CJEU. Without the necessary skills and knowledge regarding the impact of procurement decisions on competition, both within individual procedures and in the market as a whole, contracting authorities may struggle to apply these principles as the Court has consistently required.

(b) Administrative Burden and Procedural Formalism

[326] Ibid. at p. 42.
[327] Ibid.
[328] Ibid.
[329] Ibid. at p. 69, 83.
[330] Ibid. at p. 40.

The Audit has pointed out some factors that have a significant impact on competition. Among these factors are the overly restrictive selection criteria and technical requirements, which considerably limit the number of companies able to participate in public procurement procedures. [331] More than 40% of respondents to the survey identify these restrictive criteria or requirements as critical reasons contributing to situations where only a single bidder participates. [332] In my view, this situation is highly linked to the fact that Directive 2014/24 enhanced the flexibility provided to contracting authorities by allowing them to request additional information or documentation from economic operators regarding the exclusion grounds and selection criteria. [333]

This is proven by SIGMA's Assessment and Monitoring Report underlining several practical issues that arise within public procurement processes, especially focusing on the methods used by contracting authorities during the qualification stage for economic operators. [334] A primary concern mentioned is the excessively bureaucratic and formalistic approach applied by contracting authorities when requesting, verifying, and processing documents related to the qualifications of economic operators, as well as when checking for grounds of exclusion. [335] This overly rigid procedure arises primarily from the bureaucratic interpretation and application practiced by procurement officials. [336] This rigid interpretation involves the blanket application of discretionary exclusion grounds and selection criteria, even when they are irrelevant to the specific procurement. [337]

Moreover, this strict interpretation is often reinforced by external auditors who typically prioritize formal procedural compliance over actual procurement performance, effectively encouraging contracting authorities to prioritize extensive paperwork above competitive public tender. [338] Again, this stems from the European Commission prioritizing transposition over effects on competition. The resulting effects of these procedural issues are negative and extensive on competition. Economic operators face considerable inconvenience, substantial administrative burdens, and increased participation costs because of the time and resources necessary to comply and submit the documentation required by contracting authorities. [339] Contracting authorities, on the other hand, must manage procurement procedures that become longer and more expensive, as they are obligated to conduct time-consuming verification of every submitted document. [340] Consequently, competition is reduced, since many economic operators, particularly SMEs, find themselves deterred by the excessive bureaucratic requirements placed on them. [341] A survey cited within the Evaluation of SMEs' Access to Public Procurement Markets in the EU indicated that 46% of SMEs frequently or regularly encountered problems due to

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[331] Ibid.
[332] Ibid. at p. 43.
[333] SIGMA, *supra* n. [156], at p. 15.
[334] Ibid.
[335] Ibid. at p. 16.
[336] Ibid.
[337] Ibid, at p. 17.
[338] Ibid.
[339] Ibid., at p. 16.
[340] Ibid.
[341] Ibid.

excessive paperwork. [342] This proves that Through its public procurement policy, the public sector can affect the structure of the market and the incentives of economic operators to compete more or less fiercely in the long run. [343] Procurement policy, therefore, may be used to shape the longer-term effects on competition in an industry sector. [344]

This administrative and procedural burden leads to higher prices within public contracts, as bidders often add the cost of preparing tender documents into their proposed pricing.[345] [345]Furthermore, these burdensome requirements result inmany contract award procedures being canceled entirely, further inflating the overall costs and inefficiency of the public procurement system. [346] Even high-quality bids are sometimes unfairly rejected for minor formal issues, which undermine both the integrity and effectiveness of the procurement process, ultimately reducing competition in the public procurement landscape. [347]

In the Hungarian system, non-Hungarian economic operators are required to provide more extensive evidence to demonstrate their reliability and integrity in relation to the exclusion grounds, whereas Hungarian operators can rely on a simple self-declaration as sufficient proof. This additional administrative burden on foreign operators appears to result from the varying application of Article 57(4)(d) across EU member states. Some countries adopt a centralized enforcement model that limits the discretion of economic operators, while others grant contracting authorities broad discretion to assess exclusion and self-cleaning measures.

