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# LEGAL OPINION ON THE PREVENTION OF INFILTRATION OF ORGANISED CRIME IN PUBLIC PROCUREMENT

**European Union (with examples of national practices in France, Germany, Italy, The Netherlands, Sweden, United Kingdom)**

**Current to: 21.12.2023**

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**E-Avis ISDC**

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## **EXECUTIVE SUMMARY**

This comparative study explores the regulatory frameworks and practices designed to prevent the infiltration of organized crime into public procurement. It aims to provide an overview of the legal mechanisms employed to ensure the exclusion of tenderers with links to organized crime from procurement processes.

As public procurement is a legal domain in which European Union law plays a pivotal role - the rules are harmonized for tenders that exceed certain value thresholds - this study primarily focuses on EU regulations. This examination is supplemented with examples of national regulations and practices from selected European countries.

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## SUMMARY

Public procurement is subject to comprehensive EU regulation. This regulation applies to all governmental purchases of goods, services or construction services/public works exceeding certain value thresholds. Among the different pieces of legislation, the main legal instrument is the Directive 2014/24/EU on the award of public works contracts, supply contracts and services contracts.

Participation in organized crime is a mandatory grounds for exclusion under EU public procurement law.<sup>1</sup> A tenderer must be excluded if the company or if individual members of its administrative, management or supervisory body has been convicted by final judgment of offences related to the participation in a criminal organisation, as defined in Article 2 of Council Framework Decision 2008/841/JHA.<sup>2</sup> This definition includes various kinds of active participation in criminal organisations.

There is detailed EU regulation on the means of proof that can be requested by the contracting authority in relation to the grounds for excluding a tenderer.<sup>3</sup> For an exclusion due to participation in organised crime, the contracting authority can ask for an extract from the judicial record or equivalent document. Since this is not mandatory for the contracting authority and in order to avoid additional administrative burdens for tenderers, such proof is generally requested only from the winning tenderer.

To facilitate cross-border tendering, the European Union has developed the European Single Procurement Document (ESPD) and the e-Certis information tool. The ESPD is a self-declaration form accepted by all EU contracting authorities as preliminary evidence that there are no grounds for exclusion. It replaces certificates issued by individual public authorities.<sup>4</sup> The e-Certis is a web-based tool helping contracting authorities and businesses to identify the certificates and other types of evidence requested in public procurement procedures across the EU and the EEA countries.<sup>5</sup>

While the rules on exclusion and the means of proof are largely harmonised within the EU, there exists some margin of discretion for the Member States, in particular as regards the organisation and scope of the control of tenderers. Some countries have developed specific registers containing information needed for assessing whether a tenderer should be excluded. One example is the German Competition Register for Public Procurement (*Wettbewerbsregister*). This register lists the offences for which a supplier should be excluded as including participation in organised crime (the listing requires a conviction by final judgment of a person in leading positions in that company). German contracting authorities must consult the Competition Register in procurement procedures involving an estimated order value of 30,000 EUR or higher. The UK has a similar approach of relying on information in a specific register. The new Procurement Act 2023 (due to enter into force in 2024) establishes a central "debarment" list of black-listed suppliers ineligible for public-procurement tendering. A supplier always has the possibility to challenge a listing, under both UK and German law.

The Dutch system for checking tenderers is reinforced by the Bibob law, which is a general law aimed to protect the integrity of public authorities. This law allows for screening of tenderers in public procurement by the procuring authority itself or with the assistance of the National Bibob Bureau (*Landelijk Bureau Bibob*), a specialized government agency.

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<sup>1</sup> See Article 57(1) of Directive 2014/24/EU.

<sup>2</sup> Ibid.

<sup>3</sup> See Article 60 of Directive 2014/24/EU.

<sup>4</sup> The ESPD is regulated in Article 59 of Directive 2014/24.

<sup>5</sup> The e-Certis is regulated in Article 61 of Directive 2014/24.

In Belgium, the government supports a proposal to adopt similar legislation to the Dutch. This would require the establishment of a national “Bibob bureau”.

In Sweden, the procedures for controlling tenderers against official registers are currently subject to revision. A government-appointed investigative committee is proposing to introduce a one-stop-shop system for contracting authorities. This is intended to replace the current system in which procuring authorities, in their screening of the existence of grounds for exclusion, must gather information from several official registers.

Underpinned by the EU legislation on the ESPD, self-declaration forms also play an important role in national public procurement procedures. The French legislation, for instance, provides that a declaration on honour should generally be accepted as proof of the absence of criminal convictions excluding a tenderer. Given that a false declaration is a criminal offense, the tenderer has strong reasons to provide accurate information.

Italy has legislation targeting the prevention of mafia infiltration. Introduced in 1994, the so-called antimafia documentation system obliges tenderers in public procurement procedures to exhibit an “antimafia certificate”, attesting that they have no “mafia-type association” as regulated in the Italian Criminal Code.

