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**EU PROCUREMENT UPDATE:  
EXCLUDING TENDERERS FOR  
COMPETITION LAW VIOLATIONS**

## EU PROCUREMENT UPDATE: EXCLUDING TENDERERS DUE TO COMPETITION LAW VIOLATIONS

In *Infraestruturas de Portugal, S. A, Futrifer Indústrias Ferroviárias, S. A v Toscca – Equipamentos em Madeira Lda*<sup>1</sup> the Court of Justice of the European Union (CJEU) explored the extent to which national laws can limit the discretion of contracting authorities to exclude economic operators from public tenders on the grounds of unreliability due to failure to comply with competition laws.

At the heart of the matter was the possible exclusion of Portuguese manufacturer Futrifer from a rail tender due to its prior violation of competition rules. The CJEU concluded that contracting authorities should have the discretion in excluding tenderers and any attempt to curtail such discretion does not comply with the EU law.

### Background

On 18 January 2019, Infraestruturas de Portugal (IdP) (Portugal's state-owned operator of national rail and road infrastructure) initiated a procurement procedure for the supply of creosoted pine sleepers and rods for the Portuguese rail network valued at EUR 3 million.

Toscca – Equipamentos em Madeira, Lda. (Toscca) and Futrifer, Indústrias Ferroviárias, S. A. (Futrifer) both submitted a tender and on 27 July 2019, IdP awarded the contract to Futrifer.

Toscca contested the decision before the Tribunal Administrativo e Fiscal de Viseu (TAF Viseu) (Portugal's court of first instance) on the basis that the contract was awarded to Futrifer despite the 12 June 2019 finding of the Portuguese competition authority (AC) that Futrifer had violated competition rules in 2014 and 2015 relating to the provision of services for the maintenance of equipment and tracks forming part of the national rail network. The TAF Viseu rejected Toscca's action, arguing that the infringement only needed to be taken into consideration if the distortion of competition arose in the procedure being disputed. Toscca appealed to the Appellate Court, which set aside the TAF Viseu's judgment and ordered IdP to award the contract to Toscca.

The Appellate Court's decision was ultimately taken before the Portuguese Supreme Administrative Court, which sought a preliminary ruling from the CJEU.

### Key issues

- Member States are obliged to transpose Article 57(4) of Directive 2014/24 into their national laws, contrary to earlier decisions giving them discretion over this, ensuring uniformity in the application of the Directive's discretionary grounds for exclusion.
- The Court underscored the need for a balanced relationship between contracting authorities and the national competition authority, with contracting authorities having the discretion to independently assess and exclude tenderers based on competition violations even in the absence or existence of a violation finding by the national competition authorities.
- National laws that tie the hands of contracting authorities to decisions of the national competition authority are inconsistent with Directive 2014/24's objectives, which intend to afford contracting authorities the discretion and flexibility to independently assess and exclude tenderers.

<sup>1</sup> [Infraestruturas de Portugal, S. A, Futrifer Indústrias Ferroviárias, S. A v Toscca – Equipamentos em Madeira Lda, C-66/22](#)  
2 April 2024

## Member States' discretion not to transpose discretionary exclusion grounds?

The central matter under consideration was whether Member States were obligated to transpose the discretionary exclusion grounds set out under Article 57(4) of Directive 2014/24 into national law.

According to the Código dos Contratos Públicos (**CCP**) (Portugal's public procurement law) only the AC is empowered to assess the implications of breaching competition rules in respect of public procurement procedures. The CCP therefore mandates contracting authorities to adhere to any AC decisions to bar tenderers from participation for a specified period, and prevents the contracting authority from being able to evaluate the tenderer's conduct, integrity, or reliability, as it is entitled to do under Article 57(4)(d) of Directive 2014/24.

Futrifer contended that the Portuguese Republic opted not to transpose Article 57(4)(d), and the European Commission (the **Commission**), argued in its written observation that Member States did not possess such discretion based on recital 101 of Directive 2014/24. The Advocate General (**AG**), in its formal opinion, disagreed with this and contended that, whilst the existing case-law recognised the binding nature of directives on each Member State, the "*Member States [were] free not to apply the facultative grounds for exclusion*".<sup>2</sup> The AG further noted that reopening discussions could have led to making optional grounds mandatory without Member States' intervention as stipulated in Article 57(7) of Directive 2014/24.