(c) Market Concentration and Oligopolistic Structures

Representatives of Member States highlight another pivotal element of the reduction of competition, which is market concentration. Specifically, they refer to situations wherein only a small number of economic operators compete within a given market, inherently resulting in low competition. [348] Indeed, almost half of the respondents to the Audit survey identified restricted economic markets as being at least partially responsible for single bidding. [349] Moreover, approximately 45% of these respondents attributed such restrictive markets as a reason behind the high level of both negotiated procedure and award made in the absence of a call for bid. [350] One of the biggest challenges of bidder exclusion in relation to the market dynamics, is the reduction in the overall number of market players, which negatively impacts competition for future procurement procedures. [351]

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[342] Ibid.
[343] OECD, *Supra* n. [132], p. 39.
[344] Ibid.
[345] SIGMA, *supra* n. [156], at p. 16.
[346] Ibid.
[347] Ibid.
[348] EUROPEAN COURT OF AUDITORS, *supra* n. [315], at p. 43.
[349] Ibid.
[350] Ibid.
[351] OECD (2022), *supra* n. [103], at p. 33-34.

This issue is especially acute in smaller countries, where markets are typically dominated by a limited group of economic operators. In an oligopolistic market, characterized by a few dominant economic operators due to regular, strategic or behavioral barriers preventing new entrants, excluding bidders may be both impractical and detrimental.[352] Consequently, such exclusion could significantly affect the market by reducing competition, potentially driving prices upward and affecting product quality. [353] According to empirical evidence, many sectors of the economy where public procurement is commonplace, such as water supply, sewerage, road construction, electricity, and other utility supplies, are characterized by a low average number of bidders, sometimes as low as two or three. [354] Therefore, the long-term exclusion of potential economic operator(s) may cause severe distortion of competition, exacerbating the existing challenge posed by limited market participation.

Indeed, the Audit observed this reduction in the number of bidders and an increase in single bidding across all economic sectors, particularly highlighting health services and transport services and equipment as subjects of significantly elevated single bidding rates, which peaked at 44% and 28%, respectively. [355]

Additionally, single bidding rates in sewage services and construction reached peaks of 30% and 14%, respectively, while medical equipment procurement experienced a single bidding peak as high as 46%. [356]

3. The paradox of Exclusion in EU Market: Counter-Effects and Market Dynamics

The overall effectiveness of the public procurement process is fundamentally contingent upon the existence and maintenance of competition, which operates in two dimensions. [357] The first dimension involves competition within individual tenders, a concept that has long been acknowledged and promoted by public procurement regulations.[358] These rules are designed to ensure that multiple bidders submit proposals in response to a contracting authority's call for tenders, thereby enabling the selection of the offer that best meets the authority's specific needs, both in terms of price and quality. This form of competition is important in achieving value for money. [359]

The second broad dimension relates to competition at the market level, a factor that is often overlooked in public procurement regulations. Even if a tender procedure is conducted in full compliance with existing regulations, its effectiveness may be

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[352] Ibid.
[353] Ibid.
[354] Ibid.
[355] EUROPEAN COURT OF AUDITORS, *Supra* n. [315], at p. 22.
[356] Ibid. at p. 22.
[357] SÁNCHEZ GRAELLS, A., *Public Procurement and Competition: Some Challenges Arising from the Recent Developments in EU Public Procurement Law*, SSRN Working Paper, 2013, p. 2-3, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2206502.
[358] Ibid.
[359] Ibid.

undermined if there are insufficient numbers of economic operators in the market to begin with. In other words, the proper functioning of competitive procurement depends not only on the internal integrity of the tender process but also on the structural competitiveness of the external market.[360] However, most procurement rules tend to assume that markets are inherently competitive and that contracting authorities will routinely receive multiple offers, without considering the actual market conditions. [361]