## I. FACTS & QUESTIONS

On September 27, 2023, the Bundesamt für Bauten und Logistik (BBL) asked the Swiss Institute of Comparative Law (SICL) to conduct a comparative study on regulation aiming to prevent the infiltration of organized crime in public procurement. The question was raised in the context of a Postulat referring to the Italian legislation on so-called antimafia certificates.<sup>6</sup>

The SICL has focused its research on European jurisdictions. The result of the research is presented in this summary report that aims to provide an overview of key rules and practices in these jurisdictions, including a specific focus on EU law. Based on these initial findings, the BBL may ask the SICL to conduct further research.

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<sup>6</sup> Postulat 22.3658 M. Romano: *Das Anti-Mafia-Zertifikat, ausgestellt vom italienischen Staat, soll auch für das öffentliche Beschaffungswesen in der Schweiz Pflicht werden.*

## II. ANALYSIS & COMPARATIVE OBSERVATIONS

### 1. Introduction

The EU Member States spend around 14% of GDP (around €2 trillion per year) on the purchase of public works, services, and supplies.<sup>7</sup> Given the amounts of public funds at stake, the exposure to and risks from criminal activities, in particular various forms of corruption, warrant concerned attention by officials in charge of overseeing such processes. This legal opinion examines the regulation in response to a particular risk: the infiltration of organized crime in public procurement. The legislation adopted to hinder such infiltration concerns, in particular, rules on the type of documents that can be required for proving non-infiltration, including the support and use of various kinds of official registers.

It should be noted that an analysis of the reasons for criminal infiltration in public procurement and the different infiltration methods employed by criminal groups is not within the scope of this legal opinion.<sup>8</sup>

This legal opinion examines the regulation applicable in European countries. Given that public procurement is an area of law in which European Union law plays a crucial role - the rules are harmonized for tenders which exceed certain value thresholds<sup>9</sup> - the opinion largely focuses on EU regulation. This examination is supplemented by examples of national regulation and practices.

Swiss law is outside the scope of the study. However, it should be noted that Switzerland, similar to the EU, is party to the WTO Agreement on Government Procurement 2012 (the GPA), which obliges members to conduct procurements in a way that “prevents corrupt practices” (GPA, Art. IV.4). Moreover, Switzerland and the EU have a bilateral agreement on public procurement assuring market access in certain sectors (including rail transport and the supply of energy other than electricity), thereby supplementing and broadening the scope of the GPA between the two parties.<sup>10</sup>

In the following, I refer to both *contracting authorities* and *procuring authorities*. These notions are interchangeable. The same is true for *tenderer* and *supplier*.

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<sup>7</sup> See information on public procurement in the European Union at European Commission’s website: [https://single-market-economy.ec.europa.eu/single-market/public-procurement\\_en](https://single-market-economy.ec.europa.eu/single-market/public-procurement_en) (03.11.2023).

<sup>8</sup> For a discussion on this issue, see for instance C. Mazza, *How Criminals Infiltrate Public Procurement - Organised Crime and Corruption in Legal Markets and Public Sectors*, Central European Journal of International and Security Studies 10, no. 1: 10-29 (2016) and D. Ravenda *et al.*, *The effects of mafia infiltration on public procurement performance*, European Journal of Political Economy Volume 64, September 2020, 101923.

<sup>9</sup> These thresholds vary, in particular depending on the sector concerned.

<sup>10</sup> The Agreement between the European Community and the Swiss Confederation on certain aspects of government procurement is available at [EUR-Lex - 22002A0430\(06\) - E https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22002A0430\(06\)N](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22002A0430(06)N) - [EUR-Lex \(europa.eu\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22002A0430(06)N) (24.11.2023). It should also be noted that public procurement is addressed in the Convention establishing the European Free Trade Association of 4 January 1960, as amended (EFTA Agreement), available at <https://www.efta.int/Legal-Text/EFTA-Convention-1152> (24.11.2023).



## 2. International outlook and the European Union

### 2.1. World Trade Organization Agreement on Government Procurement

Public procurement is subject to regulation on different levels (international, regional and national). The **WTO Agreement on Government Procurement** (as amended on 30 March 2012)<sup>11</sup> (the GPA) establishes general principles and detailed procedural requirements that the GPA parties are obliged to apply in the covered procurement activities.<sup>12</sup> The 22 parties to this plurilateral agreement (currently 49 of WTO's 164 members are covered by the GPA) include Switzerland and the European Union.<sup>13</sup>

While the revised GPA aims, as did the original GPA, to liberalize procurement markets, the revised agreement provides Members a possibility to exclude a supplier from participating in a procurement process. As addressed in Article VIII (Conditions for Participation of the GPA) national regulation on exclusion of a supplier may be activated by a final judgment in respect of serious crimes or other serious offences by that supplier. Article VIII, however, does not detail the kind of supporting evidenced required for such an exclusion. Moreover, it should be noted that there are no details as to what kind of documentation that can be requested from a supplier in order to prove the non-existence of irregularities motivating an exclusion.