The Commission disputed this controversial interpretation, noting that both Article 57(4) and recital 101 of the Directive indicate that the legislature's intention was not to give Member States a free choice in whether or not to transpose the nine exclusion grounds contained in that provision. That choice is given to the contracting authorities, unless Member States require them to apply the exclusion grounds.

In its decision, and although The CJEU had previously held that, in line with Article 57(4) and (7) of Directive 2014/24, Member States had the freedom to choose whether to apply the discretionary grounds for exclusion or to incorporate them into national law, considering legal, economic, or social considerations prevailing at the national level,<sup>3</sup> the CJEU revisited its stance, taking into consideration the objectives of Directive 2014/24, and concluded that Member States are indeed obliged to transpose the provision.

Contrary to the arguments of Futrifer and the Portuguese Government, the CJEU emphasised that a Member State cannot omit grounds for exclusion from its national legislation transposing Directive 2014/24, as such an omission would deny contracting authorities the crucial ability conferred by the provision to apply those grounds.

### Legislation

- Article 57 of Directive 2014/24, entitled '*Exclusion grounds*', provides:
- 4. Contracting authorities *may exclude or may be required by Member States to exclude* from participation in a procurement procedure any economic operator in any of the following situations, including:
  - (d) 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
- Recital 101 of Directive 2014/24 states:
- Contracting authorities should further be given the possibility to exclude economic operators which have proven unreliable, for instance because of violations of environmental or social obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights.

<sup>2</sup> *Rad Service and others v Del Debbio and others*, C-210/20, paragraph 28: "In accordance with Article 57(4) and (7) of Directive 2014/24, the Member States are free not to apply the facultative grounds for exclusion set out in that directive or to incorporate them into national law with varying degrees of rigour according to legal, economic or social considerations prevailing at national level."

<sup>3</sup> *Meca v Comune di Napoli*, C-41/18; *Tim v Consip and Ministero dell'Economia e delle Finanze*, C-395/18; and *Rad Service and others v Del Debbio and others*, C-210/20

The CJEU clarified that while Member States could determine the conditions for applying Article 57, this authority did not extend to deciding whether the facultative grounds for exclusion under Article 57(4) should be transposed. The intention of the EU legislation was to assign the task of assessing whether a candidate or tenderer should be excluded from a procurement procedure during the tenderer selection stage solely to the contracting authority and not to any other authority.<sup>4</sup>

Additionally, the CJEU stressed that a balanced relationship between national competition authorities and contracting authorities is crucial. While contracting authorities must consider evidence and proportionality, they should not be unduly restricted by decisions of the national competition authority. As Directive 2014/24 gives contracting authorities the discretion to independently assess and exclude tenderers based on competition rule violations.

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<sup>4</sup> *Meca*, C-41/18 and *Delta Antreprizăde Construcții și Montaj* 93, C-267/18  
4 April 2024

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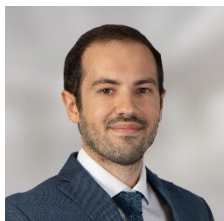
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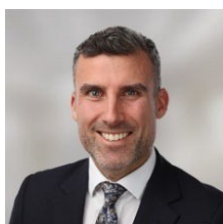
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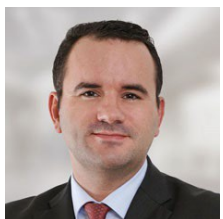
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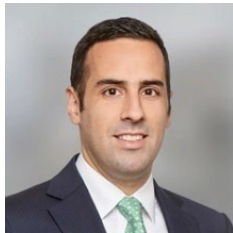
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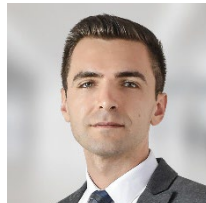


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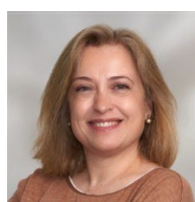


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