Therefore, from the perspective of competition law, public procurement is increasingly being scrutinized as a potential source of distortions to market competition.[362] Such distortions can arise from how procurement rules are designed or implemented, like the exclusion grounds which might create barriers to entry.[363] Recognizing this evolving understanding, Article 18(1) of Directive 2014/24/EU incorporates a general principle of competition, which should serve to increase the awareness among contracting authorities regarding the impact of their procurement decisions, from the drafting of tender documents to the evaluation and award of contracts.[364] This article explicitly encourages the development of a more competition-oriented procurement practice, aiming to ensure that the conduct of procurement does not unduly restrict or distort competition.[365]

This principle is particularly relevant in the context of excluding economic operators who have breached competition law from participating in ongoing and future procurement procedures under Article 57(4)(d). The possibility of exclusion represents a critical intersection between public procurement law and competition enforcement. [366] However, audit results and empirical studies indicate that many contracting authorities fail to recognize or apply this link effectively. The provision is drafted in discretionary terms, thereby enabling Member States and contracting authorities to implement it inconsistently. For example, in Germany, the exclusion ground is treated as optional, while in Hungary, it is applied mandatorily. This lack of harmonization not only undermines the deterrent effect of the exclusion mechanism but also creates legal uncertainty and can result in inconsistency in the internal market, ultimately impacting the overall competitiveness of procurement procedures across the European Union.

Consequently, the exclusion penalty, as it currently stands, often fails to achieve its intended deterrent effect, and may in some cases even exacerbate existing competitive imbalances. The argument for reform has been advanced most notably by Sanchez Graells, who advocates for the adoption of a stricter and more uniform debarment regime at the EU

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[360] Ibid.
[361] AMAÏZ, A., *Measures in the Fight Against Corruption in European Union Public Procurement*, paper presented at the 2nd International Public Procurement Conference (IPPC), Rome, 2006, p. 335, available at: https://ippa.org/images/PROCEEDINGS/IPPC2/Article_12_Amaiz.pdf.
[362] SÁNCHEZ GRAELLS, A., *supra* n. [358], at p. 5.
[363] Ibid.
[364] Ibid. at p. 9-11.
[365] Ibid.
[366] Ibid. at p. 13.

level. [367] Such a system, he argues, would enhance legal clarity, strengthen compliance incentives, and support a more consistent enforcement of competition law across Member States. [368]

While I acknowledge the potential benefits of harmonization, particularly in maintaining a level playing field within the EU's single market, I am not fully convinced that increased strictness alone would necessarily improve the system's effectiveness. Indeed, while a more severe penalty might theoretically raise the deterrent effect, there is a real risk that this could produce negative consequences in the EU market which is already suffering from limited competition. As recent statistical analyses suggest, several sectors within the EU are characterized by a low number of bidders, which makes the application of exclusion penalties problematic. In such scenarios, excluding a supplier may render the procurement process ineffective or even unworkable due to the lack of viable alternatives. Therefore, I suggest that the scope of the exclusion penalty should be limited to public tenders involving a minimum number of competing bidders. Notably, Sanchez Graells himself acknowledges this dilemma and concedes that in highly concentrated markets, the application of a strict debarment regime may result in unintended and harmful outcomes, such as eliminating the only or last remaining credible competitors. [369]

This paradox of bidder exclusion highlights the unintended consequences it can have on markets and tenders processes, particularly in markets with already low competition. When firms are excluded from bidding due to collusion or bid-rigging practices, it may seem like a solution to promote competition. [370] However, in markets where competition is already low, the exclusion of bidders can exacerbate the problem. In fact, collusive behaviors usually emerge in such low-competition environments because they are more stable and easier to maintain. Consequently, excluding economic operators from bidding processes can inadvertently lead to increased market concentration and potentially making the market even less competitive, which undermines the intended purpose of exclusion policies. [371] Therefore, in my view, the exclusion penalty should not be applied in these sectors, especially during this period when the EU is experiencing a notable reduction in competitive dynamics.