### 2.2. Regulation in the European Union

The European Union has detailed rules that apply to tenders whose monetary value exceeds a certain amount and which therefore are presumed to be of cross-border interest.<sup>14</sup> These regulations comply with, and at the same time safeguard, 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.<sup>15</sup> Thus, an important aspect is that the Member States **must not impose requirements that directly, or indirectly, constitute obstacles for a foreign national** (compared to a domestic actor) to participate as a tenderer.

The main legal instrument on public procurement is the **Directive 2014/24/EU** on the award of public works contracts, supply contracts and services contracts (the Public Sector Directive), hereafter

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<sup>11</sup> The GPA is available at [https://www.wto.org/english/docs\\_e/legal\\_e/rev-gpr-94\\_01\\_e.pdf](https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pdf) (16.11.2023).

<sup>12</sup> The GPA establishes rules requiring that open, fair and transparent conditions are ensured in government procurement. It should that it does not apply generally: the coverage depends on the parties' respective market access schedules of commitments.

<sup>13</sup> There are 22 parties to the GPA if the EU and its Member States are counted as a single party. Information is available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (16.11.2023).

<sup>14</sup> The principal EU public procurement rules are contained in four Directives: (1) Directive 2014/24 on the award of public works contracts, supply contracts and services contracts (the Public Sector Directive); (2) Directive 2014/25 on the award of contracts by entities operating in the water, energy, transport and postal services sectors (the Utilities Directive); (3) Directive 2014/23 on the award of concession contracts both by public sector bodies and certain utilities (the Concessions Directive); and (4) Directive 2009/81 on the award of contracts in the fields of defence and security (the Defence Directive). It should also be noted that the Directive 89/665 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (the Remedies Directive) plays an important role for ensuring compliance.

<sup>15</sup> Directive 2014/24/EU, recital 1. See also M. Steinicke & P.L. Vesterdorf, Brussels Commentary on EU Public Procurement Law, 1<sup>st</sup> ed., Baden Baden: Nomos Verlagsgesellschaft, 2018, p. 660.

Directive 2014/24. It applies to all procurements exceeding certain thresholds, for instance, EUR 5 382 000 for public works contracts and EUR 140 000 for public supply and service contracts awarded by central government authorities.<sup>16</sup>

Criteria for excluding an economic operator from participating in a procurement procedure are regulated in Article 57 of Directive 2014/24. As regards **mandatory exclusion grounds**, it provides that contracting authorities shall exclude an economic operator from participation in a procurement procedure where they have established, by verifying in accordance with Articles 59, 60 and 61, or are otherwise aware that that economic operator (or a person belonging to the operator's administrative, management or supervisory body) has been the subject of a conviction by final judgment of a number of enumerated serious crimes.<sup>17</sup> For the purpose of this report, the first ground is of interest: participation in a criminal organisation, as defined in Article 2 of Council Framework Decision 2008/841/JHA ( 11 ).<sup>18</sup> According to this provision, the member state must ensure that certain conduct related to criminal organisation must be regarded as offences. In essence, **Member States must qualify active participation (of various kinds) in the organisation's criminal activities as disqualifying an actor from tendering.**

The **means of proof to be used as evidence for the absence of grounds for exclusion are addressed in Article 60 of Directive 2014/24.** The provision lists the certificates, statements and other means of proof that the contracting authority can request. As regards the mandatory exclusion ground on the basis of participation in a criminal organisation (similar to other serious crimes), it states that *"the production of an extract from the relevant register, such as judicial records or, failing that, of an equivalent document issued by a competent judicial or administrative authority in the Member State or country of origin or the country where the economic operator is established showing that those requirements have been met [...]"*.<sup>19</sup>

If the Member State in question does not issue such documents or certificates, or where these do not cover all the exclusion grounds listed in Article 60 of Directive 2014/24, they **may be replaced by a declaration on oath** or, in Member States or countries where there is no provision for declarations on oath, by a solemn declaration made by the person concerned before a competent judicial or administrative authority, a notary or a competent professional or trade body.<sup>20</sup> Note that a false declaration for the purposes of not being excluded as a potential supplier in a public procurement procedure may itself constitute an offence punishable by a fine and/or imprisonment.<sup>21</sup>

With the aim of facilitating cross border tendering, the European Union has also introduced rules of more practical character supplemented by tools available for both contracting authorities and suppliers. Of importance in relation to rules on exclusion are the European Single Procurement Document (ESPD) and the e-Certis service, which will be discussed in the following section.

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<sup>16</sup> See Article 4 of the Directive.

<sup>17</sup> In addition to participation in a criminal organization, these include corruption, EU fraud, terrorism offences, money laundering, child labour and trafficking in human beings, and failure to pay taxes or social security contributions.

