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# Project “Support for further improvement of Public Procurement system in Serbia”, IPA 2013

## “Obavezni i fakultativni osnovi za isključenje”

*Sudska praksa Suda pravde Evropske unije*

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EU Support for Further Improvement of  
Public Procurement System  
in Serbia

# List of selected cases of CJEU on exclusion of economic operators from public procurement procedures

C-21/03 and C -34/03 “Fabricom”

C-305/08 “CoNISMa”

C-226/04 and C-228/04 “La Cascina and Zilch”

C-357/06 “Frigerio Luigi”

C-147/06 and C-148/06 “SECAP”

C-199/07 Commission v Greece

C-538/07 “Assitur”

C-376/08 “Serratonini and consortio stabile edili”

C-74/09 “Bâtiments et Ponts Construction”

C-465/11 “Forposta”

C-358/12 – “Consorzio Stabile Libor Lavori Pubblici”

C-470/13 “Generali Providencia”

C-425/14 “Impresa Edilux”

C-27/15 “Pizzo”

C-199/15 “Ciclat ”

C-171/15 “Connexion Taxi Services”

C-144/17 “Lloyd's of London”



# Exclusion: general principle of transparency

## C- 27/15 “Pizzo” 02.06.2016

### The problem

- The contracting authority (Port Authority of Messina) conducted a public procurement procedure for a service contract for the management of waste and cargo residues produced on board ships calling at ports within the jurisdiction of the Port Authority
- Some companies, including CRGT, were excluded from the procedure, due to not having paid an administrative fee to the Public Procurement Supervisory Authority (AVCP), which is not mentioned in the Italian public procurement law, has not been referred to in the relevant tender documentation, but is referred to in some Italian financial regulations
- PIZZO, the only remaining bidder in the procedure, was awarded the contract
- CRGT claimed the annulment of the decision to exclude it
- PIZZO submitted counter- claim that CRGT should be excluded also due to alleged non compliance with provisions on reliance on third parties resources (*see the slides on reliance*)
- Italian court referred to the CJEU two questions: one related to the ground for exclusion and the other related to the issue of reliance on third parties’ resources



# C- 27/15 “Pizzo”

## Conclusions of the CJEU

- the principles of equal treatment and of proportionality do not preclude an economic operator from being allowed to regularise its position and comply with that obligation within a period of time set by the contracting authority
- the principle of equal treatment and the obligation of transparency do not allow to exclude from a procedure as a result of that economic operator's non-compliance with an obligation which does not expressly arise from the documents relating to that procedure or out of the national law in force, but from an interpretation of that law and those documents and from the incorporation of provisions into those documents by the national authorities or administrative courts
- the alleged obligation to pay a fee referred to in case could be only identified by the interaction between the Finance Law, the ACPV decision making process and the judicial practice of the Italian administrative courts applying and interpreting the financial regulations



# Non – fulfillment of obligations related to payment of taxes and social contributions

## C-226/04 (C-228/04) “La Cascina and Zilch” 09.02.2006

- EU directive enables MS to exclude any candidate who has not fulfilled obligations relating to the payment of social contributions and taxes in accordance with national legal provisions (Article 29 of Council Directive 92/50)
- that provision does not preclude a national law or practice according to which a service provider, who has not fulfilled obligations relating to social security contributions and taxes by having them paid in full when the time period prescribed for submitting requests to participate in the procedure expires, may subsequently regularise his position, for example pursuant to an administrative or legal proceedings



# C-226/04 (C-228/04)

- When a MS decides to provide for exclusion due to non – payment of taxes (social contributions) it is for the MS **to set the date** by which the payments must have been made or by which the ‘regularization’ of the situation must have occurred for a service provider to avoid exclusion
- ‘regularisation’ depending on the decision of MS could be done by the deadline for lodging the request to participate, at the date of issuing the invitations to participate, at the deadline for receipt of tenders, at the date when tenders are considered or at the date of award
- this period may be fixed either by the legislation or by the contracting authorities themselves but must be, however, determined with absolute certainty and made public
- the service provider who wants to avoid exclusion should provide the evidence that he has regularised his situation within this period