In one of the OECD researches, it suggests that one of the factors affecting the effectiveness of bidder exclusion sanctions is whether the costs and risks associated with potential exclusion outweigh the immediate benefits gained from rigged bids. [372] Several factors significantly influence this cost-benefit

assessment and ultimately determine the success of enforcement efforts. Firstly, the scope of exclusion is crucial, particularly concerning which firms are affected. [373] Debarment

[367] Ibid.
[368] Ibid.
[369] Ibid. at p. 18.
[370] OECD (2022), *supra* n. [103], at p. 33-34.
[371] Ibid.
[372] Ibid. at p. 31-32.
[373] Ibid.

might apply exclusively to the violating company or extend more broadly to include subsidiaries and parent firms. [374] It could target a single business sector or all activities of the involved economic operator. [375]

However, I believe this is not a suitable reform to the EU exclusion penalty, especially since competition is already limited, and the frequency of single bidding is rising across many sectors. Nevertheless, it is also clear that the exclusion penalty would not be sufficiently deterrent if the sanctioned firm could bypass it by using subsidiaries to participate in public procurement processes. Consequently, the exclusion penalty is not an optimal solution for deterring anti-competitive behavior under current circumstances, where competition within the EU Single Market continues to decline. Furthermore, excluding an economic operator along with its subsidiaries in either similar or entirely different business sectors contradicts the principle of proportionality, as it imposes excessively broad consequences that might disproportionately harm market dynamics.

Secondly, the duration of exclusion is critical; shorter bans may minimize disruption to market operations but simultaneously reduce deterrent effectiveness, as sanctioned firms miss fewer business opportunities. [376] Conversely, longer exclusion periods can enhance deterrent effects but risk significantly damaging market competition by reducing the total number of active participants. [377] Clearly, what the OECD suggests here is that the potential negative impact on competition caused by the exclusion penalty can easily outweigh its intended benefits. Moreover, when member states strive to increase the penalty's deterrence by imposing longer bans, they inadvertently intensify its disruptive effect on competition, ultimately leading to a substantial reduction in bidders and market engagement.

Thirdly, the effectiveness of bidder exclusion sanctions heavily depends on the characteristics of the specific market and product involved. In sectors with infrequent procurement cycles or extended investment periods, firms are likely to value immediate contract awards more highly and thus perceive the threat of exclusion as less significant. [378] On the other hand, in markets characterized by frequent bidding opportunities or where future contracts promise to be larger and more valuable, the threat of exclusion represents a more substantial deterrent. [379]

In conclusion, even though the primary goal of the exclusion ground under Article 57(4)(d) is to protect the integrity of public procurement process and to maximize deterrence and public benefit by discouraging economic operators from engaging in anti-competitive behaviors in public procurement. The level of competition for public contracts to deliver works, goods, and services decreased over the past 10 years in the EU Single Market.

[374] Ibid.
[375] Ibid.
[376] Ibid.
[377] Ibid.
[378] Ibid.
[379] Ibid.

Therefore, given the statistical findings presented by the European Court of Auditors, applying the exclusion penalty, particularly the one in Article 57(4)(d), may unintentionally undermine the competitiveness of public procurement processes. The practical application of this sanction, especially given the flexibility granted to contracting authorities and member states, can exacerbate existing competition challenges. It might create the same harmful effects of anti-competitive behaviors, including higher procurement costs and reduced market competition. The evidence provided in the Audit clearly indicates that contracting authorities and member states often overlook proportionality, despite repeated emphasis by the Court of Justice of the European Union on its importance. Therefore, while exclusion penalties aim to uphold public procurement integrity, their current implementation risks compounding the problem of limiting competition. This reinforces the importance of carefully balancing enforcement measures against their potential unintended negative effects on market dynamics. Only through a nuanced and informed application of bidder exclusion sanctions can authorities ensure that the benefits of protecting public procurement and deterring anti-competitive practices outweigh the associated risks and costs.

E. Concluding Remarks

This chapter has shown that even though Article 57(4)(d) of Directive 2014/24/EU is meant to protect the integrity of the public procurement process by allowing the exclusion of economic operators that take part in agreements that distort competition, in practice, this rule often leads to opposite consequences. The exclusion penalty is supposed to deter behavior aimed at distorting competition, but when applied too strictly and without enough consideration to competition implications, it can actually make it harder and less appealing for economic operators to participate in public procurement. This reduces competition and creates problems for the open and fair market.