<sup>18</sup> Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime.

<sup>19</sup> See Article 60 (2)(a) of Directive 2014/24.

<sup>20</sup> Ibid.

<sup>21</sup> See for instance the Swedish Criminal Code (*Brottsbalk (1962:700)*) Chapter 15 section 10 and Lag (2016:1145) om offentlig upphandling chapter 13 and 15 and the French Code penal Articles 441-1 to 441-10.

### 2.2.1. The European Single Procurement Document (ESPD) and the e-Certis

Introduced to facilitate cross-border procurement, the **European Single Procurement Document (ESPD)** is a self-declaration form frequently used in public procurement procedures.<sup>22</sup> Regulated in Article 59 of the Directive 2014/24, the ESPD must be accepted by contracting authorities as preliminary evidence in replacement of certificates issued by public authorities confirming that there are no grounds for exclusion. Prior to the ESPD, all companies in a tender procedure were required to submit various documents proving their eligibility and absence of exclusion grounds (for instance, with regards to taxes and other social contributions and conviction of criminal activity). One problem with requiring attestations from various official registers is that these are not accessible immediately. In Sweden, for instance, it can take up to two weeks to obtain an extract from the criminal records registry.<sup>23</sup>

The ESPD thus facilitates participation of tenderers, in particular cross-border tenderers, as it **largely replaces the obligation to provide these documents: often only the winning tenderer is asked to provide the actual documents as proofs.**<sup>24</sup> However, there is a margin of discretion for the contracting authority as regards the submission of documents. Article 59 provides that “a contracting authority may ask tenderers and candidates at any moment during the procedure to submit all or part of the supporting documents where this is necessary to ensure the proper conduct of the procedure”.<sup>25</sup> The Directive, however, does not provide any guidance on in which situations it is “necessary to ensure the proper conduct of the procedure”. While in theory it could be applied in all procurement procedures, the use of the possibility is presumably more limited.<sup>26</sup> For instance, it could be motivated in so-called negotiated procedures where there is a prequalification stage in order to avoid unnecessary resources (that is, avoiding negotiating with a tenderer who in the end does not have the necessary qualifications).<sup>27</sup>

It should be noted that such control is not mandatory. However, if the contracting authority becomes aware of a violation, for instance the existence of a mandatory exclusion ground, there is a duty to ask for documentation.<sup>28</sup>

Originally a European Commission service, the ESPD system is now replaced by national services, which allow for better integration with national eProcurement services and databases. With the aim of promoting digitalisation of public procurement procedures, the ESPD is provided exclusively in electronic form.<sup>29</sup>

The system for online repository of certificates, the so-called **e-Certis**, is addressed in Article 61 of Directive 2014/24. It is a tool for helping contracting authorities and businesses identify the certificates and other types of evidence requested in public procurement procedures across the EU and the EEA countries.<sup>30</sup> This is possible due to a search function supported in any of the EU languages. The

<sup>22</sup> Directive 2014/24, Article 59.

<sup>23</sup> See information from the Swedish police authority at <https://polisen.se/tjanster-tillstand/belastningsregistret/barn-annan-verksamhet/> (15.12.2023)

<sup>24</sup> For a commentary, see for instance M. Steinicke & P.L. Vesterdorf, Brussels Commentary on EU Public Procurement Law, 1<sup>st</sup> ed., Baden Baden: Nomos Verlagsgesellschaft, 2018, p. 657.

<sup>25</sup> Directive 2014/24, Article 59(4).

<sup>26</sup> M. Steinicke & P.L. Vesterdorf, Brussels Commentary on EU Public Procurement Law, 1<sup>st</sup> ed., Baden Baden: Nomos Verlagsgesellschaft, 2018, p. 660.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid, p. 661.

<sup>29</sup> Directive 2014/24, Article 59 and recital 52.

<sup>30</sup> E-certis can be accessed at <https://ec.europa.eu/tools/ecertis/#/homePage> (21.11.2023).

Member States regularly update the database as regards the different documents used for proving, for instance, that an exclusion ground is not fulfilled.<sup>31</sup> Moreover, the Member States list the authorities issuing the different certificates and provide general information about the different criteria applied by the procuring authorities.<sup>32</sup>

### 3. Regulation and practices in National Jurisdictions

In this section, examples are given of national regulations and practices to combat infiltration of organised crime in public procurement. It should be noted that it is not aimed at providing a comprehensive description of the legal framework. Rather, the following highlights specific features of the different regulations.

The countries examined, with the exception of the UK, are all EU Member States. This means that the EU public procurement rules discussed above apply (provided that the contract exceeds the EU thresholds). While the basic rules are the same, the Member States have a certain margin of discretion. In particular, practical aspects (such as the organisation of the system for control) differ between the countries. This is important, given that that can impact on the overall efficiency of the system.