See: Article 59 (2) of 2014/24 directive



# Non – fulfillment...

## C-74/09 “Bâtiments et Ponts Construction” 15.07.2010

### Facts:

- Public tendering for works related to ‘Berlaymont 2000’ project (EC headquarters in Brussels)
- Procuring entity required that interested companies should show they fulfilled obligations related to payment of social contributions and taxes in the form of proof of registration in accordance with Belgian law: a tender was considered if at the time of tendering a copy of the application for registration was attached and the award was not to be made until application for registration from bidders had been decided
- A consortium composed of 2 foreign companies submitted a tender but not applied in time for registration in Belgium – their tender was in consequence rejected



# C-74/09 “Bâtiments et Ponts Construction”

## Conclusions of the CJEU

- The fact that a contractor established in another MS has produced certificates issued by competent authorities of that MS is not sufficient to confirm conclusively, that it has fulfilled its obligations in that regard (so he may be asked to prove he fulfilled his obligations in the country of contracting authority)
- EU law does not exclude a national provision according to which a contractor established in another MS than that of a contracting authority, in order to be awarded a contract, should hold a registration in the MS of contracting authority, certifying that none of the grounds for exclusion listed in the Directive applies in his case, but:
  - this obligation may not hinder or delay the contractor’s participation in the public procurement in question or lead to excessive administrative charges
  - the sole objective of the requirement to register is to check the professional qualities of the contractor concerned, for the purposes of the provisions on the exclusion
- A registration obligation cannot be regarded as additional ground for exclusion, in addition to those exclusively listed in the directive, if its is designed to implement that provision, solely to check the evidence that a contractor does not fall in one of those grounds for exclusion, particularly those relating to the payment of social contributions and taxes

See: Article 59 (2) of 2014/24 directive



# Non – fulfillment of obligations...

## C-358/12 – “Consorzio Stabile Libor Lavori Pubblici” 10.07.2014

- Under - the - threshold - procurement: relevant provisions of EU: Articles 49 and 56 of TFEU
- EU law does not preclude a national provision which *requires the contracting authorities to exclude from the procedure a tenderer who has committed an infringement relating to social security contributions where the difference between the sums owed and those paid exceeds EUR 100 and is greater than 5% of the sums owed*
- such a national provision amounts to a restriction within the meaning of Articles 49 TFEU and 56 TFEU but it may be justified in so far as it pursues a legitimate objective in the public interest and to the extent that it complies with the principle of proportionality



# C-358/12

- The pursuance of such a legitimate objective includes the indication of the lack of reliability, diligence and responsibility by an economic operator in complying with its legal and social obligations
- Exclusion is compliant with the principle of proportionality if there is a precise **threshold** for the exclusion from procurement procedures, such as that defined by the national legislation at issue, which is based on objective, non-discriminatory criteria known in advance
- As regards contracts, which due, to their value, are covered by EU procurement directive, the directive does not provide for uniform application at EU level of the grounds of exclusion it mentions and allows the Member States to make the criteria laid down therein less onerous or more flexible
- The procurement directive allows Member States to exclude from participation in a public contract any economic operator which has failed to fulfill its obligations relating to the payment of social security contributions without any minimum amount of outstanding contributions being set