The decisions made by the Court of Justice of the European Union (CJEU) clearly highlight how important it is to apply the exclusion penalty in the light of the principle of proportionality and competition. The Court's rulings in cases like Vossloh Laeis, Landkreis Aichach Friedberg, and Infraestruturas de Portugal make it clear that Article 57(4)(d) should not be used without first considering if it is proportionate in each case. The Court explains that exclusion cannot be automatic or too strict, and that contracting authorities need to make a case-by-case assessment before taking exclusion decisions. When exclusion is used too often or based only on lists or registers, it stops the process from being fair and proportionate, and may keep economic operators out of the market even when such a penalty can affect competition in public procurement process and consequently in the market.

The empirical findings drawn from the European Court of Auditors' 2023 report, shows that the regulatory objectives of the 2014 reform, including fostering greater competition, have not been fully realized. On the contrary, the data shows a marked decline in the level of competition across the EU public procurement market, characterized by increasing rates of single bidding, direct awards without tender calls, and a generally decreasing number of bidders per contract.

One of the core arguments advanced here is that the discretionary exclusion penalty under Article 57(4)(d) may inadvertently contribute to this decline. Although intended to prevent the distortion of competition by deterring anti-competitive behaviors, its overly formal application by contracting authorities, often influenced by fear of accusations of favoritism like argued by some scholars, may lead to the unnecessary exclusion of operators, thereby reducing the competitive field even further. This creates a paradox where a rule meant to protect competition instead ends up harming it.

Importantly, this chapter also demonstrates how administrative burdens and procedural formalism, exacerbated by the 2014 reforms, further contribute to the decline in competition. Contract award procedures have become lengthier and more costly, deterring participation, particularly by SMEs. As shown, an overly bureaucratic focus on procedural compliance, rather than on the substantive goals of transparency, efficiency, and competition, has inflated costs, discouraged bids, and led to increased rates of procedural cancellations.

Another significant finding pertains to market concentration. In many sectors, particularly in smaller Member States, public procurement markets are already dominated by a limited number of economic operators. The exclusion of even a single additional player in such oligopolistic environments can have far- reaching consequences, not merely reducing competition within individual tenders but also weakening the structural competitiveness of the market over time. The Audit statistics confirm a clear trend toward increased single bidding across multiple sectors, with the single bidding rate rising from 23.5% to 41.8% across the EU between 2011 and 2021. These figures underscore that in many cases, competition is already low. In such circumstances, exclusion penalties may risk being not only ineffective but actively harmful, inadvertently reinforcing market concentration and reducing the viability of competitive procurement.

Given all of this, it is clear that while making exclusion rules more consistent across the EU might help improve clarity and deterrence, this alone is not enough to solve the problem. If exclusion rules are too broad, vague and applied without consideration to competition and proportionality, they could actually make the current decline in competition worse, especially if they do not take into account the specific conditions of each market. One possible solution is to reduce the scope of these exclusion rules, so they are not applied in sectors where competition is already limited.

In conclusion, Article 57(4)(d) was intended to shield public procurement from anti-competitive conduct. However, in practice, its effectiveness has been undermined by several interrelated factors: the broad discretion granted to contracting authorities, many of whom lack sufficient awareness of the link between procurement and competition law, the overly formalistic application of exclusion grounds, and the failure to consider market dynamics. In addition, the indirect use of automatic exclusions and blacklists, the inconsistent application of self-cleaning mechanisms, and the heavy administrative burden placed on economic operators have all discouraged participation, particularly by

SMEs. The European Commission's limited focus on monitoring the actual market effects of the Directive and raising awareness of competition principles has further contributed to this issue. In concentrated or oligopolistic markets, where competition is already weak, the exclusion of even a single operator can have disproportionately harmful effects. Together, these issues have led to a reduction in the number of bidders and have ultimately weakened competition in the EU's public procurement markets.