#### 3.1. The Italian antimafia documentation system

In 1994, Italy introduced the so-called antimafia documentation system (*documentazione antimafia*), which forms part of the Italian antimafia legal framework.<sup>33</sup> The “mafia-type association” is the key concept for the application of administrative law such as the antimafia documentation rules. The definition was introduced in 1982 in the Italian Criminal Code and reads as follows:

L'associazione è di tipo mafioso quando coloro che ne fanno parte si avvalgono della forza di intimidazione del vincolo associativo e della condizione di assoggettamento e di omertà che ne deriva per commettere delitti, per acquisire in modo diretto o indiretto la gestione o comunque il controllo di attività economiche, di concessioni, di autorizzazioni, appalti e servizi pubblici o per realizzare profitti o vantaggi ingiusti per sé o per altri, ovvero al fine di impedire od ostacolare il libero esercizio del voto o di procurare voti a sé o ad altri in occasione di consultazioni elettorali.<sup>34</sup>

The antimafia documentation system introduced in 1994 obliged enterprises or individuals seeking public funding or participating as tenderer in public procurement procedures to exhibit an “antimafia certificate”, attesting that they had no “mafia-type association” as regulated in the Criminal Code. Laid down in the Italian Antimafia Code<sup>35</sup>, the rules have been amended on several occasions, in particular

<sup>31</sup> See information at <https://ec.europa.eu/tools/ecertis/#/about> (21.11.2023).

<sup>32</sup> Ibid.

<sup>33</sup> Legislative Decree 490/1994. For an analysis of the anti-mafia legal framework aimed to hinder mafia infiltration of public administration, see for instance F. Calderoni & F. Di Stefano, *The Administrative Approach in Italy* in Spapens, A., Peters, M., & Van Daele, D. (Eds.), *Administrative measures to prevent and tackle crime – Legal possibilities and practical application in EU Member States*, 1<sup>st</sup> ed., Eleven International Publishing, 2015, p. 239 ff.

<sup>34</sup> Italian Criminal Code Article 416bis paragraph 3. Available in Italian at <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2011-09-06;159> (29.11.2023).

<sup>35</sup> DECRETO LEGISLATIVO 6 settembre 2011, n. 159. Available in Italian at <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2011-09-06;159> (29.11.2023).

by a major reform in 2011 that aimed to simplify the rules and to make the antimafia documentation system more efficient.<sup>36</sup>

The current antimafia documentation rules are laid down in Libro II of the Antimafia Code. According to Article 83, a contracting public authority must, before concluding a contract with a tenderer, obtain the required type of antimafia documentation from the Prefect (an administrative civil servant acting on behalf of the government at the provincial level). The Prefect issues the documentation after consulting the national antimafia database. The database, which is linked to the information system of the Antimafia Investigative Directorate, is managed by the Italian Ministry of Interior.<sup>37</sup>

There are **two different kinds of documentation: the *Comunicazione antimafia* and the *Informazione antimafia***. The content is largely the same<sup>38</sup>, but they differ in terms of procedure. The *Comunicazione antimafia* is limited to a mere declaration based on information on convictions retrieved from the antimafia database, whereas the *Informazione antimafia* is a discretionary assessment by the Prefect regarding the existence of attempt of mafia infiltration.<sup>39</sup> The prefect must issue the *Comunicazione antimafia* immediately if no information of “mafia-type association” is found in the database.<sup>40</sup> In case of the existence of potential “mafia-type association”, the document must be issued within 30 day, with a possible extension of 45 day for complex cases.<sup>41</sup> The same deadlines apply for the *Informazione antimafia*.<sup>42</sup> The rules on the antimafia documentation in the Antimafia Code do not indicate if fees can be charged for the issuing of these documents.<sup>43</sup>

The type of antimafia documentation required depends on the value of the contract. Generally, no documentation is needed for contracts which value is below 150'000 EUR. For contracts exceeding 150,000 EUR but under the EU thresholds, the *Comunicazione antimafia* is required. When the contract value exceeds the EU thresholds, and for certain types of contracts (concessions for water supply, state property, etc.), the *Informazione antimafia* is required.<sup>44</sup> However, it should be noted that the

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<sup>36</sup> For further reading see for instance F. Calderoni & F. Di Stefano, *The Administrative Approach in Italy* in Spapens, A., Peters, M., & Van Daele, D. (Eds.), *Administrative measures to prevent and tackle crime – Legal possibilities and practical application in EU Member States*, 1<sup>st</sup> ed., Eleven International Publishing, 2015, p. 243.

<sup>37</sup> F. Calderoni & F. Di Stefano, *The Administrative Approach in Italy* in Spapens, A., Peters, M., & Van Daele, D. (Eds.), *Administrative measures to prevent and tackle crime – Legal possibilities and practical application in EU Member States*, 1<sup>st</sup> ed., Eleven International Publishing, 2015, p. 245.