# Non – fulfillment of obligations...

## C-199/15“Ciclat”, 10.11.2016

### The facts

- CONSIP (the contracting authority) awarded a contract (divided into lots) for cleaning and other services
- It was required from bidders to confirm that they satisfy the requirements for participation, by submission of their declarations
- CICALAT submitted a tender with a declaration that **they had not committed any serious infringement regarding social contributions**
- CONSIP, on its own initiative, checked with a financial authority, regularity of CICALAT situation: it transpired from the certificate issued by that authority that at the time of declaration CICALAT failed to pay (on time) a third instalment for those contributions: that instalment was paid after the declaration, together with the fourth and the last instalment – all duties were fulfilled before the verifications of tenders were conducted by CONSIP and before the results of the tenders were know
- CONSIP decided to exclude CICALAT from the procedure; that decision was challenged to the Italian court; CICALAT claimed it was not warned by authorities about existence of overdue payment; Italian court referred a question to the CJEU



# C-199/15 “Ciclat”

## Conclusions of the CJEU (based on the previous case law and elaborated on)

- The directive (2004/18) in Article 45 leaves it to MS to determine the period within which the bidders concerned must comply with their obligations relating to payment of social contributions and may make subsequent regularisations, on condition that that period respects the principles of transparency and equal treatment
- Contracting authority **may request** the correction or additional information relating to an offer, however, such corrections or additions may relate only to data which can be objectively shown to pre – date the deadline to take part in the procurement procedure but may not relate to information which must be communicated by the bidder to the contracting authority on the pain of the tenderer being excluded if the bidder fails to communicate this information
- The contracting authority **is not allowed** to accept rectifications of omissions which, as expressly provided for in the contract documentation, must result in the exclusion of the tenderer
- Provisions of the Directive provide that contracting authorities accept as sufficient evidence a certificate issued by a competent authority of the MS from which it is apparent that the requirements of the Directive are satisfied
- Contracting authorities **are not prohibited** from requesting the certificate required from the social security institution on their own initiative
- It is of little consequence that the bidder has not been warned of his irregularity as long as he has the possibility to verify, at any time, the regularity of his situation with competent authorities



# C-199/15 “Ciclat”

## Answer of the CJEU:

*The procurement directive does not preclude a national legislation provision which obliges a contracting authority to consider an infringement relating to the payment of social security contributions, recorded in a certificate requested by a contracting authority on its own initiative and issued by the social security institutions, to be a ground for exclusion, where that infringement existed on the date of the participation in a tender procedure, even if it no longer existed at the time of the award or of the verification carried out on the contracting authority’s own initiative.*



# Grave professional misconduct

## C-465/11 “Forposta” 13.12.2012

### The problem

- The Polish legislation (the PPL) required the exclusion an economic operator from a procedure for the award of a public contract *where the contracting authority concerned has annulled, terminated or renounced a public procurement contract with that same economic operator owing to circumstances for which that operator is responsible, where the termination, annulment or renouncement occurred in the three-year period before the procedure was initiated and the value of non performed part of the contract amounted to at least 5 % of the contract’s value*
- In the procedure for the provision of postal services conducted by the Polish Post two companies were excluded from the procedure because the Polish Post realized that within the preceding 3 years they have their contracts renounced by the Post – they were the only bidders so the procedure was cancelled



# C-465/11 “Forposta”

## The problem

- The Polish review body reviewing complaints from those companies had doubts whether the ground for exclusion provided in the Polish PPL was compliant with the EU provisions and referred a question to the CJEU
- in the procedure in CJEU, PL relied on Article 45 (2) d) of Directive 2004/18 allowing to exclude the economic operator who *“has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate”*

## Conclusion of the CJEU

- the directive which allows for the exclusion of an economic operator due to the ‘grave professional misconduct’ does not allow for automatic exclusion of an economic operator in the situation referred to in the PL provision



# C-465/11 “Forposta”

- the concept of ‘grave misconduct’ must be understood as normally referring to conduct by the economic operator concerned which denotes a wrongful intent or negligence of certain gravity on its part
- any incorrect, imprecise or defective performance of a contract or a part of thereof could potentially demonstrate the limited professional competence of the economic operator concerned but does not automatically amount to grave misconduct
- in order to find out whether grave misconduct exists, a specific and individual assessment of the conduct of the economic operator’s concerned must, in principle, be carried out
- the concept of ‘grave professional misconduct’ ≠ ‘circumstances for which the economic operator concerned is responsible’