IV. Conclusion and Recommendations

This thesis has demonstrated that Article 57(4)(d) of Directive 2014/24/EU, although intended to protect the integrity of public procurement by excluding economic operators engaged in anti-competitive practices, in practice causes a disproportionate and counterproductive impact on competition. Through detailed doctrinal analysis and the study of CJEU jurisprudence, it was found that the provision's vague wording, the low evidentiary threshold ("sufficiently plausible indications"), and the wide discretion granted to contracting authorities contribute to legal uncertainty, administrative burdens, and a discouraging consequences on bidder participation.

Comparative analysis of Germany and Hungary confirmed the lack of harmonized application across Member States. Germany's discretionary model, supported by the

Competition Central Register, contrasts sharply with Hungary's mandatory exclusion and centralized evaluation system. While Germany theoretically offers more room for proportionality and case-by-case assessment, in practice the Competition Central Register risks acting as an de facto blacklist. In Hungary, the application of Article 57(4)(d) is centralized, limiting the contracting authorities' discretion. In both systems, the concept of self- cleaning exists, but its effectiveness varies significantly, affecting legal certainty and discouraging firms, particularly SMEs, from participating in procurement procedures.

The analysis of recent CJEU case law, Vossloh Laeis, Landkreis Aichach-Friedberg, Infraestruturas de Portugal, and Meca, confirms that while the Court emphasizes the necessity of proportionality and individualized assessments, practical application by Member States and contracting authorities often diverges from these principles. Rigid and inconsistent application, and limited understanding of competition's role in procurement have weakened both the consistency and effectiveness of exclusion decisions.

Empirical evidence, notably the European Court of Auditors' 2023 Special Report, reveals a worrying trend: despite the 2014 reforms, competition in public procurement has declined across the EU, with higher rates of single bidding and fewer participants per tender. The excessive use of exclusion grounds, bureaucratic proceduralism, and insufficient awareness of competition policy among contracting authorities have all contributed to this negative development.

In conclusion, while Article 57(4)(d) seeks to uphold procurement integrity, its current application undermines the broader EU goals of ensuring open, competitive markets. To mitigate these unintended effects, exclusion should be used only as a last resort, with a mandatory, transparent proportionality assessment in every case. Systematic reliance on self-cleaning mechanisms should replace automatic exclusion practices. Furthermore, reforms should aim at clearer guidance at the EU level to harmonize interpretation, strengthen competition awareness among contracting authorities, and preserve bidder diversity, especially for SMEs and cross-border operators. Only then can public procurement processes truly balance integrity with market competitiveness, supporting the long-term objectives of the EU internal market.

Therefore, this thesis strongly advocates narrowing the scope of the exclusion penalty under Article 57(4)(d). Exclusion should be limited strictly to cases where there is clear and substantiated evidence of serious anti-competitive misconduct that materially affects the procurement process, rather than based merely on "sufficiently plausible indications" or low-threshold suspicions of past behavior. Moreover, exclusion should only apply in tenders that attract a minimum number of competing bidders, in order to prevent further harm to already fragile competition levels. A mandatory and detailed proportionality test should precede any exclusion decision, carefully assessing both the impact on the specific tender and on the broader market dynamics.

Additionally, the discretion of contracting authorities in applying exclusion penalties must be reduced. Decisions to exclude economic operators should be subject to verification by

centralized independent authorities that specialize in assessing the competitive impact of exclusion both in the specific tender and in the affected sector or market. Similarly, the assessment of self-cleaning measures should be handled by a centralized authority, as practiced in Hungary, rather than left to individual contracting authorities, to ensure consistency, fairness, and reduce risks of bias. Finally, urgent action is needed to reduce the administrative burden associated with exclusion and qualification processes, which currently discourages participation and exacerbates competitive decline.

Ultimately, maintaining the integrity of procurement procedures and promoting competition must be seen as complementary goals. A reformed, narrower, and centrally supervised application of Article 57(4)(d), applied carefully and proportionately, is essential to safeguarding both fair market behavior and vibrant competition across the EU internal market.