<sup>38</sup> For a detailed description of the content/type of control see F. Calderoni & F. Di Stefano, *The Administrative Approach in Italy* in Spapens, A., Peters, M., & Van Daele, D. (Eds.), *Administrative measures to prevent and tackle crime – Legal possibilities and practical application in EU Member States*, 1<sup>st</sup> ed., Eleven International Publishing, 2015, p. 247 ff.

<sup>39</sup> See for instance E. Birritteri & E. Tati, *Cooperative Compliance Measures to Prevent Organised Crime Infiltrations and the Protection of the EU's Financial Interests. A New Gold Standard in the Implementation of the Italian Recovery and Resilience Plan?*, Jean Monnet Network on EU Law Enforcement Working Paper Series No. 02/2022, p. 9.

<sup>40</sup> Article 88(1) of the Antimafia Code.

<sup>41</sup> Article 88(1) of the Antimafia Code.

<sup>42</sup> Article 92 of the Antimafia Code.

<sup>43</sup> According to our preliminary findings, no specific fees are imposed on the companies concerned. However, a definite answer to this question would require further research.

<sup>44</sup> Article 83 to 91 of the Antimafia Code. See also F. Calderoni & F. Di Stefano, *The Administrative Approach in Italy* in Spapens, A., Peters, M., & Van Daele, D. (Eds.), *Administrative measures to prevent and tackle crime – Legal possibilities and practical application in EU Member States*, 1<sup>st</sup> ed., Eleven International Publishing, 2015, p. 247.

contracting authority can request the *Informazione antimafia* also for contracts below the EU thresholds.<sup>45</sup>

Listed in Article 85 of the Antimafia Code, the individuals subject to the screening are individuals having leading roles in the organisation seeking to engage with the State. Depending on the type of organisation, the individuals include (but not limited to) owners, majority shareholders, legal representatives, partners and local representatives. For the *Informazione antimafia*, cohabiting family members of these individuals are also screened.

**The rules on antimafia documentation apply also to foreign actors.** Thus, those who exercise powers of administration, representation or management of a company incorporated abroad must also be screened, including their cohabiting family members.<sup>46</sup>

### 3.2. French legislation focus on self-declaration

In France, participation in organised crime (*l'association de malfaiteurs*) is a mandatory ground for exclusion in Article L. 2141-1 of the *Code de la commande publique*.<sup>47</sup> Similar to other EU Member States examined in this report, the tenderer shall be excluded if the conviction is final and the judgment is rendered within a period not exceeding five years from the date of the tender.<sup>48</sup> In addition to the company itself, it concerns the conviction of any person in a leading positions in the company as defined in Article L.2141-1.

For the control of the tenderers regarding the exclusion ground of participating in organised crime, the French legislation strongly encourages the use of self-declaration. Thus, since the introduction of the so-called law “Sapin II”<sup>49</sup> in 2016, **a declaration on honour (*une déclaration sur l'honneur*) instead of an extract from the criminal record should generally be accepted as proof** for the absence of convictions of the crimes listed in Article L.2141-1.<sup>50</sup> It should be noted that a false declaration, in addition to resulting in the exclusion of the tenderer, is a criminal offence.<sup>51</sup>

### 3.3. German procuring authorities rely on the information in the Competition Register

In 2017, Germany established The Competition Register for Public Procurement (*Wettbewerbsregister*) through the adoption of the Competition Register Act (*Wettbewerbsregistergesetz*) and the Competition Register Regulation (*Wettbewerbsregisterverordnung*). Managed by the *Bundeskartellamt*, it is a nationwide register that provides public contracting authorities with

<sup>45</sup> E. Birritteri & E. Tati, *Cooperative Compliance Measures to Prevent Organised Crime Infiltrations and the Protection of the EU's Financial Interests. A New Gold Standard in the Implementation of the Italian Recovery and Resilience Plan?*, Jean Monnet Network on EU Law Enforcement Working Paper Series No. 02/2022, p. 13. See also V. Gastaldo, *Interdittive antimafia tra esigenze pubbliche di prevenzione e libertà (non solo economica). Alla ricerca di un difficile bilanciamento*, in *Rivista giuridica del Mezzogiorno*, Trimestrale della Svimez 2/2020, pp. 529-558.

<sup>46</sup> The Antimafia Code (DECRETO LEGISLATIVO 6 settembre 2011, n. 159), Article 85.

<sup>47</sup> Code de la commande publique Article L2141-1 referring to Code pénal 450-4.

<sup>48</sup> The basis for the national regulations is Article 57(7) in Directive 2014/24, which limits the exclusion to maximum five years from the date of the conviction by final judgment.

<sup>49</sup> Loi numéro 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique.

<sup>50</sup> Code de la commande publique Article R2143-6. For further information on the rules on exclusion see for instance at <https://www.seban-associés.avocat.fr/wp-content/uploads/2019/10/Article-exclusions-march%C3%A9s-publics-PG.pdf> (7.12.2023).