# Exclusion due to previous infringement of competition rules

**C-470/13 “Generali Providencia” 18.12.20145**

*Under - the - threshold procurement: relevant provisions - Article 49 and 56 of FEU Treaty*

The issue: **exclusion of an economic operator having committed and infringement of national competition rules**

## Conclusions

- The Treaty does not preclude application of national legislation excluding the participation in a tendering procedure of an economic operator who has committed an infringement of competition law, established by a judicial decision having the force of res judicata, for which a fine was imposed
- The notion of **professional misconduct**, for the purposes of the procurement directive covers **all wrongful conduct** which has an impact on the professional credibility of the operator at issue and not only the infringements of ethical standards in the strict sense of the profession to which that operator belong
- Committing of an infringement of the competition rules, in particular where that infringement was penalised by a fine, is a cause for exclusion under the procurement directive – all the more it is also the case id contracts which fall short of the thresholds of the directive



# Previous involvement of an economic operator

## C-21/03 and C-34/03 “Fabricom” 03.03.2005

- EU Directive precludes a national legislation according to which a person who has been instructed to carry out research, experiments, studies or development in connection with public works, supplies, or services is not permitted to apply to participate in or to submit a tender for those works, supplies or services and where that person is not given an opportunity to prove that, in the circumstances of the case, the experience which he has acquired was not capable of distorting competition
- ‘automatic’ exclusion goes beyond what is necessary to attain the objective of equal treatment of all tenderers when it does not afford a person who has carried out certain preparatory work any possibility to demonstrate that in his particular case, that situation would not be capable of distorting competition between tenderers
- **See Article 57 (4) f) of 2014/24 Directive**

# Serious misrepresentation in supplying information/ negligent provision of misleading information

## C-387/14 – “Esaprojekt” 04.05.2017

- Provision of the Directive does not contain any reference to intentional behaviour by the economic operator:
  - in order to consider an economic operator as being guilty of ‘serious misrepresentation’ in order to exclude it from a public contract, it is sufficient if he is guilty of some degree of negligence which may have a decisive effect on the decisions to exclude candidates from being selected or awarded as public contract
  - in order to sanction an economic operator which has submitted false declarations by excluding its participation in a public contract, the contracting authority is not required, to provide evidence of the existence of wilful misconduct on the part of that economic operator



# Serious misrepresentation...

- ‘serious misrepresentation’, can be specified and explained in national law, provided that it has regard for EU law
  - the exclusion of an economic operator from participation in a public contract, in particular if it is guilty of ‘serious misrepresentation’ for making false declarations when submitting the information requested by the contracting authority may be applied where the operator concerned is guilty of a certain degree of negligence: negligence of a nature which may have a decisive effect on decisions concerning exclusion, selection or award of a public contract, irrespective of whether there was wilful misconduct on the part of that operator
- **See Article 57 (4) h) and i) of 2014/24 Directive**

# Other grounds for exclusion not mentioned in the Directive

**C-538/07 “Assitur” 19.05.2009**

## The issue

- national (Italian) legislation not allowing companies linked by a relationship of control or significant influence to participate, as competing tenderers, in the same procedure for the award of a public contract
- The Directive does not preclude MS from providing other grounds for exclusion not mentioned in the Directive intended to guarantee respect the principles of equality of treatment and transparency provided that such measures do not go beyond what is necessary to achieve that objective
- EU law does not allow a national provision, which while pursuing legitimate objectives of equality of treatment of tenderers and transparency in the public procurement procedures, provide for an absolute prohibition of participation in the same procurement procedure by undertakings linked by a relationship of control or affiliated to one another without giving them an opportunity to demonstrate that their relationship did not influence their conduct in the course of that procurement procedure



# Hvala na pažnji!