<sup>51</sup> See Code pénal, Articles 441-1 to 441-10.

information helping them to assess whether a company may or must be excluded from a tender procedure on the basis of having committed certain offences.

The offences for which a supplier is listed are enumerated in Section 2 of the Competition Register Act and include **participation in organised crime**. However, the company is only listed to the extent the person in question has acted as a representative of the company (the law refers to individuals “responsible for the management” of the undertaking, a concept that includes the supervision of management or the exercise of control in another manner in a managerial position).<sup>52</sup>

Contracting authorities must consult the Competition Register in procurement procedures involving an estimated order value of 30,000 EUR or higher.<sup>53</sup> For any order value under this sum, the consultation of the register is on a voluntary basis.<sup>54</sup>

### 3.4 Additional control mechanisms provided for in the Dutch Public Administration Probity Screening Act (Bibob Act)

Participation in a criminal organization is a mandatory exclusion ground under Article 2.86 of the Dutch Public Procurement Law of 2012 (*Aanbestedingswet 2012*), which refers to the definition in Article 2 of Council Framework Decision 2008/841/JHA (11).<sup>55</sup> Generally, the non-existence of this grounds of exclusion is attested in a self-declaration form, largely replacing the submission of an extract of the criminal record.<sup>56</sup> This is in line with many other EU Member States such as France and Sweden.

An important feature of the Dutch system to protect the integrity of public authorities in a broader sense is the Public Administration Probity Screening Act (*Wet bevordering integriteitsbeoordelingen door het openbaar bestuur*), hereafter the **Bibob Act**.<sup>57</sup> Adopted in 2003 and subject to revision in 2013, this Act aims to prevent the government (including public authorities and regional and local government) from facilitating criminal activities and money laundering in its dealings with private actors, in particular as regards the application for permits, subsidies and bids for contracts.<sup>58</sup>

Under the Bibob Act, public authorities can screen economic operators, for instance a tenderer in a public procurement proceeding. The **screening can be carried out by the procuring authority itself, or with the assistance of the National Bibob Bureau** (*Landelijk Bureau Bibob*), a government agency specialised in making such control. This screening is essentially a background check of the company enabling the authority to assess the integrity of the company and its representatives. Thus, the public authority is provided with information needed for its decision on the suitability to engage with the company. As part of the screening, the **company must fill in a specific form** (Bibob-vragenformulier). In this process the authority can ask for information that is registered at the judiciary, police authority

<sup>52</sup> *Wettbewerbsregister* section 2 referring to *Wettbewerbsbeschränkungen* section 123.

<sup>53</sup> *Wettbewerbsregister* section 6.

<sup>54</sup> *Wettbewerbsregister* section 6.

<sup>55</sup> The *Aanbestedingswet 2012* is available at <https://wetten.overheid.nl/BWBR0032203/2022-03-02/0> (7.12.2023).

<sup>56</sup> Verification of exclusion grounds are regulated in Articles 2.101 *et seq.*

<sup>57</sup> *Wet bevordering integriteitsbeoordelingen door het openbaar bestuur*, available in Dutch at <https://wetten.overheid.nl/BWBR0013798/2023-09-01> (08.12.2023).

<sup>58</sup> For information about the Act and its application in practice, see M. Kuin *et al.*, *Procesevaluatie Evaluatie- en uitbreidingswet Bibob 2013 Eindrapport, 2020*, available at <https://open.overheid.nl/documenten/ronl-db15a76a-b44a-48d2-a919-75616444fff2/pdf> (08.12.2023).

and the tax authority.<sup>59</sup> In most cases, public authorities use the form without consulting the National Bibob Bureau.<sup>60</sup> Bibob screenings are not mandatory and are more frequently used in cases regarding permits and real estate transaction than in public procurement procedures.<sup>61</sup> A survey of municipalities and provinces from 2020 shows that 61 percent of administrative bodies had adopted Bibob policies for public procurement.<sup>62</sup> The Bibob Act states that the Bibob bureau can charge the contracting authority for the bureau's costs for providing its services.<sup>63</sup>

The **Dutch Bibob Act is a source of inspiration for the Belgian Government.** There is currently a legislative bill is pending in Parliament to create a similar agency to that of the Dutch Bibob Agency.<sup>64</sup> The proposed reform includes rules on the screening of tenderers in public procurement procedures in line with the Bibob regulation.<sup>65</sup> Given that it is supported by the Government, the bill is likely to be adopted. However, there are currently no indications on the time schedule for the formal approval.<sup>66</sup>

### 3.5 Reform of the Swedish system for control of tenderers

In Sweden, the system for controlling tenderers is currently subject to revision. The government has appointed an investigative committee (*särskild utredare*) tasked with proposing regulation assuring an effective and reliable system for the control of tenderers in public procurement with regards to the existence of grounds for exclusion.<sup>67</sup> The revision thus concerns the system for controlling and not the exclusion grounds as such. As regards the exclusion ground of participation in organised crime, it should be noted that the Swedish legislation simply refers to the definition in Article 2 of Council Framework Decision 2008/841/JHA (11).<sup>68</sup>

In its report, the investigative committee identified several weaknesses of the current system. For instance, that there is no extract from the criminal records registry specifically adapted to the verification of economic operators in connection with public procurement. In the absence of adapted criminal records, the extracts include the entire criminal record, which may result in the inadvertent disclosure of irrelevant sensitive personal data.<sup>69</sup> The investigative committee also noted that for the control of the existence of grounds for exclusion, checks must be made in several different government agency databases. With regards to this and various other issues complicating the control of suppliers

<sup>59</sup> For information about the procedure, see for instance <https://business.gov.nl/regulation/public-administration-probity-screening-act/> (08.12.2023).

<sup>60</sup> M. Kuin *et al.*, Procesevaluatie Evaluatie- en uitbreidingswet Bibob 2013 Eindrapport, 2020, p. 2.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid, p. 39 ff.

<sup>63</sup> See section 56 of the Bibob Act. As regards the possibility of the contracting authority to recuperate these costs from the affected private party, see the Explanatory memorandum to the Act (Kamerstuk 26 883 nr. 3), available at <https://zoek.officielebekendmakingen.nl/kst-26883-3.html> (21.12.2023).

<sup>64</sup> See the proposal *Projet de loi relatif à l'approche administrative communale, à la mise en place d'une enquête d'intégrité communale et portant création d'une Direction chargée de l'Évaluation de l'Intégrité pour les pouvoirs publics* at <https://www.dekamer.be/FLWB/PDF/55/3152/55K3152001.pdf> (7.12.2023).

<sup>65</sup> Ibid, p. 470

<sup>66</sup> <https://verlinden.belgium.be/fr/approche-administrative-d%C3%A9finitivement-approuv%C3%A9> (7.12.2023).

<sup>67</sup> SOU 2023 :43 En samordnad registerkontroll för upphandlande myndigheter och enheter. The report is available at <https://www.regeringen.se/contentassets/612e0c2bb4024589bb8d8178c7f37070/en-samordnad-registerkontroll-for-upphandlande-myndigheter-och-enheter-sou-202343.pdf> (30.11.2023).

<sup>68</sup> Lag (2016:1145) om offentlig upphandling, Chapter 13 section 1.

<sup>69</sup> Ibid, p. 36.



(such as lack of clarity with regard to the identification of the individuals who must be subject to a criminal record check), many contracting authorities simply rely on self-declarations. According to the investigative committee, such self-declarations are insufficient to ensure that economic operators convicted of certain types of offences are prevented from participating in public procurements.<sup>70</sup>

The investigative committee proposes the **establishment of a system in which information from relevant government agency databases is delivered in a single document**, in other words a one-stop-shop offer to procuring authorities. The designated authority to provide the information from the different databases is the Swedish Companies Registration Office (*Bolagsverket*). All contracting authorities, including authorities from other EU/EEA Member States, shall have the possibility of requesting information from *Bolagsverket*. This service shall be free of charge for the contracting authorities.<sup>71</sup> The regulation establishing the new system is scheduled to enter into force on 1 October 2025.<sup>72</sup>

### 3.6 United Kingdom "debarment" list of black-listed suppliers

In the UK, a new Procurement Act 2023 received final assent on 26<sup>th</sup> October 2023 and is due to come into force in October 2024.<sup>73</sup> Repealing the current EU-based legislation, it establishes a central **"debarment" list of black-listed suppliers** ineligible for public-procurement tendering.<sup>74</sup> The aim is to prevent suppliers bidding for public contracts on the basis of their past conduct, including the conviction of certain crimes. There are various exclusion grounds motivating a blacklisting. The mandatory exclusion grounds are contained in Schedule 6 of the Act and concerns a variety of offences, including an offence under section 45 of the Serious Crime Act 2015 (**participating in activities of organised crime group**).

A Minister can add a supplier to the list after an investigation concludes that a relevant exclusion ground applies. The detailed rules for this and of the removal of a supplier from the list are laid down in Chapter 6 of the Procurement Act 2023.

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<sup>70</sup> Ibid.

<sup>71</sup> Ibid, p. 358.

<sup>72</sup> Ibid, p. 31.

<sup>73</sup> The Procurement Act 2023 is available at <https://www.legislation.gov.uk/ukpga/2023/54/part/3/chapter/6/crossheading/debarment/enacted> (01.12.2023).

<sup>74</sup> See the EXPLANATORY NOTES to the Procurement Act 2023, available at [https://www.legislation.gov.uk/ukpga/2023/54/pdfs/ukpgaen\\_20230054\\_en.pdf](https://www.legislation.gov.uk/ukpga/2023/54/pdfs/ukpgaen_20230054_en.pdf) (01.12.2023).